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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ZITA SHING CHUA, Plaintiff and Appellant, v. CITIMORTGAGE, INC., et al., Defendants and Respondents.	B267108 (Los Angeles County Super. Ct. No. VC063812)

APPEAL from judgments of the Superior Court of Los Angeles County, Roger Ito and Margaret M. Bernal, Judges. Dismissed as to MortgageIT, Inc. Affirmed as to CitiMortgage, Inc.; Northwest Trustee Services, Inc.; Citicorp Mortgage Securities, Inc.; Mortgage Electronic Registration Systems, Inc.; and U.S. Bank National Association.

Zita Shing Chua, in pro. per., for Plaintiff and Appellant.

Locke Lord, Nina Huerta and Matthew B. Nazareth for Defendants and Respondents CitiMortgage, Inc.; Citicorp

Mortgage Securities, Inc.; Mortgage Electronic Registration Systems, Inc.; and U.S. Bank National Association.

RCO Legal and Jason A. Savlov for Defendant and Respondent Northwest Trustee Services, Inc.

Reed Smith, Lorenzo E. Gasparetti, Erica Yen, Kasey J. Curtis, Karen A. Braje, Candace B. Neal and Elena O. Gekker for Defendant and Respondent MortgageIT, Inc.

After the nonjudicial foreclosure of her home, plaintiff and appellant Zita Shing Chua sued defendants and respondents MortgageIT, Inc.; Northwest Trustee Services, Inc. (Northwest); CitiMortgage, Inc.; Citicorp Mortgage Securities, Inc. (Citicorp); Mortgage Electronic Registration Systems, Inc. (MERS); and U.S. Bank National Association (U.S. Bank) for, among other things, wrongful foreclosure and violations of the Homeowner's Bill of Rights (HBOR). The trial court sustained the defendants' demurrers to Chua's first amended complaint without leave to amend on the primary grounds that she lacked standing and failed to state facts sufficient to constitute her causes of action. We dismiss the appeal as to MortgageIT because it is untimely and affirm the judgment as to the remaining defendants.

BACKGROUND

I. Chua's loan

Despite the lack of clarity in Chua's pleadings and briefs, we can ascertain the following. Chua executed a promissory note dated December 28, 2006 in favor of MortgageIT. The note was secured by a deed of trust on residential real property (the Property). MERS was named as the beneficiary under the deed

of trust acting solely as nominee for the lender and lender's successors and assigns. On April 6, 2010, an assignment of the deed of trust from MERS to CitiMortgage was recorded. Chua fell behind in payments on her note, so a notice of default was recorded in January 2011. A notice of trustee's sale was recorded on October 7, 2013, and a sale was postponed to January 17, 2014, at which time it appears the Property was sold. At some point, Chua applied for a loan modification. On January 28, 2014, a loan modification was denied, after the foreclosure sale had taken place.

II. The pleadings

A. *The complaint*

In February 2014, Chua and Rita Dinsmore[1] filed a complaint against CitiMortgage, Northwest, MortgageIT, and MERS. The complaint alleged 11 causes of action: (1) wrongful foreclosure, (2) to cancel or void corporate assignment of deed of trust, (3) cancellation of a voidable contract, (4) to cancel or void trustee's deed upon sale, (5) to set aside trustee's sale, (6) breach of contract, (7) breach of the implied covenant of good faith and fair dealing, (8) unjust enrichment, (9) elder abuse, (10) quiet title, and (11) violations of HBOR. MortgageIT demurred to the complaint, and the demurrer was sustained with leave to amend.[2]

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[1] Dinsmore is not a party to this appeal.

[2] CitiMortgage and MERS also jointly demurred to the complaint, but Chua filed her amended pleading before it could be heard.

