WILLIAM E. HELLMUTH, et al., Plaintiffs and Appellants,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

No. H042544.

Court of Appeals of California, Sixth District.

Filed May 9, 2017.

Appeal from the Monterey County, Superior Court No. M127995.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

BAMATTRE-MANOUKIAN, J.

I. INTRODUCTION

Appellants William E. Hellmuth and Lori L. Hellmuth borrowed $1,088,000 from Impac Funding Corporation dba Impac Lending Group (Impac Funding) in 2006. The loan transaction included a deed of trust securing the loan on real property in Salinas. In 2010 a "Corporation Assignment of Deed of Trust/Mortgage" was recorded. The assignment stated that respondent Mortgage Electronic Registration Systems, Inc. (MERS) had assigned to respondent Deutsche Bank National Trust Company (Deutsche Bank) "as trustee under the pooling and servicing agreement relating to Impac Secured Assets Corp., mortgage pass-through certificates, series 2007-1," "all beneficial interest" under the deed of trust securing the loan on plaintiffs' property.

Plaintiffs subsequently filed the instant action against defendants Impac Funding, Deutsche Bank, Bank of America, Impac Secured Assets Corp., and MERS alleging that defendants did not have the legal authority to initiate foreclosure proceedings on their Salinas property.[1] The trial court sustained demurrers to all causes of action included in the first amended complaint without leave to amend and entered a judgment of dismissal. For the reasons stated below, we conclude that the trial court did not err and that plaintiffs have not shown on appeal that the

complaint may be amended to state a cause of action. We will therefore affirm the judgment of dismissal.

II. FACTUAL BACKGROUND

Our summary of the facts is drawn from the allegations of the complaint and defendants' request for judicial notice, since in reviewing a ruling sustaining a demurrer without leave to amend we assume the truth of the properly pleaded factual allegations and the matters properly subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.)

In 2006 plaintiffs borrowed $1,088,000 from Impac Funding. The loan transaction included a deed of trust securing the loan on real property in Salinas. The deed of trust stated that "Ron Morrison, General Counsel" was the trustee and MERS was the beneficiary. Bank of America is the servicer of plaintiffs' loan.

Regarding the transfer of rights in the property, the deed of trust stated that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. . . . Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in [Monterey County] which currently has [an address in Salinas]."

In September 2010 a "Corporation Assignment of Deed of Trust/Mortgage" was recorded. The assignment stated that MERS assigned to Deutsche Bank "as trustee under the pooling and servicing agreement relating to Impac Secured Assets Corp., mortgage pass-through certificates, series 2007-1," "all beneficial interest" under the deed of trust securing the loan on plaintiffs' property. Kristine Crouch executed the assignment as a "Certifying Officer" for MERS. Crouch's signature was notarized on August 31, 2010.

In May 2010 plaintiffs filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court, Northern District of California. Their Chapter 13 bankruptcy proceeding was converted to a Chapter 7 bankruptcy proceeding in June 2012 and an order discharging debtor was entered in October 2012. BAC Home Loans Servicing and Deutsche Bank are noted as creditors in the bankruptcy proceedings.[2]

Plaintiffs do not assert that they have failed to make payments on their loan or that a notice of default has been issued or recorded. However, according to plaintiffs, unspecified defendants "have initiated foreclosure proceedings."

III. PROCEDURAL BACKGROUND

Plaintiffs filed a "verified first amended complaint" (hereafter, complaint)[3] against defendants Impac Funding, Deutsche Bank, Bank of America, Impac Secured Assets Corp., and MERS in September 2014. The complaint included causes of action against all defendants for wrongful foreclosure, violation of Civil Code section 2924, subdivision (a)(6),[4] violation of Business and Professions Code section 17200, and breach of the implied covenant of good faith and fair dealing,[5] plus a cause of action for declaratory relief against defendants Deutsche Bank and MERS. Plaintiffs sought monetary damages, an order enjoining defendants from "carrying out a foreclosure sale of the Property," and declaratory relief.

Defendants demurred to the complaint on the grounds that each cause of action failed to state facts sufficient to constitute a cause of action. Defendants also filed a request for judicial notice of several documents pertaining to plaintiffs' loan transaction and bankruptcy.[6] On January 16, 2015, the trial court entered its order sustaining the demurrers to each cause of action without leave to amend. A judgment of dismissal was entered on April 17, 2015. Plaintiffs filed a timely appeal from the judgment of dismissal.

IV. DISCUSSION

A. *Standard of Review*

The standard of review is well established. 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. [Citation.]" (*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*).) But we do not assume the truth of "`"contentions, deductions or conclusions of fact or law."'" (*Evans, supra*, at p. 6.)

