SUSAN CAROL PARKER, Plaintiff and Appellant,
v.
5 ARCH INCOME FUND 1, LLC et al., Defendants and Respondents.

No. E066231.

Court of Appeals of California, Fourth District, Division Two.

Filed December 20, 2017.

APPEAL from the Superior Court of Riverside County, Super.Ct.No. MCC1401378, Affirmed, Sunshine S. Sykes, Judge.

Susan Carol Parker, in pro. per. for Plaintiff and Appellant.

Malcolm Cisneros, William G. Malcolm and Brian S. Thomley for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OPINION

FIELDS, J.

I. INTRODUCTION

Plaintiff and appellant, Susan Carol Parker, filed a second amended complaint (the SAC) against several defendants alleging wrongful foreclosure and related claims stemming from a $170,000 "hard money loan" to Parker secured by a deed of trust on Parker's Temecula property. One of the defendants, Norris Group Community Reinvestment, LP (Norris), purchased the property at a nonjudicial foreclosure sale for $305,500. In a prior appeal by Parker, we affirmed the order sustaining Norris's demurrer to the SAC without leave to amend. (*Parker v. Norris Group Community Reinvestment, LP* (July 11, 2017, E064742) [nonpub. opn.].)

After the court sustained Norris's demurrer to the SAC without leave to amend, it sustained a separate demurrer to the SAC by defendants and respondents, 5 Arch Income Fund 1, LLC, California TD Specialists, and FCI Lender Services (FCI) (collectively defendants), without leave to amend. FCI is the original trustee under the deed of trust, and California TD Specialists is the assignee trustee. At the time of the foreclosure sale, California TD Specialists was still the trustee under the deed of trust and 5 Arch Income Fund, LLC held the beneficial interest under the note and deed of trust.

The SAC names three additional defendants who are not parties to this appeal and who were not parties to Parker's prior appeal in case No. E064742: (1) 5 Arch Funding, Corp., the original lender and beneficiary under the note and deed of trust; (2) 5 Arches, LLC, the entity to which 5 Arch Funding Corp. assigned its beneficial interest under the note and deed of trust, before 5 Arches, LLC, in turn, assigned its beneficial interest under the note and deed of trust to 5 Arch Income Fund 1, LLC; and (3) Sound Equity, the entity that processed the loan.

In this appeal, Parker claims defendants' demurrer to the SAC was erroneously sustained without leave to amend for the same reasons she argued in the prior appeal that Norris's demurrer was erroneously sustained without leave to amend. Parker claims the SAC shows the foreclosure proceedings and sale were wrongful for three reasons: (1) she was not in default on the $170,000 loan; (2) the entities that initiated and pursued the foreclosure sale were not authorized to do so because the note and deed of trust were assigned as collateral to secure a debt owed by the original lender's successor, 5 Arches, LLC, to Pacific Enterprise Bank; and (3) the $170,000 loan was unconscionable. Parker alternatively claims she can amend the SAC to state a cause of action against defendants for conspiring with other defendants to wrongfully deprive her of her Temecula property.

In addition to filing her opening and reply briefs in this appeal, Parker has adopted by reference her opening and reply briefs in her related appeal in *Parker v. Norris Group Community Reinvestment, LP, supra,* case No. E064742. (Cal. Rules of Court, rule 8.200(a)(5).) For their part, defendants have filed a combined respondent's brief in this appeal and have adopted by reference Norris's respondent's brief in case No. E064742. As Parker observes, her briefs in case No. E064742 address "most of" the same issues she raises in her opening brief in this appeal. On our own motion, we take

judicial notice of our nonpublished opinion in case No. E064742 and the record in that case. (Evid. Code, §§ 453, 459, subd. (a).)

We affirm the judgment in favor of defendants. As we explain, the SAC fails to state a cause of action against defendants, and there is no reasonable possibility it can be amended to state a cause of action against defendants. Because Parker's claims fail based solely on the allegations of the SAC and the judicially noticed instruments concerning the deed of trust, foreclosure proceedings, and sale, it is unnecessary to consider defendants' claim that Parker is judicially estopped from challenging the judgment.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

The SAC describes the circumstances surrounding Parker's procurement of the $170,000 loan in extensive detail, and includes a copy of the note and several instruments recorded in connection with the note and the foreclosure sale. In ruling on defendants' demurrer, the superior court took judicial notice of the deed of trust, a substitution of trustee in favor of California TD Specialists, the notice of default, the notice of sale, the trustee deed, two assignments of the deed of trust, including an assignment to 5 Arch Income Fund, LLC, a separate "collateral assignment" of the deed of trust to Pacific Enterprise Bank, and a release of the collateral assignment.[2]

In the following subsections, we summarize the allegations of the SAC, the facial contents of the recorded instruments. Additional details are discussed below in our analysis of the factual sufficiency of the SAC's alleged causes of action against defendants. Our summary is largely taken from our nonpublished opinion in case No. E064742.

