KEVIN LAWSON, et al., Plaintiffs and Appellants,
v.
CAL-WESTERN RECONVEYANCE CORPORATION, et al.,
Defendants and Respondents.

No. A142202.

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

Filed November 16, 2017.

Appeal from the Marin County, Superior Court No. CIV 1101193.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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RIVERA, Acting P.J.

Plaintiffs Kevin and Ingrid Lawson (the Lawsons) filed this action to prevent a nonjudicial foreclosure sale of their home after they defaulted on a loan secured by a deed of trust. They appeal from an order of the trial court entering judgment in favor of defendants PNC Bank, National Association (PNC Bank) and Wells Fargo Bank, N.A. (Wells Fargo) (collectively, the banks). The trial court sustained the banks' demurrer to some of the Lawsons' claims and granted summary judgment as to the rest.[1] We affirm.

I. FACTS

In September 2005, the Lawsons obtained a loan in the amount of $927,500 to refinance their residence, by signing a promissory note (note) secured by a deed of trust on the property. The deed of trust identified the lender and beneficiary as Commonwealth United Mortgage, a division of National City Bank of Indiana (National City Bank), and also identified National City Bank as the trustee. In 2008, National City Bank merged into PNC Bank.

At some point, the Lawsons fell behind on their monthly loan payments. PNC Bank sent them a letter dated July 16, 2010, advising that it was "the

servicer and owner, or authorized representative of the owner" of their loan, that they were in breach or default under the loan, and that acceleration of the note's maturity date would occur if they did not cure the breach or default by paying $16,325.37 by August 15, 2010.

The Lawsons later received a notice of default and election to sell, dated and recorded on August 25, 2010. This notice advised the Lawsons that they were in breach of their obligations, that all sums secured by the deed were immediately due, and that foreclosure proceedings had commenced. It directed the Lawsons to contact PNC Bank, care of Cal-Western for further information, and included a telephone number and mailing address. The notice bore a signature and included a signature block identifying the signer as a Cal-Western agent. The notice described Cal-Western was "either the original trustee, the duly appointed substituted trustee, or . . . [the] agent for the trustee or beneficiary under a deed of trust."

Several months later, in January 2011, the Lawsons received a document entitled, "SUBSTITUTION OF TRUSTEE." A Cal-Western representative had signed the substitution, under a signature block that stated Cal-Western was acting as attorney-in-fact for PNC Mortgage, a division of PNC Bank, "SBM TO NATIONAL CITY MORTGAGE CO." The signature was dated August 23, 2010. The document was recorded with the county on January 27, 2011. The substitution advised that "the undersigned"—Cal-Western acting as attorney-in-fact for PNC Bank—was the "present Beneficiary" under the deed of trust and was substituting Cal-Western as trustee.

Cal-Western issued a notice of a foreclosure sale of the Lawsons' home dated January 27, 2011, and that notice was recorded with the county on February 1, 2011. The notice advised that: the Lawsons were in default under the deed of trust; the beneficiary had executed and delivered various documents to the trustee, Cal-Western, including a notice of default and an election to sell; and, if the Lawsons did not take action to protect their property, Cal-Western would sell it at a public auction on February 24, 2011. The date for the trustee's sale subsequently was continued to March 15, 2011.

II. PROCEDURAL HISTORY

On March 7, 2011, the Lawsons filed a complaint against Cal-Western and PNC Bank to enjoin the foreclosure sale.[2] PNC Bank demurred to the

complaint, but the trial court overruled the demurrer. The Lawsons then sought leave to amend their complaint to add Wells Fargo as a defendant. The Lawsons told the court PNC Bank representatives twice had advised by telephone, and also had confirmed in a letter, that Wells Fargo was the "investor" for their loan. Accordingly, the Lawsons informed the court, they were "now informed and believe[d] that [Wells Fargo was] the only party that might claim to be the beneficiary" for their loan obligation. The court granted their request, and the Lawsons filed a first amended complaint naming Wells Fargo as a third defendant on January 6, 2012.

All defendants demurred to the first amended complaint. The trial court sustained the demurrer in part with leave to amend and overruled it in part. On August 20, 2012, the Lawsons then filed a second amended complaint. It alleged that all three defendants had violated: Civil Code[3] section 2923.5, subdivision (b) (first cause of action); section 2924 et seq. (second cause of action); and California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) (third through fifth causes of action). The UCL claims were predicated, respectively, on the alleged violation of section 2923.5 (third cause of action), the alleged violation of section 2924 et seq. (fourth cause of action), and an alleged violation of Penal Code section 115 (fifth cause of action). Additionally, the second amended complaint sought declaratory relief determining the proper relationship between the parties, i.e., to determine who was the loan beneficiary and who was the trustee (sixth cause of action).

The banks demurred to the second amended complaint and the trial court sustained their demurrer as to the first and third causes of action without leave to amend on December 10, 2012. The Lawsons petitioned for a writ of mandate challenging the decision, but their petition was denied. Cal-Western then settled with the Lawsons and was dismissed with prejudice in May 2013. The banks filed a motion for summary judgment on the remaining causes of action, and the trial court granted their motion on April 11, 2014. Judgment was entered in favor of the banks on the same date, and this timely appeal followed.

