MOHAMMED DANESH-BAHREINI et al., Plaintiffs and Appellants,
v.
ALAW et al., Defendants and Respondents.

No. A146911.

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

Filed March 8, 2018.

Appeal from the Contra Costa County, Superior Court No. MSC14-02017.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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KLINE, P.J.

Plaintiffs Mohammed Danesh-Bahreini and Shahnaz Danesh appeal from a judgment dismissing their action against defendants ALAW and ALAW employee Regina Cantrell following the superior court's sustaining of demurrers by ALAW and Cantrell to plaintiffs' first amended complaint against defendants JPMorgan Chase Bank, N.A. (Chase), ALAW, and Cantrell. ALAW acted as the foreclosure trustee in an attempted nonjudicial foreclosure on plaintiffs' San Ramon home and the court found the actions of ALAW and its employee Cantrell in recording a notice of trustee's sale to be covered by the statutory privileges of Civil Code section 2924, subdivisions (b) and (d),[1] such that the tort action against them was barred. The court allowed some causes of action to continue against Chase, the beneficiary under the Deed of Trust. The parties state the sale was postponed and that to date, no trustee's sale has been held.

BACKGROUND

The prior history of this action was set forth in our unpublished opinion. (*Mohammed Danesh-Bahreini et al. v. JPMorgan Chase, N.A., et al.* (Apr. 1, 2014, A135236) [nonpub. opn.] 2014 WL 13036437 (*Danesh-Bahreini I*)), and will not be repeated at length here. Suffice it to say, plaintiffs have been

in default on their home loan since 2010. Chase attempted a nonjudicial foreclosure, filing a notice of default on the property on November 2, 2010. Plaintiffs sued, resulting in the trial court's granting Chase's demurrer and dismissing the action against it. We affirmed in *Danesh-Bahreini I.* Nevertheless, no foreclosure was completed.

First Amended Complaint

As alleged in the first amended complaint, plaintiffs again experienced financial difficulties in 2014-2015. Chase advised them that it would not accept the default amount stated in the notice of default recorded on November 2, 2010, although plaintiffs were prepared to tender that amount ($36,580.75) to cure the default.[2] Plaintiffs submitted a loan modification application to Chase, which application was completed and submitted on or before October 10, 2015.

Despite the pending loan modification, ALAW recorded a notice of trustee sale on October 14, 2014, which notice set the sale date for November 10, 2014. Plaintiffs sued, the sale was postponed and to date, no trustee's sale has been held.

Plaintiffs' first amended complaint challenges ALAW and Cantrell's actions in preparing and recording of the notice of trustee sale upon several grounds:

As relevant here, the first amended complaint alleged the notice of trustee sale failed to comply with the "California Homeowner Bill of Rights" (HBOR), which became effective January 1, 2013, in that it was recorded while their loan modification was pending. "Among other things, the HBOR attempts to eliminate the practice, commonly known as dual tracking, whereby financial institutions continue to pursue foreclosure while evaluating a borrower's loan modification application. (Civ. Code, §§ 2923.6, 2924.18.)" (*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 950.) In their first and seventh causes of action against all defendants for dual tracking, plaintiffs assert the notice of trustee sale violated sections 2923.6 and 2924.18 (repealed eff. Jan. 1, 2018) respectively. Plaintiffs allege as to each of these causes of action that defendants' actions were "knowing, intentional, willful and malicious."

The complaint also alleged the notice of trustee sale failed to comply with the requirement of section 2924f, subdivision (b)(1), as it failed to state "the street address and the specific place at the street address where the sale will

be held." (Fourth cause of action.) The notice of trustee sale states, "Place of Sale: 1900 Parkside Drive, Concord, CA 94519." They allege the "address of 1900 Parkside Drive, Concord, CA 94519 does not exist." At the hearing on the demurrer, plaintiffs' counsel described that location as a larger size empty lot that has no street number.

Plaintiffs also alleged against Chase and Doe defendants that the notice of default recorded on November 2, 2010 was "stale" and deprived them of substantial notification, protections and rights extended to homeowners under the HBOR and failed to provide a basis for recording the notice of trustee sale. (Third cause of action.)