A. *The Background Allegations of the SAC*

In 1998, Parker's parents purchased the Temecula property for cash after selling their Huntington Beach home. Parker's father died in 2007, and in December 2012, Parker moved into the home "full time" to assist her mother, who had dementia and whose health was "rapid[ly] declin[ing]." Parker's mother's personal savings was "rapidly dwindling," and it was becoming "increasing[ly] difficult" to pay her in-home health care expenses. In September 2012, title to the home was transferred from Parker's parents to Parker, her mother, and Parker's daughter as joint tenants. Around that time, Parker and her mother lived in the Temecula property, but Parker had an

apartment in San Diego which she "used occasionally" and sublet to travelers through Airbnb.

Around March 2013, Parker obtained her mother's and daughter's permission to borrow against the Temecula property so that Parker could invest in a business opportunity in Minnesota. Parker planned to use the proceeds of the investment to pay her mother's health care expenses, and she believed her mother "would be set for the rest of her life" based on the investment. Parker admits her income "was difficult to document," however, and "[i]t was not easy to get the financing" for the business investment. Parker's daughter was completing her bachelor's degree, had student loans, and did not want to be involved in borrowing against the Temecula property. And, according to Parker, "no lender wanted to consider" loaning money to Parker's mother "for obvious reasons." Parker's mother died in June 2014.

The SAC indicates that Parker was an experienced investor who "had a network of private investors she had kept since her interest in real estate investing had begun back in the [19]80's." Parker began calling these contacts "to see if she could arrange a private loan." Norris was one of her "private loan" contacts. Parker "had never actually obtained financing through [Norris]." Norris "had reasonable but stricter loan guidelines than other private lenders with strict loan to value and investor contributions required." Norris "held pretty firmly to the 60-65 % [loan to value ratio] rule of thumb at least in their explanations for denials to [Parker] on different projects." Parker did not obtain any loan through Norris and does not allege Norris was involved in the $170,000 loan transaction.

Despite her business experience, Parker alleges "her hands on experience with private lenders" "was actually quite limited." She "usually ended up using her own funds or financed her properties with conventional loans," but she "had assisted her friends in Minnesota with obtaining [a loan] through a connection [with a private lender]" that was "concerned with keeping things fair." Parker's experience with defendants was "very different" and "a virtual nightmare."

Parker alleges that two "loan processor[s]" from defendant Sound Equity, the entity that processed the $170,000 loan, were "difficult to work with," and "KNEW how anxious" Parker was "to lock in a loan for her mother." In Apri1 2013, the "deadline" to invest in the Minnesota business was "quickly arriving." Sound Equity representatives "played upon" Parker's "needs to

entice and coerce her into signing a risky and predatory loan." They told Parker "there would be no loan" unless her mother and daughter were removed from the title to the Temecula property. Parker complied by having her mother and daughter quitclaim the Temecula property to Parker. Parker also alleged her "loan file" was "doctored up" to show she had sufficient income to make the payments on the $170,000 loan. Parker also alleged she "gave [Sound Equity] the documents they needed."

On April 22, 2013, Parker signed the $170,000 promissory note, dated April 19, 2013, together with a deed of trust on her Temecula property to secure the loan. Parker received the loan proceeds on May 1, 2013. The note and deed of trust identified "5 Arch Funding Corp." as the lender and beneficiary.

B. ***The Terms of the $170,000 Note***

The SAC describes the $170,000 loan as a "hard money deal." The loan had a "[s]tated [i]nterest [r]ate of 1 percent per month, or $1,700, an annualized interest rate of 12 percent. Interest-only payments of $1,700 were due beginning on June 1, 2013, and on the first day of each month thereafter. The last interest payment and the entire principal balance were due on February 1, 2014, only nine months after Parker received the loan proceeds on May 1, 2013.

A default interest rate of 2 percent per month applied to the outstanding principal balance upon the occurrence of an "[e]vent of [d]efault," which included the "nonpayment of principal, interest or other amounts when the same shall become due and payable[.]" Thus, the 2 percent default interest rate applied, effective on the second day of the month, if any 1 percent interest-only payment was not paid in full on the first day of the month. In addition, if the lender did not receive "the full amount of any payment of unpaid principal or interest or any other amount due" within five calendar days of the date such amounts were due, a late charge of 5 percent of that "full amount" was also due. Principal payments could be made at any time, without penalty. The note also required Parker to reimburse the lender for any "NSF" or insufficient funds charges incurred in the event Parker tendered a check that was dishonored due to insufficient funds.

The note also provided that, upon the occurrence of an event of default, the lender had the option to accelerate the note, or declare its principal balance

and any accrued interest and other charges immediately due, *without notice to Parker*. And, if any outstanding principal, interest, and other charges were not paid within 15 calendar days of the note's February 1, 2014, maturity date, an additional late charge of 2 percent of all unpaid principal and interest was also due.

C. ***Parker's Payments on the Note***

Parker alleges she paid the June 1 and July 1, 2013, interest-only payments on the note "without [a] problem." Thereafter, Parker notified the loan servicer, defendant FCI, that her August 1, 2013, payment would be late. She explained to FCI that the account she had set up to pay the note "was compromised at the bank and the account was frozen on August 8, 2013." She tendered the August 1 payment on August 16, and it was deducted from her bank account on August 21. By that time, she had "secured a refinance through a conventional VA [Veteran's Administration] loan and [that loan] was due to close escrow on Oct[ober] 15, 2013." On September 6, 2013, she made a $1,715 "online payment" on the note, which posted to her bank account on September 13.