B. *The first amended complaint (FAC)*

Chua then filed a 91-page FAC, which added seven causes of action without leave of court.[3] Chua named two new defendants, Citicorp and U.S. Bank, and alleged 18 causes of action: (1) wrongful foreclosure, (2) fraud in the concealment, (3) fraud in the inducement, (4) intentional infliction of emotional distress, (5) quiet title, (6) slander of title, (7) declaratory relief, (8) violations of the Truth in Lending Act (TILA) and of the Home Ownership and Equity Protection Act (HOEPA) of 1994 (15 U.S.C. § 1601 et seq.), (9) violations of the Real Estate Settlement Procedures Act (RESPA) of 1974 (12 U.S.C., § 2601 et seq.), (10) misrepresentation, (11) to cancel void assignment of deed of trust, (12) cancellation of a voidable contract, (13) to cancel void deed upon sale, (14) to set aside trustee's sale, (15) breach of contract (CitiMortgage and MortgageIT), (16) breach of the implied covenant of good faith and fair dealing (CitiMortgage and MortgageIT), (17) elder abuse (CitiMortgage and MortgageIT), and (18) violations of the HBOR (CitiMortgage and Northwest).[4]

Although her allegations are unclear, we understand them to be that Chua's loan was securitized, but it was not properly assigned or transferred to the securitized trust by the closing date; there was a broken chain of transfers or assignments; the note was split from the deed of trust; and MERS lacked authority to assign the deed of trust. Even less clear is how the various defendants are related to Chua's loan. It appears, however, that

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[3] Also, the FAC refers to exhibits but they are not attached.

[4] Except as otherwise noted, the causes of action were alleged against all defendants.

CitiMortgage was servicing the loan at the time of the foreclosure. U.S. Bank was trustee for the securitized trust (CitiMortgage Alternative Loan Trust (CMALT) Series 2007-A5) and a "transaction participant in the securitization of the subject property." Citicorp was a "securitization participant 'Depositor' " that was to deliver an assignment of the deed of trust to the trustee, U.S. Bank.

III. Defendants' responses to the FAC

A. *Northwest's response*

Northwest filed a declaration of nonmonetary status under Civil Code section 2924*l*. Chua did not object. After an order to show cause, the court dismissed Northwest with prejudice on August 24, 2015.

B. *Demurrers*

The remaining defendants (MortgageIT; CitiMortgage and MERS; U.S. Bank; and Citicorp) separately demurred to the FAC. Based on the trial court's findings that Chua lacked standing to assert the wrongful foreclosure and related causes of action and had stated insufficient facts to allege the others, the court sustained all demurrers without leave to amend. The court entered an order of dismissal as to MortgageIT on January 16, 2015 and as to the remaining defendants on April 14, 2015.[5]

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[5] Chua moved for reconsideration, but the court denied the motion. To the extent Chua intended to raise an issue as to that motion on appeal, she makes no argument regarding it and therefore any issue is forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority].)

DISCUSSION

I. The appeal as to MortgageIT[6]

The trial court sustained MortgageIT's demurrer without leave to amend and entered an order of dismissal on January 16, 2015. Where, as here, the record does not show that a notice of entry of judgment or a file-endorsed copy of the judgment was served, notice of appeal must be filed on or before 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1)(C).) One hundred and eighty days after January 16, 2015 was July 15, 2015. However, Chua did not file the notice of appeal until two months later, on September 18, 2015. The appeal is therefore untimely.

However, the time to appeal can be extended by filing a motion to vacate the judgment. Filing such a motion extends the time to appeal from the judgment "until the *earliest* of" (1) 30 days after an order is served denying the motion, (2) 90 days after the first notice of intention to move or (3) 180 days after entry of judgment. (Cal. Rules of Court, rule 8.108(c), italics added.) Here, Chua filed a notice of a motion and motion to vacate the judgment and the trial court denied it. Applying the time limits in rule 8.108(c), notice of the ruling denying the motion to vacate, which attached the court's order, was served on July 1, 2015, and 30 days after that date was July 31, 2015. Chua filed her notice of motion on May 14, 2015, and 90 days after that date was August 12, 2015. Finally, judgment was entered on January 16, 2015, and 180 days after that date was July 15, 2015. As we have noted, Chua did not file her notice of

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[6] MortgageIT joins the arguments of CitiMortgage, Citicorp, MERS, and U.S. Bank.

appeal until September 18, 2015, and therefore rule 8.108(c) does not help her. The appeal as to MortgageIT is untimely.

