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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

SEAHQJWUE HENG, Plaintiff and Appellant, v. WASHINGTON MUTUAL BANK F.A. et al., Defendants and Respondents.	B248294 (Los Angeles County Super. Ct. No. BC476489)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Law Offices of John J. Jackman and John J. Jackman for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr., for Defendants and Respondents.

Seahqjwue Heng appeals from a judgment of dismissal following the trial court's order sustaining a demurrer without leave to amend to his second amended complaint (SAC), alleging numerous causes of action arising from the foreclosure of his home. Heng contends the trial court erred when it granted judicial notice of certain recorded documents and concluded the amendments to the SAC did not cure the pleading defects addressed in the trial court's prior ruling on the demurrer to the complaint. Heng also contends the trial court violated his due process rights by striking nine causes of action added to the SAC without leave of court. Based upon our independent review, and Heng's failure to show error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Facts*

a. *WaMu Loan, Promissory Note, Deed of Trust, Trustee's Sale*

In December 2003, Heng obtained a loan from Washington Mutual Bank, FA (WaMu). Heng executed a promissory note in the amount of $382,500 in favor of WaMu. He also executed a Deed of Trust, which secured the loan on the property located in Malibu (the property), in favor of WaMu as lender and beneficiary. California Reconveyance Company (CRC) was the trustee.

On May 23, 2008, Quality Loan Service Corp. (Quality), as agent for WaMu, recorded a Notice of Default stating that Heng was $7,375.83 in arrears on his mortgage payments.

On July 8, 2008, WaMu recorded a Substitution of Trustee, substituting Quality as the trustee under the Deed of Trust. More than a month later, Quality recorded a Notice of Trustee's Sale on the property.

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[1] In reviewing an appeal from an order sustaining a demurrer, we accept all properly pleaded facts as true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) This rule, however, is qualified in that a demurrer does not admit as true " 'contentions, deductions or conclusions of fact or law.' " (*Ibid*.) We may also consider facts subject to judicial notice (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6), and allegations contrary to facts judicially noticed may be disregarded (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751).

In January 2009, the property was sold to a third party. The Trustee's Deed Upon Sale was recorded on January 16, 2009.

b. *WaMu Declared Insolvent, Chase Purchase and Assumption Agreement*

On September 25, 2008, several months before the nonjudicial foreclosure sale occurred, the Federal Deposit Insurance Corporation (FDIC), the appointed receiver of WaMu, entered into a Purchase and Assumption Agreement (P & A Agreement) with JPMorgan Chase Bank, National Association (Chase). Chase acquired certain WaMu assets, including a beneficial interest in Heng's loan, but Chase did not assume "any liability associated with borrower claims for payment of or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower, whether or not such liability is reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, judicial or extra-judicial, secured or unsecured, whether asserted affirmatively or defensively, related in any way to any loan or commitment to lend made by [WaMu] prior to failure [September 25, 2008] . . . or otherwise arising in connection with [WaMu's] lending or loan purchase activities . . . ."

2. *Civil Action Arising from Trustee's Sale*

On January 6, 2012, almost three years after Heng allegedly learned the property was sold to a third party, he filed a complaint against WaMu, Chase, and CRC.

a. *Complaint, Demurrer Sustained with Leave to Amend*

Heng's initial complaint alleged six causes of action: (1) wrongful foreclosure; (2) breach of written contract; (3) breach of implied covenant of good faith and fair dealing; (4) negligence; (5) promissory estoppel; and (6) constructive trust. The wrongful foreclosure, breach of written contract, and negligence causes of action were based on allegations that the "defendants" breached their respective duties in that they "[r]epeatedly refused and failed to respond to plaintiff's telephonic and written inquiries about the amount owed," misrepresented orally and in writing the amount owed, failed to credit one or more monthly payments, failed to apply and credit plaintiff's tender of funds to his mortgage account, charged excessive and illegitimate fees, failed to comply

with statutory notice requirements as set forth in Civil Code sections 2923.5 and "2924c, 2924d and related sections of the Civil Code," breached an oral agreement to reinstate the loan, and failed to properly serve on plaintiff the notice of assignment, substitution of trustee, and substitution of the loan servicer.

