

**JOSE R. CARNERO et al., Plaintiffs and Appellants,  
v.  
NATIONAL DEFAULT SERVICING CORP., Defendant and  
Respondent.**

[No. H039922.](#)

**Court of Appeals of California, Sixth District.**

Filed September 19, 2018.

Appeal from the Santa Clara County, Superior Court No. 112CV225835.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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PREMO, Acting P.J.

Plaintiffs Jose R. Carnero and Marta C. Carnero (the Carneros) appeal from a judgment entered in favor of defendant National Default Servicing Corporation (NDSC) after the trial court sustained NDSC's demurrer to their second amended complaint without leave to amend. The Carneros' action arose out of a mortgage they obtained in June 2007 in the amount of \$650,000 secured by residential property located at 1558 Minnesota Avenue in San Jose, California. The second amended complaint listed seven causes of action: (1) request for declaratory judgment; (2) wrongful foreclosure; (3) quiet title; (4) fraud; (5) unfair business practices; (6) equitable estoppel; and (7) accounting.

On appeal, the Carneros raise the following claims of error: (1) the trial court overlooked NDSC's references in its demurrer to "the first amended complaint," rather than "the second amended complaint"; (2) the demurrer should have been overruled because NDSC presented "undeclared, untimely, backdating forged documents, Robo-signing, and unproven beneficiary [*sic*]" and the Carneros had previously rescinded the contract; (3) NDSC purported to act as an agent for a "defunct company," namely Bear Stearns Residential Mortgage Corporation (Bear Stearns) and thus its actions were

of no effect; (4) NDSC failed to establish who the beneficiary is of the mortgage and thus the notice of default, notice of trustee's sale and other relevant documents could have no legal effect; and (5) the trial court erred in sustaining NDSC's demurrers to each of the causes of action in the second amended complaint.

For the reasons stated below, we find no error and shall affirm the judgment.

## **I. Factual and Procedural Background**

On June 22, 2007, the Carneros obtained a \$650,000 mortgage loan from Bear Stearns. The loan was secured by a deed of trust, which named Bear Stearns as the lender, Chicago Title as the trustee, and Mortgage Electronic Registration Systems, Inc., (MERS) as the beneficiary and the nominee for the lender and its successors and assigns. In December 2008, the Carneros became delinquent on the loan. On June 18, 2009, the Carneros wrote to NDSC and other entities<sup>[1]</sup> demanding that they cease efforts to foreclose on the subject property because the Carneros rescinded the loan agreement due to "deceptive lending practices" by letter dated April 21, 2009.

On July 8, 2009, NDSC recorded a notice of default and election to sell under deed of trust, acting in its capacity as agent for the beneficiary, identified as "MERS-NOMINEE FOR BEAR STEARNS." The notice of default indicated the amount owed on the loan at that time was \$17,352.54.

On August 7, 2009, MERS executed an assignment of deed of trust (assignment) that was subsequently recorded in Santa Clara County on October 9, 2009. In this document, MERS assigned its interest as the beneficiary under the deed of trust to Wells Fargo Bank, NA (Wells Fargo) as Trustee for the Certificateholders of Structured Asset Mortgage Investments II, Inc. Trust 2007-AR4. The assignment was signed by Greg Allen, acting as vice president of MERS.

Also on October 9, 2009, MERS recorded a substitution of trustee (substitution), executed on August 5, 2009, substituting NDSC as trustee in place of Chicago Title. This substitution was also signed by Greg Allen, acting as vice president of MERS.

On May 14, 2012, NDSC recorded a notice of trustee's sale. The trustee's sale was originally scheduled to take place on June 5, 2012, but was postponed several times, eventually to April 11, 2013.<sup>[2]</sup>

The Carneros filed their initial complaint against NDSC on June 4, 2012. After NDSC successfully demurred to the original complaint, the Carneros filed a first amended complaint on August 31, 2012. NDSC again successfully demurred to the first amended complaint, and the Carneros' filed the operative second amended complaint on March 19, 2013.