II. The appeal as to Northwest

Northwest filed a "declaration of nonmonetary status" under Civil Code section 2924*l*, which provides a limited procedure by which a trustee under a deed of trust may avoid participating in litigation and liability for damages, costs and attorney fees. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 349.) If a trustee files such a declaration, then the parties who have appeared in the action have 15 days from service of the declaration to object. (Civ. Code, § 2924*l*, subd. (c).) If no objection is served, then the trustee shall not be required to participate further in the action and, among other things, shall be bound by any court order relating to the subject deed of trust. (*Id.*, subd. (d).) Northwest served a declaration of nonmonetary status on September 25, 2014. The record does not contain either an objection to the declaration or a motion for relief under Code of Civil Procedure section 437, as required by the Civil Code.[7] (Civ. Code, § 2924*l*, subd. (e).) As a result, the court dismissed Northwest with prejudice on August 24, 2015, after a hearing.

On this record, and in the absence of any argument or showing that the dismissal was error, the issue is forfeited. (See generally *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Badie v. Bank of America*, *supra*, 67 Cal.App.4th at pp. 784-785; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th

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[7] In response to an order to show cause, Chua did file responsive declarations raising claims about Northwest in July and August 2015. But she does not argue that those declarations either constituted objections or a motion for relief in compliance with Civil Code section 2924*l*.

691, 699-700 [points perfunctorily raised on appeal, without adequate analysis and authority, may be treated as abandoned]; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).)

III. Standard of review of a demurrer

As to the remaining defendants (CitiMortgage, Citicorp, U.S. Bank, and MERS), we liberally construe Chua's notice of appeal to be from the April 14, 2015 order of dismissal after the demurrers were sustained without leave to amend. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) When reviewing a judgment entered following the sustaining of a demurrer without leave to amend, our de novo review requires us to assume the truth of the complaint's factual allegations, giving the complaint a reasonable interpretation and reading the complaint as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We may also consider matters subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*).) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank*, at p. 318; see also Code Civ. Proc., § 452; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

IV. The wrongful foreclosure and related causes of action[8]

To the end of setting aside the foreclosure sale and recovering title to her home, Chua asserted numerous causes of action, including one for wrongful foreclosure. We focus on wrongful foreclosure but our analysis applies to the related causes of action. The elements of a tort cause of action for wrongful foreclosure are: " '(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.' " (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) However, tender (element 3) is not required when the challenge to the foreclosure sale is that it was void. (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1100.)

It bears repeating that Chua's allegations regarding the wrongfulness of the foreclosure are opaque. But, the bases for that conclusion appear to be (1) the note and deed of trust were not assigned to the securitized trust before the trust's closing

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[8] The related causes of action are the fifth cause of action to quiet title, the sixth cause of action for slander of title, the seventh cause of action for declaratory relief, the eleventh cause of action to void or cancel corporate assignment of deed of trust, the twelfth cause of action to cancel a void contract, the thirteenth cause of action to void or cancel the trustee's deed upon sale, and the fourteenth cause of action to set aside the trustee's sale.

date; (2) the note was not transferred according to the requirements of the pool servicing agreement, which required "a complete and unbroken chain of transfers and/or assignments to and from each intervening party"; (3) the note and deed of trust were separated; (4) when MERS prepared or executed the assignment of the deed of trust, MERS was a suspended entity; (5) MERS, as nominee, lacked authority to assign the mortgage; and (6) documents were robo-signed.

The viability of these claims hinges on whether they show that any assignment of Chua's note and deed of trust was void, as opposed to merely voidable, as explained by our California Supreme Court in *Yvanova*, *supra*, 62 Cal.4th 919. *Yvanova* explained that a plaintiff has standing to proceed with a wrongful foreclosure action if an invalid assignment of a note and deed of trust was void *ab initio* and not merely voidable. A void transaction is "without legal effect." (*Id.* at p. 929.) "A voidable transaction, in contrast, 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' " (*Id.* at p. 930.) A borrower has standing "to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust" was void, "depriving the foreclosing party of any legitimate authority to order a trustee's sale." (*Id.* at pp. 942-943.) Although *Yvanova* declined to address specific circumstances in which an assignment is void as opposed to voidable, post-*Yvanova* cases provide some clarity as to Chua's various claims.

