

**HELEN KOSHAK, et al., Plaintiffs and Appellants,**  
v.  
**10675 S. ORANGE PARK BOULEVARD, LLC, et al., Defendants and Respondents.**

**HELEN KOSHAK, et al., Plaintiffs and Respondents,**  
v.  
**PLM LENDER SERVICES, INC., Defendant and Appellant.**

[Nos. G051652, G052407.](#)

**Court of Appeals of California, Fourth District, Division Three.**

Filed November 29, 2017.

Appeals from a judgment of the Superior Court of Orange County, Super. Ct. No. 30-2012-00590786). Ct. No. 30-2012-00590786, Linda Marks, Judge. Appeal by Norman Koshak and Helen Koshak. Affirmed. Appeal by PLM Lender Services, Inc. Dismissed. Motion for sanctions. Denied.

Law Offices of Lenore Albert and Lenore L. Albert, for Plaintiffs, Appellants, and Respondents.

Samuels, Green & Steel, Philip W. Green, Jennifer A. Needs and Anat Pieter, for Defendants and Respondents.

Adleson, Hess & Kelly, Phillip M. Adleson, Patric J. Kelly and Lisa J. Parrella for Defendant, Appellant, and Respondent.

## **NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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## **OPINION**

FYBEL, J.

## **INTRODUCTION**

Norman Koshak and Helen Koshak (the Koshaks)<sup>[1]</sup> appeal from a judgment of dismissal following an order sustaining a demurrer to their fourth amended complaint without leave to amend. The Koshaks sued the lenders on their home loan and the trustee that conducted a nonjudicial foreclosure of their home. We conclude none of the Koshaks' nine causes of action can state a claim for relief. Further, the Koshaks have failed to show they could assert a cause of action even if given yet another opportunity to amend the complaint. Therefore, we affirm.

## **STATEMENT OF FACTS**

In the 1990s, the Koshaks purchased a house on Orange Park Boulevard in Orange, California. As of 2004, the house was subject to an existing first deed of trust with U.S. Bank, securing a loan to the Koshaks. In 2004, the Koshaks obtained a loan in the amount of \$585,000, funded by private lenders, including Gary S. Schneider (the 2004 Loan). The 2004 Loan was secured by a second deed of trust, which was subordinate to the U.S. Bank deed of trust.

In 2005, the Koshaks defaulted on both the U.S. Bank loan and the 2004 Loan. They refinanced with a new private equity loan secured by a new second position deed of trust (the 2005 Loan). The 2005 Loan was in the principal amount of \$855,000 at 12.5 percent interest. The 2005 Loan was arranged through Schneider, doing business as First Coastal Mortgage, and was funded by individual private investors, including Schneider.<sup>[2]</sup> The proceeds of the 2005 Loan were used to reinstate, not payoff, the U.S. Bank loan, which was in default; pay off the 2004 Loan; pay a Franchise Tax Board lien against the Koshaks; place a reserve in Schneider's broker's trust account with sufficient funds for the Koshaks to make payments on the U.S. Bank loan and the 2005 Loan for one year; pay the premium on hazard insurance for the property; and pay other fees and costs related to the 2005 Loan. The closing statement, which the Koshaks received and which was attached to the complaint, explained the precise use of the loan proceeds.

In March 2007, the Koshaks defaulted on the 2005 Loan. PLM Lender Services, Inc. (PLM), the trustee, recorded a notice of default in May 2007. Although the Koshaks reinstated the loan, the default and reinstatement process occurred several more times in 2007 and 2008. In December 2008, PLM recorded a final notice of default; the Koshaks did not reinstate the

loan. The property was sold to Orange Park at a trustee's sale in December 2011.<sup>[3]</sup>

Between February 2009 and November 2011, Norman filed two Chapter 7 bankruptcies and one Chapter 13 bankruptcy, and Helen filed one Chapter 11 bankruptcy.

The Koshaks refused to vacate the property, and the Lender defendants who had acquired the property through the Orange Park limited liability company filed an unlawful detainer action against them. Ultimately, the trial court entered judgment in favor of the Lender defendants. The superior court appellate division affirmed the judgment.

## **PROCEDURAL HISTORY**

Before the trustee's sale, Norman filed a lawsuit against PLM and the Lender defendants asserting many of the same causes of action as in this case. Norman dismissed the lawsuit in January 2013, a few days before trial was scheduled to begin. The court awarded the Lender defendants their attorney fees in the amount of \$231,181. Norman did not appeal from the fee order.

In August 2012, while Norman's first lawsuit was pending, Helen filed the present case. Orange Park and Schneider filed a demurrer to the complaint. Before the demurrer was heard, Helen filed a first amended complaint. A demurrer to Helen's first amended complaint was sustained; the court gave Helen 10 days' leave to amend to allege facts showing standing.

Defendants demurred to Helen's second amended complaint.<sup>[4]</sup> Meanwhile, Norman had filed a second lawsuit asserting the same causes of action as Helen asserted in her second amended complaint. Defendants demurred to Norman's second lawsuit. The trial court consolidated the two cases, took the pending demurrer off calendar, ordered the parties to file a joint litigation plan, and gave the Koshaks leave to file a consolidated amended complaint.

After the Koshaks filed a third amended complaint in the consolidated action, the trial court ordered the parties to meet and confer regarding its deficiencies and further ordered the Koshaks' counsel to review defense counsel's suggestions about the alleged deficiencies before deciding whether she would again amend the complaint. When the Koshaks' counsel declined to amend, defendants demurred to the third amended complaint. The trial court sustained the demurrer with a final 20 days' leave to amend.

The Koshaks filed a fourth amended complaint. This complaint alleged causes of action for violation of the one form of action rule, fraudulent conveyance, equitable relief to set aside the trustee's sale, accounting, breach of contract, fraud, quiet title, breach of fiduciary duty, common counts, and violation of the Unfair Competition Law. Defendants demurred to the fourth amended complaint.

After a hearing, the trial court issued a minute order sustaining the demurrer as to all causes of action without leave to amend.<sup>[5]</sup> The minute order stated, in relevant part: "Each cause of action is premised on the survival of the other in a patchwork of allegations. Plaintiffs' fourth amended complaint after a careful review is based on a patchwork of allegations that are factually inconsistent." As to PLM, the trial court stated: "PLM Lender Services' demurrer is sustained without leave to amend based on the same reasoning and grounds as stated above. In addition, although named in several of the causes of action within the fourth amended complaint, no facts are pled or allegations referenced as to this defendant. Finally, it is unclear how this defendant can be liable since it was not a lender, beneficiary, or holder of any trust account paid from escrow."