On September 16, 2013, a Sound Equity representative called Parker and told her she was "in default of two months['] payments [and] that her loan was proceeding into foreclos[ure]." Parker needed "payoff information" on the loan in order to close her pending VA refinance of the loan. Later on September 16, Parker spoke to a representative of FCI who told her that, in order to obtain the payoff amount, she had to write a letter to FCI, at its business address, requesting a "Qualified Written Statement. . . ." Parker would then receive the payoff amount within seven to 10 business days. Parker alleges "[t]his was unacceptable" to her.

Parker alleges she "secured [as] a back up lender an FHA [Federal Housing Administration] refinance who would close escrow October 30, 2013" and notified FCI to "please cooperate and assist these lender[s] with the information they needed." Parker alleges FCI refused to provide any payoff information and refused to accept her October 2013 payment "without direct lender approval." On October 11, 2013, Parker mailed a check for $1,785 to FCI, but FCI returned the check to her on October 23.

D. ***The Foreclosure Proceedings and Sale***

On October 17, 2013, a notice of default was recorded on the $170,000 note, stating that $11,729.84 was due on the note as of October 15, 2013. Also on October 17, 2013, a "Substitution of Trustee" was recorded, substituting "California TD Specialists" as trustee under the deed of trust in place of FCI, the original trustee. A notice of trustee's sale was recorded on January 23, 2014, setting the foreclosure sale on February 18, 2014. Apparently, the foreclosure sale was postponed. The foreclosure sale was held on January 6, 2015, and Norris purchased the Temecula property for $305,500 at the foreclosure sale. According to the trustee's deed, the unpaid debt on the property was $283,853.37, and Norris was not the foreclosing beneficiary. On September 9, 2015, Norris sold the Temecula property for $393,000.

E. ***Additional Recorded Instruments***

The deed of trust was recorded on May 1, 2013, and identified 5 Arch Funding Corp. as the beneficiary, FCI as trustee, and Parker as trustor. Also on May 1, 2013, 5 Arch Funding Corp. assigned its interest in the note and deed of trust to 5 Arches, LLC, pursuant to an "Assignment of Beneficial Interest Under Deed of Trust" (the First Assignment) recorded on May 1, 2013. On June 3, 2013, 5 Arches, LLC assigned its interest in the note and deed of trust to 5 Arch Income Fund 1, LLC, pursuant to an "Assignment of Beneficial Interest Under Deed of Trust" (the Second Assignment) recorded on June 3, 2013. As the beneficiary under the deed of trust, 5 Arch Income Fund 1, LLC signed the substitution of trustee, recorded on October 17, 2013, which substituted California TD Specialists as the trustee in place of FCI. As the new trustee, California TD Specialists signed the October 17, 2013, notice of default, the notice of sale, and the trustee's deed.

F. ***The Collateral Assignment to Pacific Enterprise Bank***

On May 1, 2013, a "Collateral Assignment of Beneficial Interest Under Deed of Trust" (the Collateral Assignment) was recorded. By the Collateral Assignment, 5 Arches, LLC "collaterally assign[ed]" its interest in the note and deed of trust to Pacific Enterprise Bank "as collateral" to secure 5 Arches, LLC's obligations to the bank pursuant to a "Business Loan Agreement" dated October 29, 2012. According to the SAC, an "Allonge to Note" (the Allonge) was attached to the note that Parker signed in favor of 5 Arch Funding Corp. on Apri1 22, 2013. The Allonge states: "*Pay to the order of* Pacific Enterprise Bank (PEB), without recourse, representation or warranty, express or implied, except only as specifically provided in that

certain Business Loan Agreement dated as of October 29, 2012 by and between PEB and the undersigned [representative of 5 ARCHES, LLC.]" (Italics added & capitalization omitted.) On January 10, 2014, Pacific Enterprise Bank "release[d] and assign[ed]" its collateral assignment or security interest in the note and trust deed to 5 Arch Income Fund 1, LLC, pursuant to a "Release of Collateral Assignment of Beneficial Interest Under Deed of Trust" recorded on January 24, 2014. As indicated, 5 Arch Income Fund 1, LLC had been the beneficiary under the note and deed of trust since the Second Assignment was recorded on June 3, 2013.

G. *Procedural History and Parker's Claims on Appeal*

Parker filed this action in September 2014. The SAC was filed in March 2015 and alleges eight causes of action against each defendant, styled as: (1) "[Set] aside trustee sale and to quiet title," (2) "wrongful foreclosure," (3) "cancellation of trustee['s] deed upon sale," (4) "fraud and deceit and/or negligent misrepresentation," (5) "breach of contract," (6) "negligence and/or fraudulent misrepresentation," (7) "slander of title," and (8) "violation of the unfair competition law." (Capitalization & bolding omitted.)

The SAC seeks to cancel the trustee's deed, and alternatively seeks money damages from defendants for the alleged wrongful foreclosure. But in her opening brief on appeal, Parker states she is no longer seeking to cancel the trustee's deed, and she is only seeking damages from defendants for the wrongful foreclosure. Thus, it is unnecessary to address whether defendants' demurrer to the first and third causes of action was properly sustained without leave to amend, and we confine our analysis to whether the demurrer on the second and fourth through eighth causes of action was properly sustained without leave to amend.