Plaintiffs alleged in a sixth cause of action that ALAW and Cantrell made a false statement when Cantrell, as assistant secretary for ALAW, signed the notice of trustee Sale dated October 3, 2014, which stated: "In compliance with [section] 2923.5[, subdivision] (c) the mortgagee, trustee, beneficiary, or authorized agent declares: that it has contacted the borrower(s) to assess their financial situation and to explore options to avoid foreclosure; or that it has made efforts to contact the borrower(s) to assess their financial situation and to explore options to avoid foreclosure by one of the following methods: by telephone; by United States mail; either 1st class or certified; by overnight delivery, by personal delivery; by e-mail; by face to face meeting." Plaintiffs alleged they "are informed and believe that defendant Cantrell no effort to confirm the accuracy of that statement [*sic*]. [¶] At no time did ALAW nor Regina Cantrell contact the plaintiffs beyond recording and then causing service of the Notice of Trustee Sale. [¶] The Actions of the defendants, and their false statements, were knowing, willful, intentional, and malicious. It is the kind of false statement plaintiffs believe defendant ALAW routinely makes, as a pattern of conduct, in its recorded notices." Plaintiffs appear to contend such action violates section 2924.17, subdivision (b), which in 2014 provided in relevant part that "[b]efore recording or filing [a notice of sale], a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." (Former § 2924.17, subd. (b), added by Stats. 2012, ch. 86 (A.B. 278), § 20; see also, another section of the same number added by Stats. 2012, ch. 87 (S.B. 900), § 20.)

Plaintiffs alleged a ninth cause of action for fraud against all defendants based on dual tracking and alleging ALAW recorded the notice of trustee

sale with knowledge that a loan modification was in progress and knowing such recording was a violation of section 2923.6.

Plaintiffs also alleged an eleventh cause of action for unfair business practices in violation of Business and Professions Code sections 17200 and 17500, the Unfair Competition Law (UCL). As to this cause of action, plaintiffs alleged defendants aided and abetted each other by intentionally and unlawfully executing and recording a false and inaccurate notice of trustee sale and that these actions were intentional, knowing, willful and malicious and in disregard of California nonjudicial foreclosure law.

The asserted causes of action related primarily to Chase, but included allegations that each defendant was an agent of the others, that each defendant engaged in a joint venture with each other, that they conspired together to deprive plaintiffs of the protections offered under the California nonjudicial foreclosure law.[3]

Defendants filed demurrers to the complaints in April 2015. The trial court issued a tentative ruling for the scheduled hearing on the demurrers. In that tentative ruling, the court ruled as to the ALAW and Cantrell demurrer: "1. Conduct of foreclosure trustees is privileged. See [section] 2924[, subdivision] (d). [¶] 2. Plaintiffs have failed to adequately allege facts suggesting defendants acted with hatred or ill will. See *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1370-1371 [(*Noel*)]. [¶] 3. Plaintiffs have failed to cite legal authority suggesting liability on the part of Cantrell. [¶] 4. Ninth Cause of Action does not plead a fraud theory of liability against ALAW or Cantrell."

Plaintiffs contested the tentative ruling and hearing was held on May 26, 2015. On June 15, the court issued an unreported minute order sustaining ALAW and Cantrell's demurrer with 30 days leave to amend. Plaintiffs did not file an amended complaint. The court granted ALAW and Cantrell's application for dismissal for failure to amend and a judgment of dismissal was entered in favor of ALAW and Cantrell on September 25, 2015. Plaintiffs filed a timely notice of appeal on November 23, 2015. At that time, the action was still pending in the trial court against defendant Chase.

DISCUSSION

Standard of Review

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*), fn. omitted.) Plaintiffs here declined the opportunity to amend their pleading following the court's sustaining of ALAW and Cantrell's demurrer to their first amended complaint *with* leave to amend. "`"It is the rule that when a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can." [Citations.]' (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 109[, abrogated on another point by *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66].) Plaintiff has forfeited any right to request leave to amend. [Citation.]" (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 296; see, e.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group, 2016) ¶ 136.3, p. 8-107.)

Nonjudicial Foreclosure

As described by our Supreme Court in *Yvanova, supra,* 62 Cal.4th 919, **"A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. `The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.'** [Citation.] The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. [Citation.] [¶] **The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell.** (Civ. Code, § 2924, subd. (a)(1).) **After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. (§§ 2924, subd. (a)(2), 2924f, subd. (b).) If the sale is not postponed and the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to the highest bidder.** (§ 2924g, subd. (a); [citations].) Generally speaking, **the foreclosure sale extinguishes the borrower's debt; the lender may recover no deficiency.** [Citations.]" (*Yvanova,* at pp. 926-927, fn. omitted.)