Judgment was entered in June 2015, and the Koshaks appealed.<sup>[6]</sup>

PLM appealed from the judgment to preserve its right to correct what it claimed were judicial and clerical errors in the judgment. PLM also filed a motion in the trial court to amend the judgment; that motion was granted and an amended judgment was entered.

## **DISCUSSION**

### **I.**

#### ***STANDARD OF REVIEW***

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice can and has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) "We affirm the judgment if it is

correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. [Citation.]" ([Las Lomas Land Co., LLC v. City of Los Angeles \(2009\) 177 Cal.App.4th 837, 848.](#))

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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." ([Blank v. Kirwan \(1985\) 39 Cal.3d 311, 318.](#))

## II.

### ***COLLATERAL ESTOPPEL***

Defendants argue that the trial court properly sustained the demurrer as to all causes of action in the fourth amended complaint because those claims were barred by collateral estoppel, based on the judgment in the unlawful detainer action. **"The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding."** ([Coscia v. McKenna & Cuneo \(2001\) 25 Cal.4th 1194, 1201, fn. 1.](#)) **"The party asserting collateral estoppel bears the burden of establishing these requirements."** ([Association of Irrigated Residents v. Department of Conservation \(2017\) 11 Cal.App.5th 1202, 1230.](#))

The second and third elements of the doctrine are easily addressed. The unlawful detainer action was tried and affirmed on appeal, and is a final judgment. The Koshaks were the named defendants in the unlawful detainer action. The trial court entered judgment against the Koshaks in that action after Norman defaulted, and a court trial proceeded against Helen. The superior court appellate division affirmed the judgment. The remaining question is whether the issue of the validity of the trustee's sale was necessarily decided in the unlawful detainer action.

The Koshaks cite the general rule that **issues related to title cannot be decided in an unlawful detainer action.** "In unlawful detainer proceedings, ordinarily the only triable issue is the right to possession of the disputed

premises, along with incidental damages resulting from the unlawful detention. [Citations.] Ordinarily, **issues respecting the title to the property cannot be adjudicated in an unlawful detainer action.** [Citations.] The denial of certain procedural rights enjoyed by litigants in ordinary actions is deemed necessary in order to prevent frustration of the summary proceedings by the introduction of delays and extraneous issues. [Citations.] [¶] However, the trial court has the power to consolidate an unlawful detainer proceeding with a simultaneously pending action in which title to the property is in issue. That is **because a successful claim of title by the tenant would defeat the landlord's right to possession.** [Citation.] **When an unlawful detainer proceeding and an unlimited action concerning title to the property are simultaneously pending, the trial court in which the unlimited action is pending may stay the unlawful detainer action until the issue of title is resolved in the unlimited action, or it may consolidate the actions.** [Citation.] If it does neither and instead tries the issue of title under the summary procedures that constrain unlawful detainer proceedings, the parties' right to a full trial of the issue of title may be unfairly expedited and limited. If complex issues of title are tried in the unlawful detainer proceeding, the proceeding loses its summary character; defects in the plaintiff's title `are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment.'" ([Martin-Bragg v. Moore \(2013\) 219 Cal.App.4th 367, 385.](#))

In [Martin-Bragg v. Moore, supra, 219 Cal.App.4th 367](#), the trial court denied a request to consolidate an unlawful detainer action with a separate action to quiet title. (*Id.* at p. 379.) In a statement of decision after the unlawful detainer trial, the court found the plaintiff was entitled to possession, and rejected the defendant's claim that he actually held title to the property. (*Id.* at pp. 382-384.) The appellate court concluded that the trial court erred by trying the issue of title in the summary unlawful detainer proceeding. **"[W]hen complex issues of title are involved, the parties' constitutional rights to due process in the litigation of those issues cannot be subordinated to the summary procedures of unlawful detainer.** [Citation.] By failing to determine whether and how [the defendant]'s rights and needs might be balanced with [the plaintiff]'s legitimate interests in the matter's prompt resolution, and instead proceeding to try the complex issue of the parties' rights to title of the property within the confines of the summary procedures that apply only to straightforward determination [of] rights to possession, the court abused its discretion." (*Id.* at p. 391.)

Defendants argue that the rule of *Martin-Bragg v. Moore* does not apply in this case because Code of Civil Procedure section 1161a, subdivision (b)(3) "creates a special exception for post-foreclosure unlawful detainers." That subdivision provides, in relevant part: "In any of the following cases, a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served upon the person, . . . may be removed therefrom as prescribed in this chapter: [¶] . . . [¶] (3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected."

Code of Civil Procedure section 1161a's exception to the general rule that title cannot be determined alongside issues of possession in a summary unlawful detainer action has been applied in factually similar cases. "[A] `qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property. . . .' [Citation.] Code of Civil Procedure section 1161a, subdivision (b)(3) (section 1161a), provides an unlawful detainer action may be filed `[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected.' Furthermore, under California law a `judgment entered without contest, by consent or stipulation, is usually as conclusive a merger or bar as a judgment rendered after trial.' [Citations.] [¶] The Supreme Court in *Vella [v. Hudgins (1977) 20 Cal.3d 251, 256]* acknowledged the decisional law holding that `subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by the prior unlawful detainer judgment.' [Citation.] *Vella* explained that the propriety of applying collateral estoppel to an underlying unlawful detainer judgment brought pursuant to section 1161a became doubtful only if the claims in the second action involved activities or alleged wrongdoing not `directly connected' with the conduct of the foreclosure sale. [Citation.] Here, plaintiffs' claims all arise from the alleged invalidity of the foreclosure sale. [¶] Wells Fargo filed its unlawful detainer action against plaintiffs pursuant to section 1161a. Wells Fargo expressly alleged in its complaint the specific facts it contended established it had perfected legal title to the property, including that the foreclosure sale was conducted in accordance with Civil Code section 2924. In their answer, plaintiffs denied the allegations and

raised two affirmative defenses contending the foreclosure proceedings contained irregularities and were invalid due to lack of notice. The conduct of the sale and the validity of the resulting transfer of title to Wells Fargo were therefore directly in issue in the unlawful detainer case. Because the complaint was brought under section 1161a, it was proper for limited issues pertaining to the validity of title obtained by Wells Fargo in the sale to be raised and conclusively resolved. [Citations.] [¶] Indeed, because the sole basis upon which Wells Fargo asserted its right to possession of the property was its 'duly perfected' legal title obtained in the nonjudicial foreclosure sale, the validity of Wells Fargo's title had to be resolved in the unlawful detainer action. Under section 1161a, Code of Civil Procedure, **a purchaser who has acquired the title at such trustee's sale must prove that the property was sold in accordance with section 2924 of the Civil Code under a power of sale and that title under the sale has been duly perfected.** Under such unlawful detainer statutes title to the extent required by section 1161a not only may but must be tried. . . . [Citations.] The bleak language of the judgment which merely restored possession to [the grantee] is a sufficient adjudication of her ownership in view of the issues tendered." ([\*Malkoskie v. Option One Mortgage Corp.\* \(2010\) 188 Cal.App.4th 968, 973-974](#), fn. omitted, italics omitted.)

