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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PARVIN JAMALI,

Plaintiff and Appellant,

v.

MARTINGALE  
INVESTMENTS, LLC,

Defendant and Appellant.

B290141

(Los Angeles County  
Super. Ct. No. BC518965)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Dinsmore & Sandelmann, Frank Sandelmann, Joshua A. Valene; Law Offices of Sam Chandra and Sam Chandra, for Plaintiff and Appellant.

Law Offices of Michael Shemtoub and Michael Shemtoub, for Defendant and Respondent.

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Parvin Jamali, whose real property was sold at a foreclosure auction, appeals from a portion of a judgment in favor of purchaser Martingale Investments, LLC, in related actions for wrongful foreclosure and unlawful detainer. On appeal, Jamali contends: (1) the trial court abused its discretion by denying leave to amend her quiet title claim to allege that Jamali sent a timely notice of rescission to her lender under the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.);<sup>1</sup> (2) Martingale's first unlawful detainer action was defective because the verification was not properly signed; (3) Martingale's second unlawful detainer action could not be resolved through summary judgment procedures because no answer had been filed; and (4) the trial court could not consider the unlawful detainer actions together to remedy their defects. We conclude that the trial court did not abuse its discretion by denying leave to amend, because the statute of limitations barred Jamali from alleging a claim based on rescission under the TILA, and Jamali waived the verification defect by failing to raise a timely objection.

Martingale appeals from a portion of the judgment denying Martingale's motion to issue an order to show cause regarding contempt for failure to pay the reasonable rental value of the property. We conclude that the trial court

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<sup>1</sup> Except where otherwise indicated, all statutory references are to Title 15 of the United States Code.

properly declined to issue an order to show cause. Therefore, we affirm the judgment.

## **FACTS AND PROCEDURAL HISTORY**

### **Purchase and Foreclosure**

Jamali, who is an elderly person, purchased real property in West Hollywood on July 25, 2007. Countrywide Home Loans, Inc. recorded a trust deed reflecting a loan of \$720,000 to Jamali. ReconTrust Company, N.A., was named as trustee and Countrywide was named as lender. Bank of America, N.A., became the successor in interest to Countrywide.

On March 1, 2012, Mortgage Electronic Registration Systems, Inc. (MERS), on behalf of Bank of America, recorded an assignment of deed of trust to a trust. On behalf of the trust, ReconTrust recorded a notice of default on August 9, 2012, and a notice of trustee's sale on June 14, 2013. The sale notice said the property would be sold at an auction on July 8, 2013. Martingale purchased the property at the auction. Martingale recorded the trustee's deed upon sale on July 18, 2013.

## **Martingale's First Unlawful Detainer and Jamali's Civil Action**

On July 23, 2013, Martingale filed an unlawful detainer action against Jamali in Santa Monica (UD 1). The verification attached to the complaint contained a declaration under penalty of perjury that the allegations were true and correct. The name Olivia Reyes was typed on the verification with the date. On the signature line was typed “/s/ Service Copy.” The verification also contained the statements: “I request that a facsimile whether by traditional fax or by ‘scan and e-fax or e-mail’ be accepted as an original pursuant to CRC 2.305(d).”; “Pursuant to Evidence Code, § 1521 and Calif. Rules of Court, Rule 2.305(d), a signature hereon, in any, produced by facsimile transmission is admissible as an original.” (*sic*); and “Declaration of Attorney re Verification: My client has indicated to me that they are unable to proceed to my office to deliver a ‘wet ink signature,’ as such this document is either a faxed copy of the original or a scanned and e-mailed copy of the original. I request the court to accept it as an original per CRC 2.305(d). Sam Chandra 07/23/13, /s/ Service Copy [.]”

On August 20, 2013, Jamali filed a complaint against Bank of America, ReconTrust, and the Bank of New York Mellon, formerly known as the Bank of New York, which was the trustee for the trust (collectively the Bank defendants) and Martingale. Jamali alleged that

ReconTrust failed to comply with Civil Code section 2923.3. Also, Bank of America's securitization and transfer of the trust deed and promissory note to the trust took place after the closing date of the trust and were, therefore, void. In addition, Jamali, who had continuously offered to pay off her loan from the time the assignment was recorded, was entitled to a rescission of the trustee's sale and tort damages.