In an order filed May 21, 2013, the trial court sustained NDSC's demurrer to the second amended complaint, in its entirety, without leave to amend. The trial court entered judgment in favor of NDSC on June 21, 2013.

The Carneros timely appealed. On July 15, 2016, after the record was prepared but before briefing was completed, the Carneros obtained a stay of proceedings in this court because they had filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. That stay was lifted by order of this court on March 17, 2017.

## II. Discussion

### A. *Standard of review*

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, our review is de novo. ([\*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors\* \(2010\) 48 Cal.4th 32, 42.](#)) In performing our independent review of the complaint, we assume the truth of all facts properly pleaded by the plaintiff. ([\*Evans v. City of Berkeley\* \(2006\) 38 Cal.4th 1, 6 \(\*Evans\*\).](#)) "We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged." ([\*Rotolo v. San Jose Sports & Entertainment, LLC\* \(2007\) 151 Cal.App.4th 307, 320-321,](#) disapproved on another ground in [\*Verdugo v. Target Corp.\* \(2014\) 59 Cal.4th 312, 334.](#)) Further, "we give the complaint a reasonable interpretation, and read it in context." ([\*Schifando v. City of Los Angeles\* \(2003\) 31 Cal.4th 1074, 1081 \(\*Schifando\*\).](#)) We do not, however, assume the truth of ""contentions, deductions or conclusions of fact or law."" ([\*Evans, supra\*, at p. 6.](#))

Again, we also consider matters that may be judicially noticed and facts appearing in any exhibits attached to the complaint. (Code Civ. Proc., § 430.30, subd. (a); [\*Schifando, supra\*, 31 Cal.4th at p. 1081](#); [\*Blank v. Kirwan\* \(1985\) 39 Cal.3d 311, 318](#); [\*Rutherford Holdings, LLC v. Plaza Del Rey\* \(2014\) 223 Cal.App.4th 221, 225, fn. 1.](#)) After reviewing the allegations of the complaint, the complaint's exhibits, and the matters properly subject to

judicial notice, we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (See [Moore v. Regents of University of California](#) (1990) 51 Cal.3d 120, 125.)

### ***B. Overview of deeds of trust and nonjudicial foreclosure process***

Our Supreme Court has described the nature of deeds of trust and the nonjudicial foreclosure process as follows: **"There are three parties in the typical deed of trust: the trustor (debtor), the beneficiary (lender), and the trustee. [Citation.] The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale. [Citation.] . . . [¶] Civil Code sections 2924 through 2924k . . . govern nonjudicial foreclosure sales pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser."** ([Biancalana v. T. D. Service Co.](#) (2013) 56 Cal.4th 807, 813-814; see also [Moeller v. Lien](#) (1994) 25 Cal.App.4th 822, 830.)

**"The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. [Citation.] After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. [Citations.] If the sale is not postponed and the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to the highest bidder. [Citations.] Generally speaking, the foreclosure sale extinguishes the borrower's debt; the lender may recover no deficiency. [Citations.] [¶] The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary. [Citations.] While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent."** ([Yvanova v. New Century Mortgage Corp.](#) (2016) 62 Cal.4th 919, 927, fn. omitted (*Yvanova*)).

**Generally, a borrower cannot raise objections to an assignment of a note or a deed of trust, because it is a negotiable instrument that the lender may sell without notice to the borrower. (*Yvanova, supra*, 62 Cal.4th at p. 927.) "The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment." (*Ibid.*) "A deed of trust may thus be assigned one or multiple times over the life of the loan it secures. **But if the borrower defaults on the loan, only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process.**" (*Id.* at pp. 927-928.)**

***C. The Carneros' first four arguments are not relevant to review of an order sustaining a demurrer***

We quickly dispose of the Carneros' first four arguments, as they either elevate form over substance or because they go beyond the question of the adequacy of the pleadings. Those arguments are, again: (1) NDSC referred to the "first amended complaint," rather than "second amended complaint," in the papers supporting its demurrer; (2) NDSC's demurrer should have been overruled because it presented "undeclared, untimely, backdating forged documents, Robo-signing, and unproven beneficiary [*sic*]" and the Carneros had rescinded the original loan agreement; (3) NDSC purported to act as an agent for a "defunct company," and thus its actions were of no effect; and (4) NDSC failed to establish the beneficiary of the mortgage and thus the notice of default, notice of trustee's sale and other relevant documents have no legal effect.