"The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary. [Citations.] While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, **the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent.** (§ 2924, subd. (a)(1) [**notice of default may be filed for record only by `[t]he trustee, mortgagee, or beneficiary'**]; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334 [(*Kachlon*)] [**when borrower defaults on the debt, `the beneficiary may declare a default and make a demand on the trustee to commence foreclosure'**]; *Santens v. Los Angeles Finance Co.* (1949) 91 Cal.App.2d 197, 202 [**only a person entitled to enforce the note can foreclose on the deed of trust**].)" (*Yvanova, supra,* 62 Cal.4th at p. 927.)

"[T]he trustee under a deed of trust is an agent of the beneficiary only in a limited sense. Such a trustee `has neither the powers nor the obligations of a strict trustee; rather, he serves as a kind of common agent for the trustor and the beneficiary. [Citations.] **His agency is a passive one, for the limited purpose of conducting a sale in the event of the trustor's default or reconveying the property upon satisfaction of the debt.** [Citations.]' [Citations.] **`"The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist."'** [Citation.]" (*Biancalana v. T.D. Services Co.* (2013) 56 Cal.4th 807, 819; see *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 287-288; *Kachlon,* at p. 336.)

"A beneficiary or *trustee* under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure. (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062; *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7.)" (*Yvanova, supra,* 62 Cal.4th at p. 929, italics added.) However**, "MERE TECHNICAL VIOLATIONS OF THE FORECLOSURE PROCESS WILL NOT GIVE RISE TO A TORT CLAIM; THE FORECLOSURE MUST HAVE BEEN ENTIRELY UNAUTHORIZED ON THE FACTS OF THE CASE."** (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 409.) Further, the **PARTY ATTACKING THE SALE MUST SHOW PREJUDICE**. (*Id.* at p. 408; *Yvanova,* at p. 927, fn. 4 [**recognizing**

prejudice as an element of wrongful foreclosure]; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93 **["[D]oes the need for `strict compliance' with foreclosure notice requirements recited in various cases mean that a trustee's sale must be invalidated no matter how trivial the procedural defect? We answer this question in the negative**"].)

Here, no foreclosure was completed and no prejudice was suffered by plaintiffs, who do not allege they attempted to attend the sale and were unable to do so or that any other potential bidders were unable to locate the sale site. Although they contend that such will occur, the allegation is pure speculation and need not be accepted on this demurrer. (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 993.)

Statutory Privilege, Section 2924, Subdivision (d)

"The recording of a notice of sale and notice of default are privileged. Section 2924, subdivision (d)(1), provides that **`[t]he mailing, publication, and delivery of notices as required' by section 2924 `constitute privileged communications** pursuant to Section 47.' (§ 2924, subd. (d)(1).) **Section 2924 mandates the recording of both a notice of default** (*id.,* subd. (a)(1)), **and a notice of sale** (*id.,* subd. (a)(3))." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336 (*Schep*); *Kachlon, supra,* 168 Cal.App.4th at p. 335.)[4] The same privilege covers "performance of the procedures set forth in this article." (§ 2924, subd. (d)(2).)

Section 2924, subdivision (b), provides now as it did in 2014, **"In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage. . . ."**

"Our Legislature's purpose in declaring these procedures privileged was `to give trustees some measure of protection from tort liability arising out of the performance of their statutory duties.' (*Kachlon*[, *supra,*]168 Cal.App.4th [at p.] 340.) **That purpose is fulfilled only if *all* of the procedural steps attendant to a nonjudicial foreclosure are privileged, from the recording of the notice of default and notice of sale through the recording of the trustee's deed upon sale following the foreclosure sale.** [Citation.]" (*Schep, supra,* 12 Cal.App.5th at p. 1336.)

"Of course, section 47 creates two privileges: (1) an absolute privilege, commonly called the litigation privilege, that applies irrespective of the speaker's motive (§ 47, subd. (b)); and (2) **a qualified privilege [often referred to as the common interest privilege] that `applies only to communications made *without malice*'** (*id.,* subd. (c)). (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360.) Section 2924, subdivision (d), refers only to `Section 47' without specifying which of the two privileges applies. The courts have split on this question. (Compare *Kachlon, supra,* 168 Cal.App.4th at pp. 335-341 [§ 2924 incorporates § 47's qualified privilege] with *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1517 [§ 2924 incorporates § 47's absolute privilege].)" (*Schep, supra,* 12 Cal.App.5th at p. 1337, italics added.)[5]