On August 28, 2013, Jamali filed an ex parte application for an order transferring UD 1 to the trial court hearing the wrongful foreclosure case and relating the two cases, which the trial court granted.

Jamali filed a verified answer in UD 1. Jamali admitted that all of the statements of the unlawful detainer complaint were true, except that the foreclosure sale was irregular and there was a concomitant titled action being litigated. In the same answer, Jamali denied "every allegation of the Verified Complaint for Unlawful Detainer," and alleged 57 affirmative defenses. None of the defenses alleged that the verification of UD 1 was defective.

In September 2013, the Bank defendants filed a demurrer. On September 27, 2013, Martingale filed a demurrer.

On October 28, 2013, Jamali filed an ex parte application for relief including advancing the hearing date for a motion to consolidate UD 1 and the wrongful foreclosure action. The trial court granted the ex parte application in part, and ordered Jamali to deposit the reasonable rental value of \$4,125 per month with the court

beginning November 1, 2013, and on the first of each month thereafter, until further order of the court. That same day, the court granted a fee waiver to Jamali.

On November 14, 2013, Martingale filed an ex parte application for an order setting trial, based on Jamali's failure to comply with the October 28, 2013 order to pay the reasonable rental value. Jamali filed an ex parte application for an order lowering the amount that had been ordered on October 28, 2013. The trial court shortened time and ordered briefing.

Jamali filed a motion to consolidate UD 1 and the wrongful foreclosure action. On December 4, 2013, the trial court granted the motion to consolidate UD 1 with the wrongful foreclosure case. Further argument was scheduled regarding the reasonable rental value on January 22, 2014, which was delayed to March 7, 2014, and then April 7, 2014.

On March 10, 2014, the trial court sustained the demurrers of the Bank defendants and Martingale without leave to amend. That same day, the trial court entered an order sustaining the demurrer of the Bank defendants and a judgment of dismissal in favor of the Bank defendants.

At the hearing on April 7, 2014, the parties discussed whether UD 1 should be severed from the wrongful foreclosure action. The parties indicated they would confer and file a stipulation within a few days. No discussion was held about lowering the amount set for the reasonable rental value. Martingale unilaterally submitted a proposed order and judgment. On April 21, 2014, the trial court entered a

judgment of dismissal in favor of Martingale in the wrongful foreclosure action and ordered UD 1 severed and transferred back to Santa Monica.

On April 30, 2014, Jamali filed an ex parte application for an order vacating the April 21, 2014 order and judgment of dismissal in favor of Martingale. Jamali argued that the court could not bifurcate UD 1 without a stipulation of the parties or a noticed motion to bifurcate, which had not occurred. The trial court vacated the April 21, 2014 judgment, including the order severing and transferring UD 1. The court deliberately left in place the March 10, 2014 order sustaining the demurrer in favor of Martingale without leave to amend. As a result of the order vacating the April 21, 2014 judgment, there was no judgment entered in the case as to Martingale.

Jamali filed a notice of appeal on May 8, 2014, from the March 10, 2014 order sustaining the demurrers without leave to amend and the judgment entered as to the Bank defendants.

On July 14, 2014, Martingale filed a motion for summary judgment in UD 1. On August 15, 2014, Jamali opposed the motion for summary judgment on several grounds. Jamali argued that the trial court lacked jurisdiction, because an appeal had been perfected. The trial court issued a tentative ruling to deny the motion or allow Martingale to take the matter off calendar. Jamali did not appear at the hearing on August 21, 2014, and submitted on the tentative ruling. At the hearing, Martingale chose to

take the motion for summary judgment off calendar and requested dismissal of UD 1 without prejudice. The trial court dismissed UD 1 without prejudice.

### **Martingale's Second Unlawful Detainer Action**

Martingale served a new notice to quit on Jamali. On August 27, 2014, Martingale filed a second unlawful detainer action in Santa Monica (UD 2). The verification attached to the complaint included the handwritten signature of Olivia Reyes as the agent of Martingale and the handwritten signature of Martingale's attorney. The first page of the action was stamped "FILE BY FAX PER CRC 2.303."

