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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ETINOSA OSAHON, Plaintiff and Appellant, v. U.S. BANK NATIONAL ASSOCIATION et al., Defendants and Respondents.	B286781 (Los Angeles County Super. Ct. No. BC553995)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Lippit, Judge. Affirmed.

Stonecroft Attorneys, and Christian I. Oronsaye for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Kristina M. Pelletier for Defendants and Respondents.

Defendants U.S. Bank National Association,[1] Quality Loan Service Corporation, Select Portfolio Servicing, Inc., and Bank of America, N.A., commenced foreclosure proceedings after plaintiff Etinosa Osahon ceased payments on the mortgage for his home. Osahon offered to avoid foreclosure through a short sale, but the sale did not happen and his home was eventually sold at a foreclosure sale. Osahon filed suit, asserting a host of claims. The trial court sustained a demurrer to the first amended complaint without leave to amend and entered judgment of dismissal. We reject Osahon's claims of error. We discharge two outstanding orders to show cause and affirm.

BACKGROUND

In their briefs on appeal, both parties cite documents that were part of a motion for summary judgment on the original complaint. The demurrer at issue here was directed to the first amended complaint (FAC), which Osahon obtained permission to file while the summary judgment motion was pending. The motion for summary judgment was taken off calendar. In reviewing the court's order sustaining the demurrer, we may not consider these documents outside the FAC. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482, 483, fn. 5 (*Arce*) [ignoring "voluminous record" on appeal from order sustaining demurrer because court's review "must be based

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[1] U.S. Bank National Association's correct party designation is U.S. Bank National Association, as Trustee in trust for the registered holders of First Franklin Mortgage Loan Trust Mortgage Loan Asset-Backed Certificates, Series 2005-FF7.

on the properly pleaded factual allegations in the complaint and the facts that may be properly judicially noticed"].)[2]

1. Factual Allegations

Osahon purchased the property at issue in 2005 for $270,000, securing a primary mortgage for $216,000 from U.S. Bank's predecessor and a second mortgage for $54,000 from Bank of America. He stopped making payments in 2012.

No date is specified in the FAC, but Osahon alleges that, at some point, "Plaintiff applied to Defendant, SELECT for a modification of his mortgage to a lower affordable amount as provided under the Home Affordable Modification Program. However, Plaintiff was informed by agents of said Defendant that he did not qualify for a modification and his application was denied."

The FAC goes on to allege that, "[i]n a bid to maintain his credit rating and as an alternative to foreclosure as provided for under the Home Affordable Foreclosure Alternatives (HAFA), Plaintiff applied to Defendant, SELECT and offered to conduct a short-sale of the subject property whereby the subject property would be sold for $180,000 to an interested third party (who was already secured), thereby preserving Plaintiff's credit and at the

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[2] The trial court judicially noticed six recorded documents related to the property, including the deed of trust, assignment of the deed of trust, substitution of trustee, notice of default, notice of trustee's sale, and trustee's deed upon sale. Osahon has not challenged that ruling on appeal, so we may consider these documents in reviewing the sufficiency of the complaint. (*Arce, supra,* 181 Cal.App.4th at p. 482.)

same time affording Defendants an opportunity to recoup part of their loan."

While the parties discussed the short sale, Select Portfolio recorded a notice of default on February 11, 2014, without informing Osahon of any default. Then, in April 2014, Osahon "opened up discussions" with Select Portfolio and requested a "loan modification and/or short sale." While "discussions and/or the application for loan modification and/or short sale, were ongoing," Select Portfolio recorded a notice of trustee's sale on May 15, 2014.

On May 27, 2014, Select Portfolio responded to Osahon's short sale offer by requesting a higher sale price, and Osahon submitted another offer for a sale at $190,000. Select Portfolio agreed to that amount and instructed Osahon to "submit a contract and documents reflecting such an amount."

On June 27, 2014, Select Portfolio sent Osahon a letter denying the short sale request because Osahon did not meet the requirements. Osahon's agent called Select Portfolio and was told that "the short-sale was being approved" and "to disregard the letter" because the short sale was still being reviewed.