Garretson v. Post, supra, 156 Cal.App.4th 1508, occurred in the context of an anti-SLAPP motion to strike a wrongful foreclosure cause of action under Code of Civil Procedure section 425.16. The Court of Appeal held that **nonjudicial foreclosure proceedings, including the notice of foreclosure, were not constitutionally protected activity under the anti-SLAPP statute.** (*Garretson,* at p. 1512.) In so doing, the court discussed the statutory privilege of section 2924. The court was persuaded, "**The Legislature's rationale for extending the litigation privilege . . . to nonjudicial foreclosures was to protect trustees in the performance of their contractual and statutory duties.** The proponents of the original amendment to [section] 2924 in 1996 commented that `Trustees who record and send notices of default and of sale can be vulnerable to defamation suits despite the fact that when the same allegations are made in the context of a judicial foreclosure, they are clearly privileged communications. This appears to be because ***A NONJUDICIAL FORECLOSURE IS A PRIVATE, CONTRACTUAL PROCEEDING, RATHER THAN AN OFFICIAL, GOVERNMENTAL PROCEEDING OR ACTION.*** Essentially, the required communications of default are the same and made for the same purpose.' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1488 (1995-1996 Reg. Sess.) as amended June 26, 1996, p. 2, italics added; see also Sen. Rules Com., Off. of Sen. Floor Analysis, Unfinished Business, Analysis of Sen. Bill No. 1488 (1995-1996 Reg. Sess.) as amended July 9, 1996, p. 3.)" (*Garretson,* at p. 1518.)

In *Kachlon, supra,* 168 Cal.App.4th 316, in a thoughtful discussion of the inconclusive legislative history of the privilege conferred by section 2924, the appellate court recognized that the immunity conferred "was intended to

give trustees some measure of protection from tort liability arising out of the performance of their statutory duties. The overall balance of interests reflected in the statutory scheme, however, favors protection of trustors' property rights, thus suggesting that trustors should not be entirely deprived of the ability to vindicate their property rights if wrongfully violated by the trustee. Granting absolute immunity from such wrongdoing would wholly sacrifice the trustor's interest in favor of the trustee. The qualified common interest privilege, on the other hand, would provide a significant level of protection to trustees, leaving them open to liability only if they act with malice. At the same time, it preserves the ability of trustors to protect against the wrongful loss of property caused by a trustee's malicious acts." (*Katchlon,* at p. 340.)

The Court of Appeal in *Schep, supra,* 12 Cal.App.5th 1331, refused to take a position on the issue of absolute versus qualified trustee immunity because it found the recording of the notice of default, of the notice of auction sale and of the trustee's deed upon sale underlying the plaintiff's slander of title action in the case before it were privileged even under section 47's narrower qualified privilege for communications made without malice. (*Schep,* at p. 1337.) *Schep* also observed: "**For the purposes of section 47's qualified privilege, `malice' means that the defendant (1) `"was motivated by hatred or ill will towards the plaintiff,"' or (2) `"lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."**' (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 721; § 48a, subd. (d)(4) [**defining `actual malice' as `hatred or ill will toward the plaintiff**'].)" (*Ibid.*; see *Kachlon, supra,* 168 Cal.App.4th at p. 336.)

We agree with *Kachlon,* that the balance of interests reflected in the statutory scheme for nonjudicial foreclosure is best served by the qualified privilege and that the common interest privilege applicable to "a communication, without malice, to a person interested therein . . . by one who is also interested" (§ 47, subd. (c)) is a "natural fit for nonjudicial foreclosure" (*Kachlon, supra,* 168 Cal.App.4th at p. 339), which "bears none of the attributes essential for absolute privilege," as it does not occur in a judicial or quasi-judicial proceeding, nor does it occur in an "official proceeding authorized by law." (§ 47, subd. (b)(3); *Kachlon,* at p. 339.)

Kachlon held the **actions of the trustee in wrongfully recording the notice of default without adequate investigation and in failing to rescind the notice upon being shown the original promissory note had been satisfied were privileged unless it acted with malice**. (*Kachlon, supra,* 168 Cal.App.4th at p. 343.) The evidence presented at trial failed to show the trustee acted with malice. (*Id.* at p. 344.) The appellate court rejected the assertion that the trustee acted with reckless disregard as to whether the notice of default was warranted when it failed to obtain the original note and deed of trust. **"`[M]ere negligence in making "a sufficient inquiry into the facts on which the statement was based" does [not], of itself, relinquish the privilege. "Mere inadvertence or forgetfulness, or careless blundering, is no evidence of malice**." [Citation.] [¶] While "[the] concept of negligence is inherent in the issue of probable cause" [citation], the decisions long ago recognized that **to constitute malice the negligence must be such as "evidenced a wanton and reckless disregard of the consequences and of the rights and of the feelings of others"** [citation].' [Citations.]" (*Id.* at p. 344.) Moreover, "with respect to statements falling within section 47[, subdivision] (c), `malice is not inferred from the communication.'" (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1204, quoting § 48; *Noel, supra,* 113 Cal.App.4th at p. 1370.)