On August 28, 2014, Jamali filed a motion to vacate the dismissal of UD 1. Jamali argued that the trial court did not have jurisdiction to enter a dismissal of UD 1, because the appellate court had jurisdiction of the pending appeal, including the consolidated UD 1, and an automatic stay of the trial court proceedings was in effect. Martingale opposed the motion to vacate, and Jamali filed a reply.

On September 15, 2014, Martingale filed a request for entry of default in UD 2. Jamali's default was entered as requested that day.

On September 24, 2014, a hearing was held on Jamali's motion to vacate the dismissal in UD 1. The trial court took the matter under submission.



On September 26, 2014, the court clerk entered judgment by default in UD 2 in favor of Martingale for possession of the property only. An answer prepared for Jamali in UD 2 was executed by her attorney and a translator on October 9, 2014. The answer was served on Martingale, but not filed in UD 2.

Jamali filed an ex parte application on October 10, 2014, in the consolidated action. The trial court noted that a writ of execution had been issued in UD 2, but the case was not before the court in the consolidated action and could not be transferred because Jamali had not submitted a notice of related case. The trial court granted Jamali's motion to vacate dismissal of UD 1. As a result of vacating the dismissal of UD 1, both unlawful detainer actions were pending.

That same day, Jamali filed an ex parte application in Santa Monica to vacate the default and default judgment entered against Jamali in UD 2.

On October 16, 2014, Jamali filed a notice of related case in the consolidated action concerning UD 2. On November 7, 2014, the trial court found UD 2 was related to UD 1 and the wrongful foreclosure action. The court ordered UD 2 transferred.

On January 6, 2016, this appellate court issued an unpublished opinion affirming the March 10, 2014 judgment of dismissal as to the Bank defendants and dismissing Jamali's purported appeal from the nonappealable March 10, 2014 order sustaining Martingale's demurrer. (*Jamali v.*

*Bank of America Home Loans* (Jan. 6, 2016, B256199).) On February 16, 2016, Jamali filed a petition for review with the Supreme Court. On March 30, 2016, the Supreme Court granted Jamali's petition. (*Jamali v. Bank of America Home Loans* (Mar. 30, 2016, No. S232426) [nonpub. order].) The order granting review transferred the case back to this appellate court with directions to vacate and reconsider the decision in light of *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919. (*Ibid.*)

On April 15, 2016, this appellate court vacated the prior unpublished decision. On April 13, 2017, we issued a new unpublished decision again dismissing the purported appeal as to Martingale, and affirming the judgment of dismissal as to the Bank defendants. We concluded that Jamali could not maintain an action for quiet title against the Bank defendants, because they did not have an adverse claim to title. The demurrer to the claim for wrongful foreclosure was properly sustained because the assignment was not void, but merely voidable under New York law. Because Jamali lacked standing to challenge the validity of the assignment to the trust, she could not maintain an action for cancellation of the instruments or elder abuse that relied on alleging the assignment was invalid.

For the first time during oral argument on appeal after remand, Jamali requested leave to amend to add a cause of action for rescission under Civil Code section 1689 and the TILA. We found Jamali's request to be untimely, and

concluded that by failing to raise the issue in her briefs on appeal, she had forfeited the contention on appeal.

### **Proceedings after Remittitur**

On August 10, 2017, Martingale filed a motion to sever UD 1 and UD 2 from the wrongful foreclosure action, dismiss UD 1, and transfer UD 2 or set it for trial. Martingale also argued that an order to show cause should issue to Jamali to appear and show cause why Jamali should not be found in contempt of court for disregarding the obligations to make payments into escrow despite the court order.

On August 14, 2017, Jamali filed a motion for leave to file a first amended complaint. Jamali argued that she sent a request to Countrywide to rescind the underlying loan in 2007. Countrywide took no action on the demand for rescission and Jamali did not sue to enforce the rescission. In *U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 782 (*Naifeh*), the appellate court had applied *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 574 U.S. 259 (*Jesinoski*) for the first time in California, clarifying that a borrower need only send a notice of rescission to the lender within the time period set forth in the TILA, not file a lawsuit within the time period. Jamali noted that leave to amend had been sought from this appellate court during oral argument to pursue the quiet title action on the rescission theory established in *Naifeh*. Although the request was

untimely as to the Bank defendants, Jamali argued that it was not untimely to seek leave to amend as to Martingale.