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, supra*, 39 Cal.3d at p. 318; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 225, fn. 1.)[7] 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.)

We will apply this standard of review to determine whether the trial court properly sustained the demurrers of defendants Bank of America, Deutsche Bank, and MERS.

B. *Violation of Section 2924, subdivision (a)(6)*

In the cause of action for violation of section 2924, subdivision (a)(6), plaintiffs alleged that "[d]efendants are responsible for multiple violations of the California Civil Code section 2924(a)(6) and other provisions of [section] 2924 et seq, as revised by Senate Bill 900. Defendants have initiated foreclosure proceedings without holding beneficial interest or being authorized to do such."

On appeal, plaintiffs contend that these allegations are sufficient to state a cause of action for violation of section 2924, subdivision (a)(6) because they allege that defendants recorded a notice of default against their property without being the "holder of the ownership interest." We understand plaintiffs to attempt to state a cause of action for wrongful initiation of foreclosure proceedings in violation of section 2924, subdivision (a)(6). Defendants respond that section 2924, subdivision (a)(6) does not provide a private right of action for injunctive relief or damages.

Although plaintiffs assert on appeal that a notice of default has been recorded on their property, their complaint lacks any allegations regarding a notice of default. Moreover, their record cite is to pages of the complaint that do not mention a notice of default. Even assuming that a notice of default has been recorded, we find no merit in plaintiffs' contention that they have sufficiently alleged a cause of action for wrongful initiation of foreclosure proceedings in violation of section 2924, subdivision (a)(6). As we will explain, we agree with defendants that section 2924, subdivision (a)(6) does not provide a private right of action for injunctive relief or money damages.

Section 2924, subdivision (a)(6) provides in pertinent part: "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure

process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest."

Section 2924, subdivision (a)(6) was enacted as part of the California Homeowner's Bill of Rights (HBOR) section 2923.4 et seq., which became effective on January 1, 2013. (Stats. 2012, ch. 86, § 10; see also *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157-158 (*Lucioni*).) In *Lucioni* the appellate court considered whether a plaintiff could state a cause of action for injunctive relief under section 2924, subdivision (a)(6) to prevent a foreclosure on the ground that the defendants lacked authority to foreclose. (*Lucioni, supra*, at pp. 157-158.) The *Lucioni* court determined that the Legislature did not intend to confer a private right of action for injunctive relief under section 2924, subdivision (a)(6), for several reasons. (*Lucioni, supra*, at pp. 158-161.)

First, the *Lucioni* court found that "[i]n the HBOR, the Legislature authorized a private right of action to enjoin a nonjudicial trustee's sale where a lender violates any one of nine statutory provisions. Under section 2924.12(a)(1), **a homeowner may bring an action for injunctive relief due to a material violation of section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17. Under section 2924.19(a)(1), a homeowner also may bring an action for injunctive relief for a material violation of section 2923.5 or 2924.18.**" (*Lucioni, supra*, 3 Cal.App.5th at p. 158.)

Second, the *Lucioni* court reasoned that the Legislature "did not provide for injunctive relief for a violation of section 2924(a)(6), the provision that the complaint relies upon in seeking injunctive relief. That is, section 2924(a)(6) is not one of the nine sections identified in sections 2924.12(a)(1) and 2924.19(a)(1). In our view, under the text of the HBOR, a foreclosure may be enjoined due to a material violation of the statutory provisions that the Legislature has chosen to list, but not due to a violation of unlisted provisions. `Generally, the expression of some things in a statute implies the exclusion of others not expressed.' [Citations.] As the Legislature chose to provide for injunctive relief for some HBOR violations, but not for a violation of section 2924(a)(6), we do not find such relief impliedly available. Under the HBOR, then, a plaintiff may not seek to enjoin a foreclosure

based on a claim that the foreclosing party lacked the necessary authority to foreclose." (*Lucioni, supra*, 3 Cal.App.5th at pp. 158-159.)

We find the reasoning of *Lucioni* to be persuasive. Significantly, **SECTION 2924 DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF OR MONETARY DAMAGES FOR A VIOLATION OF SECTION 2924, SUBDIVISION (A)(6).** In contrast, other provisions of the HBOR expressly provide a private right of action for statutory violations. For example, section 2924.19, subdivision (a)(1) states: "If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.5, 2924.17, or 2924.18." Another example is section 2924.19, subdivision (b), which states in part: "After a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages pursuant to Section 3281, resulting from a material violation of Section 2923.5, 2924.17, or 2924.18 by that mortgage servicer, mortgagee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale." The HBOR does not provide such remedies for a violation of section 2924, subdivision (a)(6).