Similarly, in [\*Bliss v. Security-First Nat. Bank\* \(1947\) 81 Cal.App.2d 50, 58-59](#), the appellate court concluded **that res judicata principles were applicable in an action to set aside a trustee's sale when ownership of the property based on purchase at the trustee's sale was an issue at the unlawful detainer trial**, which had occurred under Code of Civil Procedure section 1161a.

Here, the unlawful detainer complaint alleged, in relevant part, that Orange Park, Schneider, and Lantieri "acquired the Premises on December 27, 2011 by purchasing the property at a trustee's sale conducted under the power of sale contained in a deed of trust. [The Koshaks] were the borrowers under the promissory note related to the foreclosed deed of trust, and foreclosure proceedings were commenced pursuant to [the Koshaks'] default under the loan documents. The trustee's sale was duly noticed and conducted in compliance with all requirements under California law. *Title to the Premises received under the trustee's sale was duly performed*, and the pertinent Trustee's Deed Upon Sale was recorded with the Orange County Recorder on January 3, 2012 under Document Number XXXXXXXXXXXXXXXX."

(Italics added.) No party has provided us with a copy of the Koshaks' answer to the unlawful detainer action.

The Koshaks cite in their appellate briefs to portions of the transcript of the unlawful detainer trial, but the full transcript is not in the appellate record. What is clear from the portions of the unlawful detainer record that are before us is that the issues addressed in the unlawful detainer action included whether the title to the property had been duly perfected under Code of Civil Procedure section 2924, and therefore whether Code of Civil Procedure section 1161a was applicable. In the minute order following the bench trial, the court held: "[P]laintiffs have complied with the applicable statutes concerning foreclosure sales."

The superior court appellate division's opinion affirming the judgment noted: "[T]he Koshaks argue that the trial court erred by entering judgment in favor of Orange Park Plaintiffs because there were complex issues regarding title that needed to be tried in an unlimited action pending before the superior court. The Koshaks requested consolidation, but their request was denied. The trial court was aware that the judge in the pending unlimited civil action had denied the Koshaks' motion to consolidate or coordinate the unlimited civil action with the limited action." The appellate division concluded: "[T]he Koshaks argue that the trial court erred by granting possession to Orange Park Plaintiffs because there was evidence of a forged note. The trial court impliedly rejected giving credence to the 'forged note' when it determined that the Orange Park Plaintiffs were entitled to possession."

We conclude that the issue of the propriety of the trustee's sale was necessarily decided in the unlawful detainer action. Therefore, collateral estoppel would bar relitigation of any issues related to the propriety of the trustee's sale in the present action. We will address the collateral estoppel defense in connection with each cause of action to which it relates, *post*.

### **III.**

#### ***FIRST CAUSE OF ACTION — VIOLATION OF ONE ACTION RULE AGAINST ORANGE PARK, SCHNEIDER, AND LANTIERI***

Code of Civil Procedure section 726, subdivision (a) states in relevant part, "[t]here can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an

estate for years therein, which action shall be in accordance with the provisions of this chapter." Code of Civil Procedure Section 726 sets forth the one form of action rule, which restricts the secured creditor's remedies for notes secured by real property. ([Walker v. Community Bank \(1974\) 10 Cal.3d 729, 733.](#)) "This provision was first enacted in substantially similar form more than a century ago, and its general operation has long been clear. **A secured creditor can bring only one lawsuit to enforce its security interest and collect its debt.**" ([Security Pacific National Bank v. Wozab \(1990\) 51 Cal.3d 991, 997](#), fn. omitted.) **Under the one form of action rule, a secured creditor must proceed against the security before enforcing the underlying debt.** (*Ibid.*)

**A nonjudicial foreclosure, as opposed to a judicial foreclosure, is not an "action" within the meaning of Code of Civil Procedure section 726; therefore, a nonjudicial foreclosure does not violate section 726.** ([Walker v. Community Bank, supra](#), 10 Cal.3d at p. 736; [Hatch v. Security-First Nat. Bank \(1942\) 19 Cal.2d 254, 258](#) [**absent a judicial foreclosure, Code of Civil Procedure section 726 has no direct application**]; [Black Sky Capital, LLC v. Cobb \(2017\) 12 Cal.App.5th 887, 896](#) ["**Section 726 expressly applies to judicial foreclosures; it does not apply if a nonjudicial foreclosure is pursued**"], review granted, Sep. 27, 2017, S243294.<sup>[7]</sup>) In this case, as the Koshaks alleged in their fourth amended complaint, the lenders conducted a nonjudicial foreclosure of the property. Therefore, the Koshaks failed to state a cause of action for violation of the one form of action rule.

The Koshaks cited two cases in their fourth amended complaint, and do so again in their appellate briefs, for the proposition that a bank's offset or lien against the borrower's property is an action that brings into play the one form of action rule when the bank later seeks to judicially foreclose on the property. ([Security Pacific National Bank v. Wozab, supra](#), 51 Cal.3d at pp. 1000-1001 [**BANK'S SETOFF OF FUNDS IN DEPOSITOR'S DEMAND ACCOUNT AGAINST DEBT SECURED BY DEPOSITOR'S INTEREST IN REAL PROPERTY VIOLATES THE ONE FORM OF ACTION RULE**]; [Shin v. Superior Court \(1994\) 26 Cal.App.4th 542, 549](#) [**prejudgment attachment before judicial foreclosure violates the one form of action rule**]). Those cases involved judicial, not nonjudicial foreclosures, and therefore are inapplicable in this case.

#### IV.

#### ***SECOND CAUSE OF ACTION — FRAUDULENT CONVEYANCE AGAINST SCHNEIDER, ORANGE PARK, AND LANTIERI***

"A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [¶] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." (Civ. Code, § 3439.04, subd. (a).)