In support of the motion for leave to amend, Jamali submitted the declaration of her attorney, Payman Taheri. Taheri declared, “The underlying loan secured by the deed of trust was originally obtained from Countrywide Home Loans in 2007. Soon thereafter, the Plaintiff rescinded the loan by sending a request to rescind to Countrywide in 2007. Countrywide took no action on the demand for [rescission] and the Plaintiff did not sue to enforce the rescission.”

Jamali attached a proposed amended complaint for quiet title, wrongful foreclosure, cancellation of instrument, and elder abuse against the Bank defendants and Martingale. The proposed complaint added two paragraphs to the quiet title cause of action alleging that within the time for rescission under the TILA, Jamali had transmitted her intent to rescind the underlying note to Countrywide and declared her intent to return to Countrywide all monies borrowed from it, causing her house to be free and clear of any lien by Countrywide. Countrywide did not fulfill its obligations contractually or under the TILA. Jamali’s causes of action for wrongful foreclosure, cancellation, and elder abuse did not contain any new allegations concerning the TILA.

On August 15, 2017, Martingale filed an ex parte application to advance the time to hear the motion to sever, which the trial court granted. In the statement of facts in the application, Martingale recited that the trial court

consolidated UD 1 and UD 2 with the wrongful foreclosure action on October 10, 2014, but in fact, no consolidation is reflected in the records provided on appeal as to UD 2.

On August 23, 2017, Martingale filed an opposition to Jamali's motion for leave to amend. In addition to arguing that the motion was untimely, Martingale argued that the court should deny Jamali's request for relief under the disentitlement doctrine, because she was in contempt of a court order to deposit the fair market rent. Alternatively, the court should require Jamali to deposit the proceeds with the court.

On August 24, 2017, Jamali opposed the motion to sever the unlawful detainer actions from the wrongful foreclosure action. On August 29, 2017, Jamali filed a reply with respect to the motion for leave to amend.

On September 15, 2017, the trial court construed Jamali's motion as a motion for reconsideration, because the March 10, 2014 ruling had sustained Martingale's demurrer without leave to amend. The court found Jamali should have sought leave to file an amended complaint 53 months earlier. Jamali did not seek reconsideration within 10 days of written notice of entry of the order on March 10, 2014. More than 10 days after entry of the order, Jamali included Martingale in her appeal on May 8, 2014, from the judgment in favor of the Bank defendants. The court denied the motion for leave to amend as extremely untimely. As a result of the court's ruling, the motion to sever the unlawful detainer cases was moot, and the cases were set for trial.

The parties filed final status conference briefs. On March 8, 2018, Martingale filed a request for entry of default based on the complaint filed “08/27/14.” The clerk rejected the request on the ground that the filing date of the complaint was incorrect.

On March 9, 2018, Martingale filed a motion for summary judgment. Martingale argued that it had purchased the premises at auction, recorded a deed, and served a three day notice to quit the premises. Jamali refused to deliver possession. Issues related to the conduct of third parties before the sale were not defenses to unlawful detainer. Martingale was required to establish each element of the causes of action. Jamali could not rely on allegations of her answer to defeat summary judgment, but was required to submit a counter affidavit. As a bona fide purchaser for value, Martingale was entitled to a conclusive presumption that the trustee’s sale was properly conducted. Martingale requested judgment for possession of the property. Martingale submitted the declaration of its agent Reyes in support of the motion for summary judgment. One of the documents that Martingale submitted in support of the motion was the answer prepared for Jamali in UD 2.

Jamali filed an opposition to the motion for summary judgment. Jamali argued that the wrongful foreclosure action had been consolidated with UD 1, but not UD 2. Instead, UD 2 had been abated and stayed. The verification in UD 1 did not comply with Code of Civil Procedure section 446. A second three-day notice to quit was not valid, since

there was a pending case on an existing three-day notice and there could be only one cause of action for unlawful detainer on a property. The three-day notice in UD 2 became void when UD 1 was resurrected. Even though Martingale's demurrer had been sustained without leave to amend in the wrongful foreclosure action, as long as no judgment was entered, Jamali was free to challenge title.