III. DISCUSSION

A. *Standard of Review*

A party against whom a complaint has been filed may object to the complaint by filing a general demurrer, claiming the complaint does not state sufficient facts to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) On appeal from a judgment of dismissal after a general demurrer was sustained without leave to amend, we are guided by long-settled rules and two standards of review. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Mosley v. San Bernardino City Unified School Dist.* (2005) 134

Cal.App.4th 1260, 1262.) First, we review the complaint de novo to determine whether it states a cause of action. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235.) We treat the demurrer as admitting the factual allegations of the complaint, and we consider judicially noticeable matters, but we do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan, supra*, at p. 318.) We also give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Ibid.*)

Second, if the complaint does not state a cause of action, we determine whether the superior court abused its discretion in sustaining the demurrer without leave to amend. "[W]e decide whether there is a reasonable possibility that the defect[s] [in the complaint] can be cured by amendment: . . . if not, there has been no abuse of discretion and we affirm. [Citations.]" (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) It is the plaintiff's burden to show either that (1) the complaint states a cause of action or (2) the superior court abused its discretion in denying the plaintiff leave to amend. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 866.)

B. *The SAC Does Not State a Cause of Action Against Defendants for Wrongful Foreclosure (the Second Cause of Action)*

In her second cause of action for wrongful foreclosure, Parker alleges defendants effected an "illegal, fraudulent or willfully oppressive sale" of her Temecula property. She claims the foreclosure proceedings and sale were wrongful because (1) she was never in default of the note; (2) the Collateral Assignment means that Pacific Enterprise Bank was the only entity authorized to foreclose on the Temecula property; and (3) the $170,000 loan was unconscionable. We reject these claims for the same reasons we rejected them in the prior appeal; our analysis of the claims is the same in both appeals.

1. Applicable Legal Principles

As we did in the prior appeal, we begin by setting forth a brief overview of nonjudicial foreclosure proceedings. "**A nonjudicial foreclosure sale is a `quick, inexpensive[,] and efficient remedy against a defaulting debtor/trustor**.' (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830. . . .) To preserve this remedy for beneficiaries while protecting the rights of

borrowers, `**Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' (*Ibid.*) UNDER A DEED OF TRUST, THE TRUSTEE HOLDS TITLE AND HAS THE AUTHORITY TO SELL THE PROPERTY IN THE EVENT OF A DEFAULT ON THE MORTGAGE.** (See *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 333-336. . . .) **To initiate the foreclosure process, `[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents' must first record a notice of default. (Civ. Code, § 2924, subd. (a)(1).) The notice of default must identify the deed of trust `by stating the name or names of the trustor or trustors' and provide a `statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred' and a `statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy [the] obligation . . . that is in default.' ([Civ. Code,] § 2924, subd. (a)(1)(A)-(C).) After three months, a notice of sale must then be published, posted, mailed, and recorded in accordance with the time limits prescribed by the statute. ([Civ. Code,] §§ 2924, subd. (a)(3), 2924f.)"** (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10, fn. omitted.)

"`**After a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale**. [Citation.] Generally, **a challenge to the validity of a trustee's sale is an attempt to have the sale set aside and to have the title restored.' (***Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 103. . . .) **The elements of a cause of action to set aside a foreclosure sale 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 suffered prejudice or harm; and (3) the trustor or mortgagor tenders the amount of the secured indebtedness or was excused from tendering.** (*Id.* at p. 104.)" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 800.**)**

"The first element [of a cause of action for wrongful foreclosure or to set aside a foreclosure sale] may be satisfied by allegations that (1) the trustee or beneficiary failed to comply with the statutory procedural requirements for the notice or conduct of the sale; (2) the trustee did not

have the power to foreclose; (3) the trustor was not in default, no breach had occurred, or the lender waived the breach; or (4) the deed of trust was void. [Citation.]" (*West v. JPMorgan Chase Bank, N.A., supra*, 214 Cal.App.4th at p. 800.) As will appear, Parker has not and cannot plead this element.

2. Parker Was in Default on the Note

Parker claims the foreclosure proceedings and sale were wrongfully initiated because she *was never in default* on the $170,000 note. (Civ. Code, § 2924.) She argues she was not in default because her August 2013 and September 2013 payments posted to her bank account. But by her allegations in the SAC, Parker effectively admits that she was in default on the note and that she never cured the default.

First, as Parker argues, the SAC and its attached exhibits show Parker tendered a payment of $1,700 on August 16, 2013, and that the payment (check No. 8835) posted to her bank account on August 21, 2013. The SAC also shows that Parker made an online payment of $1,715 on September 6, 2013, and that this payment posted to her account on September 13, 2013. Nonetheless, these payments were tendered *after* August 1 and September 1, the dates the payments were due according to the terms of the note. The first late payment, the August 2013 payment, constituted an "[e]vent of [d]efault," triggering the default interest rate of 2 percent per month which accrued on the principal balance of the note from and after August 2, 2013. Parker's own allegations show that she indisputably defaulted on the note on August 2, 2013, because the lender did not receive her August 2013 interest payment by August 1, 2013. Additionally, her late tendered August and September 2013 payments did not include the default interest rate or late fees. Thus, the August and September 2013 payments were insufficient to pay the amounts due under the note. Parker also alleges that, on September 16, 2013, Sound Equity representatives contacted her and told her she was in default "of two months[’] Payments" on the note, and her loan was proceeding to foreclosure. Thus, by mid-September 2013, Parker knew she was in default on the note.