Moreover, the legislative history of the HBOR supports the *Lucioni* court's statutory analysis. The Legislative Counsel's Digest for the HBOR states: "The bill would authorize a borrower to seek an injunction and damages for violations of *certain of the provisions* described above, except as specified." (Legis. Counsel's Dig., Assem. Bill No. 278 (2011-2012 Reg. Sess.) 86 Stats. 2012, p. 2296, italics added.) Further, a Conference Committee Report states: **"Importantly, no action for money damages would be allowed until the date the trustee's deed is recorded after a foreclosure sale. At all times until then, the only legal remedy a homeowner may seek is an action to enjoin a substantial violation of *the specified sections*, along with any trustee's sale."** (Sen. Rules Com., Off. of Sen. Floor Analyses, Conf. Com. Rep. on Assem. Bill No. 278 (2011-2012 Reg. Sess.) adopted by Senate on July 2, 2012, p. 33, italics added.)

As we have discussed, section 2924, subdivision (a)(6) is not one of the specified sections of the HBOR which, if violated, will allow the homeowner to seek injunctive relief or money damages. We therefore determine that the Legislature did not intend to create a private right of action for either injunctive relief or monetary damages for a violation of section 2924, subdivision (a)(6). For these reasons, we conclude that plaintiffs may not state a cause of action for wrongful initiation of foreclosure proceedings under section 2924, subdivision (a)(6) and the

trial court did not err in sustaining defendants' demurrer. (See *Lucioni, supra,* 5 Cal.App.4th at p. 161.)

C. *Wrongful Foreclosure*

In the cause of action for wrongful foreclosure, **plaintiffs allege that defendants do not have authority to foreclose because the promissory note was "securitized into a trust," defendants violated the express terms of the trust's pooling and service agreement, and defendants cannot produce documents showing that the deed of trust or promissory note was timely assigned to the "Securitized Trust" before the 2007 closing date.**

According to plaintiffs, these allegations are sufficient for a cause of action for wrongful foreclosure because they allege that defendants do not have legal authority to initiate foreclosure proceedings and plaintiffs have been prejudiced by the threat of foreclosure. Defendants reject this contention, arguing, among other things, that **plaintiffs cannot state a cause of action for wrongful foreclosure since they have not alleged that a foreclosure has taken place**. We agree.

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. [Citation.]" (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.) Here, plaintiffs have not alleged that defendants caused a foreclosure sale of their Salinas property to take place. Absent this element, plaintiffs' allegations are insufficient to state a cause of action for wrongful foreclosure.

We understand plaintiffs to rely upon the California Supreme Court's decision in *Yvanova, supra,* 62 Cal.4th 919 for the proposition that a plaintiff homeowner may assert a cause of action for wrongful foreclosure that challenges a defendant's legal authority to initiate foreclosure proceedings. The decision in *Yvanova* does not support this proposition because ***Yvanova* is a post-foreclosure case in which our Supreme Court limited its holding to the post-foreclosure context. The *Yvanova* court stated: "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.*" (*Id.* at p. 924, italics added.) The court also expressly stated that it did not "address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (*Ibid.*)

Plaintiffs also rely on the decision in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) but that decision is similarly inapplicable. In *Glaski*, unlike the present case, a nonjudicial foreclosure sale of the plaintiff's property had taken place before the wrongful foreclosure action was brought. (*Id.* at p. 1086.) The decision in *Glaski* therefore does not support the proposition that a wrongful foreclosure action may be brought to preempt a threatened nonjudicial foreclosure.

Since plaintiffs have not alleged that a foreclosure sale of their Salinas property has taken place, they have not stated facts sufficient for a cause of action for wrongful foreclosure. We therefore conclude that the trial court did not err in sustaining the demurrer to this cause of action.

D. *Violation of Business and Professions Code section 17200*

In the cause of action for violation of Business and Professions Code section 17200 et seq., plaintiffs allege that defendants engaged in deceptive business practices by assigning the promissory note and deed of trust to a securitized trust after the closing date of the trust. Plaintiffs also allege that defendant Deutsche Bank engaged in a deceptive business practice by violating the express terms of the pooling and service agreement "that controls the securitized trust it purports to act as Trustee, i.e., MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-1." Further, plaintiffs allege that defendants recorded documents to initiate foreclosure proceedings with knowledge of their falsity and with intent to defraud plaintiffs.

On appeal, plaintiffs contend that these allegations are sufficient to state a cause of action for violation of Business and Profession Code section 17200 because they "specifically pleaded that Defendants engaged in deceptive business practices with respect to the recordation of documents regarding their loan and foreclosure of their home by, among other things, executing and recording documents without the legal authority to do so. These violations gave Defendants an unfair competitive advantage over their competitors as well as Plaintiffs."

