SUSAN CAROL PARKER, Plaintiff and Appellant,
v.
NORRIS GROUP COMMUNITY REINVESTMENT, LP, Defendant and Respondent.

No. E064742.

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

Filed July 11, 2017.

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

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

Alvarado Smith, S. Christopher Yoo and Jacob M. Clark for Defendant and Respondent.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OPINION

FIELDS, J.

I. INTRODUCTION

Plaintiff and appellant, Susan Carol Parker, appeals from the judgment dismissing her second amended complaint (SAC) against defendant and respondent, Norris Group Community Reinvestment, LP (Norris), after Norris's general demurrer to the SAC was sustained without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).) We affirm the judgment dismissing the SAC against Norris.[1]

The allegations of the SAC show that, in April 2013, Parker signed a promissory note for a $170,000 "hard money" loan and a deed of trust on her Temecula residential property to secure the loan. Parker received the loan proceeds on May 1,

2013, and the entire principal balance was due only nine months later, on February 1, 2014. The note had a "[s]tated [i]nterest [r]ate" of 1 percent per month. Nine interest-only payments of $1,700 (or a total of $15,300) were due on the first day of each month beginning on June 1, 2013 through February 1, 2014. If the lender did not receive any interest payment by its due date, a "[d]efault [i]nterest [r]ate" of 2 percent per month applied to the principal balance of the loan from the date of the default. The SAC also shows that Parker's August 2013 and September 2013 interest payments were late, and that the lender refused to accept Parker's October payment.

Norris purchased the Temecula property for $305,500 at a nonjudicial foreclosure sale on January 6, 2015. At that time, according to the trustee's deed, the total unpaid debt on the property was $283,853.37, and all of the debt was based on the $170,000 loan and the foreclosing deed of trust. Norris was not involved in the April 2013 loan transaction, and the note and deed of trust were never assigned to Norris. 5 Arch Funding Corp., the lender and original beneficiary under the deed of trust, assigned the note and deed of trust to 5 Arch Income Fund 1, LLC, the beneficiary at the time of the foreclosure sale.

By her SAC, Parker claims the trustee's deed conveying her Temecula property to Norris is void and must be set aside because the foreclosure was wrongful. Alternatively, she seeks money damages from Norris and the other defendants for wrongful foreclosure. To these ends, the SAC alleges eight causes of action, 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.)

Parker claims her SAC states facts sufficient to constitute each cause of action alleged against Norris. Specifically, she claims the SAC shows that the foreclosure proceedings and sale were wrongful for three independent reasons: (1) she was not in default on the $170,000 loan; (2) the entities that initiated and pursued the foreclosure were not authorized to do so because the note and deed of trust were assigned as collateral to secure a debt owed by the lender's successor to Pacific Enterprise Bank; and (3) the $170,000 loan was unconscionable. Alternatively, Parker claims she can amend the SAC to state a cause of action against Norris for conspiring with the other defendants to wrongfully deprive her of her Temecula property.

We conclude the SAC does not state a cause of action against Norris, and there is no reasonable possibility it can be amended to state a cause of action against Norris. The SAC and recorded instruments judicially noticed by the superior court show that Parker defaulted on the note in August 2013, the default was never cured, and the note remained unpaid when Norris purchased the property at the foreclosure sale. Further, the collateral assignment of the deed of trust to Pacific Enterprise Bank did not void the foreclosure proceedings or sale, the loan transaction was neither procedurally nor substantively unconscionable, and there is no reasonable possibility the SAC can be amended to state any cause of action against Norris, including a claim for conspiring with others to "wrongfully" deprive Parker of her Temecula property.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The SAC and Judicially Noticed Matters*

The SAC is 62 pages long and includes 69 additional pages of exhibits, including the $170,000 promissory note and deed of trust in favor of its original beneficiary and the lender, 5 Arch Funding Corp. In ruling on the demurrer, the superior court granted Norris's request to take judicial notice of several instruments recorded in connection with the foreclosure sale, including the deed of trust, substitution of trustee, notice of default, notice of sale, trustee's deed, two assignments of the deed of trust, a "collateral assignment" of the deed of trust to Pacific Enterprise Bank, and a release of the collateral assignment. The court also took judicial notice of an unlawful detainer judgment entered on April 7, 2015, granting Norris possession of the Temecula property.

In the SAC, Parker describes the circumstances of her $170,000 loan transaction in extensive detail. In the following subsections, we summarize the background allegations of the SAC, the facial contents of the recorded instruments, the demurrer, and the ruling on the demurrer.[2] Additional details are discussed below in our analysis of the factual sufficiency of the SAC's alleged causes of action against Norris.