Jamali's attorney submitted his own declaration. He stated that the following actions were taken in the Santa Monica courthouse with respect to UD 2: On September 4, 2014, before Jamali's default was entered, she had filed a motion to transfer UD 2; execution of the writ of possession was stayed on October 10, 2014; the default and default judgment in UD 2 were vacated on October 30, 2014; Jamali moved to quash service of summons and the complaint on November 4, 2014, but the motion was taken off calendar pursuant to a November 7, 2014 order relating and transferring UD 2 to the cases in downtown Los Angeles. On February 11, 2015, the trial court stayed UD 2, which continued to be in effect, and UD 2 was never consolidated with the other cases. Jamali noted that UD 1 was not verified as was required.

On March 15, 2018, Martingale filed a motion requesting that the court issue an order to show cause regarding finding Jamali in contempt for failure to submit payments equal to the fair rental value of the property as required under the October 28, 2018 order. Martingale requested that the court hold Jamali in contempt as to the

unpaid amount of \$214,500, as well as interest and sanction to Martingale for the costs and fees incurred to enforce the order and the order to show cause.

A hearing was held on the summary judgment motion on March 16, 2018. Jamali argued that no three-day notice had been served before the UD 1 was filed. UD 1 was unverified, so Jamali was going to move to dismiss UD 1 after the ruling on summary judgment. The trial court stated that both of the unlawful detainer actions were before the court and took the matter under submission.

On March 26, 2018, the trial court entered an order granting the motion for summary judgment in UD 1. As a result of the ruling, the court found the motion for summary judgment moot as to UD 2. That day, the court entered judgment in favor of Martingale as against Jamali and awarded possession of the property to Martingale, terminating Jamali's possessory rights.

Jamali filed an opposition to the motion to set an order to show cause regarding contempt. The opposition took the form of an open letter to the trial court. Jamali stated that the court should recuse itself. She accused the court of being unhinged, imposing its "own brand of justice," and "abdicating its duty and its oath to conduct itself within the confines of both the United States, as well as the California Constitution" in granting the motion for summary judgment. Jamali argued that there was no valid order for payment of rent, or the order had not been intentionally violated by Jamali. When the court ordered payment of the reasonable



rent amount, the court stated that Jamali would not be obligated to pay if she qualified for a fee waiver. The court granted Jamali a fee waiver the same day that the order was made. Jamali stated that an order to show cause for contempt should not be issued, and instead, the court should reconsider the rulings.

Martingale filed a reply. A hearing was held on April 16, 2018, on the motion for an order to show cause regarding contempt for failure to submit payments. The trial court took the matter under submission, then denied the motion on April 17, 2018. The court found that UD 1 had been continued indefinitely pending Jamali's appeal in the wrongful foreclosure action on the condition that she deposit \$4,125 per month as rent. No rent was paid. The court noted that the form of Jamali's opposition was improper and struck the section entitled "Open Letter to the Court" on the court's own motion. The court found that a detailed procedure was required to be followed to notify a person charged with an "indirect contempt" that occurs outside the presence of the court, allowing an opportunity to be heard. The court concluded that the only remedy for failing to make the rent deposit was to hold a trial within 15 days of the date that the payment was due on November 1, 2013.

That day, the court signed a judgment in favor of Martingale. On May 17, 2018, Jamali filed a timely notice of appeal from the judgment. On June 1, 2018, Martingale filed a notice of appeal from the judgment as well.

## DISCUSSION

### Leave to Amend Complaint Against Martingale

#### A. Standard of Review

When a trial court sustains a demurrer without leave to amend, we determine whether there is a reasonable possibility that the defect can be cured by amendment. (*Yvanova, supra*, 62 Cal.4th at p. 924; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) The trial court abuses its discretion if there is a reasonable possibility plaintiff could cure the defect by amending the complaint. (*City of Dinuba v. County of Tulare, supra*, 41 Cal.4th at p. 865; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) The plaintiff has the burden of proving the defect would be cured by an amendment. (*Campbell v. Regents of University of California, supra*, 35 Cal.4th at p. 320; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

#### B. Rescission under the TILA

Jamali contends the trial court abused its discretion by denying her request for leave to amend the complaint to add factual allegations that she sent a notice of rescission to her lender within the statutory period provided by the TILA. We find no abuse of discretion, because Jamali has not shown

that she could allege a cause of action against Martingale even with the new allegations.

