**ANDREW D. MacRITCHIE et al., Plaintiffs and Appellants,**
**v.**
**WELLS FARGO BANK, N.A., et al., Defendants and Respondents.**

No. C071645.

**Court of Appeals of California, Third District, Placer.**

Filed January 31, 2018.

Appeal from the Superior Court No. SCV0028732.

**NOT TO BE PUBLISHED**

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BLEASE, Acting P.J.

Plaintiffs Andrew D. and Cynthia L. MacRitchie appeal from a judgment dismissing their first amended complaint after the trial court sustained a demurrer by defendants Wells Fargo Bank, N.A., (Wells Fargo), and Federal Home Loan Mortgage Corporation (FHLMC), joined by Cal-Western Reconveyance Corporation (Cal-Western). Plaintiffs brought suit after the foreclosure sale of their home, alleging causes of action for breach of contract, breach of security instrument, declaratory relief, negligent misrepresentation, and quiet title. Wells Fargo was the loan servicer, and FHLMC was the purchaser at the foreclosure sale. Cal-Western was the trustee under the deed of trust. Cal-Western filed a petition in bankruptcy, and the appeal was stayed as to it when this court issued its earlier opinion affirming the judgment in favor of Wells Fargo and FHLMC. The court has since been advised that Cal-Western's bankruptcy stay is no longer in effect. Cal-Western has been given an opportunity to file a respondent's brief, but has not done so.

We shall affirm the judgment in Cal-Western's favor for the same reasons we affirmed it in favor of the other defendants.

**FACTUAL AND PROCEDURAL BACKGROUND**

In 2003 plaintiff Cynthia MacRitchie purchased a home in Auburn, California. In 2006, after she and Andrew MacRitchie married, the couple obtained a $308,250 adjustable rate loan from MortgageIT, Inc. (MortgageIT), secured by a deed of trust recorded against the Auburn property. Pursuant to the deed of trust, Mortgage Electronic Registration Systems, Inc. (MERS) acted as the nominee for the lender, MortgageIT, and was the beneficiary of the deed of trust. First American Title was the trustee of the deed of trust. At some point, Wells Fargo became the beneficiary of the trust deed.[1]

The first amended complaint alleged that plaintiffs contacted defendant Wells Fargo Bank, their loan servicer, in October 2008 about refinancing their mortgage. They were current on their mortgage payments at that time. Wells Fargo informed them that because of the decrease in their home's value, refinancing was impossible. Wells Fargo informed plaintiffs that it would consider them for a loan modification only if their mortgage payments were at least three months late, at which time it would send them a modification application. In November 2008, plaintiffs stopped making payments.

By January 12, 2009, Cal-Western, the substitute trustee, recorded a notice of default indicating the arrearage was $11,432.57.[2] On March 2, 2009, Wells Fargo sent plaintiffs a letter stating that they were being considered for a loan modification, and that if they qualified, Wells Fargo would suspend the foreclosure activity for 30 days.[3] Also if they qualified, Wells Fargo would create a new payment plan, and after plaintiffs made three payments in the new amount, Wells Fargo would finalize the loan modification.

On April 14, 2009, plaintiffs received a notice of trustee's sale. The notice indicated the sale would take place on May 4, 2009. Upon receipt of the notice, plaintiffs called Wells Fargo, whose agent stated the sale would be "pushed back" until Wells Fargo had time to review plaintiffs' case and make a determination regarding modification. Plaintiffs repeatedly submitted documents requested by Wells Fargo.

Finally, in September 2009, Wells Fargo sent plaintiffs a letter enclosing a "Trial Period Plan" (TPP). It stated: "If you qualify under the program requirements and comply with the terms of the Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure." The letter went

on to explain that plaintiffs would be required to explain their financial hardship, submit income documentation, and make timely monthly payments during the trial period. Three payments were required in the TPP, due October 1, 2009, November 1, 2009, and December 1, 2009. The TPP provided that there was "no `grace period' allowance in [the] Agreement." All installments were required to be "received on or before the due date and made strictly in accordance with" the terms of the agreement.

Plaintiffs alleged they immediately sent the requested documentation, sent their first payment under the TPP on September 30, 2009, their second payment on November 4, 2009, and their third payment on December 2, 2009. When on January 11, 2010, plaintiffs had yet to receive a modification of their loan, they telephoned Wells Fargo to inquire about the modification. They were told Wells Fargo would send the documents for the modification around the middle of February 2010, and that they should continue to make payments until they received word the loan modification had been approved. Plaintiffs made a payment of $2,160.61 on January 11, 2010, and another payment of $2,160.61 on February 12, 2010.