The first argument, that NDSC sometimes referenced the first amended complaint rather than the second amended complaint in its demurrer to the second amended complaint, is without merit. There is no suggestion the trial court was misled by these occasional misstatements or, more importantly, that it failed in its duty to review the allegations of the operative pleading. Where there is no "indication to the contrary, we are required to presume [the trial] court was aware of, and followed, the applicable law and considered all the relevant facts and arguments." (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 447.) We are mindful that attorneys, in proofreading documents, sometimes miss what may be, to other readers, obvious errors. **To reflexively rule against a party based solely on inconsequential mistakes would elevate form over substance, a result we strive to avoid.** (Civ. Code, § 3528.)

The Carneros' next three arguments, based on their claims that NDSC presented "forged" documents, acted as an agent for a "defunct company" and failed to establish the beneficiary of the mortgage, raise evidentiary matters. **In reviewing an order sustaining a demurrer without leave to amend, we are concerned only with whether the allegations of the operative pleading state one or more causes of action as a matter of law, not what the parties might eventually be able to prove to a trier of fact should the matter survive the pleading stage.**

*D. NDSC's arguments regarding res judicata and collateral estoppel*

We next examine NDSC's claims that the second amended complaint is barred by the doctrines of res judicata or collateral estoppel because two prior actions brought against it by the Carneros relating to this property were resolved in NDSC's favor.

The California Supreme Court explained in [DKN Holdings LLC v. Faerber \(2015\) 61 Cal.4th 813, 823-824 \(DKN Holdings\)](#), the term "res judicata" is imprecise, as it has been used "as an umbrella term encompassing both claim preclusion and issue preclusion" and as a synonym for claim preclusion. This inconsistency has "caused some confusion." (*Id.* at p. 823.) "To avoid future confusion" between the two types of preclusion, which "have different requirements," the court endorsed the use of the terms "claim preclusion" and "issue preclusion." (*Id.* at p. 824.) We shall use these terms here, and urge those practicing before this court to do the same.

**Claim preclusion "bar[s] relitigation of [a] claim altogether" where a second suit involves: "(1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit." ([DKN Holdings, supra, 61 Cal.4th at p. 824](#), italics added.) Issue preclusion bars "a party to the first lawsuit, or one in privity with a party" to the first lawsuit, from relitigating issues that were "actually litigated" and "conclusively resolve[d]" in the first lawsuit. (*Ibid.*) Unlike claim preclusion, issue preclusion (1) "does not bar entire causes of action," but "prevents relitigation of previously decided issues" and (2) "can be raised by one who was not a party or privy in the first suit." (*Ibid.*) "The party asserting [issue preclusion] bears the burden of establishing [its] requirements." ([Patel v. Crown Diamonds, Inc. \(2016\) 247 Cal.App.4th 29, 40.](#))**

As it did in the trial court, NDSC submitted records from two prior cases the Carneros filed against it, one in federal court and one in state court. The federal action was filed by the Carneros in 2009 against NDSC and several other entities, including EMC Mortgage Corporation, Chase Bank, Wells Fargo Bank, Bear Stearns and others. (*Jose Carnero et al. v. EMC Mortgage Corporation et al.* (U.S. District Court for the Northern District of California, No. C 09-4696 JF (HRL)).) That action was dismissed in its entirety by order dated November 22, 2010.

Although NDSC indicates in its brief that the claims against it were dismissed with prejudice, the order provides only that "all claims against the *moving defendants*" were dismissed with prejudice by the federal court. (Italics added.) The order identifies the moving parties as "Real Time Resolutions, Inc. . . . EMC Mortgage Corporation, JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Wells Fargo Bank. . . ." NDSC (along with one Randy Miguel, Chicago Title Company, and Bear Stearns Residential Mortgage Corporation) are identified in the order as named, but unserved, defendants. As to those "remaining defendants" (including NDSC), the Carneros' claims were dismissed "*without prejudice* for failure to prosecute." (Italics added.) NDSC provided no records to support its assertion that the claims against it were dismissed with prejudice.