(1) *Post-closing transfer into a securitized trust*

Saterbak v. JPMorgan Chase Bank, N.A. (2016) 245 Cal.App.4th 808 considered whether a post-closing transfer of a note and deed of trust into a securitized trust renders the assignment void, which appears to be the first of Chua's bases for setting aside the foreclosure. *Saterbak* held that such allegations do not state a cause of action. Rather, an untimely assignment is merely voidable, not void. (*Id.* at p. 815; accord, *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43 ["an assignment to a securitized trust made after the trust's closing date is merely voidable"]; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802 (*Mendoza*); *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259 ["postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law"]; *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736; *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88, 89.) Hence, a borrower such as Chua has no standing under California's nonjudicial foreclosure scheme to challenge a foreclosure based on an alleged untimely assignment to a securitized trust.

(2) *"Complete and unbroken chain of assignments"*

If "a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." (*Yvanova*, *supra*, 62 Cal.4th at p. 935.) In *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th

552, for example, the plaintiff alleged that Chase assigned " 'all beneficial interest' " in the note and deed of trust to Deutsche Bank in April 2009, and then assigned the same interests to Bank of America in November 2009. (*Id.* at p. 564.) These allegations were sufficient to show that the assignment to Bank of America was void; hence, the plaintiff had standing to allege a wrongful foreclosure cause of action. (Accord, *Yvanova*, at p. 935 ["only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure"].)

In contrast to the specific allegations in *Sciarratta*, Chua generally alleges, for example, that defendants had no "lawful ownership [and] a security interest" in the Property and that the "foreclosing entity was not the true owner of the loan because its chain of ownership had been broken by a defective transfer of the loan to the securitized trust." Chua thus alleges a bare conclusion that the foreclosing entity had no right to foreclose, with no specifics as to why. In further contrast to *Sciarratta*, Chua alleges no specifics about any assignments or about what relation the named defendants have to her loan and the foreclosure; for example, although it appears that CitiMortgage was the foreclosing entity, she alleges only that Citicorp was a "securitization participant 'Depositor.' " We therefore conclude that no cause of action has been stated under *Sciarratta*.

(3) *Separation of the note from the deed of trust*

Chua's third argument for standing appears to be based on allegations that the note became separated from the deed of trust, rendering the deed of trust a nullity. Such a claim has been rejected. A deed of trust automatically transfers with the

note it secures—even without a separate assignment. (Civ. Code, § 2936; *Yvanova*, *supra*, 62 Cal.4th at p. 927 ["The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment"]; *Yhudai v. IMPAC Funding Corp.*, *supra*, 1 Cal.App.5th at pp. 1259-1260, fn. 6 ["legal fact" that if note is conveyed to a trust, so is deed of trust and right to foreclose]; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1004 ["we decline to read additional requirements into the nonjudicial foreclosure statute requiring the note and the deed of trust to be held by the same party"]; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 ["[w]e likewise see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note"].)

(4) *MERS was a suspended corporation*

Chua alleges that MERS was suspended when it prepared or executed the assignment of the deed of trust. But suspension of MERS's corporate status would not have rendered the assignment void. Contracts that a suspended corporation enters into are not void but merely voidable. (Rev. & Tax. Code, § 23304.1, subd. (a); *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 668-669.) Chua appears to concede that a contract entered into by a suspended corporation is merely voidable.

(5) *MERS's status as nominee*

Chua appears to allege that MERS, as nominee, lacked authority to assign the deed of trust. The role MERS plays in the lending marketplace has been explained as follows: "MERS is a private corporation that administers a national registry of real

estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*), disapproved on another point by *Yvanova*, *supra*, 62 Cal.4th at pp. 939-941.)

MERS acted in this capacity here: Chua's deed of trust states MERS is "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." A trustor who agrees "under the terms of the deed of trust that MERS, as the lender's nominee, has the authority to exercise all of the rights and interests of the lender, including the right to foreclose, is precluded from maintaining a cause of action based on the allegation that MERS has no authority to exercise those rights." (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 83, disapproved on another point by *Yvanova*, *supra*, 62 Cal.4th at pp. 939-941.) MERS has the authority to assign a deed of trust in connection with a nonjudicial foreclosure. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1504, disapproved on other grounds in *Yvanova*, at p. 939, fn. 13; *Fontenot*, *supra*, 198

Cal.App.4th at p. 271 ["the allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender"].) Therefore, Chua's allegations about MERS do not advance her standing.