The Koshaks' cause of action for fraudulent conveyance alleges that they are creditors of the lenders because the Koshaks paid \$320,000 in interest to the lenders, which they are entitled to recover because the lenders charged usurious interest rates. Further, the Koshaks allege Orange Park was a mere shell with no assets when it acquired the property at the auction. The Koshaks do not allege the trustee's sale constituted a transfer made or an obligation incurred by the lenders, nor do they allege any of the other elements of a fraudulent conveyance claim. The trial court did not err in sustaining the demurrer without leave to amend on this cause of action.

On appeal, the Koshaks do not raise any argument as to the trial court's ruling sustaining the demurrer on this cause of action.

#### V.

#### ***THIRD CAUSE OF ACTION — ACCOUNTING AGAINST SCHNEIDER AND PLM***

**"A cause of action for accounting requires a showing of a relationship between the plaintiff and the defendant, such as a fiduciary relationship, that requires an accounting or a showing that the accounts are so complicated they cannot be determined through an ordinary action at law. [Citations.]`An action for accounting is not available where the**

**plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation.'" ([Fleet v. Bank of America N.A. \(2014\) 229 Cal.App.4th 1403, 1413.](#))**

In [Fleet v. Bank of America N.A., supra, 229 Cal.App.4th 1403](#), another panel of this court considered the trial court's order sustaining a demurrer to a complaint based on an allegedly wrongful foreclosure of the plaintiffs' home. The order sustaining the demurrer as to the cause of action for an accounting without leave to amend was affirmed. (*Id.* at pp. 1413-1415.) In part, the appellate court concluded that the plaintiffs had failed to establish the necessary elements for a separate cause of action. "As to the part [of the cause of action for accounting] dealing with how the loan payments were applied before foreclosure, it appears this issue can be folded into the fraud and breach of contract causes of action. If the Fleets are maintaining that they overpaid BofA—either under the trial period plan agreement or because of the fraudulent promise—the overpayment will constitute an element of their damages. If something else turns up in discovery, they can request leave to amend. As of now, however, they do not appear to have alleged the necessary elements of a separate cause of action for accounting." (*Id.* at p. 1414.)

Here, too, the Koshaks' cause of action for an accounting does not allege anything more than a prayer for relief related to the cause of action for fraud. The trial court did not err in sustaining the demurrer to this cause of action.

## **VI.**

### ***FOURTH CAUSE OF ACTION — BREACH OF CONTRACT AGAINST SCHNEIDER DBA FIRST COASTAL MORTGAGE***

The Koshaks' fourth cause of action alleges that, in negotiating the terms of the loan, Schneider made an oral agreement to give \$300,000 of the loan proceeds to the Koshaks at closing. The Koshaks further allege that at closing, Schneider represented that the \$300,000 would be placed in an interest-bearing trust account for them. When the loan closed, only \$150,000 was placed in trust and the other \$150,000 was used to pay off various fees and costs. The complaint alleges that the distribution of the \$300,000 was documented in written closing statements.

The only contract alleged by the Koshaks in the fourth amended complaint was the oral agreement to provide \$300,000 to them in cash or in trust. The

borrower's escrow closing statement from First Coastal Mortgage, which was signed by both Helen and Norman on April 28, 2005, showed \$45,720 and \$106,875 for holding funds attributable to the first and second deeds of trust, respectively. The final borrower's closing statement from North American Title Company dated May 16, 2005, includes the following debits: (1) "1st MTG payments to First Coastal Mortgage Trust \$45,720.00"; (2) "2nd MTG payments to First Coastal Mortgage Trust \$106,875.00"; and (3) "Proceeds Due Borrower \$39,651.06." (Both of the closing statements were attached to the fourth amended complaint.)

**Breach of an oral contract is subject to a two-year statute of limitations.**

(Code Civ. Proc., § 339, subd. 1.) The fourth amended complaint alleges that the Koshaks were aware of the breach of the oral contract at the time the loan funded, and no later than May 16, 2005, when they received a closing statement showing that \$300,000 was not being provided to them in the form of cash or held for them in trust. The statute of limitations on their breach of oral contract claim began to run, at the latest, on May 16, 2005, and thus expired long before the present complaint was filed in August 2012. The trial court did not err in sustaining the demurrer on this cause of action.

**VII.**

***FIFTH CAUSE OF ACTION — FRAUD AGAINST ORANGE PARK, SCHNEIDER, AND LANTIERI***

**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 and reasonably relied on the representation, and (5) the plaintiff suffered resulting damages. ([Lazar v. Superior Court \(1996\) 12 Cal.4th 631, 638.](#)) The statute of limitations for a fraud claim is three years from the date of discovery of the facts constituting the fraud. (Code Civ. Proc., § 338, subd. (d).)**

The Koshaks allege four misrepresentations in their fourth amended complaint:

"a. On or about April 26, 2005, Defendants GARY A. SCHNEIDER (f/k/a FIRST COASTAL MORTGAGE); PLM LENDER SERVICES, INC. GARY A. SCHNEIDER AND FRANCIS B. LANTIERI d/b/a LINCOLN

TRUST COMPANY TRUSTEE, and Neil H. Leventhal and Jody Lee Leventhal, Hy Stolier, Jerry Snyder, Connie Snyder, Edward Corey Rhodes, Valerie Ann Burchfield, E and M Magee trust dated 4/12/2002, and Cheryl Kiggins, now known as Defendant 10675 S. ORANGE PARK BOULEVARD, LLC *represented that there was a default on the August 2004 \$595,000.00 Koshak loan and that in order to cure the default, plaintiffs had to refinance their loan in a new amount of \$855,000.00 under the name of FIRST COASTAL MORTGAGE at 12.5% or else they would take their home through a foreclosure auction.*

"b. On or about April 26, 2005, Defendants GARY A. SCHNEIDER (f/k/a FIRST COASTAL MORTGAGE); PLM LENDER SERVICES, INC. GARY A. SCHNEIDER AND FRANCIS B. LANTIERI d/b/a LINCOLN TRUST COMPANY TRUSTEE, and Neil H. Leventhal and Jody Lee Leventhal, Hy Stolier, Jerry Snyder, Connie Snyder, Edward Corey Rhodes, Valerie Ann Burchfield, E and M Magee trust dated 4/12/2002, and Cheryl Kiggins, now known as Defendant 10675 S. ORANGE PARK BOULEVARD, LLC *represented the reason for the increased principal was on the grounds defendants had placed approximately \$300,000.00 in trust to pay off the monthly mortgage payment for them.*

"c. Second, in December 2011 Defendants 10675 S Orange Park Blvd, LLC took the property, *representing to others that it was the beneficiary under the Note as the holder in due course or that the Note was endorsed to them.* In fact, the Note was not endorsed in blank and it was not endorsed to the Defendant 10675 S Orange Park Blvd, LLC and the defendant was not the holder in due course.