Around one month later, on July 31, 2014, Select Portfolio agreed to conclude the short sale on several conditions, including that Osahon obtain approval of the short sale from Bank of America as the second mortgage holder, and submit an updated HUD-1 Closing Statement from the escrow company by noon the following day. Osahon provided the requested documents the same day.

Also on the same day (July 31, 2014), Select Portfolio's appraiser contacted Osahon's agent to request a walkthrough of the property prior to closing, and Osahon agreed. However,

Osahon was in a car accident and could not give the appraiser access to the property for the walkthrough. No walkthrough ever occurred. Osahon contacted Select Portfolio the next day (August 1, 2014). He was told Select Portfolio would no longer agree to the short sale because the property was scheduled for a foreclosure sale on August 11, 2014, and there was not enough time to approve a short sale and close the deal before the foreclosure date.

Select Portfolio thereafter refused to talk to Osahon to conclude the short-sale transaction. The foreclosure sale did not take place until a year and a half later, on March 29, 2016.

2. Procedural Background

Osahon filed the original complaint on August 7, 2014, four days before the foreclosure sale was first scheduled to take place. In October 2015, defendants filed a motion for summary judgment on the original complaint. That motion was apparently pending when the property was sold at the foreclosure sale in March 2016. Defendants withdrew the motion and filed a new motion for summary judgment in October 2016. In response, Osahon filed a motion for leave to file the FAC, which the trial court granted. The motion for summary judgment was taken off calendar.

The FAC alleges 15 causes of action: (1) negligence; (2) fraud; (3) cancel trustee's deed upon sale; (4) set aside trustee's sale; (5) wrongful foreclosure; (6) breach of contract; (7) breach of implied covenant of good faith and fair dealing; (8) promissory estoppel; (9) specific performance; (10) unjust enrichment; (11) violation of Business and Professions Code section 17200, et seq.; (12) quiet title; (13) slander of title; (14) declaratory relief; and (15) injunctive relief. Defendants demurred to all of the claims.

Osahon voluntarily dismissed the unjust enrichment and injunctive relief claims. The trial court sustained a demurrer to the rest of the claims without leave to amend. The court entered judgment of dismissal with prejudice, and Osahon appealed.

DISCUSSION

I. We Have Jurisdiction to Consider Osahon's Appeal; the Orders to Show Cause Are Discharged

Two orders to show cause are pending. We issued the first order because the appellate record did not contain a judgment following the dismissal of Osahon's complaint. In response to the order, Osahon provided a notice of entry of judgment filed September 27, 2017, and the judgment itself, filed September 19, 2017. We order the record augmented to include these documents. (Cal. Rules of Court, rule 8.155(a)(1)(A).) The order to show cause on this basis is discharged.

We issued the second order to show cause because it still was not clear whether the judgment was final and appealable. The problem arose because the trial court consolidated two civil cases and an unlawful detainer case involving the property: (1) *Etinosa Osahon v. U.S. Bank National Association, Quality Loan Service Corp., Select Portfolio Servicing, Bank of America National Association, and Leon Reingold*, Los Angeles County Superior Court, case No. BC553995 (the case pending in the current appeal); (2) *Amoni Oyin-Obi v. Etinosa Osahon, U.S. Bank National Association, Select Portfolio Servicing, and Bank of America National Association*, Los Angeles County Superior Court, case No. BC602559 (the *Oyin-Obi* case); and (3) *Leon Reingold v. Etinosa Osahon*, Los Angeles County Superior Court, case No. 16B01606 (the *Reingold* case).

The *Oyin-Obi* case was filed by the proposed buyer Osahon had located for the short sale.[3] The parties stipulated to consolidate the present case and the *Oyin-Obi* case "for all intents and purpose," in order "to avoid hardship, duplicate expenses and for the sake of judicial economy." The trial court ordered the cases consolidated.

The *Reingold* case was an unlawful detainer proceeding filed by the buyer in the foreclosure sale. Osahon filed a motion and ex parte application to consolidate the *Reingold* case with the present case to "avoid repetitive trials of the same common issues, avoid unnecessary costs and delays to the Court and to all of the parties, and eliminate the risk of inconsistent adjudications." Osahon also noted in this motion that he had added Reingold as a defendant in the present case. The court granted the ex parte request in a minute order, without specifying the scope of the consolidation, and stayed the *Reingold* case. The FAC caption indicates the three cases were "Consolidated for all Proceedings."