On February 15, 2010, Wells Fargo assigned the note and deed of trust to FHLMC. The assignment was recorded on March 30, 2010.

On March 5, 2010, plaintiffs learned from a potential bidder that a trustee's sale would be taking place that morning. Plaintiffs were on the telephone with Wells Fargo from 9:30 to 10:15 a.m. that morning. The Wells Fargo representative told plaintiffs their house was not up for sale, then put plaintiffs on hold. When the representative came back on the line, he again told them no sale was taking place, and asked them to fax updated financial information. Plaintiffs then called the "Trustee Sales Line" and were informed the sale did not go through.

While plaintiffs were on the telephone with Wells Fargo, their home was sold to defendant FHLMC. FHLMC purchased the property for $155,323.80. Plaintiffs represent that FHLMC filed an unlawful detainer case against them, pursuant to which they lost possession of the property in April 2012.

Plaintiffs filed suit against Wells Fargo, FHLMC, and Cal-Western. The first amended complaint, the complaint at issue here, alleged causes of action for breach of contract and negligent misrepresentation against Wells Fargo, breach of security instrument (second cause of action), declaratory relief

(third cause of action), and quiet title (fifth cause of action). Cal-Western was named in the last three named causes of action, and this opinion deals only with those causes of action. Defendants demurred to the complaint, and the trial court sustained the demurrer without leave to amend.

Plaintiffs' second cause of action for breach of security instrument alleged that MortgageIT never recorded a substitution of trustee or assigned its interest in the note and deed of trust. Thus, when Cal-Western recorded the notice of default, when it recorded the notice of trustee's sale, and when it sold the property, it acted without authority because it was not the trustee of record. The trial court took judicial notice of an exhibit to plaintiffs' superseded complaint, which was a recorded substitution of trustee naming Cal-Western as the trustee. The exhibit had been omitted from the first amended complaint. The document had been recorded prior to the notice of trustee's sale. The trial court further found that plaintiffs could not assert a cause of action claiming irregularity in the foreclosure process without alleging tender, and plaintiffs had not alleged tender.

The trial court found that the third cause of action for declaratory relief was based on the other claims, and that it failed because they failed. The trial court found the fifth cause of action for quiet title failed because plaintiffs did not allege that they tendered full payment of their debt.

## DISCUSSION

### I

### Standard of Review

Our review is de novo, and we assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490.) We also consider matters shown in exhibits attached to the complaint and incorporated by reference, as well as matters that cannot reasonably be controverted and that were judicially noticed. (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919.) To the extent the factual allegations in the complaint conflict with the complaint's exhibits, we rely on the contents of the exhibits. (*Performance Plastering*, at p. 665.)

## II

## Damages

Although we discuss the causes of action separately, the overarching problem with plaintiffs' causes of action for breach of contract, breach of security instrument, and negligent misrepresentation is that plaintiffs cannot allege damages.

**A cause of action for breach of contract requires the plaintiff plead: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff.** (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388 (*Careau & Co.*).) **Plaintiffs' cause of action for breach of a security instrument is also a breach of contract action**. Plaintiffs' causes of action for breach of contract and breach of the security agreement allege merely that plaintiffs "have been damaged in an amount to be proven at time of trial." Plaintiffs also alleged they were entitled to punitive and exemplary damages.

Under the circumstances presented, **plaintiffs lost the property, but gained the extinguishment of a $308,250 debt.** Plaintiffs had no equity in the property. The property was not worth the amount of the debt, a fact we may infer from plaintiffs' allegation that they could not refinance the $308,250 loan due to the home's decrease in value and from the significantly lower sales price at the foreclosure sale.

**Nor did plaintiffs lose anything by making payments under the TPP.** Plaintiffs alleged they stopped making payments on their mortgage in November 2008. They began making payments under the TPP in October 2009. Thus, when they began making payments under the TPP, the mortgage was 11 months in arrears. Plaintiffs made only five payments under the TPP in the total amount of $10,803.05. The notice of default stated that as of January 7, 2009, some eight months *before* they began making payments under the TPP and less than three months into the 11-month period of nonpayment, they were in arrears on the loan in the amount of $11,432.57, an amount which consisted of past due payments, costs, and expenses.