"d. Third, On May 17, 2005, Defendant, Gary A Schneider doing business as FIRST COASTAL MORTGAGE *represented that the refinance loan would cure Plaintiff's default and that First Coastal Mortgage had placed approximately \$300,000 in trust, including but not limited to \$45,720.00 in `Trust' to pay off the first mortgage and \$106,875.00 in `Trust' to pay off the second mortgage (current refinance loan) with First Coastal Mortgage, which would bear interest, in consideration for plaintiff to refinance [the] loan of \$595,000.00 with First Coastal Mortgage by indebting [the] property to the enormous amount of \$855,000.00.*" (Italics added.)

The first alleged misrepresentation is uncertain. First, it alleges that the alleged misrepresentation regarding the 2004 loan was made by PLM, despite the fact the complaint alleges PLM was the servicer on the 2005 loan and the trustee on the deed of trust, and therefore was not involved in the application for the 2004 loan. Second, the fourth amended complaint

contains specific allegations that the 2004 loan was in default, meaning that the representation, if made, was not false. Third, the allegation that the Koshaks were required to refinance through Schneider and First Coastal Mortgage at a specific interest rate is contradicted by other allegations in the complaint that the Koshaks asked Schneider "what he could do to cure the default," Schneider "advised" the Koshaks to use his services for refinancing the loan, and the Koshaks "did not go elsewhere to seek refinancing in order to cure their default in reliance on the original promise that there would be a \$300,000.00 cash out."

The second and fourth alleged misrepresentations allege that defendants told the Koshaks \$300,000 of the 2005 loan proceeds would be held in trust for them. Assuming defendants made that representation and further assuming it was false, the closing statements attached to the fourth amended complaint clearly showed that funds were not being held in trust for the Koshaks, but rather that approximately \$150,000 was being held in trust to pay the mortgage payments on the U.S. Bank loan and the 2005 loan. The Koshaks were aware or reasonably should have been aware of the alleged falsity of the representations when they received the closing statement in 2005, and the statute of limitations began to run at that time. Thus, the statute of limitations on those allegations of fraud had expired years before the Koshaks filed the present lawsuit in 2012.

The third alleged misrepresentation claims that Orange Park made misrepresentations to others regarding its status as the beneficiary under the promissory note. The Koshaks fail to plead the element of justifiable reliance. They do not allege that they ever learned of this alleged misrepresentation, much less that they justifiably relied on it to their detriment.

The trial court did not err in sustaining the demurrer to the cause of action for fraud.

## **VIII.**

### ***SIXTH CAUSE OF ACTION — QUIET TITLE AGAINST ORANGE PARK, SCHNEIDER, AND LANTIERI***

The Koshaks sued to quiet title to the property, alleging that the adverse claim of Orange Park, Schneider, and Lantieri to the property was based on a forged promissory note.

As explained, *ante*, the issue of title to the property was necessarily decided in the unlawful detainer action brought under Code of Civil Procedure section 1611a, subdivision (b)(3). The doctrine of collateral estoppel would prevent the relitigation of the issue of title in this action. Therefore, the trial court did not err in sustaining the demurrer to the Koshaks' claim to quiet title.

## **IX.**

### ***SEVENTH CAUSE OF ACTION — BREACH OF FIDUCIARY DUTY AGAINST SCHNEIDER DBA FIRST COASTAL MORTGAGE AND PLM***

Although this cause of action is nominally asserted against PLM, there are no factual allegations against PLM. More importantly, in a joint litigation plan approved by the Koshaks' counsel, it was agreed that PLM was not a party to the breach of fiduciary duty claim. The Koshaks agree in their appellate briefs that PLM is not a proper party to the breach of fiduciary duty claim. Therefore, the trial court did not err in sustaining the demurrer as to PLM on the claim for breach of fiduciary duty.

As to Schneider, the Koshaks argue he breached a fiduciary duty owed to them by virtue of his role as a broker and lender on the 2005 loan. "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." ([\*Oasis West Realty, LLC v. Goldman\* \(2011\) 51 Cal.4th 811, 820.](#)) A mortgage broker is a fiduciary for the borrower. (Civ. Code, § 2923.1, subd. (a).) The Koshaks allege that Schneider was the mortgage broker on the 2005 loan, and therefore met the first element.

Where the gravamen of the fiduciary duty claim is that the defendant committed constructive fraud, as it is here, the applicable statute of limitations is the three-years-from-discovery period set forth in Code of Civil Procedure section 338, subdivision (d). ([\*City of Vista v. Robert Thomas Securities, Inc.\* \(2000\) 84 Cal.App.4th 882, 889.](#)) Based on the allegations in the fourth amended complaint, did the Koshaks file their complaint on time?

The Koshaks allege Schneider breached his fiduciary duty by failing to obtain a loan that would provide the Koshaks a \$300,000 cash payment at the time the loan funded. The statute of limitations on this claim therefore

started to run when the loan funded and the Koshaks did not receive that much in cash, and expired long before the complaint was filed.

The Koshaks also allege Schneider breached his fiduciary duty by switching out the promissory note they signed, which provided for 59 monthly payments of \$8,697.92, and a balloon payment of \$222,383.33, with a note that provided for 59 monthly payments of \$8,906.25, and a balloon payment of \$863,906.25.<sup>181</sup> They claim they could not have learned of the replacement of the promissory note until it was due, which would make their complaint timely. None of the documents we may consider in reviewing a ruling on a demurrer explains why there were apparently two fully executed promissory notes.

To the extent the Koshaks' claims arise from the lack of authenticity of the note, those claims are barred by collateral estoppel, as the validity of the note was necessarily decided in the unlawful detainer action.

The trial court did not err in sustaining the demurrer to this cause of action.

**X.**

***TENTH CAUSE OF ACTION — COMMON COUNTS AGAINST ORANGE PARK, SCHNEIDER, AND LANTIERI***

In their cause of action for common counts, the Koshaks allege that Orange Park, Schneider, and Lantieri became indebted to the Koshaks in the amount of \$320,000 "for money paid by [the Koshaks] to said defendants at their request." The Koshaks allege the money was paid for a loan they never actually received. The Koshaks further allege that they demanded repayment of the \$320,000, but that their demands were ignored.