Application of the Qualified Privilege

"Since the qualified privilege creates a presumption that the communication is made innocently and without malice [citations],***the pleadings must contain affirmative allegations of malice in fact, and malice must exist as a fact in order to destroy the privilege***. [Citations.] **Such facts must establish that the person speaking the defamatory words entertained toward the person defamed a feeling of hatred or ill will going beyond that which the occasion for the communication apparently justified and different from that motive which prima facie rendered the communication privileged**. [Citations.]" (*Smith v. Hatch* (1969) 271 Cal.App.2d 39, 47-48, italics added.)

Plaintiffs' specific claims against the trustee ALAW and its employee Cantrell—that the location of the trustee sale was not sufficiently specific and that Chase had received a completed loan modification application at the time of recording—relate to their recording of the Notice of Sale, which, if done without malice, is privileged under section 2924, subdivision (d). The

question here is whether plaintiffs' pleadings contain adequate affirmative allegations of malice in fact to find the qualified privilege inapplicable.

The first and seventh causes of action against all defendants for dual tracking assert the notice of trustee sale violated of sections 2923.6 and 2924.18 respectively. Each cause of action contains an allegation that defendants' actions were "knowing, intentional, willful and malicious," but no facts, other than the statutory violation itself, that would support a finding of malice against the trustee. **Such boilerplate statement of malice, particularly when the only action alleged to have been taken by the trustee was to record the notice of trustee sale is insufficient.**

The second cause of action against "all defendants except Cantrell," cannot stand against ALAW either, as **THE TRUSTEE HAS NO DUTY (OR POWER) TO CONSIDER OR OFFER LOAN MODIFICATIONS, LOSS MITIGATION, OR ALTERNATIVES TO FORECLOSURE.**

The third cause of action regarding the alleged "stale" notice of default is not alleged against ALAW and Cantrell, but only against Chase and Doe defendants. Plaintiffs cite no authority supporting their claim that a notice of default can become "stale." More to the point here, nothing in this cause of action would implicate any duty on the part of the trustee. There are no allegations that would support a finding of malice by the trustee in recording the notice of trustee sale.

Nor do we find persuasive plaintiffs' estoppel claim on appeal. In a one-page discussion in their opening brief, plaintiffs contend in conclusory fashion that "defendants should be estopped from using the stale 2010 notice of default and the 2014 notice of trustee sale." Plaintiffs argue that they were prepared to tender the amount stated in the 2010 notice of default in 2014, and that amount was refused. They are apparently arguing that they were led by Chase to believe the amount stated in the 2010 default notice was the sum needed to cure the default in 2014. Such claim was not raised by plaintiffs in the trial court and therefore is not a proper issue to be decided on this appeal. (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423; see *Consumer Watchdog v. Department of Managed Health Care* (2014) 225 Cal.App.4th 862, 878.)

Moreover, this estoppel theory is unsupported as plaintiffs did not maintain they received no explanation why their proposed tender was inadequate.

They acknowledge that when their representative called Chase on October 29, 2014, that person was told the amount of the default stated in the 2010 notice of default was no longer accurate. Moreover, the notice of default itself advised with respect to the specific amount of the default: "This amount is $36,580.75 as of October 25, 2010 *and will increase until your account becomes current.*" (Italics added.)[6] Hence the notice clearly notified plaintiffs that the amount of the default would continue to increase if future payments were not made.

The fourth cause of action alleges a violation of section 2924f, subdivisions (b)(1) and (b)(2)[7] by using a "non-existent address" as the place of the trustee sale in the notice of trustee sale. At all relevant times, section 2924f, subdivision (b)(1) provided in part that "before any sale of property can be made under the power of sale contained in any deed of trust or mortgage . . . notice of the sale thereof shall be given by posting a written notice of the time of sale and of the street address and the specific place at the street address where the sale will be held. . . ."

