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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANOOSHAVAN SARKISIAN et al., Plaintiffs and Appellants, v. U.S. BANK, N.A. et al., Defendants and Respondents.	B238254 (Los Angeles County Super. Ct. No. EC055402)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Law Offices of Richard Il. Rydstrom and Richard I. Rydstrom; Borowitz & Clark and M. Erik Clark for Plaintiffs and Appellants.

Bryan Cave, Stuart W. Price, Kamao C. Shaw and Douglas E. Winter for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Anooshavan Sarkisian and Roobina Sarkisian (plaintiffs or the Sarkisians), husband and wife, challenge the validity of a foreclosure sale of their real property located at 1418 Norton Avenue in Glendale (the property). They contend that defendants and respondents U.S. Bank, N.A. (U.S. Bank), Countrywide Home Loans Inc. (Countrywide), Recontrust Company, N.A. (Recontrust), Bank of America, N.A. (B of A), BAC Home Loans Servicing, LP (BAC) and Darrell Schiffer (collectively, the bank defendants) engaged in a tortious scheme to obtain title and possession of the property. Plaintiffs' first amended complaint (FAC) set forth numerous causes of action, including quiet title. The trial court sustained the bank defendants' demurrer to the FAC and then entered judgment in their favor. On appeal, plaintiffs' main argument is that the trial court erroneously sustained the demurrer. We shall reject all of plaintiffs' arguments and affirm the judgment.

FACTUTAL AND PROCEDURAL BACKGROUND[1]

1. *The Promissory Note and Deed of Trust*

In August or September 2006, plaintiffs obtained a $700,000 loan from Countrywide secured by the property. The secured loan was memorialized by a promissory note and deed of trust dated August 25, 2006. The deed of trust, recorded on September 5, 2006, states that the Sarkisians are the borrowers (trustors), Recontrust is the trustee, Countrywide is the lender, and Mortgage Electronic Registration Systems,

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[1] Because the principal issue on appeal is whether the trial court erroneously sustained the bank defendants' demurrer to the FAC, our summary of the relevant facts assumes the factual allegations in the FAC are true, but we do not assume the truth of the FAC's contentions, deductions or conclusions of law. (*Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1552 (*Bower*).) Many of the facts in our summary are based on documents recorded in the Los Angeles County Recorder's office and attached to the FAC. To the extent there is a conflict in the facts alleged in the body of the FAC and the attached exhibits, the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

Inc. (MERS) is the "nominee" of the lender and, in that capacity, the beneficiary of the deed of trust.[2]

2. *The Nonjudicial Foreclosure*

Plaintiffs apparently were unable to timely make the payments due under the promissory note. On or about October 2, 2007, Recontrust, as trustee of the deed of trust, recorded a notice of default and election to sell under the deed of trust.

On February 6, 2008, Recontrust allegedly conducted a public auction of the property pursuant to Civil Code section 2924 and its powers as trustee under the deed of trust. Although the FAC asserts many legal arguments regarding this public auction, it contains a paucity of facts about what actually occurred. The public auction is referred to in three subsequently recorded documents, namely a pair of trustee's deeds upon sale and a notice of rescission, which we shall discuss *post.*

3. *The Assignment of the Deed of Trust and Promissory Note, and the First Trustee's Deed*

On February 19, 2008, Recontrust recorded two documents. The first was a corporation assignment of deed of trust (the assignment). This document stated that MERS transferred all beneficial interest in the deed of trust, together with the promissory note described in the deed of trust, to U.S Bank, as trustee for Mortgage Pass-Through Certificates Series 2007-AR1 (mortgage trust). The assignment was dated September 28, 2007 and notarized on February 14, 2008.

The second document Recontrust recorded on that day was a trustee's deed upon sale (first trustee's deed). This deed stated that U.S. Bank, as trustee of the mortgage trust, purchased the property at a public auction on February 6, 2008, for $734,579.82, which was the amount of the unpaid debt the plaintiffs owed under the promissory note.