1. The Background Allegations of the SAC

In 1998, Parker's parents purchased the Temecula residence 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 April 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.

2. The Terms of the $170,000 Note

The SAC describes the $170,000 loan as a "hard money deal." As noted, 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.

3. 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.

4. 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.

5. 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.

6. 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 April 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.

7. Superior Court Proceedings Following the Trustee's Sale

(a) *The Unlawful Detainer Action*

On April 7, 2015, Norris obtained an unlawful detainer judgment against Parker, granting Norris possession of the Temecula property, following a two-day court trial in *Norris Group Community Reinvestment, LP v. Parker*, Riverside County Superior Court case No. SWC1500174. Norris filed the unlawful detainer action on January 23, 2015, after it purchased the Temecula property at the January 6, 2015 foreclosure sale.[3]

(b) *The Present Action*

Parker filed the present action in September 2014. Parker's original complaint is not part of the record on this appeal. In her first amended complaint, filed in October 2014, Parker named five defendants: 5 Arches, LLC, 5 Arch Funding Corp., 5 Arch Income Fund 1, LLC, California TD Specialists, and FCI. In her SAC, filed in March 2015, Parker named Norris and Sound Equity as defendants, in addition to the five previously-named defendants.

B. *Norris's Demurrer and the Court's Ruling on the Demurrer*

In July 2015, Norris demurred to the SAC on the ground it failed to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Norris argued that the SAC did not and could not state a cause of action against Norris, because the SAC and judicially noticed instruments showed (1) Parker was in default on the note, and (2) the foreclosure proceedings and sale were initiated and conducted by authorized persons. Following a hearing, the court sustained Norris's demurrer without leave to amend.

In its order sustaining the demurrer, the court stated that Parker could not state her first alleged cause of action for quiet title because *Parker* no longer had an ownership interest in the Temecula property. She could not state her second and third causes of action for wrongful foreclosure and for cancellation of the trustee's deed because the SAC and recorded instruments showed she "defaulted under the promissory note" and "the foreclosing entities had authority to foreclose." Parker's fourth cause of action for "fraud and deceit and/or negligent misrepresentation" failed on similar grounds: there were "insufficient allegations" that the trustee's deed was void or that Norris "made any misrepresentations upon which [Parker] relied."

The court also noted in its order that Parker conceded that her fifth cause of action for breach of contract was not alleged against Norris. Her sixth cause of action for "negligent and/or fraudulent misrepresentation" was deficient because there were "insufficient allegations" that Norris owed a legal duty or breached a legal duty to Parker. The seventh cause of action for slander of title failed because publication of the challenged documents (the notice of default and substitution of trustee) were privileged under Civil Code sections 2924, subdivision (d)(1) and 47. Lastly, the eighth cause of action for "violations of unfair competition law" was deficient because "all other claims upon which it relies fail."

The judgment dismissing the SAC against Norris was entered on September 9, 2015. Parker timely appealed.

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, 1236.) 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 Norris for Quiet Title (the First Cause of Action)***

In her first alleged cause of action "to [set] aside trustee sale and to quiet title" (capitalization & bolding omitted), Parker seeks to quiet title to the Temecula property in herself against Norris and the other defendants. To state a cause of action for quiet title, the plaintiff must allege, among other elements, "[t]he adverse claims to the title of the plaintiff against which a determination is sought." (Code Civ. Proc., § 761.020, subd. (c); *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802-803 [quiet title claim not stated where none of the named defendants had title claim adverse to plaintiff's claim].) That is, the complaint must allege that the defendant has a title claim to the property adverse to the plaintiff's claim. The SAC did not satisfy this element. As Parker concedes, Norris no longer has a title claim adverse to Parker's, because Norris sold the Temecula property for $393,000 on September 9, 2015. Because *Norris* no longer holds or claims an interest in the property adverse to Parker's, the SAC cannot be amended to state a claim against Norris for quiet title.

C. ***The SAC Does Not State a Cause of Action Against Norris for Wrongful Foreclosure or Cancellation of Trustee's Deed (the Second and Third Causes of Action)***

In her alleged causes of action for wrongful foreclosure and to cancel the trustee's deed, Parker alleges Norris and the other defendants effected an "illegal, fraudulent or willfully oppressive sale" of her Temecula property. She seeks to cancel the trustee's deed and seeks money damages. She claims the foreclosure proceedings and sale were wrongful for three reasons: (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.