Plaintiffs here allege "[t]here is no place with an address of 1900 Parkside Drive, Concord, CA 94519." They further allege that defendants' providing of a false or non-existent address was "knowing, intentional, willful and malicious." Plaintiffs allege no facts, other than their allegation that the address does not exist, to support their claim that the trustees knowingly, willfully and maliciously provided a false address. With respect to the "non-existence" of the address, both the court and plaintiffs' counsel at the demurrer hearing, recognized that the location *did* exist and that it was a vacant lot. However, the street address did not appear on the lot.

No authority holds that the trustee cannot hold a sale in a vacant lot. The notice identified the place of sale, as both the court and plaintiff's counsel acknowledged the located property was a vacant or empty lot. The notice contained a street address sufficient to allow the property to be located and **nothing in the statute requires that the "street address" for the place of sale appear or be posted on the property where the sale is being held.**

As to the trustee defendants, the boilerplate allegation of malice was insufficient to overcome the statutory privilege.

In their sixth cause of action against all defendants, plaintiffs allege the trustees made no effort to confirm the accuracy of the statement required by section 2923.5 and signed by Cantrell on October 3, 2014, that the mortgagee, trustee, beneficiary, or authorized agent has contacted the borrower(s) or has made efforts to contact them to assess their financial situation and to explore options to avoid foreclosure. Plaintiffs allege that the statement was false and that neither ALAW nor Cantrell contacted plaintiffs beyond recording and causing service of the notice of trustee sale.

They further allege on information and belief that Cantrell made no effort to confirm the accuracy of the statement before signing it, asserting this failure violated section 2924.17, providing that the declaration "shall be accurate and complete and supported by competent and reliable evidence." Plaintiffs allege these actions and false statements, "were knowing, willful, intentional, and malicious. It is the kind of false statement plaintiffs believe defendant ALAW routinely makes, as a pattern of conduct, in its recorded notices."

First, the trial court sustained JPMorgan's demurrer to this cause of action on the ground that the alleged violation of section 2923.5 was barred by "issue preclusion" by our previous opinion in *Danesh-Bahreini I.* We agree. Our prior opinion recognized **"the private right of action created by section 2923.5 is `very limited.'"** (*Danesh-Bahreini I, supra,* 2014 WL 1303643, p. *4.) In *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214, the court held that section 2923.5 may be enforced by a private right of action. (Accord, *Skov v. U.S. Bank National Association* (2012) 207 Cal.App.4th 690, 699.) However, **the right of action "is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.**" (*Mabry,* at p. 214 [§ 2923.5 is not preempted by federal law, "but, we must emphasize, it is not preempted because the remedy for noncompliance is a simple postponement of the foreclosure sale, nothing more"].) (Accord, *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1616.) Consequently, we concluded "[if] appellants are entitled to pursue relief against respondents for not properly considering their applications for loan modification, it must be in some other form than for violation of section 2923.5." (*Danesh-Bahreini I,* at p. *5.) Plaintiffs have attempted to do this by scaffolding their section 2923.5 claim that they were not properly contacted about, assessed or considered for loan modification or other options to avoid foreclosure on a claim under section

2924.17 that the declaration signed by Cantrell stating they had been was false.

No liability would be incurred by the trustees' failing to make a sufficient inquiry into the facts on which the statement was made, even if the statement were false. (*Kachlon, supra,* 168 Cal.App.4th at p. 344.) Plaintiffs have pleaded no *facts* indicating that ALAW or Cantrell were motivated by hatred or ill will towards the plaintiffs. (*Schep, supra,* 12 Cal.App.5th at p. 1337.) The question is whether by signing the form declaration, Cantrell and her employer ALAW "`"evidenced a wanton and reckless disregard of the consequences and of the rights and of the feelings of others" [citation]' [Citation.]" (*Kachlon,* at p. 344; see *Noel, supra,* 113 Cal.App 4th at pp. 1370-1371.) Particularly here, where it was the responsibility of the beneficiary and not the trustee to assess the borrower's financial situation and to explore options to avoid foreclosure and where the trustee acts only at the direction of the beneficiary, it does not appear that the allegations of malice are supported by the facts alleged. Further, if the plaintiff can overcome the qualified privilege in cases like this by merely alleging the trustee's actions and statements were "knowing, willful, intentional, and malicious," the statutory privilege, with its purpose of protecting the trustee from harassing litigation, would be undermined.