The state case cited by NDSC was filed by the Carneros in Santa Clara County Superior Court sometime before September 7, 2010.<sup>131</sup> (*Jose R. Carnero et al. v. EMC Mortgage Corporation et al.*, Santa Clara County Superior Court No. 109CV154682.) NDSC submits a copy of a judgment entered in that action on October 12, 2011, which states, as follows: "The Demurrer of Defendants EMC Mortgage Corporation . . . JPMorgan Chase Bank, N.A., . . . and Wells Fargo Bank, National Association as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc. Trust 2007-AR4, Mortgage Pass-Through Certificates, Series 2007-AR-4, . . . to the Third Amended Complaint ('TAC') . . . came on regularly for hearing on June 8, 2011. . . . [¶] After consideration of the pleadings, IT IS ORDERED, ADJUDGED, AND DECREED: [¶] 1. The TAC of Plaintiffs is dismissed with prejudice. [¶] Plaintiffs shall take nothing against Defendants in this action." Again, NDSC is not identified as one of the defendants which demurred to the third amended complaint, so there is no basis for NDSC's claim that judgment was entered in its favor in this action.

Like the trial court, we find that the NDSC "fails to demonstrate that identical causes of action against it resulting in a *final judgment* were asserted" in the two prior cases it cites. (Italics added.) NDSC provided no records which establish that judgment was entered in its favor in either the federal or the state action.

#### ***D. Analysis of the second amended complaint***

We now turn to an analysis of the allegations set forth in the second amended complaint.

##### ***1. Wrongful foreclosure***

In support of this cause of action, the Carneros allege that there is insufficient proof of ownership of the debt and that the promissory note and deed have been "[b]ifurcated invalidating the [s]ecurity instrument." They further allege that the notice of default is invalid because: (1) the substitution of trustee was "untimely"; and (2) Greg Allen did not have authority to sign for MERS. The Carneros allege that the "real beneficiary . . . must show the note to make sure that the assignment of the new deed of trust is indeed legal."

**Wrongful foreclosure is a common law tort claim taking the form of either "an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper." (*Sciarratta v. U. S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561.) A cause of action for wrongful foreclosure has three elements: "To obtain the equitable set-aside of a trustee's sale or maintain a wrongful foreclosure claim, a plaintiff must allege that (1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.)**

The Carneros' cause of action for wrongful foreclosure is premised on their allegations that NDSC is not the true beneficiary of the note and the true beneficiary, i.e., the only party that could lawfully initiate the foreclosure process, has not been properly identified. "A foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action."



(*Yvanova, supra*, 62 Cal.4th at p. 929.) Only the original beneficiary, or an assignee or agent of an assignee, is authorized to initiate the foreclosure process by instructing the trustee to take steps toward completing a nonjudicial foreclosure sale.

However, ***Yvanova is a post-foreclosure case and the Supreme Court expressly limited its holding to that context, as follows: "Our ruling in this case is a 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."*** (*Yvanova, supra*, 62 Cal.4th at p. 924, italics added.)

Here, the Carneros have not alleged that NDSC *caused* a foreclosure sale of their property to take place. Absent this element, the allegations are insufficient to state a cause of action for wrongful foreclosure, and the trial court did not err in sustaining NDSC's demurrer to this cause of action.

## ***2. Quiet title***

The Carneros' cause of action for quiet title relies on their allegations that NDSC had no authority to record a notice of default or notice of trustee sale on the property and that, due to the alleged defects in the purported assignments of the deed of trust and promissory note, title rests with them. We disagree.

Generally, **a borrower may not quiet title against a secured lender without first paying the outstanding debt on which the mortgage or deed of trust is based.** (*Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707.) **The cloud on the title remains until the debt is paid.** (*Burns v. Hiatt* (1906) 149 Cal. 617, 620-622.) **Therefore, to quiet title, the defaulted borrower must tender the full amount of the debt for which the property was secure.** (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877-878.)