1. Applicable Legal Principles

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 restore**d.' (*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., supra*, 214 Cal.App.4th at p. 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 and the trustee's deed is therefore void 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. In the SAC, however, Parker admits 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, including Norris, 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 void 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 pledger, 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 pledger, 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. . . . [¶] . . . that 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 pledger, 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 argues the loan transaction should be voided because it 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. *Orcilla v. Big Sur, Inc., supra*, 244 Cal.App.4th 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.

D. ***Parker's Other Alleged Causes of Action Are Also Factually Insufficient***

Parker concedes that her fifth cause of action for breach of contract is not alleged against Norris. Thus, it is unnecessary to address this claim.

All of Parker's other alleged causes of action, namely, her fourth and sixth for fraud, deceit, and negligent or fraudulent misrepresentations, her seventh for slander of title, and her eighth for unfair competition, are factually insufficient. All of these claims are based on the same allegations underlying Parker's wrongful foreclosure claim, 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 alleged causes of action.

E. ***There is No Reasonable Possibility Parker Can Amend the SAC to State Any Cause of Action Against Norris 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. . . .' [Citations.]" (*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 Norris for engaging in a civil conspiracy with the other defendants to deprive her of her Temecula property. She alleges Norris offered her $225,000 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 "colluded" with the other defendants 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.

Parker argues that Norris is not a bona fide purchaser of her Temecula property because the $305,500 price it paid was too low. We disagree. The elements of a bona fide purchase are payment of value, in good faith, and without actual or constructive notice of another's rights. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1331.) Norris paid value for the Temecula property, namely, $305,500 at the January 6, 2015 foreclosure sale. Norris also had notice of Parker's equitable claim to the property at the time of the foreclosure sale because, in January 2014, Norris spoke to Parker about her loan and purchasing the property. For the reasons explained, however, Parker did not have a valid claim to the property, and no other persons have asserted previously undisclosed claims to the property that were not satisfied from the proceeds of the foreclosure sale.

"`[I]t is settled that "Where there is no irregularity in a nonjudicial foreclosure sale and the purchaser is a bona fide purchaser for value, a great disparity between the sales price and the value of the property is not a sufficient ground for setting aside the sale."' ([*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1237], quoting *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 832 . . .; *Central Nat. Bank v. Bell* (1936) 5 Cal.2d 324, 328 . . . [`It is no new doctrine in this state that mere inadequacy of price is not sufficient ground for setting aside a trustee's sale legally conducted. . . .']; cf. *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531, 542 . . . [`[M]ere inadequacy of the foreclosure sale price is no basis for setting the

sale aside, though it may be set aside . . . if the price is so low as to "shock the conscience or raise a presumption of fraud or unfairness."'].) Thus, in *Moeller v. Lien, supra*, 25 Cal.App.4th 822, a sale price of only 25 percent of the value of the property was not grounds for invalidating the sale." (*Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 409-410, fn. omitted.)

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 Norris.

IV. DISPOSITION

The judgment dismissing Parker's SAC against Norris is affirmed. Norris shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278.)

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

[1] The SAC names six defendants in addition to Norris: (1) 5 Arches, LLC; (2) 5 Arch Funding Corp.; (3) 5 Arch Income Fund 1, LLC; (4) California TD Specialists; (5) FCI Lender Services (FCI); and (6) Sound Equity. After Norris filed its general demurrer, three of the other six defendants—5 Arch Income Fund 1, LLC, California TD Specialists, and FCI—also generally demurred to the SAC, and their demurrers were also sustained without leave to amend. Parker has appealed from the judgments dismissing the SAC against these three defendants in case No. E066231. That appeal remains pending.

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

[3] Parker appealed the unlawful detainer judgment to the appellate department of the superior court. Norris has requested that this court take judicial notice of the record on that appeal, the unpublished opinion of the superior court appellate department, and the remittitur for the matter. (*Norris Group Community Reinvestment, LP v. Parker*, Riverside County Superior Court case No. APP1500081 (the UD action). Norris claims the court records from the UD action show that

three of the issues raised on this appeal, namely, (1) whether Parker was in default on the note, (2) whether the Collateral Assignment rendered the foreclosure proceedings and sale void, and (3) whether Norris was a bona fide purchaser for value at the foreclosure sale, were actually adjudicated in favor of Norris in the UD action and are therefore res judicata against Parker under the doctrine of issue preclusion. Parker opposed the request for judicial notice. We deny the request. As will appear, the SAC and the instruments judicially noticed by the superior court show that Parker has not and cannot allege a cause of action against Norris. It is therefore unnecessary to take judicial notice of the court records in the UD action.