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[2] "A 'nominee' is a person or entity designated to act for another in a limited role—in effect, an agent." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 (*Fontenot*).) "MERS is a private corporation that administers a national registry of real estate debt interest transactions." (*Id.* at p. 267.)

4. *The Unlawful Detainer Action*

On March 25, 2008, U.S. Bank, as trustee for the mortgage trust, filed a verified unlawful detainer complaint against the Sarkisians. (*U.S. Bank National Association, etc. v. Anooshavan Sarkisian et al.* (Super. Ct. L.A. County, 2008, No. 08C02640) (UD action).) The complaint alleged that U.S. Bank purchased the property at a foreclosure sale in accordance with Civil Code section 2924 et seq., and then duly perfected its interest in the property by recording a trustee's deed upon sale. The complaint also alleged that U.S. Bank was pursuing possession of the property pursuant to Code of Civil Procedure 1161a, subdivision (b).[3]

On May 1, 2008, the superior court entered a default judgment in the UD action in U.S. Bank's favor and against the Sarkisians. The judgment provided that U.S. Bank, as trustee of the mortgage trust, was entitled to "possession" of the property.[4]

On May 5, 2008, U.S. Bank obtained a writ of possession. Plaintiffs contend they were forced out of the property in September 2008.

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[3] Typically, an unlawful detainer action is commenced by a landlord against a tenant, whether or not the landlord holds title to the property. (See Code Civ. Proc., § 1161.) Code of Civil Procedure section 1161a provides for an unlawful detainer action against a person who holds over and continues possession of property after the property has been sold. Subdivision (b) of the statute describes five different circumstances under which an unlawful detainer action may be commenced. As explained *post*, only subdivision (b)(3) applies to the facts stated in the complaint. This subdivision provides that an unlawful detainer action may be pursued against a person who holds over and continues possession of real property after receiving a three-day written notice to quit the property, "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected." (Code Civ. Proc., § 1161a, subd. (b)(3).)

[4] When the superior court adjudicated the demurrer in the present case, it took judicial notice of the complaint and judgment in the UD action. We take judicial notice of the same documents. (Evid. Code, § 452, 459.)

5. *Second Trustee's Deed*

On June 11, 2008, Recontrust, as trustee of the deed of trust, recorded a trustee's deed upon sale (second trustee's deed). The second trustee's deed stated that Countrywide, for the benefit of Citigroup Global Markets Realty Corp., purchased the property at a public auction on February 6, 2008, for $734,579.82, which was the amount of the unpaid debt the plaintiffs owed under the promissory note. The second trustee's deed also stated that it was "being recorded to correct the vesting & supercedes [*sic*]" the first trustee's deed.

6. *Notice of Rescission*

On October 15, 2009, Recontrust, as trustee of the deed of trust, recorded a notice of rescission of trustee's deed upon sale pursuant to Civil Code section 1058.5. Because this document lies at the heart of plaintiffs' action, we shall discuss it in some detail.

The notice of rescission stated that Recontrust "has been informed by [MERS] that [MERS] desires to rescind the Trustee's Deed recorded upon the foreclosure sale which was conducted in error due to a failure to communicate timely, notice of conditions which would have warranted a cancellation of the foreclosure sale which did occur on 02/06/2008." The notice further stated: "NOW THEREFORE, [Recontrust] HEREBY RESCINDS THE TRUSTEE'S SALE AND PURPORTED [second trustee's deed] AND HEREBY ADVISES ALL PERSONS THAT THE [second trustee's deed] IS HEREBY RESCINDED AND IS AND SHALL BE OF NO FORCE AND EFFECT WHATSOEVER. THE DEED OF TRUST . . . IS IN FULL FORCE AND EFFECT."