The Carneros argue that they need not allege tender for two reasons: (1) they have alleged that the "foreclosure sale is VOID [*sic*]"; and (2) it would be unfair to require the Carneros to tender the outstanding debt because Wells

Fargo, the "illegal holder of the new deed of trust," would be "unjustly enriched" if it were repaid in full immediately rather than over the time remaining on the mortgage loan.

The Carneros' allegations regarding the "defects" in the various assignments and notices leading up to the notice of trustee sale are directed at certain aspects of the MERS system. "As described in [\*Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance\* \(2005\) 270 Neb. 529](#), MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender. This aspect of the system has come under attack in a number of state and federal decisions across the country, under a variety of legal theories. The decisions have generally, although by no means universally, found that **THE USE OF MERS DOES NOT INVALIDATE A FORECLOSURE SALE THAT IS OTHERWISE SUBSTANTIVELY AND PROCEDURALLY PROPER.**" ([\*Fontenot v. Wells Fargo Bank N. A.\* \(2011\) 198 Cal.App.4th 256, 267 \(Fontenot\).](#))

Here, **the deed of trust, executed by the Carneros and attached as an exhibit to the second amended complaint, expressly provides that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." (Italics added.) The deed of trust also provides: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."** (Italics added.)

The Carneros agreed that MERS had the right to exercise all interests and rights held by Bear Stearns and its successors and assigns. **UNDER THE DEED OF TRUST, MERS, AS NOMINEE FOR BEAR STEARNS' SUCCESSORS, WAS EXPRESSLY AUTHORIZED TO ASSIGN THE DEED OF TRUST.** (See [Herrera v. Federal National Mortgage Assn.](#) (2012) 205 Cal.App.4th 1495, 1505, disapproved of on another point in [Yvanova, supra](#), 62 Cal.4th 919.) Therefore, the Carneros' allegations that the assignments were void are expressly contradicted by the deed of trust itself.

The Carneros' attempt to avoid the tender rule by invoking "unjust enrichment" is also without merit. They argue it is "unfair" for Wells Fargo to be repaid in one lump sum rather than receive periodic payments over the remaining period of the loan. The Carneros entered into a loan agreement in which they borrowed a certain sum of money to finance their purchase of a residence. **We see nothing "unfair" about requiring a borrower to repay a loan in full, regardless of whether that repayment is made in installments or all at once, especially when accepting that argument would result in a windfall to the borrower.**

Consequently, the Carneros were required to allege tender to maintain a quiet title cause of action and their failure to do so is fatal to that claim.

### ***3. Fraud***

**There are five elements necessary for pleading and proof of fraud: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."** ([Lazar v. Superior Court](#) (1996) 12 Cal.4th 631, 638 (*Lazar*).) **Fraud must be pleaded with specificity; "general and conclusory allegations do not suffice."** (*Id.* at p. 645; see also [Small v. Fritz Companies, Inc.](#) (2003) 30 Cal.4th 167, 184.) **The particularity requirement compels a plaintiff to plead facts which "show how, when, where, to whom, and by what means the representations were tendered."** ([Lazar, supra](#), at p. 645.) **And where the defendant is a corporation, the plaintiff must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."** ([Scott v. JPMorgan Chase Bank, N. A.](#) (2013) 214 Cal.App.4th 743, 764, quoting [Tarmann v.](#)

[State Farm Mut. Auto. Ins. Co. \(1991\) 2 Cal.App.4th 153, 157.](#)) **The reliance element of fraud is satisfied "when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction."** ([Alliance Mortgage Co. v. Rothwell \(1995\) 10 Cal.4th 1226, 1239.](#))

The Carneros assert that the misrepresentation that forms the basis of their fraud claim is that the "[notice of default] is false." Assuming this allegation is true, however, the Carneros must still allege that they *relied* on the "false" notice of default to their detriment. They do not do so. For example, **they do not allege that the notice of default prompted them to make payments to anyone not legally entitled to receive them or that they otherwise acted (or refrained from acting) in reliance on the notice.**<sup>[4]</sup> (See [Glaski v. Bank of America \(2013\) 218 Cal.App.4th 1079, 1091-1092](#) [demurrer sustained without leave to amend due to plaintiff's failure to allege specific actions taken in reliance upon fraudulent representations].)