The judgment of dismissal at issue in the present appeal resolved Osahon's claims against defendants, but left unresolved the claims Osahon asserted against Reingold in the present case after Osahon added him as a defendant. The judgment also did not resolve claims asserted in the two other actions, specifically the claims Oyin-Obi asserted against defendants and Osahon in the *Oyin-Obi* case, and the unlawful detainer claim Reingold

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[3] On appeal, Osahon has requested that we take judicial notice of documents filed in the *Oyin-Obi* case. We grant the request.

asserted against Osahon in the *Reingold* case. The trial court has since stayed the remaining proceedings pending the outcome of this appeal.

Under the " 'one final judgment' " rule, "an order or judgment that fails to dispose of all claims between the litigants is not appealable under Code of Civil Procedure section 904.1, subdivision (a)." (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 436 (*Nguyen*).) The question is whether the judgment of dismissal resolving Osahon's claims against defendants is an appealable final judgment, in light of the consolidation of these cases and the remaining issues involving the parties.

"Code of Civil Procedure section 1048, subdivision (a), authorizes the trial court, when appropriate, to 'order a joint hearing or trial' or to 'order all the actions consolidated.' Under the statute and the case law, there are thus two types of consolidation: a consolidation for purposes of trial only, where the two actions remain otherwise separate; and a complete consolidation or consolidation for all purposes, where the two actions are merged into a single proceeding under one case number and result in only one verdict or set of findings and one judgment." (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147 (*Hamilton*).)

Osahon and defendants contend the court consolidated the cases only for trial, thereby rendering the judgment final as to them. Although the FAC caption indicated the cases were consolidated "for all proceedings" (see *Hamilton, supra,* 22 Cal.4th at pp. 1148-1149), the trial court's order did not clearly specify the scope of consolidation. The FAC and subsequent pleadings continued to identify multiple case numbers, with the instant case designated as the "lead" case. The defendants'

demurrer proceeded as if this case remained distinct; the record does not indicate there was any attempt to coordinate or combine challenges to the relevant complaints. Each action was brought by different plaintiffs. The parties in the three actions overlap but they are not identical in each suit. These facts suggest consolidation was for procedural purposes or trial only, rather than a true merger of the actions. (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 196–197 [distinguishing " 'complete consolidation,' " which may occur when the parties are identical and the claims could have been joined, from " 'consolidation for trial,' " where " 'the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy' "].)

Further, the trial court issued a separate judgment in this case following the order sustaining defendants' demurrer, indicating the parties and court appeared to anticipate separate verdicts or sets of findings, and separate judgments as to each action. We thus agree with the parties that the three actions were consolidated for trial only. The record before us does not reflect that any part of the other actions was implicated in the demurrer litigation in this case. There are no remaining causes of action between Osahon and defendants in this action.[4] We

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[4] While the judgment did not resolve Osahon's claims against Reingold, we may exercise jurisdiction " 'when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party.' " (*Nguyen, supra,* 105 Cal.App.4th at p. 437.) The judgment left no issue to be determined as to defendants in Osahon's suit.

therefore conclude Osahon's appeal from the judgment does not violate the one final judgment rule. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 701–703 [where actions were consolidated for trial only the judgment following the trial of one of the actions was final and the appeal did not violate the one final judgment rule].)

The order to show cause is discharged.

II. Standard of Review

We review the sustaining of a demurrer de novo. Assuming all facts properly pleaded or reasonably inferred from the pleaded facts are true, we must determine whether those facts state a claim under any legal theory. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751 (*Scott*).) We do not assume the truth of "mere contentions, deductions, or conclusions of law." (*Ibid.*) We may consider facts the trial court judicially noticed. "Indeed, a demurrer may be sustained where judicially noticeable facts render the pleading defective [citation], and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed." (*Ibid.*)

We review the denial of leave to amend for abuse of discretion, evaluating " 'whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion,

the trial court's order sustaining the demurrer without leave to amend must be affirmed. [Citation.]' " (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607).)