7. *The Forcible Detainer Action*

Plaintiffs contend that in late March or mid-April 2010, shortly after they learned about the notice of rescission, they began living in the property again. On June 30, 2010, U.S. Bank, as trustee for the mortgage trust, filed a verified complaint for forcible entry and forcible detainer against the Sarkisians. (*U.S. Bank National Association, etc. v. Anooshavan Sarkisian et al.* (Super. Ct. L.A. County, 2010, No. 10C04846) (forcible detainer action).) The complaint alleged that U.S. Bank was the owner of the property pursuant to a trustee's sale conducted on February 6, 2008, and that the Sarkisians

forcibly entered the property without U.S. Bank's consent and remained on the property despite receiving a notice to surrender possession.

On August 8, 2011—after the present action commenced—the superior court held a bench trial on the forcible detainer action. On the same day, the court entered judgment for U.S. Bank and against the Sarkisians.[5] The present appeal does not challenge the judgment in the forcible detainer action.

8. *The Complaint and First Amended Complaint in this Action*

On April 1, 2011, plaintiffs commenced this action by filing a complaint in the superior court. Plaintiffs filed the FAC on August 13, 2011.

Although the FAC is difficult to follow, the gravamen of the pleading is that the bank defendants and other defendants[6] allegedly engaged in a "common plan or scheme" to obtain title and possession of the property. This scheme was executed by numerous individuals and entities, including U.S. Bank and its attorneys, Recontrust, B of A and its alleged subsidiaries, Countrywide and BAC, and Darrell Schiffer, an alleged employee of BAC and agent of U.S. Bank, B of A, Countrywide and Recontrust.

The FAC alleged that the February 6, 2006, nonjudicial foreclosure and public auction was achieved by "trickery and the utterance of false, confusing, misleading, void or unlawful documents affecting title and possessory rights to [the property]." In furtherance of this scheme, the bank defendants allegedly "concealed" the notice of rescission, which "return[ed] title to the Sarkisians." The bank defendants also allegedly filed the UD and forcible detainer actions without duly obtaining title to the property and with knowledge that their claim to title and possessory rights to the property was contrary to the notice of rescission. Additionally, the bank defendants allegedly filed misleading

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[5] When the superior court adjudicated the demurrer in the present case, it took judicial notice of the complaint and civil case summary in the forcible detainer action. We take judicial notice of the same documents. (Evid. Code, § 452, 459.)

[6] The other defendants are Joan Duffy, Danny Crisci, and Ewing & Assoc Sotheby's Int'l Realty. These defendants are not parties to this appeal.

documents in plaintiffs' bankruptcy proceedings.[7] These documents allegedly concealed the notice of rescission and misrepresented to the court that the assignment was executed on September 28, 2007, when in fact it was signed on February 14, 2008, after the foreclosure sale, making the assignment void on its face.

Based on these and a host of other allegations, the FAC purports to set forth causes of action for (1) negligence, (2) waste, (3) "Set-Aside Trustee Foreclosure Sale/Wrongful Listing for Sale," (4) conspiracy to defraud, (5) unfair and deceptive business practices, (6) conversion, (7) slander of title, (8) abuse of process, (9) nuisance, (10) quiet title, (11) intentional infliction of emotional distress, and (12) negligent infliction of emotional distress.

9. *Plaintiffs' Motion to Vacate the Judgment in the UD Action*

On May 27, 2011—before filing their FAC—plaintiffs filed a motion in the present action to vacate the judgment in the UD action. The trial court denied the motion on July 7, 2011.[8]

10. *The Bank Defendants' Demurrer*

On October 3, 2011, the bank defendants filed a demurrer to the FAC on the ground that the FAC failed to state facts sufficient to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e)). The superior court sustained the demurrer without leave to amend. In so doing, the court found that the FAC was barred for two main reasons. The first was that the FAC did not allege plaintiffs tendered the amount due on the promissory note. The court determined that under the "tender rule," all of the FAC's causes of action

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[7] The FAC alleged that plaintiffs filed a voluntary petition for bankruptcy in July 2010, and that the bankruptcy court dismissed their case in March 2011.