**Attempted fraud is not a cognizable tort**, however, and the trial court did not err in sustaining NDSC's demurrer to the Carneros' fraud cause of action.

#### ***4. Unfair business practices***

Business and Professions Code section 17200 "prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL [unfair competition law] covers a wide range of conduct. It embraces "anything that can properly be called a business practice and that at the same time is forbidden by law." [Citations.] [Citation.] . . . [¶] [Business and Professions Code] [s]ection 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." ([Korea Supply Co. v. Lockheed Martin Corp. \(2003\) 29 Cal.4th 1134, 1143.](#))

**To bring a private action under Business and Professions Code section 17200 et seq. a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of**

**the claim."** ([Kwikset Corp. v. Superior Court \(2011\) 51 Cal.4th 310, 322](#); Bus. & Prof. Code, § 17204.)

The Carneros allege that NDSC engaged in deceptive business practices by: "(a) Instituting improper or premature foreclosure proceedings to generate unwarranted fees; [¶] (b) Executing and recording false and misleading documents; [¶] (c) Executing recording documents without the legal authority to do so; [¶] (d) Failing to disclose the principal for which documents were being executed and record [*sic*] in violation of [Civil Code] § 1095; [¶] (e) Failing to record Powers of Attorney in connection with other recorded documents in violation of [Civil Code] § 2933; [¶] (f) Violating the Security First rule; [¶] (g) Demanding and accepting payments for debts that were non-existent; [¶] (h) Acting as beneficiaries and trustee's sale and postponement of the sale pursuant to [Civil Code] § 2924g and [Civil Code] § 2924h; [¶] (j) [*sic*] Failing to comply with [Civil Code] § 2923.5; [¶] (k) Failing to comply with the HAMP guidelines; [¶] (l) Misrepresenting the foreclosure status of properties to borrowers; and [¶] (m) Other deceptive business practices."

Here, the Carneros sufficiently allege economic injury in the form of the impending foreclosure on their residence, but fail to sufficiently allege a causal link between this injury and NDSC's allegedly unfair or unlawful acts. The Carneros allege that they "made their mortgage payments until December 2008 when they became delinquent." There are no allegations that NDSC undertook any actions with respect to the Carneros' property until October 2009 at the earliest. **It was the Carneros' failure to make the required payments on their mortgage that caused the nonjudicial foreclosure proceedings, not any act or omission by NDSC. "A plaintiff fails to satisfy the causation prong of the [Unfair Competition] statute if he or she would have suffered the same harm whether or not a defendant complied with the law."** ([Jenkins v. JPMorgan Chase Bank, N. A. \(2013\) 216 Cal.App.4th 497, 522](#), disapproved of on another point in [Yvanova, supra, 62 Cal.4th 919](#).) The Carneros have not alleged that they defaulted on their mortgage due to any unfair or unlawful activity conducted by NDSC and thus the trial court did not err in sustaining NDSC's demurrer to this cause of action.

## ***5. Declaratory judgment***

Code of Civil Procedure section 1060 authorizes "[a]ny person . . . who desires a declaration of his or her rights or duties with respect to another . . . in cases of actual controversy relating to the legal rights and duties of the respective parties [to] bring an original action . . . for a declaration of his or her rights and duties. . . ." **"To qualify for declaratory relief, [a party] would have to demonstrate its action presented two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations."** ([Jolley v. Chase Home Finance, LLC \(2013\) 213 Cal.App.4th 872, 909.](#))

In their declaratory judgment cause of action, the Carneros allege that NDSC "intends to proceed . . . with an unlawful and invalid trustee sale based on the non-existent [*sic*] security and the invalid notices based on this security." The Carneros further allege that NDSC has violated California's nonjudicial foreclosure law, as set forth in Civil Code section 2924 et seq.