The Koshaks argue the trial court erred by sustaining the demurrer to this cause of action because a common count is not subject to a general demurrer, citing [Moya v. Northrup \(1970\) 10 Cal.App.3d 276, 280](#). However, when the common count is based on the same facts specifically pleaded in another cause of action that is subject to demurrer, the common count also fails. **"It is the established law of California that, if plaintiff is not entitled to recover under one count in a complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of**

**facts specifically pleaded in the other count."** ([Hays v. Temple \(1937\) 23 Cal.App.2d 690, 695.](#))

The allegations that the Koshaks paid \$320,000 in interest for a loan, the promised terms of which they did not receive, were also raised in the causes of action for fraud, fraudulent conveyance, and violation of the one form of action rule. Therefore, the general rule that a common count is not subject to a general demurrer does not apply here. And, for the same reasons those causes of action were subject to demurrer (see *ante*), so too is the claim for a common count.

## **XI.**

### ***ELEVENTH CAUSE OF ACTION — UNFAIR COMPETITION LAW AGAINST PLM, ORANGE PARK, SCHNEIDER, AND LANTIERI***

California's Unfair Competition Law, Business and Professions Code section 17200, "defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] Its coverage is 'sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" [Citations.] It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' [Citations.] By proscribing 'any unlawful' business practice, 'section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citations.]" ([Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. \(1999\) 20 Cal.4th 163, 180, fn. omitted.](#)) **A plaintiff asserting a cause of action under Business and Professions Code section 17200 "must state with reasonable particularity the facts supporting the statutory elements of the violation."** ([Khoury v. Maly's of California, Inc. \(1993\) 14 Cal.App.4th 612, 619.](#)) A demurrer to a cause of action under Business and Professions Code section 17200 is properly sustained when the complaint "identifies no particular section of the statutory scheme which was violated and fails to describe with any reasonable particularity the facts supporting violation." ([Khoury v. Maly's of California, Inc., supra, 14 Cal.App.4th at p. 619.](#))

**The statute of limitations for a claim under Business and Professions Code section 17200 is four years from the date the cause of action accrued.** (Bus. & Prof. Code, § 17208.)

The Koshaks' fourth amended complaint sets forth seven specific ways in which defendants allegedly violated the Unfair Competition Law. First, it alleges Orange Park, Schneider, and Lantieri violated the one form of action rule. As explained *ante*, because this case involved a nonjudicial foreclosure there was no violation of the one form of action rule.

Second and third, the Koshaks allege PLM and Schneider, doing business as First Coastal Mortgage, violated California's forgery laws (Pen. Code, § 470) by changing the amount owed on the note after the Koshaks signed the loan documents without providing notice and obtaining consent. To the extent the Koshaks' claims arise from the lack of authenticity of the note, those claims are barred by collateral estoppel, as the validity of the note was necessarily decided in the unlawful detainer action. The Koshaks allege the forgery occurred "at least since August 2006." Therefore, the Koshaks cannot avoid the four-year statute of limitations.

Fourth, the Koshaks allege the Lender defendants violated "antitrust laws" by "hiring the same Auctioneer to prequalify the bidders at foreclosure sale to do the bidding for them as a credit bidder, thereby ensuring the property is sold by credit bid transfer to the defending creditors." This allegation does not specify, and the fourth amended complaint did not otherwise identify, any particular statute the alleged conduct violates, and thus cannot support a claim for violation of the unfair competition laws.

Fifth, the Koshaks allege PLM committed numerous unfair, unlawful, or fraudulent business practices in connection with the servicing, assignment, and foreclosure of the property, and other related matters. This laundry list of alleged bad conduct by PLM includes matters in which it was never involved ("[m]aking a loan without looking to the ability to repay the loan based solely on the plaintiffs' equity in the home"); matters that are not involved in this case at all ("[f]ailing to disclose all fees and charges on the HUD 1 statements"); and matters that may or may not have been unfair, unlawful, or fraudulent at the time ("[f]ailing to respond to the Qualified Written Request sent in 2010 within 30 days thereof").<sup>[9]</sup> The fourth amended complaint does not actually allege PLM undertook any of the actions in the list of bad conduct. Further, there is no allegation as to when these actions occurred, making them, too, subject to the applicable statute of limitations. Finally, those alleged acts that involve the propriety of the trustee's sale or the title to the property are subject to collateral estoppel.

Sixth, the Koshaks allege all the defendants violated Penal Code section 470 by using a forged promissory note that "materially altered the terms of the note." They further allege that Orange Park, Schneider, and Lantieri foreclosed on a note that was not endorsed to them. They further allege that PLM instructed its lenders to change the material terms of promissory notes without ensuring that the borrowers had authorized the changes. To the extent the Koshaks' claims arise from the lack of authenticity of the note, those claims are barred by collateral estoppel, as the validity of the note was necessarily decided in the unlawful detainer action. The Koshaks do not allege when the claimed forgery occurred. Therefore, the Koshaks cannot avoid the four-year statute of limitations.

Seventh, the Koshaks allege that Orange Park, Schneider, and Lantieri violated the automatic stay of Norman's Chapter 7 bankruptcy case by executing a writ of possession on the property. Nowhere else in the fourth amended complaint is the Chapter 7 bankruptcy pleading or the writ of possession even mentioned. In the absence of any factual allegations about execution of a writ of possession while a bankruptcy proceeding was pending and an automatic stay covering the property was in effect, the Koshaks' claim for violation of the Unlawful Competition Law fails on this basis.

The Koshaks argue that the California Supreme Court's opinion in [\*Yvanova v. New Century Mortgage Corp.\* \(2016\) 62 Cal.4th 919](#) "makes it clear that the void assignments can be the basis for such [an unlawful competition] action." That case, however, did not even mention Business and Professions Code section 17200. The court noted that its holding was an extremely narrow one: "We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. **NOR DO WE HOLD OR SUGGEST THAT PLAINTIFF IN THIS CASE HAS ALLEGED FACTS SHOWING THE ASSIGNMENT IS VOID OR THAT, TO THE EXTENT SHE HAS, SHE WILL BE ABLE TO PROVE THOSE FACTS.** Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those

elements." ([\*Yvanova v. New Century Mortgage Corp., supra\*, 62 Cal.4th at p. 924.](#))

The Koshaks also cite [\*Majd v. Bank of America, N.A. \(2015\) 243 Cal.App.4th 1293, 1297\*](#), in which another panel of this court held that the foreclosure of the plaintiff's house was wrongful "because the foreclosure occurred while the loan servicer was reviewing his loan for a modification under the Home Affordable Modification Program," and therefore the plaintiff could assert a cause of action under Business and Professions Code section 17200. The Koshaks make no similar allegations here.

For all of these reasons, we conclude the trial court properly sustained the demurrer as to the cause of action for violation of the Unfair Competition Law.