III. The Record Is Adequate for Our Review

Osahon did not provide a reporter's transcript or suitable substitute for the hearing on defendants' demurrer. (See Cal. Rules of Court, rules 8.134 [agreed statement], 8.137 [settled statement].) However, we reject defendants' contention that the absence of the reporter's transcript precludes our review. An appellant bears the " 'burden to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court. . . ." ' " (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 (*Flannery*); see Cal. Rules of Court, rule 8.120(b).) A reporter's transcript may not be necessary if the appeal involves a legal issue requiring de novo review. (*Ibid.*) Here, not only did the trial court's order set out reasons why the court sustained the demurrer, but our review is de novo, so a transcript of the oral proceedings on demurrer is unnecessary for our evaluation of the sufficiency of Osahon's FAC.

The absence of a reporter's transcript could be more problematic for the trial court's discretionary denial of leave to amend, which the court did not explain in its order sustaining the demurrer. (*Flannery, supra,* 5 Cal.App.5th at p. 483 ["In many cases involving the substantial evidence or abuse of discretion standard of review, however, a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable."].) But we conclude below that Osahon forfeited any challenge to the denial of leave to amend by failing to adequately address it in his

briefs on appeal, so we need not address the sufficiency of the record on this issue.

IV. We Will Not Reverse the Judgment for Any Failure to Meet and Confer

Osahon argues the judgment should be reversed because defendants failed to meet and confer before filing their demurrer, in violation of Code of Civil Procedure section 430.41. That section generally provides, "Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).)

We need not mire ourselves in the details of defendants' allegedly inadequate meet and confer efforts. Code of Civil Procedure section 430.41, subdivision (a)(4) provides, "Any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer." Subdivision (f) also provides, "Nothing in this section affects appellate review or the rights of a party pursuant to Section 430.80." Even if defendants' meet and confer efforts were insufficient, the trial court could not have overruled the demurrer on that basis and we will not reverse the judgment of dismissal for this reason.[5]

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[5] Osahon also contends defendants' failure to meet and confer violated a trial court order allowing Osahon to exceed page limits in his opposition and directing him to "talk to opposing counsel M&C on amended complaint." As is clear from the

V. Osahon Failed to State Any Grounds for Relief

Despite his numerous causes of action in the FAC, Osahon confines his substantive arguments on appeal to four general points: (1) the trial court should not have applied the "tender rule" to bar his claims; (2) construing the FAC "[a]s a [w]hole," he stated a valid cause of action for violation of the Homeowner's Bill of Rights (Civ. Code, §§ 2923.4, et seq.; HBOR); (3) defendants breached a duty of care owed to him and committed fraud in the short sale process; and (4) Osahon is entitled to void the foreclosure sale. We confine our opinion to addressing these specific contentions, which we reject. Osahon has forfeited any other challenges to the judgment by failing to raise them in his briefs on appeal. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 290, fn. 2 (*Foxen*).)

A. We Need Not Address the Application of the Tender Rule

The trial court concluded Osahon failed to allege he could tender his debt, which barred his claims to void or cancel the trustee's deed upon sale, to set aside the trustee's sale, to quiet title, and for wrongful foreclosure. Osahon does not address these claims, but instead argues at length that the tender rule does not bar a claim under the HBOR. (See *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1273 (*Valbuena*) [tender not required for suit alleging violation of HBOR].)

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court's language, the court ordered Osahon to talk to defendants' counsel, not the other way around.

Osahon's argument is misplaced because the trial court did not bar any HBOR claim for failure to tender the outstanding debt. Instead, the court found Osahon failed to plead a separate HBOR claim, and even if he had, it would not provide grounds to quiet title or set aside the sale because his only available remedy after the foreclosure sale was damages. (Civ. Code, § 2924.12, subd. (b).) In any case, we need not address his tender argument because we likewise conclude he has failed to allege an HBOR claim for other reasons (albeit different than the trial court).

Osahon's failure to address the tender rule beyond his HBOR claim forfeited any challenge to the correctness of the trial court's application of the tender rule to the other causes of action. (*Foxen, supra,* 6 Cal.App.5th at p. 290, fn. 2.)

B. Osahon Has Not Stated a Claim for Violation of the HBOR

Effective January 1, 2013, the HBOR "was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' ([Civ. Code,] § 2923.4, subd. (a).)" (*Valbuena, supra,* 237 Cal.App.4th at p. 1272.)