“The TILA protects a consumer from fraud, deception, and abuse by requiring the creditor to disclose to the consumer certain information about the subject financing. (15 U.S.C. § 1601; see, e.g., 12 C.F.R. §§ 1026.17–1026.23 (2016).) It generally entitles a consumer who has secured a credit transaction with a lien on the consumer’s principal dwelling . . . to rescind a loan transaction within three business days. (§ 1635(a).)” (*Naifeh, supra*, 1 Cal.App.5th at pp. 779–780, fn. omitted.) If the creditor fails to provide disclosures to the consumer that are required under the TILA, including notice of the right to rescind, the rescission period is “three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first.” (§ 1635(f); 12 C.F.R. § 1026.23(a)(3)(i) (2019).)

“To exercise the right of rescission, the consumer must notify the creditor of his or her intention to rescind ‘by mail, telegram or other means of written communication.’ (12 C.F.R. § 1026.3(a)(2) (2016).)” (*Naifeh, supra*, 1 Cal.App.5th at p. 780.) When a consumer exercises the right to rescind, the consumer is not liable for any finance or other charge, and any security interest given by the consumer “becomes void upon such a rescission.” (§ 1635(b).) When a consumer exercises a valid right of rescission, the creditor must act within 20 days after receipt of the notice of rescission to return the borrower’s money and take any action necessary to reflect the termination of its security interest. (§ 1635(b).)

Failure to respond to the consumer's request constitutes a separate TILA violation. (§ 1640(a).) Section 1640(e) provides a one year statute of limitations to bring an action for legal damages based on a violation of section 1635.

“Thus, as with any rescission remedy, the intent is to return the parties to the status quo ante. Unlike rescission at common law, however, the procedure set forth in section 1635(b) does not require the borrower to tender first, thus giving leverage to consumers and exposing lenders to situations in which the borrower has no funds to return the principal while the debt is no longer secured. (See *Merritt v. Countrywide Financial Corp.* (9th Cir. 2014) 759 F.3d 1023, 1030 (*Merritt*).)” (*Naifeh, supra*, 1 Cal.App.5th at p. 780.) “Furthermore, a creditor's failure to comply with the requirements of section 1635 subjects it to actual and statutory damages, attorney's fees, and costs. (§ 1640.)” (*Ibid.*)

The TILA procedures apply unless a court orders otherwise. (§ 1635(b); see 12 C.F.R. § 226.23.) “By turning to the court, a lender may change its fortunes in at least two ways. First, it may challenge the validity of the rescission—that is, whether there was a failure to disclose information, such that the time for rescission under the TILA was extended to three years. Second, whether or not the lender agrees that the rescission was timely and valid, it may request that a different procedure be used to effectuate the rescission remedy; thus, courts have sometimes required the borrower to tender the loan proceeds *first*, before the creditor

must give up its security interest. (See, e.g., *Yamamoto v. Bank of New York* (9th Cir. 2003) 329 F.3d 1167, 1170–1173 (*Yamamoto*).)” (*Naifeh, supra*, 1 Cal.App.5th at p. 781.)

“Previously, [courts] required that borrowers effectuate TILA loan rescissions by giving lenders their notice of rescission and also bringing suit to enforce that rescission, both to be accomplished within the three-year window set forth in 15 U.S.C. § 1635(f) [for cases in which the creditor failed to deliver any disclosure required under the TILA]. [Citations.] However, the Supreme Court altered that usual procedure in *Jesinoski*. It eliminated the need for a borrower to bring suit within the three-year window to exercise TILA rescission. Instead, ‘rescission is effected when the borrower notifies the creditor of his intention to rescind.’ *Jesinoski*, 135 S.Ct. at 792. ‘[S]o long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.’ *Id.* Thus, although emphasizing that the borrower need only give the notice of rescission within the three years, the Court did not clarify when a suit to enforce the rescission must be brought after a lender’s failure to act on that notice of rescission.” (*Hoang v. Bank of America, N.A.* (9th Cir. 2018) 910 F.3d 1096, 1100 (*Hoang*).)

“TILA does not include a statute of limitations outlining when an action to enforce such a rescission must be brought.” (*Hoang, supra*, 910 F.3d at p. 1098.) “When there is no statute of limitations expressly applicable to a

federal statute, ‘we do not ordinarily assume that Congress intended that there be no time limit on actions at all.’

[Citation.] Rather, ‘the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.’ [Citation.]” (*Id.* at p. 1101.)