The breach of implied covenant of good faith and fair dealing cause of action alleged that based upon Civil Code section 2923.6, a duty arose on behalf of the loan servicer to offer loan modifications to borrowers whose loan is part of a mortgage pool. Heng's loan allegedly was part of a mortgage pool, and the defendants failed to undertake the risk analysis as set forth in Civil Code section 2923.6 in connection with loan modifications.

To support the promissory estoppel cause of action, the complaint alleged WaMu promised to modify and reinstate Heng's loan and reneged on that promise. The sixth cause of action sought to obtain a constructive trust.

Chase and CRC filed a demurrer to the complaint. Three days before the hearing on the demurrer, Heng filed a first amended complaint alleging the same causes of action. The trial court, however, had not received the first amended complaint by the time of the hearing and issued an order sustaining the unopposed demurrer to the complaint with leave to amend.

Instead of another round of demurrers to the first amended complaint, Heng obtained a stipulation and order from the court to "amend the complaint filed herein" to cure the deficiencies noted in the trial court's ruling on the demurrer to the complaint.

b. *SAC, Demurrer to SAC Sustained Without Leave to Amend*

Without leave of court, Heng added nine additional causes of action to the SAC. The SAC alleged the following causes of action: (1) wrongful foreclosure; (2) wrongful foreclosure; (3) breach of contract; (4) breach of contract; (5) negligence; (6) fraud; (7) breach of implied covenant of good faith and fair dealing; (8) promissory estoppel; (9) constructive trust; (10) "to set aside trustee's sale"; (11) "to cancel or void trustee's deed upon sale"; (12) unjust enrichment; (13) violation of Business and Professions Code section 17200; (14) quiet title; and (15) slander of title. (Capitalization omitted.)

The second, fourth, sixth, and 10th through 15th causes of action, which were added without leave to amend, were stricken by the trial court pursuant to Code of Civil Procedure section 436. As discussed *post*, to the extent Heng has addressed these causes of action (second and fourth) in his opening brief as sufficiently alleged, we treat these causes of actions as proposed amendments. We summarize the pertinent facts in the SAC.

The SAC alleges that pursuant to the loan agreement, WaMu made certain promises and covenants to Heng, including: the right to have enforcement of the security instrument discontinued at any time prior to the earliest of (a) five days before sale of the property pursuant to any power of sale contained in the security instrument, (b) such other period as applicable law might specify for termination of his rights to reinstate, or (c) entry of judgment enforcing the security instrument. This right was contingent upon paying sums due under the security instrument and note, curing any default of any other covenant, and paying expenses incurred in enforcing the security instrument. Upon reinstatement, the security instrument and obligations were to remain fully effective as if no acceleration had occurred.

Following default, Heng allegedly engaged in "many conversations and negotiations with" WaMu in an effort to save the property from foreclosure. WaMu through its representative allegedly "represented that Heng could cure the default by bringing the loan amount due and owing current, and that would allow and permit" WaMu to modify the original loan to prevent foreclosure. After repeated discussions, on September 4, 2008, the SAC alleges that Heng paid to WaMu, and WaMu accepted, a sum of $16,925 that would satisfy the default. WaMu's representative allegedly indicated to Heng that no further payments were required while the loan modification was pending. Instead, without notice, Heng alleges the property was sold at a trustee's sale. Heng learned of the trustee's sale on January 30, 2009 when he received a courtesy copy of a notice of unlawful detainer.

The first cause of action for wrongful foreclosure alleges numerous violations of Civil Code section 2924, including the failure to (1) "[r]espond to plaintiff's telephonic

and written inquires [*sic*] about the amount owed under the note and the amount required to reinstate the loan"; (2) comply with a valid notice of default and a valid notice of trustee's sale; (3) serve notice of substitution of the loan servicer; and (4) offer Heng a feasible loan modification or other workout plan.

The third cause of action for breach of contract is based upon the same wrongful conduct alleged to support the wrongful foreclosure cause of action.

The fifth cause of action for negligence is based upon a breach of a duty of care in "the administration, execution and foreclosure of the promissory note and deed of trust." The allegations generally repeat the conduct alleged in the first cause of action, and specifically allege that the defendants failed to "properly and accurately credit payments," prepared and filed "false documents," and foreclosed "on the Subject Property without having the legal authority and/or proper documentation to do so."

The seventh cause of action alleges a breach of the implied covenant of good faith and fair dealing based upon WaMu's failure to work out a loan modification plan despite Heng's payment to cure the default.