III. DISCUSSION

A. Statutory Framework[4]

"`The financing or refinancing of real property in California is generally accomplished by the use of a deed of trust.' [Citation.] **`A deed of trust . . . conveys title to real property from the trustor-debtor to a third party trustee to secure the payment of a debt owed to the beneficiary-creditor under a promissory note. [Citations.] The customary provisions of a valid deed of trust include a power of sale clause, which empowers the beneficiary-creditor to [foreclose] on the real property security if the trustor-debtor fails to pay back the debt owed under the promissory note.** [Citations.]' [Citation.]" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491 (*Rossberg*.) **"`[A]lthough the deed of trust technically conveys title to the real property from the trustor-debtor to the trustee, the extent of the trustee's interest in the property is limited to what is necessary to enforce the operative provisions of the deed of trust.**' [Citation.] **Generally, a deed of trust requires the trustee only to perform one of two `mutually exclusive duties: (1) should the trustor-debtor default on the debt, the TRUSTEE *MUST* INITIATE FORECLOSURE ON THE PROPERTY FOR THE BENEFIT OF THE BENEFICIARY-CREDITOR or (2) should the trustor-debtor satisfy the secured debt, the trustee must reconvey title to the real property back to the trustor-debtor, extinguishing the security device.**' [Citation.] **Despite the security interest the deed of trust creates, `the trustor-debtor retains all incidents of ownership with regard to the real property, including the rights of possession and sale.**' [Citation.]" (*Rossberg, supra*, 219 Cal.App.4th at pp. 1491-1492.)

"When a trustor-debtor defaults `on a debt secured by a deed of trust, the beneficiary-creditor may elect to judicially or nonjudicially foreclose on the real property security. Sections 2924 through 2924k set forth a "comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." [Citation.]' [Citation.]" (*Rossberg, supra*, 219 Cal.App.4th at p. 1492, italics omitted.) **To commence the nonjudicial foreclosure process, the "trustee, mortgagee, or beneficiary, or any of their authorized agents," must record a notice of default and election to sell**. (§ 2924, subd. (a)(1).) **The "mortgagee, trustee, or other person authorized to take the sale" must then wait three months before proceeding with the sale**. (§ 2924, subd. (a)(3).) **After that three-month period, a notice of sale must be published, posted, recorded and mailed 20 days before the foreclosure sale.** (§§ 2924, subd. (a)(3), 2924b, subd. (b)(2), 2924f.) The property is then sold at a public auction to the highest bidder (§ 2924g, subd. (a)), "but

before the sale occurs the statutory scheme provides the trustor-debtor with several opportunities to cure the default and avoid losing the property." (*Rossberg, supra*, at p. 1492.) "`"`**The purposes of this comprehensive scheme are threefold: (1) to provide the [beneficiary-creditor] with a quick, inexpensive and efficient remedy against a defaulting [trustor-debtor]; (2) to protect the [trustor-debtor] from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.'** [Citation.]" [Citation.] "Significantly, `[n]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, **"[n]either appraisal nor judicial determination of fair value is required," and the debtor has no postsale right of redemption.'** [Citation.]" [Citation.]' [Citation.]" (*Rossberg, supra*, 219 Cal.App.4th at p. 1492.)

B. Demurrer

1. Standard of Review

"`On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the "reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded." [Citation.] It "is error for a trial court to sustain a demurrer [if] the plaintiff has stated a cause of action under any possible legal theory." [Citation.] We apply a de novo standard in reviewing the court's ruling sustaining the demurrer.' [Citation.]

"In evaluating the court's refusal to permit an amendment, we are governed by an abuse-of-discretion review standard. [Citation.] The court abuses its discretion if there is a reasonable possibility an amendment would cure the defects. [Citation.] The appellant has the burden to identify specific facts showing the complaint can be amended to state a viable cause of action. [Citation.]" (*Minnick v. Automotive Creations, Inc.* (2017) 13 Cal.App.5th 1000, 1004 (*Minnick*).)

2. Section 2923.5

The Lawsons appeal the trial court's order sustaining the banks' demurrer to the first and third causes of action of the second amended complaint without leave to amend. Those causes of action alleged a violation of section 2923.5, "also known as the Perata Mortgage Relief Act." (*Mabry v. Superior Court*

(2010) 185 Cal.App.4th 208, 214, fn. omitted (*Mabry*).) Section 2923.5 was added as part of Senate Bill No. 1137, enacted in 2008 (Stats. 2008, ch. 69, § 2, pp. 225-227) (Senate Bill No. 1137), in response to the foreclosure crisis. (*Rossberg, supra*, 219 Cal.App.4th at p. 1493.) The legislation was intended "to avoid unnecessary foreclosures of residential properties and thereby provide stability to California's statewide and regional economies and housing market by requiring early contact and communications between mortgagees, beneficiaries, or authorized agents and specified borrowers to explore options that could avoid foreclosure and by facilitating the modification or restructuring of loans in appropriate circumstances." (Stats. 2008, *supra*, at § 1, subd. (g), p. 225.) Toward that end, section 2923.5 establishes certain contact requirements.