## **XII.**

### ***LEAVE TO AMEND***

#### **A.**

##### ***Generally***

The trial court's minute order sustaining the demurrer reads, in relevant part: "Plaintiffs were given a last and final opportunity to amend, but have been unable to state sufficient facts to support the causes of action as alleged in the fourth amended complaint after having been given three opportunities. The facts as alleged as incapable of cure given the numerous opportunities afforded plaintiffs, and ` . . . the burden of proving such reasonable possibility is squarely on the plaintiff.' [Citation.] Plaintiffs have not provide[d] a means of curing defects in the pleading."

On appeal, the Koshaks argue: "If there is a defect in the pleading, leave to amend should be granted specifically stating what allegation is missing in the interest of justice[.] [¶] Federal court is the same as state court on the rule of liberality in amending pleadings. The abuse of discretion standard is used for denying a motion for leave to amend. [Citation.] Dismissal without leave to amend is improper unless it is clear that the Complaint could not be saved by any amendment. [Citation.] [¶] The Defendants actions were illegal. It is clear that the complaint could be saved by amendment so the demurrers should be reversed."

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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." ([Blank v. Kirwan, supra, 39 Cal.3d at p. 318.](#))

The federal cases cited by the Koshaks, even if they were binding authority on this court,<sup>[10]</sup> reiterate that the trial court's decision not to grant leave to amend is reviewed for abuse of discretion. Further, these cases do not in any way change the rule in this state that the burden is on the party seeking leave to amend to show a reasonable possibility that the defects in the pleading can be cured by amendment. The Koshaks essentially deny that burden is theirs by asking this court to tell them what allegations are missing from their complaint.

In their reply brief on appeal, the Koshaks contend that, because the defendants continued to file demurrers, motions to strike, and motions for judgment on the pleadings, "[t]here was no time to think about how to amend the pleadings." The Koshaks fail to explain, however, why they have been unable to come up with a reasonable possibility of amendment since the time judgment was entered.

## **B.**

### ***Wrongful Foreclosure***

The fourth amended complaint does not contain a cause of action for wrongful foreclosure, nor does any of the Koshaks' prior complaints. Nevertheless, the Koshaks argue in the opening appellate brief that the trial court erred by dismissing their claims. We will review this argument to determine whether the Koshaks have a reasonable possibility of amending the fourth amended complaint to state a claim for wrongful foreclosure and cancellation of documents.

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.' [Citation.] Federal district courts interpreting this cause of action have frequently cited the Nevada rule . . . that "[a]n action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale.' [Citations.] In other words, **mere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case.** This is a sound addition." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408-409.)

Further, **a homeowner may assert a cause of action for wrongful foreclosure "where a party alleged not to be the true beneficiary instructs the trustee to file a Notice of Default and initiate nonjudicial foreclosure."** [Citation.] We agree with this statement of law, but believe that properly alleging a cause of action under this theory requires more than simply stating that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, a plaintiff asserting this **theory must allege facts that show the defendant who invoked the power of sale was not the true beneficiary.**" (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094.)<sup>[11]</sup>

The Koshaks cannot allege facts supporting a cause of action for wrongful foreclosure. The Koshaks cannot allege they had tendered or were able to tender the amount necessary to cure their default. Additionally, the Koshaks acknowledge their default under the 2005 loan, so they cannot prove there was no breach on their part. Finally, given the effect of collateral estoppel in this case, the Koshaks would be unable to plead or prove the party invoking the power of sale was not the true beneficiary under the deed of trust.

We are therefore satisfied there is no reasonable possibility that the Koshaks can amend their fourth amended complaint to state a cause of action for wrongful foreclosure. The trial court did not err in sustaining the demurrer without leave to amend.

### **XIII.**

#### ***ATTORNEY FEES AND COSTS IN THE TRIAL COURT***

The trial court awarded Orange Park, Schneider, and Lantieri \$133,697.96 in attorney fees and costs in connection with the demurrer to the fourth amended complaint. The Koshaks make two arguments on appeal challenging that award: (1) because the trial court erred in sustaining the demurrers without leave to amend, the resulting award of attorney fees and costs must be reversed; and (2) the Lender defendants were not parties to the deed of trust, and therefore were not entitled to recover their attorney fees.

The first argument fails, for all the reasons set forth *ante*.

The second argument also fails. The Koshaks argue: "[The Lender defendants] were not the beneficiary and not entitled to fees because they were never a proper party to the deed of trust." Both the deed of trust and the promissory note on which the Koshaks' fourth amended complaint was based contain attorney fees provisions. The relevant language from the deed of trust provides: "Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees." The note reads, in relevant part: "[T]he Note Holder will have the right to be paid back for all its costs and expenses to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees." The Lender defendants' claim for attorney fees is clearly covered by the language of the deed of trust and the promissory note. The trial court did not err in awarding the Lender defendants their attorney fees.

#### **XIV.**

##### ***PLM's APPEAL***

PLM filed a motion in the trial court to amend the judgment to add the correct names of the parties. The trial court granted that motion and entered an amended judgment. PLM has already obtained the relief it seeks on appeal. PLM's appeal is dismissed as moot.

#### **XV.**

##### ***KOSHAKS' MOTION FOR SANCTIONS***

On appeal, the Koshaks filed a motion for monetary sanctions in the amount of \$28,710 against the Lender defendants and their attorneys Jennifer Needs

and Philip Green (the Opposing Parties).<sup>[12]</sup> The Opposing Parties filed an opposition to the motion for sanctions.<sup>[13]</sup>

The Koshaks' motion contends that sanctions are appropriate because the Opposing Parties undertook dilatory actions in bad faith to gain an unfair advantage in the appeal. Specifically, the Koshaks contend that Needs requested an extension of time to file a respondents' brief for the Lender defendants based on Needs' claimed medical problems. The Koshaks further contend that at the same time, Needs and Green were participating in a hearing before the California State Bar in order to get the Koshaks' attorney suspended or disbarred, thereby leaving the Koshaks without counsel.

The grounds for imposition of sanctions on appeal are: "(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal's determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules." (Cal. Rules of Court, rule 8.276(a).) The alleged dilatory actions by the Opposing Parties do not fall into any of the specified categories. The Opposing Parties did not file an appeal; they did not include any unnecessary matter in the appellate record; they did not file a motion; and the Koshaks do not identify any other rule they claim was violated. We presume the Koshaks intend to claim that a request for an extension of time to file a brief is equivalent to the filing of a frivolous motion.