The eighth and ninth causes of action for promissory estoppel and constructive trust are based upon the allegations that Heng tendered the amount to cure the default, and thereafter the property was wrongfully foreclosed.

Chase and CRC filed a demurrer to the SAC that was sustained without leave to amend. The trial court's eight-page tentative ruling, which became the order of the court, concluded that the first, third, fifth, seventh, eighth, and ninth causes of action in the SAC had not been sufficiently amended to cure the pleading defects previously identified in the demurrer to the complaint.

Judgment of dismissal was entered and this timely appeal followed.

DISCUSSION

1. *Standards of Review*

We review the trial court's judgment of dismissal following the order sustaining the demurrer to the SAC without leave to amend de novo and exercise our independent judgment as to whether a cause of action has been stated under any legal theory.

(*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We review the trial court's refusal to allow leave to amend under the abuse of discretion standard. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We must consider if there is a reasonable probability that the pleading defects can be cured by amendment. (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506.) Heng bears the burden of proving that he can amend (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318), and he may make this showing for the first time on appeal (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386-1388).

2. *The Trial Court Did Not Err in Granting the Request for Judicial Notice*

Heng contends the trial court erred in granting the request for judicial notice of recorded documents, including the Deed of Trust, the Notice of Default, the Substitution of Trustee, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale, along with the P & A Agreement. We disagree.

The SAC attached as exhibits all of the recorded documents except the Trustee's Deed Upon Sale. Heng takes exception to the trial court's references in its written ruling to the Deed of Trust and the Notice of Default. But, these documents were attached as exhibits to the SAC and properly considered by the trial court. Nevertheless, the trial court's interpretation is not binding on this court. We consider exhibits in light of the rule that facts set forth in exhibits attached to a complaint are accepted as true and given precedence over contrary allegations in the pleading. (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

As for the Trustee's Deed Upon Sale, the court may take judicial notice of the "fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.) Thus, judicial notice of the Trustee's Deed Upon Sale was not error because there is no genuine dispute regarding the authenticity of this document.

Heng presents no argument that the trial court erred in taking judicial notice of the P & A Agreement.[2] "Where, as here, judicial notice is requested of a *legally operative* document like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its *legal effect*." (See *Scott v. JPMorgan Chase Bank, N.A., supra,* 214 Cal.App.4th at p. 754.) Of significance here is a provision in the P & A Agreement in which Chase did not assume liability for borrower claims related to loans or commitments WaMu made before September 25, 2008. Heng does not challenge the authenticity of the P & A Agreement or raise any argument to dispute this provision.

We agree with *Scott v. JPMorgan Chase Bank, N.A., supra,* 214 Cal.App.4th 743, that at least two subdivisions of Evidence Code section 452 provide support for the trial court's decision to take judicial notice of the P & A Agreement. (*Scott v. JPMorgan Chase Bank, N.A.*, at pp. 752-761.) Subdivision (c) of Evidence Code section 452 states that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Official acts of the FDIC fall within this subdivision. Moreover, the FDIC's official act of transferring certain WaMu assets (but not certain liabilities) to Chase as of September 25, 2008 as stated in the P & A Agreement is an official act subject to judicial notice. (See *Scott v. JPMorgan Chase Bank, N.A.*, at pp. 752-753.)

Evidence Code section 452, subdivision (h) also provides support for the trial court's decision. This subdivision provides that judicial notice may be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Heng does not dispute the fact of the P & A Agreement, or the legal effect in transferring to Chase the stated assets of WaMu, but none of its liabilities for borrowers' claims related to loans or commitments WaMu made before September 25, 2008. As stated in

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[2] The failure to develop an argument constitutes a forfeiture of the issue on appeal. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161-1162.)

Scott v. JPMorgan Chase Bank, N.A., *supra*, 214 Cal.App.4th 743, numerous federal courts have taken judicial notice of the P & A Agreement under a similar provision of the federal rules of evidence. (*Id*. at pp. 753-754 & fn. 2.)

Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, however, reached the opposite conclusion because, in that case, serious doubt existed as to the completeness of the P & A Agreement downloaded from the FDIC Web site and submitted in support of the lender's motion for summary judgment. (*Id*. at pp. 886-891.) In *Jolley*, unlike here, the P & A Agreement and its legal effect were reasonably subject to dispute. *Scott v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th 743, not only distinguished *Jolley* on this fact, but also qualified the "broad brush" of the *Jolley* court's conclusion that California law did not permit taking judicial notice of the P & A Agreement, stating, "certainly *Jolley* did not decide the propriety of judicial notice under circumstances that were not before it, but are now before us." (*Scott v. JPMorgan Chase Bank, N.A.*, at p. 761, fn. 9.) Under the circumstances presented here, the trial court did not err in taking judicial notice of the P & A Agreement.