(6) *Robo-signing*

Chua alleges that Richard Martinez, "a known robo-signer," signed a substitution of trustee, which substituted CR Title Services as trustee under the deed of trust. To the extent a document was robo-signed, it would be voidable, not void, at the injured party's option. (*Kalnoki v. First American Trustee Servicing Solutions, LLC*, *supra*, 8 Cal.App.5th at p. 46 [" ' "As to the robo-signer allegations, there does not appear to be anything about 'robo-signing' the notice of default or the notice of substitution that makes them invalid or ineffective. Even if true, 'robo-signing' does not have any bearing on the validity of the foreclosure process here." ' "]; *Mendoza*, *supra*, 6 Cal.App.5th at p. 819; *Pratap v. Wells Fargo Bank, N.A.* (N.D.Cal. 2014) 63 F.Supp.3d 1101, 1109.) Therefore, to the extent Chua intended to base any of her causes of action on allegations regarding robo-signing, such allegations do not give her standing.

V. Chua's fraud causes of action

Chua alleged three fraud-based causes of action: fraud in the concealment, fraud in the inducement, and misrepresentation. Fraud causes of action must be pled with particularity. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [particularity requirement necessitates pleading facts showing how, when, where, to whom, and by what means representations were tendered]; *Tarmann v. State Farm Mut.*

Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 157-158 [requirement of specificity in fraud action against corporation requires plaintiff to allege names of persons who made allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written]; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 764.)

In contrast to the specificity required for fraud causes of action, Chua alleges generalities and bare conclusions. She, for example, alleges "[d]efendants" concealed that her loan was securitized. That bare allegation fails to state a cause of action because an element of fraudulent concealment is the defendant had a duty to disclose the fact to the plaintiff. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606 [elements are concealment or suppression of a material fact, defendant has duty to disclose, defendant intended to defraud, plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact, and damage].) There was no duty of disclosure because Chua's deed of trust provides that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

Next, Chua appears to allege, among other things, that she was fraudulently induced to enter into the loan. (See generally *Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 638 [promissory fraud may lie where defendant fraudulently induces plaintiff to enter into a contract].) Even if we assume that such a general allegation could state fraud, MortgageIT was the lender and any appeal as to it is untimely. Chua also generally alleges that "defendants" misrepresented who was entitled to exercise the power of sale provision and who held the note and deed of trust.

She fails, however, to allege how she relied on any misrepresentation or was damaged by it.

Finally, Chua's misrepresentation cause of action is premised on a multitude of general and vague allegations.[9] Those allegations include, by incorporation, ones about general foreclosure abuses but exclude specifics about her loan. (See, e.g., *Mendoza*, *supra*, 6 Cal.App.5th at p. 806 ["Plaintiff's description of foreclosure abuse generally, as extracted from the popular media, is fully developed, but her allegations of the specific flaws in the securitization of her specific loan are quite sparse."].) Her allegations also appear to focus on the lender's failure to make various disclosures; however, Chua's appeal as to MortgageIT, the lender, is untimely.

VI. Breach of contract and breach of the implied covenant of good faith and fair dealing causes of action[10]

The elements of a breach of contract cause of action are: (1) the contract, (2) plaintiff's performance or excuse for

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[9] The elements of a cause of action for fraudulent misrepresentation 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 v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 78; accord, *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166.)

[10] Chua alleges these causes of action against CitiMortgage and MortgageIT only. Because the appeal as to MortgageIT is untimely, we do not address any allegations against it.

nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) "[I]t is elementary that one party to a contract cannot compel another to perform while he himself is in default." (*Lewis Publishing Co. v. Henderson* (1930) 103 Cal.App. 425, 429.) Also, implied in every contract is a covenant of good faith and fair dealing. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1014-1015.) To plead a breach of the implied covenant, a plaintiff must allege the existence of a contractual obligation, along with conduct that frustrates her rights to benefit from the contract. (*Careau & Co.*, 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.)