Parker also claims that FCI wrongfully prevented her from curing the default by refusing to provide her with a payoff amount for the $170,000 loan, and for this reason, too, the foreclosure sale was wrongful. (*Miles v. Deutsche*

Bank National Trust Co. (2015) 236 Cal.App.4th 394, 407 [cause of action for wrongful foreclosure stated where plaintiff timely tendered amount in default before foreclosure sale].) Parker alleges that, on September 16, 2013, she spoke to an FCI representative who told her that, to obtain the payoff amount, she had to write a letter to FCI, at their business address, requesting a "Qualified Written Statement. . . ." FCI advised Parker that it also needed the lender's "direct approval" to provide the payoff amount to Parker and "that would be no problem." Parker would receive the payoff amount within seven to 10 business days after FCI received her written request. Inexplicably, however, Parker also alleges that making a written request to FCI for the payoff amount was "unacceptable" to her. Thus, Parker admits she refused to request the payoff amount from FCI in writing even though, by her own admission, she would have received the payoff amount before the end of September 2013 had she made the written request.

Parker alleges she needed the payoff amount to close a pending refinance of her $170,000 loan through the Veterans Administration (VA). She alleges a representative of the mortgage company that was handling her VA refinance called her around September 16, 2013, and told her FCI had advised the representative that the $170,000 loan was two months in arrears. The representative advised Parker that she would not be able to obtain the VA refinance unless the mortgage company could obtain the payoff amount for the $170,000 loan. By Parker's own admission, her refusal to make a written request to FCI for the payoff amount prevented her from obtaining the VA refinance, assuming she otherwise qualified for the VA refinance. Nothing any of the defendants did prevented Parker from obtaining the payoff amount by the end of September 2013.

Parker also alleges she "secured [as] a back up lender an FHA [Federal Housing Administration] refinance who would close escrow October 30, 2013," and she notified FCI to "please cooperate and assist these lender[s] with the information they needed." Parker alleges FCI then refused to provide any payoff information to her and refused to accept her October 2013 payment "without direct lender approval." As discussed, however, **FCI only refused to provide the payoff amount without a written request for it from Parker, and Parker admits she would not submit a written request**. Parker's failure to submit a written request for the payoff amount prevented her from refinancing the $170,000 loan through her "backup" Federal Housing Administration lender.

Further, the notice of default, recorded on October 17, 2013, states that $11,729.84 was due on the note as of October 15, 2013. The SAC also shows that, on January 21, 2014, FCI presented Parker with a payoff demand of $198,926.02, due as of January 31, 2014, to pay the $170,000 loan in full. The payoff demand also stated that $114.68 in daily interest would accrue on the loan after January 31, 2014. FCI also advised Parker that, to *reinstate* the loan, $25,072.69 was due as of January 31, 2014. Parker does not allege that the amount stated in the notice of default was incorrect or that the amounts stated in FCI's payoff or reinstatement demands were incorrect. Parker also does not allege she was not allowed to pay the loan in full or reinstate it by curing the default after she received FCI's payoff and reinstatement demands. In sum, Parker's allegations show she was in default on the note in August 2013, she never cured the default, and no act or omission of any of the defendants prevented her from curing the default or paying the loan in full.

3. The Foreclosure Proceedings and Sale Were Lawfully Initiated and Conducted

Parker claims the foreclosure proceedings and sale are wrongful based on the Collateral Assignment, by 5 Arches, LLC, on May 1, 2013, of the note and deed of trust to Pacific Enterprise Bank. Parker argues that because 5 Arches, LLC made the Collateral Assignment of the note and deed of trust to Pacific Enterprise Bank on May 1, 2013, 5 Arches, LLC "had nothing to assign" when, on June 3, 2013, it assigned the note and deed of trust to 5 Arch Income Fund 1, LLC. Thus, Parker argues, 5 Arch Income Fund 1, LLC had no authority to execute the substitution of trustee, recorded on October 17, 2013, substituting California TD Specialists as the trustee under the deed of trust in place of FCI. Parker argues California TD Specialists accordingly had no authority to record the notice of default and otherwise conduct the foreclosure proceedings. Hence, Parker argues, the notice of default, the notice of sale, and the foreclosure sale and trustee's deed are void because they were executed by California TD Specialists. (See *Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th at pp. 923, 939-940 [trustor has standing to claim wrongful foreclosure where "purported assignment" of note and deed of trust to foreclosing beneficiary was void].)

This claim fails because it conflates *a sale* or a complete assignment of all of the beneficial interest under a note and deed of trust with the distinct assignment of a note and deed of trust solely *as collateral to*

***secure a debt* owed by the beneficiary to the assignee.** By the Collateral Assignment, 5 Arches, LLC did not assign its entire beneficial interest under the note and deed of trust to Pacific Enterprise Bank. Rather, it retained that beneficial interest, and properly assigned it to 5 Arch Income Fund 1, LLC pursuant to the Second Assignment. The foreclosure-related instruments, namely, the substitution of trustee, notice of default, notice of sale, and trustee's deed, are therefore not void or executed by unauthorized parties.