Defendants contend that plaintiffs cannot state a claim under Business and Professions Code section 17200 because the record shows that the recording of the deed of trust and assignment in this case were not wrongful; their claim is derivative of the other nonviable claims; and any economic injury suffered by plaintiffs was caused by their own conduct in declaring bankruptcy.

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. [Citation.]" (*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.)

We recognize that it has been held that **the California statutory scheme for nonjudicial foreclosure does not allow a preemptive action to challenge the authority of the entity or person initiating the foreclosure**. (See *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813-814 (*Saterbak*); accord, *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1155.) The California Supreme Court in *Yvanova* expressly did not provide guidance as to the propriety of a preemptive action, stating that "disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*. . . . We do not address the distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward." (*Yvanova, supra*, 62 Cal.4th at p. 934.)

However, we need not determine in this case whether plaintiffs' UCL claim is barred because it constitutes an improper preemptive action to challenge the authority of the entity or person initiating foreclosure. Even assuming, without deciding, that their UCL claim is not barred on that ground, we find that under the

weight of current authority plaintiffs have not stated facts sufficient to show an unlawful, unfair, or fraudulent business practice.

Plaintiffs allege that defendants engaged in a deceptive business practice by assigning the promissory note and deed of trust to a securitized trust after the closing date of the trust. We understand plaintiffs to thereby argue that this allegation is sufficient to show that defendants violated Business and Professions Code section 17200 by initiating the nonjudicial foreclosure process without legal authority due to a defective assignment of the note and deed of trust.

IN *YVANOVA*, OUR SUPREME COURT RULED THAT "ONLY THE ENTITY HOLDING THE BENEFICIAL INTEREST UNDER THE DEED OF TRUST—THE ORIGINAL LENDER, ITS ASSIGNEE, OR AN AGENT OF ONE OF THESE—MAY INSTRUCT THE TRUSTEE TO COMMENCE AND COMPLETE A NONJUDICIAL FORECLOSURE. (§ 2924, subd. (a)(1); [citation].) If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure. [Citation.]" (*Yvanova, supra*, 62 Cal.4th at p. 935.) Thus, "a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Id.* at p. 939.)

However, "[w]hen an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Yvanova, supra*, 62 Cal.4th at p. 936.)

The *Saterbak* court observed that "*Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely voidable. [Citation.] We conclude such an assignment is merely voidable. [Citation.]" (*Saterbak, supra*, 245 Cal.App.4th at p. 815, fn. omitted; accord, *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259 [**A POSTCLOSING ASSIGNMENT OF A LOAN TO AN INVESTMENT TRUST THAT VIOLATES THE TERMS OF THE TRUST RENDERS THE ASSIGNMENT VOIDABLE**].) Therefore, plaintiffs'

allegation of a postclosing assignment of the note and deed of trust to a securitized trust is an allegation of a voidable defect in the assignment that does not support a borrower's UCL claim for deceptive practices. Plaintiffs have not provided any authority for a contrary conclusion.

Plaintiffs also allege that Deutsche Bank violated the express terms of the pooling and service agreement. In *Yvanova*, our Supreme Court described a pooling and service agreement: "`The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are set forth in a Pooling and Servicing Agreement ("PSA").' [Citation.]" (*Yvanova, supra*, 62 Cal.4th at p. 930, fn. 5.) Plaintiffs have provided no authority for the proposition that the Deutsche Bank's alleged violations of the pooling and service agreement at issue in this case render the assignment void. Moreover, the weight of authority is to the contrary. **"[A] BORROWER DOES NOT HAVE STANDING TO CHALLENGE AN ASSIGNMENT THAT ALLEGEDLY BREACHES A TERM OR TERMS OF A PSA BECAUSE THE BENEFICIARIES, NOT THE BORROWER, HAVE THE RIGHT TO RATIFY THE TRUSTEE'S UNAUTHORIZED ACTS."** (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 813.) Therefore, failure to comply with the terms of a pooling and service agreement renders the assignment voidable, not void. (*Saterbak, supra*, 245 Cal.App.4th at p. 815.) Such allegations are therefore insufficient to support a borrower's UCL claim for deceptive practices.

Finally, plaintiffs allege that defendants recorded documents to initiate foreclosure proceedings with knowledge of their falsity and with intent to defraud plaintiffs. These conclusory allegations are insufficient to support a fraud claim. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) "`Thus "`the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.'" [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered.'" [Citation.]" (*Ibid.*)

For these reasons, plaintiffs have failed to state facts sufficient for a cause of action for violation of Business and Professions Code section 17200. We therefore determine that the trial court did not err in sustaining the demurrer to this cause of action.