The ninth cause of action alleging fraud based on dual tracking and Chase's misrepresentations to plaintiffs, alleges that ALAW knew that a loan modification was in progress when it recorded the notice of trustee sale and also knew that such recording was a violation of section 2923.6. The court correctly concluded that the cause of action did not adequately allege *fraud* against ALAW or Cantwell. "**The elements [of a cause of action for fraud] are: `"(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or `scienter'); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage."'** [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 974.) **"These elements may not be pleaded in a general or conclusory fashion.** ([*Lazar v. Superior Court* (1996) 12 Cal.4th 632], 645.) **Fraud must be pled specifically—that is, a plaintiff must plead *facts* that show with particularity the elements of the cause of action**. (*Ibid.*)" (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1090.) We reject plaintiffs' assertions that fraud need no longer be pled with particularity or that their allegations of joint venture and conspiracy among all defendants was a sufficient substitute for that particularity. Further, the

allegation of knowledge falls short of the allegations of malice required to overcome the privilege.

The eleventh cause of action attempts to state a cause of action for Unfair Business Practices under the UCL against all defendants.

"The UCL prohibits any `unlawful, unfair or fraudulent business act or practice.' `Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.' [Citation.] **An act can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or fraudulent."** (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554.)

Plaintiffs allege defendants made false and misleading statements concerning the proposed performance or disposition of real property. (Bus. & Prof. Code, § 17500.) They allege defendants aided and abetted each other by intentionally and unlawfully executing and recording a false and inaccurate notice of trustee sale, that the notice was recorded in violation of sections 2923.4, 2923.6 and 2924, and that these actions were intentional, knowing, willful and malicious and in disregard of California nonjudicial foreclosure law.

In their opening brief, plaintiffs do not put forth any argument supporting their pleading of this cause of action against ALAW and Cantrell, other than contending plaintiffs have "standing" to bring this claim, citing *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 603-604.[8] They argue that the HBOR provides that "`[t]he rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.' California Civil Code § 2924(h). California Civil Code § 2924.19(h) repeats this admonition."

First, former section 2924.19, subdivision (g) effective in 2014, did contain this language.[9] However, at that time, the statute also specifically provided that "**A mortgage servicer, mortgagee, beneficiary or authorized agent *shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale,* or that has been corrected and remedied by third parties working on its behalf prior to**

the recordation of the trustee's deed upon sale." (Former § 2924.19, subd. (c), italics added.) Here, no foreclosure was concluded and no trustee's deed upon sale was recorded, hence no liability for such violation under the statute.

As for the second statutory provision cited by plaintiffs in their opening brief, we shall assume that plaintiffs are referring not to section 2924, subdivision (h), which did not exist in 2014 and does not now exist, but are instead referring to section 2924h. Subdivision (g) of section 2924h does contain the phrase "[i]n addition to any other remedies. . . ." However, this section does not involve the recording of a notice of trust sale, but speaks to bids and bidders at a trustee's sale, the finality of such sale, rescission for failure of consideration, delivery of payment, restraint of bidding and remedies therefore. (See § 2924h.)

"`"Appellate briefs must provide argument and legal authority for the positions taken. `When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.'" [Citation.] **"We are not bound to develop appellants' argument for them."'** [Citation.]" (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1509.) **We may "treat as waived, forfeited or meritless any issue that, although raised in the briefs, is not supported by pertinent or cognizable legal argument or proper citation of authority**. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 9:21, pp. 9-6 to 9-7; see, e.g., *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956 **["`The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived.'"**].)

Moreover, were we to treat the issue as not waived, this cause of action as pleaded alleges defendants violated the UCL by recording the notice of trustee sale in violation of sections 2923.4, 2923.6 and 2924. By basing their cause of action on these statutes, plaintiffs have attempted to invoke the "unlawful" prong of the statue. "Under its `unlawful' prong, `the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.' [Citation.] Thus, **a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong."** (*Berryman v. Merit Property Management, Inc., supra,* 152 Cal.App.4th at p. 1554.) Having determined, that ALAW and Cantrell's actions relating to preparing and recording of the notice of trustee sale were

covered by the section 2924, subdivision (d) privilege, the UCL claim also fails.

AMICUS CURIAE CONTENTIONS

We granted permission for Eve Sutton to file an amicus brief in this case. Sutton states she is the defendant in an unlawful detainer action and the plaintiff in a wrongful foreclosure action pending in the San Mateo County Superior Court. She contends the Contra Costa County Superior Court refused to consider either laches or estoppel when confronted with the delay between the recording of the 2010 notice of default and the 2014 notice of trustee sale in this case and that our determination of this case will impact the San Mateo County Superior Court proceedings to which she is a party.