“Because TILA rescissions necessarily require a contract to be rescinded, contract law provides the best analogy and we adopt the general contract law statute of limitations. . . . There is no federal law that provides a closer analogy, nor do TILA policies at stake and the practicalities of TILA rescission litigation make federal law a more appropriate vehicle for interstitial lawmaking.” (*Hoang, supra*, 910 F.3d at p. 1101.) In California, an “action based upon the rescission of a contract in writing” is subject to a four-year statute of limitations. (Code Civ. Proc., § 337, subd. (3); *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 873.) To determine the statute of limitations that applies in a quiet title action, we refer to the underlying theory of relief, which in this case is the TILA rescission. (See *Oates v. Nelson* (1969) 269 Cal.App.2d 18, 21–22.)

Applying California’s four-year contract statute of limitations, Jamali’s allegations of rescission under the TILA are untimely. Jamali seeks to add allegations that she sent a notice of rescission to Countrywide within the time period allowed under the TILA. In other words, Jamali sent a rescission notice within three days of her transaction with Countrywide, no later than July 28, 2007. Jamali has not

asserted that Countrywide failed to provide TILA disclosures or that she sent her rescission notice to Countrywide's successor-in-interest. Jamali's cause of action to enforce rescission arose when Countrywide failed to take any action to wind up her loan within 20 days of receiving Jamali's notice of rescission. (See § 1635(b).) The statute of limitations on an action to enforce her TILA rescission ran no later than August 17, 2011. Jamali did not bring her wrongful foreclosure action until August 20, 2013, two years after the statute of limitations had run, and then waited several additional years before requesting leave to allege rescission under the TILA. We find no abuse of discretion in denying leave to amend. Since the statute of limitations barred an action based on rescission under the TILA, we do not need to determine whether Jamali could assert a quiet title claim based on rescission against a bona fide purchaser for value with no notice of her TILA rescission.

## **Motion for Summary Judgment**

### **A. Standard of Review**

“Summary judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We generally review a ruling granting summary judgment de novo. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798.)” (*Jameson v. Pacific Gas &*

*Electric Co.* (2017) 16 Cal.App.5th 901, 908.) “We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show “specific facts,” and cannot rely upon the allegations of the pleadings.’ [Citation.] [¶] We affirm the trial court’s decision if it is correct on any ground the parties had an adequate opportunity to address in the trial court, regardless of the reasons the trial court gave.” (*Id.* at pp. 908–909.)

## **B. Verification of UD 1**

Jamali contends that the verification for the first unlawful detainer complaint was not signed as required by Code of Civil Procedure section 128.7, subdivision (b), and California Rules of Court, rule 2.305, subdivision (d). We conclude that Jamali forfeited the issue by failing to raise it before summary judgment.

The parties agree that unlawful detainer complaint must be verified and include the name of the person verifying the complaint, either typed or printed. (Code Civ. Proc., § 1166, subd. (a)(1).)

Any objection to the verification must be raised at the proper time or it is forfeited. (*McCullough v. Clark* (1871) 41 Cal. 298, 302.) “[T]he proper objection where a party fails to verify a pleading is a motion to strike . . . which may be made only upon timely notice and provides for hearing and



extension of time to answer.’ (*Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 575, internal citations omitted.)” (*Zavala v. Board of Trustees* (1993) 16 Cal.App.4th 1755, 1761.) When a party proceeds to trial without objecting to improper verification, the right to object to the pleading error is waived and cannot be raised at trial or on appeal. (*Ibid.*)

“California appellate courts have held that a pleading may be amended for the purpose of curing a signature defect. In *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915, the California Supreme Court ruled that failure to verify a pleading, where the verification is required by statute, ‘is a mere defect curable by amendment.’ Moreover, ‘[a]mendments may cure such a defect even when submitted after the statute of limitations has run on the time to file the original complaint, since verification of a complaint is not a jurisdictional requirement.’ (*Ibid.*; see also *Perlman v. Municipal Court* (1979) 99 Cal.App.3d 568, 574 [failure to verify a writ petition is a procedural defect that may be cured by amendment].)” (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163–1164.)