3. *The Causes of Action in the SAC Alleged Against Chase Fail as a Matter of Law*

Heng contends the trial court erred in sustaining the demurrers to his causes of action for wrongful foreclosure (first cause of action), breach of contract (third cause of action), negligence (fifth cause of action), breach of the implied covenant of good faith and fair dealing (seventh cause of action), promissory estoppel (eighth cause of action), and constructive trust (ninth cause of action). These causes of action alleged against Chase fail as a matter of law.

a. *Wrongful Foreclosure (First Cause of Action) Is Not Sufficiently Alleged*

The SAC alleges a laundry list of 12 violations of Civil Code section 2924 et seq., without any specific factual allegations or specific statutory references to support the wrongful foreclosure cause of action.

To maintain a claim for wrongful foreclosure, Heng must allege: "(1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered

prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.) Exceptions to the tender rule include when "(1) the underlying debt is void, (2) the foreclosure sale or trustee's deed is void on its face, (3) a counterclaim offsets the amount due, (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale, or (5) the foreclosure sale has not yet occurred. [Citations.]" (*Ibid*.)

The trial court sustained the demurrer to this cause of action, concluding no illegal, fraudulent, or willfully oppressive sale of the property was sufficiently alleged, and the allegations did not constitute any statutory violation. Heng contends the trial court erred because the defendants " 'breached their respective duties under Sections 2924 et seq. of the California Civil Code in that Defendants and each of them repeatedly refused and failed inter alia to comply with the statutory requirements of Civ. Code § 2924.' " This is the extent of the argument to support this cause of action.

There is a comprehensive statutory framework established in Civil Code sections 2924 to 2924k to govern the regulation of nonjudicial foreclosure sales. We are not required to attempt to determine which statutory violation Heng alleges in section "2924 et seq." or further develop Heng's argument for reversal. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Although our review is de novo, we start from the presumption that the trial court was correct. To obtain reversal, Heng must affirmatively show prejudicial error through reasoned argument, citation to material facts in the appellate record, and discussion of applicable legal authority. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) Heng has not made this showing.

Heng cannot state a cause of action based upon any procedural irregularities in the nonjudicial foreclosure sale. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831.) The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites, as it does here, that all the statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly. (*Ibid*.) While Chase argues that the

presumption is conclusive because the property was sold to a bona fide purchaser (BFP), whether a buyer is a BFP is an issue of fact. (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1254.) For purposes of ruling on a demurrer, the allegations are not sufficient to determine whether the third party is a BFP. (*Id*. at p. 1253.) We agree with Chase, however, that to the extent this cause of action is based upon whether the trustee followed all statutory procedures with respect to the default and sales notices, the exhibits attached to the SAC take precedence over any contrary factual allegations. No allegations in the SAC rebut the presumption that the sale was conducted regularly and properly.

The alleged irregularity in the trustee's sale, however, also is based upon the allegation that WaMu failed to credit the $16,925 payment Heng made on September 4, 2008, after the Notice of Default and Notice of Trustee's Sale had been recorded. Heng alleges he had an oral agreement with a WaMu representative that his payment would satisfy the default and no further payments were required while the loan modification Heng sought was pending.

Although we acknowledge Chase's argument that these allegations contradict others in the complaint and in the SAC, Heng initially alleged, albeit in a conclusory fashion, a breach of "oral and written agreement(s)" to reinstate the loan and to avoid the trustee's sale. The SAC supports these conclusory allegations with specific facts related to that oral agreement between Heng and WaMu. Accepting these facts as true, the oral agreement was entered into between Heng and WaMu before Chase acquired the loan under the terms of the P & A Agreement. There is no allegation that the oral agreement bridged the FDIC's receivership or Chase's acquisition of the loan after September 25, 2008, and there is no allegation that any specific representations were made by Chase representatives as to any loan modification. Chase did not assume any liabilities for borrower claims related to loans or commitments WaMu made before September 25, 2008.