The Collateral Assignment stated that 5 Arches, LLC was assigning the note and deed of trust to Pacific Enterprise Bank "*as collateral*" for 5 Arches, LLC's "obligations" to Pacific Enterprise Bank pursuant to the Business Loan Agreement dated October 29, 2012, between 5 Arches, LLC and Pacific Enterprise Bank. (Italics added.) In other words, **as its name suggests, the Collateral Assignment was an assignment of the note and deed of trust as collateral to secure a debt, or a pledge. It was not an assignment of *all of* 5 Arches, LLC's right, title, and interest in the note and deed of trust.** The Allonge to the note is consistent with our interpretation of the Collateral Assignment as a pledge. The Allonge states: "Pay to the order of Pacific Enterprise Bank (PEB), without recourse, representation or warranty, express or implied, except only as specifically provided in that certain Business Loan Agreement dated as of October 29, 2012 by and between PEB and [5 Arches, LLC.]" (Capitalization omitted.)

As explained in the treatise on California real estate law by Miller & Starr, **"[a] promissory note, whether or not it is a negotiable instrument, and whether or not it is secured by a deed of trust on real property, is considered personal property for purposes of its pledge or assignment as security for another obligation. A pledge or other assignment of such a note is governed by article 9 of the Uniform Commercial Code. The note and deed of trust may be assigned as collateral security by the beneficiary, in which case it is the same as a pledge. A pledge of a note creates a security interest in the note upon compliance with the Uniform Commercial Code."** (5 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 13:52, p. 13-228, fns. omitted.)

And, **under the California Uniform Commercial Code (Cal. U. Com. Code, § 9101 et seq.), the assignee of a security interest in a note and deed of trust has no right to unilaterally (that is, absent a default by the assignor) sell, release, or subordinate the assignor's interest in the note and deed of trust, absent a contrary agreement between the assignor**

and assignee. (*Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 541-543.) Thus, Pacific Enterprise Bank, as assignee of a security interest in the note and deed of trust, had no right to sell or transfer the note and deed of trust, absent an agreement allowing it to do so between itself and 5 Arches, LLC. Parker does not allege that the Business Loan Agreement gave Pacific Enterprise Bank the right to sell or transfer the note and deed of trust. Thus, 5 Arches, LLC retained "legal title" to the collateral, that is, to the deed of trust, following the Collateral Assignment, and had the right to assign the deed of trust to 5 Arch Income Fund 1, LLC. (See generally *MacDonald v. Pacific Nat. Bank* (1944) 66 Cal.App.2d 357, 361-362 [**where legal title to collateral remains in pledgor, pledgee merely has a lien on the title, unless otherwise provided in the pledge contract**]; *Robinson v. Raquet* (1934) 1 Cal.App.2d 533, 544 [**where personal property is pledged, the general property and title remain in the pledgor, subject only to a lien in favor of the pledgee for the amount of his debt**].)

The "Release of Collateral Assignment" dated January 10, 2014, and recorded January 24, 2014, is also consistent with our interpretation of the Collateral Assignment as a pledge. It states that Pacific Enterprise Bank "releas[ed] and assign[ed]" its "rights, title and interest under that certain Collateral Assignment" to 5 Arch Income Fund 1, LLC. It does not state that Pacific Enterprise Bank was releasing a "beneficial interest" under the note and deed of trust. (See generally *In re Woodson Co.* (9th Cir. 1987) 813 F.2d 266, 270-272 [transactions were loans, not sales, where creditor "possessed none of the usual indicia of ownership" and debtor "retained all of the obligations of an owner and conducted itself . . . as owner."].)

The title record also shows that Pacific Enterprise Bank had no right to foreclose on the note and deed of trust upon Parker's default, during the period Pacific Enterprise Bank had a security interest in the note and deed of trust. In order to foreclose on the note and deed of trust, Pacific Enterprise Bank was required to record: (1) a copy of the Business Loan Agreement, that is, "the security agreement that creates or provides for a security interest in the obligation secured by the mortgage" and (2) its "sworn affidavit in recordable form stating. . . . [¶] . . . [t]hat a default has occurred" *and* that it had the right "to enforce the mortgage nonjudicially." (Cal. U. Com. Code, § 9607, subd. (b); 5 Miller & Starr, *supra,* § 13:52, p. 13-232.) Parker does not allege any such instrument was recorded.

In sum, because 5 Arches, LLC did not assign its *entire* beneficial interest under the note and deed of trust to Pacific Enterprise Bank, and Parker does not allege that Pacific Enterprise Bank had the right to foreclose on the deed of trust pursuant to the Business Loan Agreement, 5 Arches, LLC retained the right to assign its entire beneficial interest under the note and deed of trust to 5 Arch Income Fund 1, LLC, which it did on June 3, 2013. Thus, upon Parker's default on the note, 5 Arch Income Fund 1, LLC was authorized to substitute California TD Specialists as the trustee under the deed of trust. California TD Specialists was also authorized to initiate and conduct the foreclosure proceedings and sale.