The Koshaks have failed to show the Opposing Parties acted in a dilatory manner, or in order to obtain an undue advantage on appeal. The disciplinary proceedings were instituted by the State Bar because the Koshaks' attorney failed to cooperate with a State Bar investigation, and failed to pay monetary sanctions properly imposed by trial courts in multiple cases, not all of which involved the Opposing Parties. In this appeal, the Koshaks' opening brief and appendix were stricken, not because the Opposing Parties were attempting to delay the appeal until the State Bar proceedings against the Koshaks' attorney were in full swing, but because the *other respondents* filed a motion asking that the appeal be dismissed or the brief and appendix stricken because the appendix was defective.

As for the requests for extensions of time to file the Lender Defendants' respondents' brief, the Opposing Parties were, in several instances, required to apply for extensions of time to file the respondents' brief due to the Koshaks' refusal to stipulate to an extension. One request for a stipulation

was based on the serious illness of attorney Needs. The Opposing Parties offered the following: "Counsel for Respondent PLM Lender Services, Inc., Philip M. Adelson, has stipulated to the extension request. [¶] Counsel for Appellants Helen Koshak and Norman Koshak replied to the extension request on May 5, 2016, at 10:56 a.m. as follows: `Helen Koshak has been undergoing chemotherapy and you stole \$700,000.00 from her and her family. So it sounds like Karma to me. You have 10 attorneys working at your office. You are on the list of attorneys working on the case—you draft the brief Phil or are you not done spending the \$700,000 you stole yet?'"

At its core, the motion for sanctions is based on a belief that attorney Needs was not really ill, and that there was no real need for an extension of time to file a respondents' brief. There is no evidence offered in support of those beliefs.

To the extent the Koshaks' motion for sanctions has any basis, Needs' declaration in opposition to the motion rebuts it entirely. In relevant part, her declaration states: "During October 2015, I began experiencing daily symptoms of severe illness. In April 2016, my physician ordered that I go on full disability. On May 18, 2016, I underwent open abdominal surgery to remove a golf-ball-sized tumor from my liver and was hospitalized until May 23, 2016. My husband took three weeks of family leave to attend to my care during my disability period. I also received other medical care and treatments prior to, during, and after my medical leave. I am still actively under the care of multiple physicians. . . . I endeavored to return to work full time on July 6, 2016. On July 14, 2016, I suffered a delayed-onset complication from my surgery. As of the date of this Declaration, my doctor has placed me on partial disability and has limited me to a maximum of twenty hours of work per week." Needs attached to the declaration documents from her doctor regarding her illness and inability to work, and from the Employment Development Department showing the dates she received disability benefits.

Needs' declaration also states: "On July 7, 2016, I appeared in the State Bar Court in Los Angeles and testified at Ms. Albert's disciplinary trial. During the trial, Ms. Albert, acting pro se, attempted to malign my credibility by asking me whether I misled this Court by misrepresenting that I was `deathly ill' in order to wrongfully obtain a briefing extension. I testified, under the penalty of perjury, that I never misled this Court; never used the term `deathly ill'; my illness was real and as described herein; and Mr. Green was

forced to formally request an extension of time because Ms. Albert refused to stipulate to an extension and, instead, expressed pleasure at the thought of me having cancer and that she thought it was `karma.' Upon hearing the grotesqueness of Ms. Albert's behavior, the Judge of the State Bar Court orally admonished Ms. Albert. The Judge further refused to allow Ms. Albert to ask me any further questions regarding my credibility and excused me following a single question on re-direct from counsel representing the State Bar."

The motion for sanctions is denied. It is frivolous and demonstrably without any merit.

## **DISPOSITION**

The judgment is affirmed. Respondents shall recover their costs on appeal.

ARONSON, ACTING P. J. and IKOLA, J., concurs.

[1] Where appropriate, we will refer to Norman Koshak and Helen Koshak by their first names; we intend no disrespect.

[2] The investors were Schneider, Francis B. Lantieri, Neil H. Leventhal, Jody Lee Leventhal, Hy Stoler, Jerry Snyder, Connie Snyder, Edward Corey Rhodes, Valerie Ann Burchfield, and Cheryl Kiggins. These lenders will be referred to collectively herein as the Lender defendants. The Lender defendants formed 10675 S. Orange Park Blvd., LLC (Orange Park) to acquire the property at the trustee's sale.

[3] The appellate record does not explain what happened to the U.S. Bank deed of trust.

[4] Separate demurrers were filed by PLM and by Orange Park and the Lender defendants. The two defendant groups' demurrers raised the same legal issues, and the defendants joined in each other's demurrers. To avoid confusion, we will hereafter refer to the court's rulings on the demurrer, singular.

[5] The trial court granted defendants' joinders in each other's demurrers, and denied as moot motions to strike and for judgment on the pleadings.

[6] The Koshaks' notice of appeal was filed before the judgment was signed and entered. We treat their notice of appeal as having been filed immediately after entry of the judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

[7] The Supreme Court has not ordered that the opinion be depublished or that it is not citable, in whole or in part. (Cal. Rules of Court, rules 8.1105(e)(2), 8.1115(e)(3).) While

this opinion has no binding or precedential effect while on review, it is cited here as persuasive authority. (*Id.*, rules 8.1105(e)(1)(B), 8.1115(e)(1).)

[8] The first note would have resulted in a total repayment by the Koshaks of \$735,560.61 on a loan in the amount of \$855,000 at 12 percent interest. The second note would have resulted in a total repayment of \$1,389,375.

[9] **The Real Estate Settlement Procedures Act, which requires loan servicers to respond to qualified written requests from borrowers, was amended effective July 22, 2010 to lower the response time from 60 days to 30 days.** (12 U.S.C. § 2605(e); Pub.L. No. 111-203; 124 Stat. 1376 (July 21, 2010).) Therefore, at the time the Koshaks allegedly sent their Qualified Written Request, PLM may or may not have been required to respond in 30 days.

[10] **"[F]ederal case authority does not bind us on matters of state law."** (*Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1267.)

[11] *Glaski v. Bank of America* **has been heavily criticized.** We cite it here only to fully consider whether the Koshaks might be able to state a claim. We do not adopt or endorse its holding.

[12] Sanctions are sought for: (1) the attorney fees expended in preparing the motion (\$1,300); (2) the discovery sanctions owed by the Koshaks' attorney to other attorneys and/or litigants (\$10,253); and (3) the costs assessed by the State Bar against the Koshaks' attorney for proceeding to trial on her disciplinary action (\$17,159).

[13] The Koshaks filed a reply to the opposition; a reply brief is not permitted, and has not been considered by this court in ruling on the motion for sanctions. (Cal. Rules of Court, rules 8.54, 8.276.)