This claim is duplicative of the Carneros' wrongful foreclosure cause of action, which as discussed above, cannot be stated as there has been no trustee sale. Where an "action for declaratory relief depends upon the other causes of action," and the plaintiff "failed to state a claim sufficient to recover on any of [those other] causes of action," the "claim for declaratory relief action must also fail as a matter of law." ([Ratcliff Architects v. Vanir Construction Management, Inc. \(2001\) 88 Cal.App.4th 595, 607.](#))

## ***6. Equitable estoppel***

**"Equitable estoppel, originally known as estoppel in pais, and also called estoppel by conduct, is simply stated. `Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.' [Citations.] The doctrine is defensive in nature only, and `operates to prevent one [party] from taking an unfair advantage of another.'"** ([San Diego Mun. Credit Union v. Smith \(1986\) 176 Cal.App.3d 919, 922-923.](#))

**California does not recognize an independent cause of action for equitable estoppel: "[A]s Witkin . . . explains, `[t]he [equitable estoppel] doctrine acts defensively only."** (13 Witkin, Summary of Cal.

Law [(10th ed. 2005)] Equity, § 190, p. 527; see also [Central National Ins. Co. v. California Ins. Guarantee Assn. \(1985\) 165 Cal.App.3d 453, 460](#) [equitable estoppel `must be pleaded . . . either as a part of the cause of action or as a defense'.) As a stand-alone cause of action for equitable estoppel will not lie as a matter of law. . . ." ([Behnke v. State Farm General Ins. Co. \(2011\) 196 Cal.App.4th 1443, 1463.](#))

As estoppel in pais cannot be stated as an independent cause of action in California, the trial court was correct in sustaining NDSC's demurrer to these allegations in the second amended complaint.

## 7. Accounting

"A cause of action for accounting requires a showing of a relationship between the plaintiff and the defendant, such a [*sic*] 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 their second amended complaint, the Carneros alleged that NDSC "received mortgage payments . . . [and] had a legal duty to accurately and timely account for these payments and apply [them] to the trust deed mortgage." The Carneros "dispute the accuracy of" the amount due set forth in the "notice of trustee sale . . . [and on information and belief allege] that [NDSC] has imposed unlawful and unsubstantiated charges and fees to this notice of trustee sale amount."

These allegations are insufficient to support an accounting cause of action. First, the Carneros are not alleging, in this cause of action, the right to recover any particular amount *from* NDSC; rather, they are alleging that they do not believe the amount they supposedly *owe* is accurately reflected on the notice of trustee sale. Second, whereas determining the amount owed on the Carneros' mortgage may not be a simple calculation, the Carneros allege no facts to establish that it would be an exceedingly difficult one. The amount owed, offset by the Carneros' payments, plus late payment penalties, accrued interest, etc., can all be readily determined by reference to the documents

and records held by the parties. Accordingly, the trial court properly sustained NDSC's demurrer to the accounting cause of action.

### ***E. Leave to amend***

"In deciding whether the trial court abused its discretion in denying leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." ([Fontenot, supra, 198 Cal.App.4th at p. 274.](#))

The Carneros argue that leave to amend should be granted, but do not explain what allegations they would add to any of their causes of action to make them sufficient. Accordingly, the Carneros have failed to meet their burden to prove that an amendment could cure the defects with their complaint.

### **III. Disposition**

The judgment is affirmed. National Default Servicing Corporation shall recover its costs on appeal.

Bamattre-Manoukian, J. and Grover, J., concurs.

[1] None of these other entities are parties to the instant appeal.

[2] There is nothing in the record to show that the trustee's sale took place in April 2013 or at any other date.

[3] NDSC provided a copy of the third amended complaint in that action, which was filed on September 7, 2010. There are no other documents in the record which establish the filing date of the original complaint.

[4] In fact, rather than being misled in any way by the notice of default, it seems clear the Carneros have *always* believed that it is defective and acted accordingly.