Parker maintains that Pacific Enterprise Bank was the only party that had a right to foreclose on and collect the note upon her default because it had the original note in its physical possession from May 1, 2013, until January 10, 2014, when it executed the Release of Collateral Assignment in favor of 5 Arch Income Fund 1, LLC. Parker is mistaken. The retention of the original note by Pacific Enterprise Bank merely assured Pacific Enterprise Bank that it would receive proceeds from *any* foreclosure sale under the note and deed of trust, in the event its pledgor, 5 Arches, LLC, was in default of the Business Loan Agreement at the time of any such foreclosure sale.

4. The Loan Was Not Unconscionable

Parker claims she suffered damages because the loan transaction is unconscionable. (Civ. Code, § 1670.5.) "Unconscionability generally is a legal question we review under the de novo standard. [Citation.] **`Unconscionability has procedural and substantive aspects,' both of which must be present for a court to refuse to enforce a contract based on unconscionability.** [Citations.] **Courts use a `"sliding scale"' approach in assessing the two elements, such that `the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'** [Citation.]" (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 997.)

"`"**Procedural unconscionability" concerns the manner in which the [challenged] contract was negotiated.'"** (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656.) "**Absent unusual circumstances, evidence that one party has overwhelming bargaining power, drafts the contract, and presents it on a take-it-or-leave-it basis is sufficient to**

demonstrate procedural unconscionability and require the court to reach the question of substantive unconscionability, even if the other party has market alternatives." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 109.)

Parker has alleged procedural unconscionability in the negotiation of her $170,000 loan. She alleges that representatives of Sound Equity presented the terms of the loan to her on a take-it-or-leave-it-basis. She was told "there would be no loan unless she removed her mother and daughter from title," she "would need to get them to sign quit claim deeds immediately," and she had to represent that her mother would be moving out of the Temecula property and living in her San Diego apartment. She was told: "`You know, you just need to do what you have to do if you want this loan to go through.'" These facts demonstrate that Parker has pled procedural unconscionability. **"The relevant factors in assessing the level of procedural unconscionability are oppression and surprise**. [Citation.] **`"The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party."**' [Citation.]" (*Orcilla v. Big Sur, Inc., supra*, 244 Cal.App.4th at pp. 997-998.) The oppression component is present because Parker alleges she had no role in negotiating the terms of the loan. (*Ibid.*)

The surprise component, however, is not present. "THE COMPONENT OF SURPRISE ARISES WHEN THE CHALLENGED TERMS ARE `HIDDEN IN A PROLIX PRINTED FORM DRAFTED BY THE PARTY SEEKING TO ENFORCE THEM.'" (*Abramson v. Juniper Networks, Inc., supra*, 115 Cal.App.4th at p. 656.) The terms of the note were not hidden in fine print. The note is less than four pages long, and its key terms, including its default terms, are plainly set forth in the first and second pages. Parker cannot allege she was surprised by the terms of the note. Thus, Parker has alleged a low level of procedural unconscionability. (*Orcilla v. Big Sur, Inc., supra*, 244 Cal.App.4th at pp. 997-998.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms. . . ." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246.) In sum, **substantive unconscionability exists where a contract is "`"`so one-sided as to "shock the conscience"'"'" and "there is no justification for its one-sidedness."** (*Orcilla v. Big Sur, Inc., supra*, 244 Cal.App.4th at pp. 997-

998.) Parker claims her $170,000 loan is substantively unconscionable because its terms were "one-sided," "extreme," and "unreasonable." We disagree. To be sure, the loan was a short term, nine-month loan, had an interest rate of 1 percent per month, a default interest rate of 2 percent per month, and would be in default if the lender did not receive a single interest-only monthly payment when due on the first day of the month. But Parker admits she sought out the loan in order to invest in a business opportunity in Minnesota and that her income was "difficult to document." A 1 percent monthly interest rate (a 12 percent annualized rate) on a $170,000, nine-month business-purpose loan, secured by a nonowner occupied residential property (as Parker admits the Temecula residence was supposed to be) to a borrower with "difficult to document" income, is not substantively unconscionable. (Cf. *id.* at pp. 990-991, 998-999 [**HOME LOAN AND HOME LOAN MODIFICATION WERE UNCONSCIONABLE AND UNENFORCEABLE, AND TRUSTEE'S SALE OF PROPERTY SECURING THE LOANS WAS ACCORDINGLY "ILLEGAL," WHERE THE MONTHLY LOAN PAYMENTS EXCEEDED THE BORROWERS' INCOME BY MORE THAN $1,000**].)

Furthermore, Parker clearly alleges that she sought out the $170,000 loan. Despite Parker's complaints of being rudely treated by Sound Equity representatives in the processing of the loan, and by FCI representatives in the servicing of the loan, it is clear from the extensive allegations of the SAC that no one solicited or pressured Parker to enter into the loan transaction or sign the note and deed of trust. Though Parker also complains she had to remove her mother and daughter from the title to the Temecula property to obtain the loan, she admits she willingly did so and that she willingly gave Sound Equity all of "the documents they needed" to process the loan and obtain the lender's approval for the loan.