As to the allegation that Chase waived its right to foreclose by accepting payments, the Deed of Trust expressly permits acceptance of any payment or partial

payment without waiver of any rights. We have reviewed the remaining allegations and conclude that Heng has not stated a cause of action for wrongful foreclosure against Chase.

b. *Breach of Contract (Third Cause of Action) Is Not Sufficiently Alleged*

To plead a breach of contract, Heng must allege "(1) the existence of [a] contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The statute of limitations on an oral agreement is two years. (Code Civ. Proc., § 339.)

Heng alleges essentially the same violations of Civil Code section 2924 to support his breach of contract cause of action. In his opening brief, Heng argues two "instances of breach" occurred, citing to a provision in the Deed of Trust addressing a borrower's right to reinstate after acceleration. It is alleged that Heng complied with this provision based upon the oral modification agreement. WaMu allegedly breached the oral modification agreement by failing to credit his payment. There are no allegations that Chase breached the oral agreement.

Moreover, this cause of action is time barred. Heng filed his complaint on January 6, 2012, more than two years after the breach of the oral modification agreement, which allegedly occurred at the latest on January 30, 2009 when he learned that the property had been sold at a trustee's sale to a third party.

c. *Negligence (Fifth Cause of Action) Is Not Sufficiently Alleged*

To state a cause of action for negligence, Heng must plead and prove that a legal duty to use reasonable care was owed to him. (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.)

Heng argues, however, that "lender" exceeded " 'its conventional role as a mere lender of money,' " when WaMu accepted the $16,925 payment in September 2008 based upon the alleged oral modification agreement.

These allegations do not plead that Chase exceeded its role as a lender in connection with any purported loan modification. Thus, the general *Nymark* rule applies. Accordingly, Heng cannot allege a duty of care to state a negligence cause of action against Chase.

d. *Breach of the Implied Covenant of Good Faith and Fair Dealing (Seventh Cause of Action) Is Not Sufficiently Alleged*

To plead a breach of the implied covenant of good faith and fair dealing, Heng must allege the existence of a contractual obligation, along with conduct that frustrates his rights to benefit from the contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1394.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.)

Heng bases this cause of action on WaMu's failure to honor the oral modification agreement. As explained above, any oral agreement to modify the loan is between Heng and WaMu. Chase did not assume liability for borrower's claims related to loans or commitments WaMu made before September 25, 2008. Heng has not alleged any facts to show that Chase had any knowledge of, or made any representations related to, this alleged oral modification agreement.

Heng also alleges that the "Foreclosing Defendants" breached the implied covenant of good faith and fair dealing by refusing a feasible loan modification or other workout plan. Chase had no duty under the terms of the Deed of Trust or statutory duty

under Civil Code section 2923.6 to offer a loan modification to Heng after it acquired the loan pursuant to the P & A Agreement. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617.) Accordingly, Heng has not alleged a cause of action for breach of the implied covenant of good faith and fair dealing against Chase.

e. *Promissory Estoppel (Eighth Cause of Action) Is Not Sufficiently Alleged*

"Promissory estoppel is an equitable doctrine that allows enforcement of a promise that would otherwise be unenforceable based on lack of consideration." (*Chavez v. Indymac Mortgage Services*, *supra*, 219 Cal.App.4th at p. 1063.) The elements of a promissory estoppel claim are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting estoppel must be injured by his reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.)

Heng's claim is based upon promises WaMu made in servicing the loan before Chase entered into the P & A Agreement. To the extent that these general allegations could be construed to include Chase, a party claiming estoppel must specifically plead all facts relied on to establish its elements. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48.) Here, there are no such specific allegations against Chase. Accordingly, Heng has not alleged a cause of action for promissory estoppel against Chase.

f. *Constructive Trust (Ninth Cause of Action) Is Not Sufficiently Alleged*

Heng makes no attempt in his brief to present argument to challenge the trial court's ruling sustaining the demurrer without leave to amend on his request to obtain a constructive trust. Constructive trust is an equitable remedy. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332.) To obtain a constructive trust, Heng must establish "the existence of a res, the plaintiff's right to the res, and the defendant's acquisition of the res by some wrongful act." (*Ibid*.)

Heng has not sufficiently alleged wrongful foreclosure or any other actionable wrongful act to satisfy the first element to obtain a constructive trust.