[8] Plaintiffs had previously attempted to vacate the judgment in the UD action by filing motions in that case. They filed a motion to vacate or set aside the judgment in May 2008, and then took the motion off calendar. Plaintiffs later filed an amended motion to vacate or set aside the judgment, which the superior court denied in October 2008. Subsequently, plaintiffs appealed the judgment in the UD action to the appellate division of the superior court. In November 2009, the appellate division dismissed the appeal as untimely.

were barred. In addition, the trial court ruled that the judgment in the UD action conclusively adjudicated the issue of title to the property, and thus the FAC was barred under the doctrine of res judicata.

On November 28, 2011, based on its ruling on demurrer, the court entered judgment in favor of bank defendants and against plaintiffs. Plaintiffs filed a timely notice of appeal of that judgment.

CONTENTIONS

Plaintiffs argue that the trial court erroneously sustained the bank defendants' demurrer to the FAC and abused its discretion by denying their motion to vacate the judgment in the UD action. They contend that no tender was required because the notice of rescission rescinded the nonjudicial foreclosure sale of the property to U.S. Bank and rendered the first trustee's deed conveying title to U.S. Bank "void." Additionally, plaintiffs argue that the FAC is not barred under the doctrine of res judicata because the judgment in the UD action was based on a "false-in-fact" and "void" sale and deed. Finally, plaintiffs contend that the trial court erroneously denied their motion to vacate the judgment in the UD action.

DISCUSSION

1. *Standard of Review of an Order Sustaining a Demurrer*

We review an order sustaining a demurrer de novo and "will affirm a judgment based on the sustaining of a demurrer on any properly supported ground, regardless of the trial court's reason for its ruling." (*Bower*, *supra*, 196 Cal.App.4th at p. 1552.) " ' "We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.]" ' [Citation.] However, we need not accept as true plaintiff's contentions, deductions or conclusions of fact or law." (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 87 (*Maxton*).)

2. *The FAC is Barred by the Tender Rule*

"As a general rule, a debtor cannot set aside [a nonjudicial] foreclosure based on irregularities in the sale without also alleging tender of the amount of the secured debt. [Citations.] 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].' " (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512 (*Shuster*).) Also, because a borrower's action challenging the validity of a trustee's sale is in equity, the borrower is required to do equity before the court will exercise its equitable powers. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 (*Onofrio*).)

The major exception to the tender rule is that a borrower is not required to tender the amount due on the promissory note where it would be inequitable to require such a tender. (*Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 291 (*Humboldt*); *Onofrio*, *supra*, 55 Cal.App.4th at p. 424.) Hence, a tender of the full amount due is not required when the borrower (trustor) has a counter-claim or set-off against the lender (beneficiary), when the borrower challenges the validity of the underlying debt, or when the borrower is not liable for the underlying debt. (*Onofrio*, at p. 424; *Shuster*, *supra*, 211 Cal.App.4th at p. 512; *Humboldt*, at p. 291.)

The tender rule applies to a foreclosure sale that is "voidable" due to some irregularity in the foreclosure process. (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877 (*Dimock*); *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) The borrower, however, is not required to tender the loan balance when the deed of trust (*Shuster*, *supra*, 211 Cal.App.4th at p. 512) or the trustee's deed upon sale (*Dimock*, at p. 878) is void on its face. This is because when a borrower attacks a void deed, he or she is not relying upon equity. (*Ibid.*)

In the present case, each of the causes of action in the FAC are based on the alleged invalidity of the February 6, 2006, foreclosure sale to U.S. Bank. Yet the FAC does not allege that plaintiffs tendered at any time the amount of their secured debt. The FAC also does not allege any facts indicating that a recognized exception to the tender

rule applies. The trial court thus correctly sustained the demurrer to the FAC on the ground that plaintiffs' action is barred by the tender rule.