E. *Declaratory Relief*

In the cause of action for declaratory relief, plaintiffs allege that "DEUTSCHE and MERS have participated in deceptive activity in order to facilitate a foreclosure of the Property." Plaintiffs further allege that defendants have committed violations of section 2924, subdivision (a)(6) and Business and Professions Code section 17200, and assert that a judicial declaration is necessary to ascertain their rights under the deed of trust.

Plaintiffs contend that these allegations are sufficient because they have alleged that controversies exist regarding whether defendants have an enforceable interest in their property, the ownership of the property, and the validity of the liens on the property. We disagree.

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.'" [Citation.]" (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909 (*Jolley*).)

We have determined that plaintiffs failed to state facts sufficient for a cause of action under either section 2924, subdivision (a)(6) or Business and Professions Code section 17200. Accordingly, we further determine that plaintiffs have failed to allege the existence of an actual controversy involving justiciable questions relating to the parties' respective rights or obligations. (See *Jolley, supra*, 213 Cal.App.4th at p. 909.) The trial court therefore did not err in sustaining the demurrer to the cause of action for declaratory relief.

F. *Request for Leave to Amend*

Finally, plaintiffs contend that the trial court abused its discretion in denying leave to amend the complaint. They assert that "the trial court should have, at the very least, granted leave to amend so that Plaintiffs could clarify [their] arguments and be afforded sufficient time to conduct discovery. In the event that any ambiguity existed, or that any fact was not pled as explicitly as is required, Plaintiffs should have been granted leave to amend." As we will discuss, plaintiffs' contentions are insufficient to meet their burden on appeal.

The rules governing leave to amend the complaint are as follows: "If the court sustained the demurrer without leave to amend, as here, 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. [Citation.]" (*Schifando, supra*, 31 Cal.4th at p. 1081.)

"To satisfy that burden on appeal, a plaintiff `must show in what manner he [or she] can amend his [or her] complaint and how that amendment will change the legal effect of his [or her] pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the `applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation]." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.)

In their argument on appeal, plaintiffs fail to show in what manner their complaint could be amended to state any cause of action. We therefore conclude that plaintiffs have not met their burden on appeal and the trial court did not abuse its discretion in denying leave to amend. Having also found no merit in any of other issues that plaintiffs raised on appeal, we will affirm the judgment of dismissal without reaching defendants' judicial estoppel argument.

V. DISPOSITION

The judgment of dismissal is affirmed.

ELIA, ACTING P.J. and MIHARA, J., concurs.

[1] Only defendants Bank of America, Deutsche Bank, and MERS have appeared as respondents in this appeal.

[2] We deny defendants' request for judicial notice of several documents pertaining to plaintiffs' bankruptcy proceedings, which defendants concede were not before the trial court at the time of the judgment that is the subject of this appeal. "It has long been the general rule and understanding that `an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

[3] The record on appeal does not include a verification for the "verified first amended complaint." Code of Civil Procedure section 446 provides in part: "In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true; and where a pleading is verified, it shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his or her office, or from some cause unable to verify it, or the facts are within the knowledge of his or her attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he or she shall set forth in the affidavit the reasons why it is not made by one of the parties."

[4] All further statutory references are to the Civil Code unless otherwise indicated.

[5] On appeal, plaintiffs have not raised any issue with respect to the trial court's order sustaining the demurrer to the cause of action for breach of the covenant of good faith and fair dealing without leave to amend. An appellant's failure to address a cause of action on appeal from the trial court's order sustaining a demurrer constitutes abandonment of that cause of action on appeal. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 983, fn.1.) We therefore find that plaintiffs have abandoned this cause of action.

[6] The record does not include the trial court's ruling, if any, on defendants' request for judicial notice.

[7] Plaintiffs contend that the trial court erred in granting defendants' request for judicial notice of the December 29, 2006 deed of trust, the assignment of deed trust recorded on September 16, 2010, and the docket of the United States Bankruptcy Court, Northern District of California, petition No. 10-55079. Defendants argue that plaintiffs waived this issue by failing to object to the request for judicial notice during the proceedings below. We find no merit in plaintiffs' contention. As stated in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn.1 (*Yvanova*), "[t]he existence and facial contents of these recorded documents were properly noticed in the trial court under Evidence Code sections 452, subdivisions (c) and (h), and 453. [Citation.] Under Evidence Code section 459, subdivision (a), notice by this court is therefore mandatory. We therefore take notice of their existence and contents, though not of disputed or disputable facts stated therein. [Citation.]"