In sum, the trial court did not err in sustaining the demurrers to these causes of action against Chase. Heng did not present any amendments to the trial court, and he did not present any amendments in his opening brief in this court, to cure these pleading defects.

4. *The SAC Does Not State a Cause of Action Against CRC*

The SAC does not allege any wrongful conduct on the part of CRC in connection with the alleged oral modification agreement or the nonjudicial foreclosure sale. Quality, the substituted trustee under the Deed of Trust, conducted the nonjudicial foreclosure sale. Thus, the trial court did not err in sustaining CRC's demurrer to the SAC without leave to amend.

5. *The Proposed Causes of Action Alleged in the SAC Fail to Meet Heng's Burden to Show the SAC Could be Amended to Allege a Cause of Action Against Chase*

Heng contends that the trial court violated his due process rights by sua sponte striking nine causes of action in the SAC. He presents argument that two of these nine causes of action state valid claims against Chase. As discussed, the trial court properly exercised its discretion, and the proposed causes of action are not sufficiently alleged.

a. *The Trial Court Had Authority to Strike the Causes of Action Added to the SAC Without Leave of Court*

Heng contends that the trial court violated his right to due process[3] when it relied on Code of Civil Procedure section 436 to strike the nine causes of action in the SAC that had not been alleged in the two prior pleadings. Following an order sustaining a demurrer with leave to amend, the plaintiff may amend only the causes of action asserted in the complaint, not add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015; *People ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785-786.) The plaintiff may not amend the complaint to add a new

[3] Heng does not make a showing that prior notice would have made any difference. Additionally, Heng did not provide a record of the proceedings to indicate that he raised this issue in the trial court and would have requested leave to amend if given the opportunity.

cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. (*Patrick v. Alacer Corp.*, at p. 1015 [stating rule but finding it inapplicable where new cause of action "directly responds" to trial court's reasons for sustaining the demurrer].)

Here, the trial court ruled on the demurrer to the complaint, granting leave to amend. Although Heng filed a first amended complaint alleging the same six causes of action, the parties stipulated to forego another round of demurrers, and the trial court granted Heng leave to amend to cure the defects in the causes of action asserted in the complaint. Heng was not given leave to add additional causes of action and there is no indication these additional causes of action "directly respond" to the trial court's reasons for sustaining the demurrer to the complaint. Given the circumstances presented here, the trial court did not err. As previously noted, however, we treat the additional causes of action as proposed amendments.

"Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found ' "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case." ' " (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507.) In his opening brief, Heng focuses on two new causes of action for wrongful foreclosure (second cause of action) and breach of contract (fourth cause of action) as apparent and consistent with his theory of the case. Heng has forfeited any argument that the remaining seven causes of action are potentially effective amendments by failing to present reasoned argument, citation to material facts, and discussion of pertinent legal authority. (*Magic Kitchen LLC v. Good Things Internat., Ltd., supra*, 153 Cal.App.4th at pp. 1161-1162.)

b. *Proposed Wrongful Foreclosure Cause of Action (Second Cause of Action) Alleged Against Chase Fails as a Matter of Law*

Heng attempts to state a wrongful foreclosure cause of action against Chase based upon the improper transfer of the promissory note during securitization or any other transfer of the promissory note subsequent to 2004. " 'Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to

another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing [his] obligations under the note.' " (*Jenkins v. JPMorgan Chase Bank, N.A.*, *supra*, 216 Cal.App.4th at p. 515.) Moreover, Heng must allege prejudice. (*Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th at p. 272.) Heng does not allege that any assignment interfered in any manner with his performance. Therefore, Heng lacks standing to complain about any alleged defective assignment or securitization.

c. *Proposed Breach of Contract Cause of Action (Fourth Cause of Action) Alleged Against Chase Fails as a Matter of Law*

Heng contends the fourth cause of action adds additional facts to support the theory that the nonjudicial foreclosure sale was "wrongful and the respondent's breached the contract because they did not have the right to foreclose." This cause of action alleges a breach of the Deed of Trust by "failing to apply the payments made by Heng and specifically the payments of September 2008 to Heng's loan." As explained above, the SAC does not allege any basis to hold Chase liable for any oral modification agreement entered into between Heng and WaMu before Chase acquired WaMu's assets. Accordingly, this cause of action fails as a matter of law. Because the proposed amendments do not state a claim under any legal theory, the demurrer to the entire SAC was properly sustained without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.