She reaches too far. The "laches" theory she attempts to import into this appeal is not an issue here. Plaintiffs did not assert laches in the first amended complaint. As we have pointed out, the third cause of action alleging a violation of "California Civil Code § 2924 Stale Notice of Default" was specifically directed to Chase and Doe defendants and not to respondent ALAW and Cantrell. The term "laches" is mentioned only once in passing in appellants' reply brief. "Amici briefs generally must be confined to the *issues raised by the appealing parties.* Issues raised for the first time by amici curiae ordinarily will not be considered. . . ." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 9:210.1, pp. 9-61 to 9-62.) **IT IS ESTABLISHED THAT "AMICUS CURIAE MUST TAKE THE CASE AS THEY FIND IT."** (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1275; see *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 13.)

With respect to Sutton's argument supporting plaintiffs' estoppel claim, based on plaintiffs' asserted tender of the amount due as stated in the 2010 notice of default and its rejection by Chase, such claim was not raised by plaintiffs in the trial court and therefore is not a proper issue to be decided on this appeal. (*Dimmick v. Dimmick, supra,* 58 Cal.2d at pp. 422-423; see *Consumer Watchdog v. Department of Managed Health Care, supra,* 225 Cal.App.4th at p. 878.) Moreover, as we discuss above, the estoppel theory is unsupported in this case.

DISPOSITION

The judgment dismissing the action as to ALAW and Cantrell is affirmed.

Richman, J. and Stewart, J., concurs.

[1] All statutory references are to the Civil Code, unless otherwise indicated.

[2] The notice of trustee's sale recorded October 14, 2014, stated a balance owing of "$1,203,749.28 (estimated)."

[3] Other causes of action included:

A second cause of action: alleging defendants, except Cantrell, violated section 2923.4 in that they did not consider or provide a meaningful opportunity to obtain loss mitigation or loan modification or other alternative to foreclosure before recording either the notice of default or notice of trustee sale;

Fifth and eighth causes of action: seeking injunctive relief pursuant to sections 2924.12 and 2924.19 to enjoin violations of the HBOR;

A tenth cause of action: alleging as to Chase only that the original 2007 loan was Unconscionable.

[4] Section 2924, subdivision (d) provides now as it did in 2014:

"All of the following shall constitute privileged communications pursuant to Section 47: [¶] (1) The mailing, publication, and delivery of notices as required by this section. [¶] (2) Performance of the procedures set forth in this article. [¶] (3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure."

[5] *Rodriguez v. JPMorgan Chase & Co.* (S.D. 2011) 809 F.Supp.2d 1291, 1299, also holds, without analysis, that a foreclosure trustee is entitled to absolute immunity from suit pursuant to sections 47 and 2924, subdivision (d) for certain actions it took related to the foreclosure process, including issuance of the notice of default.

[6] The notice of default also advised plaintiffs that their default was the failure to pay "The 04/01/2010 INSTALLMENT OF PRINCIPAL AND INTEREST AND ALL SUBSEQUENT MONTHLY INSTALLMENTS OF PRINCIPAL AND INTEREST; PLUS ANY ADDITIONAL ACCRUED AND UNPAID AMOUNTS INCLUDING, BUT NOT LIMITED TO, LATE CHARGES, ADVANCES, IMPOUNDS, TAXES, HAZARD INSURANCE, ADMINISTRATIVE FEES, INSUFFICIENT AND PARTIAL RETURN CHECK FEES, STATEMENT FEES, AND OBLIGATIONS SECURED BY PRIOR ENCUMBRANCES."

[7] Subdivision (b)(2) of section 2924f does not refer to a "street address" or any address.

[8] We are puzzled by the reference to *Lu v. Hawaiian Gardens Casino, Inc., supra,* 50 Cal.4th 592, in which the court held Labor Code section 351, which provides that a gratuity is the sole property of the employee to whom it was given, contains no private right to sue. (*Lu,* at p. 596.) The court concluded there was *no* private right of action under Labor Code section 351, but stated there may be other remedies available to the plaintiff, such as an action for conversion. (*Lu,* at pp. 603-604.)

[9] Section 2924.19 was repealed by Statutes 2015, chapter 303 (Assem. Bill No. 731, § 29, eff. Jan. 1, 2016). (See 11 Wests Civ. Code, § 2924.19 (repealed) Historical and Statutory Notes, 2018 pocket part, p. 141.)