Parker also does not explain why she did not seek a reverse mortgage on the Temecula residence, if the ultimate purpose in obtaining the "hard money" loan was to pay her ailing mother's in-home health care expenses. Nor does Parker explain why she could not set aside $15,300 of the $170,000 loan proceeds (less the $7,000 origination fee and other charges) to pay the 1 percent monthly interest payments on the loan through February 1, 2014. Parker admits her bank account was "frozen" on August 8, 2013, despite her having received the loan proceeds on May 1, 2013.

C. *Parker's Fifth Cause of Action for Breach of Contract Is Factually Insufficient*

In her fifth cause of action for breach of contract, Parker essentially seeks to rescind the note on the ground defendants wrongfully increased the interest rate on the note, thereby wrongfully increasing the amounts due on the note. In sustaining defendant's demurrer to this cause of action, the court indicated that the allegations of the SAC showed Parker defaulted on the note and, having failed to perform her obligations under the note, could not establish any cause of action against defendants for breach of contract based on the terms of the note. For the reasons explained, the court was correct: The allegations of the SAC show Parker defaulted on the note by not paying the August 21, 2013, $1,700 interest payment when due. Pursuant to the terms of the note, the monthly interest rate increased from 1 to 2 percent per month. The increased interest rate was not wrongful; it was allowed by the terms of the note.

D. *Parker's Sixth, Seventh, and Eighth Causes of Action Are Factually Insufficient*

Parker's fourth cause of action for fraud, deceit, and either negligent or fraudulent misrepresentations, her seventh cause of action for slander of title, and her eighth cause of action for unfair competition, are also factually insufficient. These claims are based on the same allegations underlying Parker's second cause of action for wrongful foreclosure, namely, that the trustee's deed is void because (1) she was not in default on the note, (2) only Pacific Enterprise Bank had authority to initiate the foreclosure proceedings and sale, and (3) the loan transaction was unconscionable. For the same reasons the SAC does not state a cause of action for wrongful foreclosure, the SAC does not state facts sufficient to constitute these additional causes of action.

E. *There Is No Reasonable Possibility Parker Can Amend the SAC to State Any Cause of Action Against Defendants Based on the Loan Transaction or Foreclosure Sale*

As noted, when a demurrer is sustained without leave to amend, the plaintiff has the burden on appeal of showing there is a reasonable possibility that the defects in the complaint can be cured by amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Leave to amend should be denied "only `where

the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. . . .' [Citation.]" (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992.)

Parker argues she can amend the SAC to state a cause of action against defendants for engaging in a civil conspiracy with the other defendants to deprive her of her Temecula property. She alleges Norris offered her $225,00 for the property in January 2014, nearly $100,000 less than the $305,500 Norris paid for the property at the January 6, 2015, foreclosure sale. Norris then "flipped" the property, selling it for $393,000 in September 2015. Parker claims Norris and the other defendants "colluded" with each other to offer her less than the appraised or fair market value of her Temecula property, and this constituted a civil conspiracy. We disagree. **A cause of action for civil conspiracy requires "(1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design."** (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062.) Offering Parker less than the appraised or fair market value of her property was not wrongful, and did not result in any damages to Parker.

Lastly, nothing alleged in the SAC, or that reasonably could be alleged in a further amended complaint, shows or could show that the foreclosure proceedings and sale were "fraudulent or oppressive" or otherwise wrongful. As discussed, the allegations of the SAC demonstrate in great detail that Parker willingly sought the $170,000 "hard money" loan in order to invest in a business opportunity, and that Parker willingly produced all of the documentation necessary to obtain the loan, including the quitclaim deeds to the Temecula property from her mother and daughter. Based on Parker's extensive allegations, and for the reasons discussed, there is no reasonable possibility Parker can amend the SAC to state any cause of action against defendants.

IV. DISPOSITION

The judgment dismissing Parker's SAC against defendants is affirmed. Defendants' request for judicial notice, filed on January 23, 2017, is denied. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278.)

McKINSTER, Acting P. J. and CODRINGTON, J., concurs.

[1] Defendants claim Parker is judicially estopped from challenging the judgment based on representations she made to the superior court during a February 22, 2016, hearing in a proceeding concerning the distribution of the proceeds of the foreclosure sale pursuant to Civil Code section 2924j. (*In re 45921 Via La Colorada, Temecula, California 92592*, Riverside County Superior Court case No. RIC1514579.) Defendants claim Parker represented to the court that she was no longer seeking to void the foreclosure sale *and* that she was no longer pursuing *any* claims against defendants. Parker disputes defendants' interpretation of her statements. She claims she only represented she was no longer seeking to void the foreclosure sale and denies saying she was no longer seeking damages from defendants for her wrongful foreclosure and related claims in this case. Because it is unnecessary to address defendants' judicial estoppel claim, we deny as moot defendants' request to take judicial notice of the records in case No. RIC15145709, namely, the petition filed by California TD Specialists, Parker's written claim, the reporter's transcript of the February 22, 2016, hearing, and the February 23, 2016, minute order distributing $21,231.93 of the foreclosure sale proceeds to Parker.

[2] The existence and facial contents of these recorded instruments were properly noticed in the superior court pursuant to Evidence Code sections 452, subdivisions (c) and (h) and 453. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.) Accordingly, this court is required to take judicial notice of these same instruments pursuant to Evidence Code section 459, subdivision (a). (*Yvanova v. New Century Mortgage Corp., supra,* at p. 924, fn. 1.)