**Plaintiffs have not alleged that defendants' actions prevented them from seeking other financing, or prevented them from purchasing another property.** (See *Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220

Cal.App.4th 915, 928.) Plaintiffs argue they have suffered injury because every parcel of real property is considered unique under California law. The long-established maxim that every real property is unique addresses the nature of the remedy where a plaintiff suffers damages because a contract for the sale of property has been breached. In such case, the plaintiff may seek specific performance because money damages are inadequate. (*Glynn v. Marquette* (1984) 152 Cal.App.3d 277, 280.) The rule is inapplicable here because we are not dealing with a contract for the sale of property, and plaintiffs have not suffered any damage, since the home was taken in satisfaction of their debt.

Plaintiffs have alleged that had they known of the foreclosure sale "they could have cured the default." However, their right to "cure the default" by paying the amount of the default and reinstating the loan, expired five business days prior to the sale date. (Civ. Code, § 2924c, subds. (a)(1), (e).) Plaintiffs do not allege that they could have redeemed the property prior to sale by tendering the entire amount owing, together with interest, costs, and fees. Plus, the **PLAINTIFFS WOULD HAVE TO HAVE ALLEGED SOME LOST EQUITY IN THE PROPERTY** to have suffered damages as a result of the foreclosure, something the facts indicate they cannot do.

Plaintiffs have also requested punitive and exemplary damages. **There must be a recovery of actual damages to support an award of exemplary damages, and exemplary damages are not available for a breach of contract**. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530; Civ. Code, § 3294, subd. (a).)

**III**

**Breach of Security Agreement**

The deed of trust on the property listed plaintiffs as the borrowers, MortgageIT as the lender, and MERS as the beneficiary, acting solely as a nominee for the lender and the lender's successors. The deed of trust also provided that the lender could appoint a successor trustee.

Quoting from a document that is not in the record and was not attached to the complaint, **plaintiffs state that MERS purported to assign the note to Wells Fargo, but that MERS did not have the authority to assign the note, rendering the assignment void. This statement is belied by the deed of trust, which provided that MERS was a "nominee for Lender**

**and Lender's successors and assigns." The note provided that the lender "may transfer this Note."**

**Plaintiffs also argue there was a break in the chain of title when the note was assigned to one party while the deed of trust named another party.** Apparently, plaintiffs' argument is that this rendered the assignment invalid and the foreclosure sale void. Plaintiffs cite an 1873 case which stated that a "note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." (*Carpenter v. Longan* (1873) 83 U.S. 271, 274 [21 L.Ed. 313], fn. omitted.)

More recent authority has rejected the theory that a note and deed of trust are inseparable. *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440, held that the procedures governing nonjudicial foreclosures are set forth in Civil Code sections 2924 through 2924k, and they do not require that the note be in the possession of the party initiating foreclosure. The nonjudicial foreclosure statutory scheme is exhaustive and courts do no read any additional requirements into the statute. (*Debrunner*, at p. 441.) Accordingly, there is **NO REQUIREMENT THAT THE PARTY COMMENCING A NONJUDICIAL FORECLOSURE SALE HAVE A BENEFICIAL INTEREST IN BOTH THE NOTE AND THE DEED OF TRUST.** (*Ibid.*) Likewise, *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513, disapproved on another point in *Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th 919, held that because the statutory provisions, "broadly authorize a `trustee, mortgagee, or beneficiary, or *any of their authorized agents*' to initiate a nonjudicial foreclosure ([Civ. Code,] § 2924, subd. (a)(1), italics added), [they] do not require that the foreclosing party have an actual beneficial interest in both the promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale."

Under their cause of action labeled breach of security agreement, plaintiffs also alleged that Cal-Western executed and recorded the notice of default and notice of trustee's sale, and that their lender, MortgageIT, never recorded a substitution of trustee appointing Cal-Western in lieu of First American as trustee. They alleged Cal-Western therefore acted without authority, since First American was actually the trustee of record.

The trial court found that exhibit E to plaintiffs' original complaint was a recorded substitution of trustee, substituting Cal-Western as the trustee in place of First American, and that the substitution of trustee was signed and recorded prior to the notice of trustee's sale. The substitution of trustee was omitted from the first amended complaint.