While Osahon discussed the HBOR in the FAC, he did not actually allege a cause of action for violation of the HBOR. Yet, the keystone of his appeal is an alleged violation of the " 'dual tracking' " provision in HBOR, Civil Code section 2923.6. Dual tracking "occurs when a bank forecloses on a loan while negotiating with the borrower to avoid foreclosure." (*Valbuena, supra,* 237 Cal.App.4th at p. 1272.) In accordance with settled

principles of review, we examine the FAC to see if the allegations state a valid HBOR dual-tracking violation. (*Scott, supra,* 214 Cal.App.4th at p. 751.)

As it was in effect at the time of foreclosure proceedings in this case, Civil Code section 2923.6[6] "sought to encourage loan modifications as an alternative to foreclosures." (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1116 (*Schmidt*).) "It is the intent of the Legislature that the mortgage servicer offer the borrower a loan modification or workout plan if such modification or plan is consistent with its contractual or other authority." (Civ. Code, § 2923.6, subd. (b).) To that end, the statute provided that once a borrower submitted a "complete application for a first lien loan modification," the mortgage servicer, mortgagee, trustee, beneficiary, or other agent could not record a notice of default or notice of sale, or conduct a trustee's sale, while the modification application was pending. (Civil Code, § 2923.6, subd. (c).) "[A]n application shall be deemed 'complete' when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer." (Civ. Code, § 2923.6, subd. (h).)

Thereafter, the foreclosing entity could only proceed if "(1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired. [¶]

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[6] All citations to Civil Code section 2923.6 refer to the version in effect between January 1, 2013 and December 31, 2017, when the foreclosure proceedings took place in this case.

(2) The borrower does not accept an offered first lien loan modification within 14 days of the offer. [¶] (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." (Civ. Code, § 2923.6, subd. (c).)

"Former section 2923.6 also required mortgage servicers, mortgagees, trustees, beneficiaries, or agents to provide borrowers with 30 days to appeal the denial of a loan modification, as well as additional time after the denial of an appeal. (See former § 2923.6, subds. (d), (e).) The statute further required that borrowers be provided 'written notice to the borrower identifying the reasons for [the modification] denial, including' the amount of time a borrower had to request an appeal, 'instructions regarding how to appeal the denial,' as well as information regarding the basis of the denial and possible other foreclosure alternatives. (*Id.*, subd. (f).)" (*Schmidt, supra,* 28 Cal.App.5th at p. 1116.)

As these provisions make clear, dual-tracking is prohibited while a "complete application for a first lien *loan modification*" is pending. In the FAC, Osahon alleges he had applied for a loan modification at some point, but his request was denied. He alleges no further details about that process, including whether his application was "complete." He also does not base any of his claims of wrongdoing on that loan modification application. Instead, his allegations of wrongdoing in the FAC are based on Select Portfolio's alleged mishandling of his later offer to conduct a short sale.

While he labels that offer as an "application for loan modification and/or short sale," he has cited no authority for treating his offer of a short sale as a "complete application for a

first lien *loan modification,*" which would trigger the HBOR dual-tracking provisions. "Loan modification" is not defined in the HBOR, but the Legislature recognized it is one of several different types of "loss mitigation options" or "foreclosure prevention alternatives" available to borrowers in the nonjudicial foreclosure process. (See Civ. Code, § 2923.4 ["The purpose of the act that added this section is to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have meaningful opportunity to obtain, available loss mitigation options, if any, offered through the borrower's mortgage servicer, such as *loan modification or other alternatives to foreclosure*." (Italics added.)]; see also *id.*, § 2920.5, subd. (b) [defining "[f]oreclosure prevention alternative" as "a first lien loan modification or another available loss mitigation option"].) In other parts of the HBOR, the Legislature recognized a short sale as another type of "foreclosure prevention alternative." (See, e.g., Civ. Code, § 2924.11, subd. (d) ["A mortgagee, beneficiary, or authorized agent shall record a rescission of a notice of default or cancel a pending trustee's sale, if applicable, upon the borrower executing a permanent foreclosure prevention alternative. *In the case of a short sale*, the cancellation of the pending trustee's sale shall occur when the short sale has been approved by all parties and proof of funds or financing has been provided to the mortgagee, beneficiary, or authorized agent." (Italics added.)].)