Here, Chua claims that CitiMortgage breached the contract, because the "terms of the note required payments made by [Chua] to be applied properly to the note." This vague statement is insufficient to allege a breach of contract. It neither explains how payments were improperly applied or how such "improper" application damaged her. These missing allegations are especially crucial where, as here, Chua concedes she stopped paying on the note.

Similarly, in her breach of the implied covenant of good faith and fair dealing cause of action, Chua alleges that MERS breached the covenant by allowing its agent to execute the assignment of the deed of trust to appoint a new trustee to begin foreclosure. MERS, however, is not a party to this cause of action.

VII. Intentional infliction of emotional distress

"Intentional infliction of emotional distress requires a plaintiff to prove: ' " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.] The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result." ' " (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 902; accord, *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Chua does not allege extreme and outrageous conduct. In essence, all that she alleges is the wrongful foreclosure caused her severe emotional distress. However, these contentions are not supported by pleaded facts. "It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid." (See *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334.)

VIII. Violations of the TILA and HOEPA

The purpose of TILA, as amended by HOEPA, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him [or her] and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." (15 U.S.C.A. § 1601(a) et seq.) Chua alleges that "defendants" violated TILA and HOEPA by failing to provide her with "accurate material disclosures" and by failing to take into account the Legislature's intent in approving these laws. As a result, Chua was unable to refinance or to obtain a loan modification. These conclusory allegations fail to state a cause of action. To the extent Chua alleges violations of TILA and HOEPA based on the loan's origination, it is unclear how this cause of action can be stated against entities other than the dismissed lender, MortgageIT.

IX. Violations of RESPA

"RESPA regulates the settlement process for real estate disputes [citation], as well as banks' servicing of mortgage loans regulated by the federal government [citation]. Any mortgage loans secured by a first or subordinate lien on residential real property are regulated by the federal government." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 530-531, disapproved on another ground in *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.) The law requires, regulates or prohibits a variety of conduct by lenders and loan servicers. Lenders, for example, must provide to loan applicants certain information and a good faith estimate of charges of real estate settlement services (12 U.S.C. § 2604(c), (d)), and disclose whether the servicing of

the loan may be assigned, sold, or transferred to another (*id.*, § 2605(a)). Chua's most specific allegation regarding how defendants violated RESPA is the following: "Defendants violated RESPA because the payments between the [d]efendants were misleading and designed to create a windfall. These actions were deceptive, fraudulent and self-serving." This ambiguous allegation fails to state a cause of action. And, to the extent Chua alleges violations of RESPA based on origination of the loan, it is unclear how these defendants had any connection to that transaction, given that MortgageIT was the lender. Finally, depending on the type of violation alleged, a cause of action for violating RESPA must be brought within one or three years from the date of the occurrence of the violation. (12 U.S.C. § 2614.) That date is usually the date the transaction closed (here, December 2006) or the date disclosures should have been made. Chua's complaint, however, was not filed until 2014. (*Snow v. First American Title Ins. Co.* (5th Cir. 2003) 332 F.3d 356, 359.) Therefore, the cause of action is time-barred.

X. Elder abuse (CitiMortgage and MortgageIT)

Chua premises her elder abuse cause of action on the allegedly invalid assignment of the note and trust deed and foreclosure of her home. As she has not demonstrated standing to assert a wrongful foreclosure cause of action, the trial court did not err in sustaining defendants' demurrer to the elder abuse cause of action. (See generally Welf. & Inst. Code, § 15610.30; see also *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527-528 [not tortious for commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid].) To the extent Chua bases this cause of action on conduct relating to Dinsmore, Dinsmore is not a party to this

appeal and Chua has no standing to assert elder abuse on Dinsmore's behalf.