Plaintiffs argue the trial court erred when it judicially noticed the facts stated in the substitution of trustee rather than merely the fact that the document had been recorded. The trial court took judicial notice of the recorded substitution of trustee. As noted earlier, exhibits attached to a superseded complaint are properly considered on demurrer. (*Frantz v. Blackwell, supra,* 189 Cal.App.3d at p. 94.) The only fact in the recorded substitution of trustee that was relied on by the trial court was the fact that "MERS, the original beneficiary, substituted Cal-Western Reconveyance Corporation as trustee in place of First American Title." It was permissible for the trial court to take notice of this fact. "When a court is asked to take judicial notice of a document, the propriety of the court's action depends upon the nature of the facts of which the court takes notice from the document. . . . [F]or example, it was proper for the trial court to take judicial notice of the dates, parties, and legally operative language of a series of recorded documents, but it would have been improper to take judicial notice of the truth of various factual representations made in the documents." (*Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 265.)

In this case, the trial court took notice only of the dates, parties, and legally operative language of the documents to find that Cal-Western has been substituted as the trustee in place of First American Title.

Plaintiffs also argue that the trial court should not have taken judicial notice of the facts stated in the documents that they themselves attached as exhibits to the first amended complaint at issue in the demurrer proceeding. These documents were attached to the first amended complaint and were incorporated into the complaint. "`The general rule is that when a written instrument which is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, upon demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage.' [Citation.]" (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 785-786.) Plaintiffs' argument that defendants may not point to the exhibits to disprove the allegations of the complaint is not well taken. **If the factual allegations of the complaint conflict with the**

**exhibits, we rely on the contents of the exhibits.** (*Performance Plastering v. Richmond American Homes of California, Inc., supra*, 153 Cal.App.4th at p. 665.)

**IV**

**Declaratory Relief**

Plaintiffs' third cause of action is for declaratory relief. Plaintiffs alleged a controversy regarding the ownership of the property arose because of defendants' breach of the security instrument, breach of the forbearance agreement, and refusal of defendants to cure the breaches.

They argue they have sufficiently alleged a cause of action for declaratory relief because an actual controversy exists in that they claim their deed of trust was paid off by default insurance.

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. . . ." (Code Civ. Proc., § 1060.) However, "[t]he purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach. `[Declaratory] procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' [Citations.]" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.)

In this case, plaintiffs seek a remedy for a past wrong, the sale of their home by foreclosure. **Declaratory relief is inappropriate where a party claims a fully matured cause of action for money**. (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.) In the absence of factual allegations indicating an actual present controversy, as opposed to the redress of a past wrong, plaintiffs have failed to state a cause of action for declaratory relief.

**V**

**Quiet Title**

The trial court found that plaintiffs' quiet title cause of action failed because plaintiffs did not tender full payment of their debt. **A borrower cannot quiet title to secured property without alleging payment of the debt secured by the property**. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86.)

Plaintiffs argue they were excused from alleging tender because the trustee's sale was void. They argue the sale was void because they were not provided notice of the sale.

Plaintiffs' argument is based on alleged irregularities in the foreclosure process. **The tender requirement is excused only where: (1) the underlying debt is invalid; (2) the deed of trust is invalid; (3) there exists a counter claim that is equal to or greater than the amount due; or (4) it would be inequitable to impose the condition on the particular party challenging the sale.** (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113.) **Where, as here, the plaintiffs are attempting to set aside the foreclosure sale based on irregularities in the sale, they must allege tender of the amount of the secured debt.**[4] (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579.)

As part of their argument that they were not required to tender payment of the debt for a quiet title action, plaintiffs argue the debt was paid by securitization or by default insurance. Apparently, they believe this constituted tender. However, **assuming plaintiffs' debt was paid through securitization or insurance, plaintiffs' obligation to perform under the note was not extinguished,** and they cannot maintain a quiet title action absent an allegation of tender of the debt.

**DISPOSITION**

The judgment is affirmed as to Cal-Western. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

Robie, J. and Mauro, J., concurs.

[1] Exhibit I to the first amended complaint is an assignment of trust in which Wells Fargo granted its beneficial interest to FHLMC. The document assigning the note and deed of trust to Wells Fargo was not attached to the first amended complaint, but was

attached to the initial complaint. In that recorded assignment, MERS assigned the deed of trust to Wells Fargo. Exhibits attached to a superseded complaint are properly considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

[2] The trial court's order sustaining demurrer stated that exhibit E to plaintiffs' original complaint, neither of which is in the record before us, was a recorded substitution of trustee in which MERS, the original beneficiary, substituted Cal-Western as trustee in place of First American Title.

[3] The letter was actually sent under the letterhead of **America's Servicing Company, an internal division of Wells Fargo**. We will refer to both entities as Wells Fargo.

[4] Plaintiffs assert they have damage claims that would offset the amount they owe. As discussed, *ante*, plaintiffs have no damages.