Jamali did not object to any defect in the verification for nearly five years after UD 1 was filed on July 23, 2013. Only after Martingale filed its motion for summary judgment nearly five years later did Jamali raise the verification of the complaint in opposition to summary judgment and assert that the improper verification

precluded the trial court from granting the motion for summary judgment. Jamali forfeited the issue by failing to properly object to the lack of verification prior to the motion for summary judgment through a motion to strike or a motion for judgment on the pleadings. Had Jamali raised a timely objection to the verification, the court could have allowed an amendment of the complaint to cure the signature defect. (See *Board of Trustees v. Superior Court*, *supra*, 149 Cal.App.4th at p. 1172.) The motion for summary judgment was supported by evidence and did not merely rely on the allegations of the complaint. We conclude that Jamali's objection to the verification was forfeited for failure to timely raise the issue. Jamali is also estopped under the doctrine of invited error from asserting a defect in the verification as a ground for reversal, because UD 1 had been dismissed and Jamali induced the trial court to vacate the dismissal and reinstate the action. (See *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1203–1204.) Jamali cannot now complain that the action should have been dismissed because of a defective verification. Summary judgment was properly granted in UD 1, and therefore, the trial court correctly concluded UD 2 was moot.

## **Application for Order to Show Cause**

### **A. Standard of Review**

Questions of fact are reviewed under the substantial-evidence test. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271.) We review questions of law independently. (*Ibid.*)

### **B. Contempt**

Martingale contends a prima facie case for contempt is presented when an unlawful detainer defendant fails to deposit rent ordered by the court, and therefore, the trial court should have issued an order to show cause regarding contempt. We disagree.

Unlawful detainer trials must be held within 20 days after a request is made to set the matter for trial. (Code Civ. Proc. § 1170.5, subd. (a).) “If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action. [¶] The determination of the

amount of the payment shall be based on the plaintiff's verified statement of the contract rent for rental payment, any verified objection thereto filed by the defendant, and the oral or demonstrative evidence presented at the hearing. The court's determination of the amount of damages shall include consideration of any evidence, presented by the parties, embracing the issue of diminution of value or any set off permitted by law." (Code Civ. Proc., § 1170.5, subd. (c).) "If the defendant fails to make a payment ordered by the court, trial of the action shall be held within 15 days of the date payment was due." (Code Civ. Proc., § 1170.5, subd. (d).)

"The order must be clear, specific, and unequivocal. (*Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1273.) "Any ambiguity in a decree or order must be resolved in favor of an alleged contemnor." [Citation.]' [Citation.]" (*Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1549 (*Koshak*).) Contempt that does not occur in the immediate view and presence of the court is "indirect contempt." (*Rosenstock v. Municipal Court* (1976) 61 Cal.App.3d 1, 6.) ""A proceeding for the punishment of an indirect contempt is commenced by the presentation of an affidavit setting forth the alleged contemptuous acts. (Code Civ. Proc., § 1211.) The affidavit is in effect a complaint, frames the issues before the court and is a jurisdictional prerequisite to the court's power to punish." [Citation.]' [Citation.]" (*Koshak, supra*, 200 Cal.App.4th at p. 1549.)

“The facts essential to jurisdiction for a contempt proceeding are “(1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; (4) willful disobedience of the order.” [Citations.]’ [Citation.] ‘The record of the court must affirmatively show upon its face the facts upon which jurisdiction depends so that an appellate court can determine if a contempt has been committed. [Citation.]’ [Citation.]” (*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736; see also *In re Ivey* (2000) 85 Cal.App.4th 793, 798.)

The trial court properly declined to issue an order to show cause for contempt based on Jamali’s failure to pay the rent specified in the October 28, 2013 order. Martingale’s pleading seeking an order to show cause did not provide that Jamali had the ability to comply with the court’s order, which was a prerequisite to determining whether contempt had been committed. The order was based on the rental value of the property and was not a determination of Jamali’s ability to pay. In fact, Jamali showed that at the time the order to pay rent was entered, she qualified for court fee waivers. When an unlawful detainer defendant fails to make a rent payment ordered by the court, the remedy provided under Code of Civil Procedure section 1170.5 is to hold trial within 15 days of the date payment was due. Martingale did not establish a prima facie case and the trial court acted within its discretion to decline to issue an order to show cause.

## **DISPOSITION**

The judgment is affirmed. The parties are to bear their own costs on appeal.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.