Plaintiffs argue that the first trustee's deed conveying the property to U.S. Bank was void because the notice of rescission rendered it so. We disagree. The notice of rescission was filed pursuant to Civil Code section 1058.5. This statute provides: "Where a trustee's deed is invalidated by a pending bankruptcy or otherwise, recordation of a notice of rescission of the trustee's deed, which notice properly identifies the deed of trust, the identification numbers used by the recorder or the books and pages at which the trustee's deed and deed of trust are recorded, the names of all trustors and beneficiaries, the location of the property subject to the deed of trust, and the reasons for rescission, shall restore the condition of record title to the real property described in the trustee's deed and the existence and priority of all lienholders to the status quo prior to the recordation of the trustee's deed upon sale." (Civ. Code, § 1058.5, subd. (b).)

The plain terms of the notice of rescission provided that Recontrust, the trustee of the deed of trust, merely rescinded the sale of the property *to Countrywide* and the *second* trustee's deed. The notice of rescission did not rescind the sale of the property *to U.S. Bank* or the *first* trustee's deed. The status quo before the second trustee's deed was rescinded was that U.S. Bank held title to the property. Under Civil Code section 1058.5, subdivision (b) and the terms of the notice of rescission, Recontrust simply revived the status quo by recording the notice of rescission.

Plaintiffs argue that because the notice of rescission stated that the deed of trust was in "full force and effect," the first trustee's deed was necessarily void. We disagree. In order to adopt plaintiffs' position, we would be required to interpret the notice of rescission as *impliedly* rescinding the first trustee's deed. Civil Code section 1058.5, subdivision (b), however, provides that a notice of rescission must specify, inter alia, "the identification numbers used by the recorder or the books and pages at which the trustee's deed . . . [is] recorded" and the names of "all . . . beneficiaries." Here, the notice of rescission identified the instrument number and date of the second trustee's deed and the beneficiary of that deed, Countrywide, but did not so identify the first trustee's deed or

U.S. Bank. The notice of rescission thus only rescinded the second, not the first, trustee's deed, despite the ostensibly incongruous statement that the deed of trust was still in effect.

We note that the FAC alleges that the assignment was executed on February 14, 2008, and not on September 28, 2007, as the bank defendants claim. The assignment itself is ambiguous. It is "DATED" September 28, 2007, and notarized on February 14, 2008. For purposes of demurrer, we must accept the plaintiffs' allegation that the assignment was executed on February 14, 2008, *after* U.S. Bank purchased the property at the foreclosure sale.

Even assuming the assignment to U.S. Bank was invalid[9] or the notice of rescission was defective, the FAC is still deficient because it contains no facts showing prejudice to plaintiffs. (*Fontenot, supra*, 198 Cal.App.4th at p. 272 ["a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interest"].) In *Fontenot*, the court addressed a similar situation. There, the plaintiff challenged the validity of a foreclosure on the ground that MERS, the original lender's nominee, did not transfer the promissory note to the successor lender, HSBC, because it lacked the authority to do so. The court, however, held that even if MERS lacked authority to transfer the note, the plaintiff could not prevail because she did not show prejudice. (*Ibid.*) "If MERS indeed lacked authority to make the assignment," the court reasoned, "the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note." (*Ibid.*)

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[9] Because a nonjudicial foreclosure sale is presumed to have been conducted regularly, plaintiffs had the burden of pleading facts demonstrating that the assignment was invalid. (*Fontenot, supra*, 198 Cal.App.4th at p. 270.)

The same is true here. The FAC alleged no facts indicating plaintiffs were prejudiced by any of the alleged irregularities or defects in the assignment or notice of rescission. It did not, for example, allege that plaintiffs had the means to tender the amount due under the promissory note but as a result of the bank defendants' conduct were unable to do so. Moreover, plaintiffs do not dispute that at the time of the foreclosure sale they were in default of their payment obligations under the promissory note, that they were duly notified of the foreclosure sale, that the assignment merely substituted U.S. Bank for their original creditor without changing any of plaintiffs' obligations, that the notice of rescission was recorded 20 months after the foreclosure sale, and that they did not tender the amount due under the promissory note at any time. Accordingly, any irregularities or defects in the assignment or notice of rescission had no prejudicial impact on plaintiffs and cannot be the basis for invalidating the sale of the property to U.S. Bank.