Loan modifications and short sales both avoid foreclosure but do so in very different ways. A "loan modification" necessarily implies the continued existence of the loan, now modified, that allows the borrower to continue to pay renegotiated loan payments and stay in his or her home. (See *Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal.App.4th

49, 64 (*Lueras*) [" '[A] loan modification, which at its core is an attempt by a money lender to salvage a troubled loan, is nothing more than a renegotiation of loan terms. This renegotiation is the same activity that occurred when the loan was first originated; the only difference being that the loan is already in existence.' "].) At the end of the process, a lender's "decision on [the borrower's] application for a modification plan would likely determine whether or not [the borrower] could keep her house." (*Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 641 (*Rossetta*); see *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 950 [HBOR " 'expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that *homes will not be lost*,' " italics added].)

By contrast, in a short sale, "the borrower sells the home to a third party for an amount that falls short of the outstanding loan balance; the lender agrees to release its lien on the property to facilitate the sale; and the borrower agrees to give all the proceeds to the lender." (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 671.) After a short sale, a borrower might avoid some of the adverse effects a foreclosure sale has on his or her credit, but he or she relinquishes both the loan and the home.

By limiting the dual-tracking restrictions to "first lien loan modifications" as opposed to any loss mitigation option or foreclosure prevention alternative, the Legislature must have intended to limit the dual-tracking provisions to loan modifications that might help a borrower stay in his or her home. That necessarily excludes other types of loss mitigation options or foreclosure prevention alternatives, such as short sales. (Cf. Civ. Code, § 2923.7, subd. (a) [requiring "single point of contact" when

borrower "requests a foreclosure prevention alternative"].) Citing nothing to show otherwise, Osahon's allegations fail to state a violation of the HBOR dual-tracking provisions.[7]

C. Osahon's Negligence and Fraud Claims Fail

The only claims Osahon specifically addresses on the merits in his briefs on appeal are fraud and negligence. We address them together because they fail for the same reason.

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*Lueras, supra,* 221 Cal.App.4th at p. 78.) The elements of negligence are "(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Id.* at p. 62.)

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[7] Osahon also suggests defendant violated another HBOR provision requiring that "[w]hen a borrower submits a complete first lien modification application or any document in connection with a first lien modification application, the mortgage servicer shall provide written acknowledgement of the receipt of the documentation within five business days of receipt." (Civ. Code, § 2924.10, subd. (a).) As with the dual-tracking provisions, Osahon's offer of a short sale was not a "first lien modification application" that would trigger this provision.

Osahon argues defendants breached a duty of care and committed fraud by making several "[c]ontradictory and [i]nconsistent [c]ommunications" with him. Specifically, he argues that defendants "assured him that the loan modification will be approved and that they would not dual track" him, and that they "promised [him] that they would come back for a walk through of the subject property (after the initial one that was cancelled on July 31, 2014 owing to [Osahon's] medical condition) and thereafter stopped communicating with" him.

We reject Osahon's contention involving the appraisal walk-through because his allegations in the FAC show that defendants did not *promise* to return to the property for another appraisal walk-through. His exact allegations were that, when he missed the first appraisal appointment and requested that the appraiser return, the appraiser "responded that even though he had a tight schedule he would *endeavor to return to conduct the walk-through*." (Italics added.) When Osahon contacted Select Portfolio the next day "to inquire about the status of the walk-through," Select Portfolio's relationship manager told him the short sale was off. These allegations do not show that defendants affirmatively promised to conduct another appraisal walk-through after he missed the first appointment.