XI. HBOR[11]

The HBOR is a statutory scheme designed to address the foreclosure crisis in California and to encourage lenders and loan servicers to engage in good faith loan modification efforts. (*Valbuena v. Ocwen Loan Servicing, LL*C (2015) 237 Cal.App.4th 1267, 1272; *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 752.) To those ends, the HBOR prohibits dual tracking, which occurs when a servicer proceeds with a foreclosure while the borrower's application for a loan modification is under review and, in some cases, for 30 days after denial of a modification. (Civ. Code, § 2923.6; *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 950.) The HBOR also requires servicers to provide to borrowers a "single point of contact" to enhance communication. (Civ. Code, § 2923.7.) The HBOR provides for injunctive relief for statutory violations that occur prior to foreclosure (Civ. Code, § 2924.12, subd. (a)), and monetary damages when the borrower seeks relief for violations after the foreclosure sale has occurred (*id.*, subd. (b)). (*Valbuena*, at p. 1273.) Chua thus alleges that CitiMortgage violated the HBOR by, first, foreclosing while she was actively engaged in "loan modification negotiations or a workout plan or short sale" and, second, failing to establish a "single point of contact."

First, Civil Code section 2923.6, subdivision (c) provides that "[i]f a borrower submits a complete application for a first lien loan modification," the foreclosing entity "shall not record a

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[11] Chua alleged this cause of action against only CitiMortgage and Northwest.

notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending," until the borrower is provided with a written determination regarding his application and the time for an appeal (30 days) has expired. Civil Code section 2923.6, subdivision (g), further provides that, "the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated . . . prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer." This provision seeks to "minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay[.]" (*Ibid.*)

It appears that Chua is attempting to state a cause of action under subdivision (g) of Civil Code section 2923.6 because she alleges she had a "*new* modification package in review through January 2014 and was informed that no sale could take place during the pending modification." (Italics added.) But her application was denied on January 28, 2014, which was after the foreclosure sale apparently occurred. Chua's allegation that she had a "new" application suggests she had a prior application. Therefore, she was required to allege there was a "material change" in her financial circumstances since the date of her last application and that she documented this material change and submitted it to CitiMortgage. The FAC, however, is devoid of any such facts. A cause of action under Civil Code section 2923.6, subdivision (g) has not been stated.

Nor has Chua stated any cause of action based on her second ground, that she was not provided a "single point of contact." The HBOR mandates that "[u]pon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." (Civ. Code, § 2923.7, subd. (a).) A " 'single point of contact' " is defined as "an individual or team of personnel each of whom has the ability and authority to perform the responsibilities described" in the statute. (*Id.*, subd. (e).) Those responsibilities include "[c]ommunicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options"; "[c]oordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application"; and "[e]nsuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any." (*Id.*, subd. (b)(1), (2) & (4).) Where the single point of contact consists of a team, the mortgage servicer must "ensure that each member of the team is knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process." (*Id.*, subd. (e).)

Chua does not allege that she requested a single point of contact. (Civ. Code, § 2923.7, subd. (a).) Also, although she alleges that she could not get a "straight answer from any of the myriad number of purported representatives and changing point of contact" and was instead "shuttled from one 'department' " to the next, this allegation does not establish a violation of the

statute because the statute authorizes a team of personnel to be the single point of contact. Moreover, Chua does not allege that the single point of contact—be it an individual or a team—failed to, for example, communicate the process by which she could apply for an available foreclosure prevention alternative. Chua therefore failed to allege a cause of action under the HBOR.

XII. Chua's due process arguments

In her opening brief, Chua contends that the trial court violated her due process rights, guaranteed by our state and federal constitutions. Though inartfully stated, the thrust of her argument appears to be that she was denied a fair hearing and the right to produce evidence and to cross-examine witnesses. However, the proceeding below was not a trial. It was a challenge to the complaint, which is based solely on the pleadings and matters judicially noticeable. No constitutional violation occurred.

XIII. Leave to amend

Chua has not identified any facts she could allege that would state any of her causes of action. She has not, for example, cited *Sciarratta* or suggested that she can allege facts showing a void assignment under that case. The trial court therefore properly exercised its discretion to sustain the demurrer without leave to amend as to the first through eighteenth causes of action.

DISPOSITION

The appeal as to MortgageIT is dismissed. The judgment is affirmed as to Citicorp, MERS, U.S. Bank, Northwest, and CitiMortgage. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, 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.