3. *The FAC is Barred by the Doctrine of Collateral Estoppel*

"The aspect of res judicata known as issue preclusion or collateral estoppel bars a party from relitigating any issues necessarily included in a prior, final judgment." (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 973, fn. 4, italics omitted (*Malkoskie*).) For the reasons that follow, we shall conclude that plaintiffs are collaterally estopped from challenging the validity of U.S. Bank's title to the property in this action.

Because an unlawful detainer action is a summary proceeding usually limited to the issue of immediate possession of real property, a judgment in such an action usually has limited res judicata effect "and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title." (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 (*Vella*).) An exception to this rule is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional unlawful detainer suit brought by a landlord to include actions by certain purchasers of property. (*Vella*, at p. 255.) In these cases, title to the property may be an issue.

In *Malkoskie*, the court applied the exception to the rule that title cannot be tried in unlawful detainer in circumstances similar to the present case. There, Wells Fargo Bank, N.A. (Wells Fargo), after purchasing real property at a nonjudicial foreclosure sale, brought an unlawful detainer action against the previous homeowners pursuant to Code of Civil Procedure section 1161a, subdivision (b)(3). This subdivision permits an unlawful detainer action against a person who holds over and continues possession of real property after receiving a three-day written notice to quit the property, "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, *and the title under the sale has been duly perfected*." (Code Civ. Proc., § 1161a, subd. (b)(3), italics added.) In a subsequent action by the previous homeowners seeking to set aside the nonjudicial foreclosure sale, the court held that the judgment in the unlawful detainer action "conclusively resolved" the validity of title to the property in Wells Fargo's favor. (*Malkoskie*, *supra*, 188 Cal.App.4th at p. 974.)

Likewise, in the UD action, the complaint alleged that U.S. Bank purchased the property at a foreclosure sale in accordance with Civil Code section 2924, and that it was seeking possession of the property pursuant to Code of Civil Procedure section 1161a, subdivision (b). Subdivision (b) sets forth five circumstances under which an unlawful detainer action may be commenced, all of which require the plaintiff to purchase the property and to duly perfect title. Subdivision (b)(3) appears to be the only circumstance which applies to the facts stated in the complaint.[10] The complaint in the UD action thus raised the issue of title to the property. (*Malkoskie*, *supra*, 188 Cal.App.4th at p. 974.)

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[10] The other circumstances are (1) where the property has been sold pursuant to a writ of execution, (2) where the property has been sold pursuant to a writ of sale, (3) where the property has been sold by a person who holds over and continues in possession, or (4) where a manufactured home, mobilehome, truck camper, or floating home has been sold pursuant to Health and Safety Code section 18037.5. (Code Civ. Proc., § 1161a, subd. (b)(1), (2), (4) & (5).)

Although the judgment in the UD action was obtained by default, the issue of title was necessarily and actually decided. By permitting their default in the UD action to be entered, the Sarkisians confessed the truth of all material allegations in the complaint, including U.S. Bank's allegations that it purchased the property at a foreclosure sale and thereafter perfected its interest in the property. (*Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 131.) The Sarkisians therefore are collaterally estopped from denying that U.S. Bank holds title to the property. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 871 ["Even a judgment of default in a civil proceeding is 'res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint' "].)

Each of plaintiffs' causes of action in this case rest on the premise that U.S. Bank did not acquire title to the property. Because U.S. Bank conclusively established in the UD action that it holds title to the property, the trial court correctly sustained the bank defendants' demurrer to the FAC.