Osahon does allege in the FAC that defendants "promised they would not dual track (contrary to the HBOR) the Plaintiff while the loan modification and/or short sale agreement was being considered, but that promise was untrue" because they recorded the Notice of Trustee sale on May 15, 2014. Generally, "[l]enders and borrowers operate at arm's length. [Citations.] '[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.' " (*Lueras, supra,* 221 Cal.App.4th at p. 63.) Courts are split on whether a duty arises when a lender undertakes the process of a loan modification with a borrower in default. (See *Rossetta, supra,* 18 Cal.App.5th at p. 638 [discussing cases "divided on the question of whether accepting documents for a loan modification is within the scope of a lender's conventional role as a mere lender of money, or whether, and under what circumstances, it can give rise to a duty of care with respect to the processing of the loan modification application"].) A lender does owe a duty to a borrower not to make material misrepresentations of fact in the loan modification or foreclosure process. (*Lueras, supra,* 221 Cal.App.4th at p. 68.)

We need not address the issue of duty because, even if defendants breached a duty not to dual track the short sale process and misrepresented that it would not do so, Osahon alleged no damage resulting from any alleged breach. Osahon does not allege any specific damages in the FAC beyond the bare fact that he suffered "damages" as a result of defendants' fraud and negligence. In his reply brief on appeal, he vaguely claims he was injured because he "invested his time and resources, [and] secured a buyer to prevent any negative rating on his credit."

Yet, these alleged injuries had no connection to defendants' alleged dual-tracking of the foreclosure and the short sale. As noted above, Select Portfolio canceled the short sale after Osahon failed to meet the appraiser at the property at the agreed time due to his accident. The recordation of the notice of default and notice of trustee's sale had no impact on that. While Osahon alleges that Select Portfolio did not reschedule the appraisal because the foreclosure sale was set to go forward on August 11,

2014, the sale did not actually take place until March 29, 2016, a year and a half *after* the short sale discussions ended. Osahon did not allege that he lost his home—or suffer any other damage—from the recordation of the notice of default and notice of trustee's sale during the time he was pursuing the short sale.

Finally, Osahon alleges that defendants "assured Plaintiff that they would grant and/or approve any request for such short sale and/or loan modification." But read in the context of the other factual allegations, that promise was contingent on Osahon fulfilling several conditions, including that Osahon meet the appraiser at the agreed-upon time at the property. He failed to fulfill that condition, so he cannot show *defendants'* alleged failure to complete the short sale as promised caused him to suffer any damages.

D. Osahon Is Not Entitled to Void the Foreclosure Sale

Civil Code section 2924.12 provides for injunctive relief for a violation of the HBOR that occurs prior to foreclosure and "actual economic damages" when a borrower seeks relief after foreclosure. (Civ. Code, § 2924.12, subds. (a)–(b); see *Valbuena, supra,* 237 Cal.App.4th at p. 1272.)[8] Even though the foreclosure sale to Reingold occurred in 2016, Osahon argues he is still entitled to injunctive relief to void the sale because Reingold was not a bona fide purchaser. Since we have concluded Osahon has

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[8] The provision in effect at the time Osahon filed his original complaint provided for the same forms of relief. (See Civ. Code, § 2924.12, subds. (a)–(b), eff. Jan. 1, 2013 to Dec. 31, 2014.)

not stated a claim for violation of the HBOR, this contention necessarily fails.

VI. Osahon Has Not Shown He Should Have Been Granted to Leave to Amend

In his opening brief on appeal, Osahon requested leave to amend in a single sentence without explaining how he would amend the FAC. In his reply brief, he expanded on his request, but still failed to explain how he could amend his complaint to cure the defects outlined above. For the first time at oral argument, he cited facts contained in other portions of his opening brief to contend he should have been granted leave to amend. We find he has forfeited the issue. (*Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 369 [plaintiff forfeited request for leave to amend by raising it for first time in reply brief]; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 282 [cursory request for leave to amend forfeited argument that court abused discretion in denying leave to amend]; see *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1185 (*Daniels*) [belated request for leave to amend at oral argument forfeited issue].)[9]

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[9] Even considering the facts Osahon's counsel identified at oral argument, he has not shown a reasonable possibility that amending the FAC would cure its defects. (*Daniels, supra,* 246 Cal.App.4th at p. 1186.) His proposed facts related to his HBOR dual-tracking claim, which fails as a matter of law, and to the appraiser's alleged promise to return to conduct an appraisal, which contradicted the allegation in the FAC that the appraiser would merely "endeavor to return" to the property.

DISPOSITION

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

ADAMS, J.*

We concur:

BIGELOW, P. J.

WILEY, J.

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