4. *We Do Not Reach Bank Defendants' Other Arguments*

In addition to their arguments based on the tender rule and res judicata, the bank defendants contend that the FAC fails to state a cause of action for two additional reasons. The first is that much of their alleged wrongful conduct, including obtaining a writ of possession and filing the complaints in the UD action and forcible detainer action, was privileged. The bank defendants also argue that the FAC does not include facts supporting essential elements of particular causes of action. Because we have concluded that the trial court correctly sustained the bank defendants' demurrer to the FAC based on the tender rule and collateral estoppel, we do not reach the bank defendants' remaining arguments.

5. *Plaintiffs' Request for Leave to Amend*

When a general demurrer is sustained, "the plaintiff must be given leave to amend his or her complaint when there is a reasonable possibility that the defect can be cured by amendment. [Citations.] 'The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Maxton, supra,* 203 Cal.App.4th at p. 95.)

" 'To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden.' [Citation.] The plaintiff must clearly and specifically state 'the legal basis for amendment, i.e., the elements of the cause of action,' as well as the 'factual allegations that sufficiently state all required elements of that cause of action.' [Citation.]" (*Maxton, supra,* 203 Cal.App.4th at p. 95.)

Here, on the last page of its opening brief, plaintiffs requested this court for "leave to amend the complaint and cure any defects in pleading." Plaintiffs did not, however, specifically state the additional facts or new legal theories they would allege if given leave to amend. Accordingly, plaintiffs did not meet their burden of showing there is a reasonable possibility that the defects in the FAC can be cured by amendment.

6. *Motion to Vacate*

Plaintiffs argue that the trial court erroneously denied their motion to vacate the judgment in the UD action.[11] A party may move to set aside or vacate a judgment pursuant to Code of Civil Procedure section 663, on the grounds that (1) the judgment was based on an incorrect or erroneous legal basis or was not consistent with or supported by the facts, or (2) the judgment was not consistent with or supported by the special verdict. A party or his or her counsel may also seek relief from a judgment pursuant to Code of Civil Procedure section 473, subdivision (b) on the grounds of mistake, inadvertence, surprise, or excusable neglect. In this case, plaintiffs brought the motion under both statutes.

The bank defendants claim that the order denying plaintiffs' motion to vacate was not appealable. But under well established case law, an order denying a motion for relief from a default judgment under Code of Civil Procedure section 473, subdivision (b), is appealable. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998)

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[11] Plaintiffs did not file a notice of appeal of the order. Their notice of appeal was from the judgment.

61 Cal.App.4th 1384, 1394; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1008.) The case law, however, does not clearly resolve the issue of whether an order denying a motion to set aside or vacate a judgment under Code of Civil Procedure section 663 is separately appealable. (See *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 890 (*Clemmer*) [the order is "nonappealable"]; *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 302 ["the precedential value of *Clemmer* is doubtful"]; *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 820-823 [discussing split in authority].)

In any case, regardless of whether the order denying plaintiffs' motion was appealable, the trial court correctly denied the motion because it was untimely. In order to file a motion to set aside or vacate a judgment under Code of Civil Procedure section 663, a party must file a notice of intention of filing such a motion either (1) after the decision is rendered and before the entry of judgment, or (2) within 15 days of being served by a notice of entry of the judgment or within 180 days after entry of judgment, whichever is earliest. (Code Civ. Proc., § 663a, subd. (a).) Here, plaintiffs filed their motion more than three years after the judgment in the UD action was entered. Nothing in the record indicates plaintiffs filed a notice of intent to file their motion. Accordingly, to the extent the motion was based on Code of Civil Procedure section 663, it was untimely.

A motion for relief from a judgment pursuant to Code of Civil Procedure section 473, subdivision (b) "shall be made within a reasonable time, in no case exceeding six months, after the judgment . . . was taken." (Code Civ. Proc., § 473, subd. (b).) Plaintiffs' motion in this case was made long after the six-month deadline expired. We therefore affirm the trial court's order denying plaintiffs' motion to vacate the judgment in the UD action because the motion was untimely.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.