When Cal-Western recorded its notice of default in 2010, section 2923.5, subdivision (a) provided that a "mortgagee, trustee, beneficiary, or authorized agent" could only record a notice of default 30 days after initially contacting the borrower "in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure."[5] If a "mortgagee, beneficiary, or authorized agent" was unable to reach a borrower, it could still record a notice of default 30 days after satisfying the "due diligence requirements" specified in subdivision (g) of section 2923.5, which included: "sending a first-class letter that include[d] the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency"; "attempt[ing] to contact the borrower by telephone number at least three times at different hours and on different days"; and "send[ing] a certified letter, with return receipt requested."[6] (Former § 2923.5, subds. (a), (g); see also, § 2923.5, subds. (a), (e).) We refer to these requirements collectively as "the contact requirements."

Former section 2923.5, subdivision (b) further required that the notice of default "include a declaration that the mortgagee, beneficiary, or authorized agent [had] contacted the borrower, [had] tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h)" (the declaration requirement). Former section 2923.5, subdivision (h) created an exception to the contact requirements where a borrower had: (1) "surrendered the property"; (2) "contracted with an organization, person, or entity whose primary business [was] advising people who

have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries"; or (3) "filed [a bankruptcy case] . . . under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code." (See also, § 2920.5, subd. (c).) Additionally, former section 2923.5, subdivision (i) limited application of the contact requirements to "mortgages or deeds of trust recorded from January 1, 2003, to December 31, 2007, inclusive, that [were] secured by owner-occupied residential real property containing no more than four dwelling units." As used in subdivision (i), "`owner-occupied' [meant] that the residence [was] the principal residence of the borrower as indicated to the lender in loan documents." (Former § 2923.5, subd. (i); see also, §§ 2923.5, subd. (f), 2924.15, subd. (a).)

3. Analysis

Cal-Western's agent here issued and recorded a notice of default declaring that "[Senate Bill No.] 1137 [did] not apply." The Lawsons allege in their second amended complaint that this assertion violated the declaration requirement stated in former section 2923.5, subdivision (b) because it was false.[7] Both the first and third causes of action rely on this alleged violation of the declaration requirement. Notably, the Lawsons did *not* allege in their second amended complaint that the banks violated the contact requirements stated in former section 2923.5, subdivision (a).

We commence our review by examining the declaration requirement. During the period relevant to this appeal, as noted, **former section 2923.5, subdivision (b) required both that a notice of default include a declaration, and that the declaration confirm one of the following was true: (1) the "mortgagee, beneficiary, or authorized agent" had "contacted the borrower"; (2) the "mortgagee, beneficiary, or authorized agent" had "tried with due diligence to contact the borrower," or (3) "no contact was required pursuant to subdivision (h)." (Former § 2923.5, subd. (b).)** In their second amended complaint, the Lawsons acknowledged that the notice of default they received did include a declaration and that the declaration asserted no contact was required. But, the Lawsons contended, the declaration still did not satisfy the requirements of former section 2923.5, subdivision (b) because the statement it included was false.

The trial court ruled the Lawsons could not rely on this alleged violation of the declaration requirement without more. Quoting *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*), **the trial court reasoned that the Lawsons had to assert "`the alleged imperfection in the foreclosure process was prejudicial to [their] interests.'"** (*Id.* at p. 443; see *id.* at pp. 437, 439, 443-444 [**affirming order sustaining demurrer without leave to amend, in action to stop an impending foreclosure based on an alleged technical defect in the notice of default, where the plaintiff was unable to articulate how the defect was prejudicial];** see also, e.g., *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289 **["`Procedural defects which do not affect the substantial rights of the parties do not constitute reversible error'"].)** If the Lawsons "got what they were entitled to" under former section 2923.5 despite the alleged declaration defect—i.e., if defendants nonetheless contacted them "in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure," the court concluded (see former § 2923.5, subd. (a)), then the Lawsons "would have suffered no prejudice by the incorrect recital in the notice of default," and there would be "no basis for postponing the sale in order to require" compliance. (See, e.g., *Mabry, supra*, 185 Cal.App.4th at p. 221 [**deeming the contact requirements of former section 2923.5 "`key'" because they imposed "the substantive obligation . . . on lenders"**]; *id.* at pp. 223-224 **[the remedy for noncompliance with former section 2923.5 was postponement of the foreclosure sale]; § 2924g, subd. (c)(1)(A).)** We agree with the trial court's reasoning and conclusion.

The Lawsons do not dispute they were required to allege a resulting injury. They contend they sufficiently did so (1) by asserting that defendants were seeking to foreclose on their home and (2) by including in their second amended complaint a prayer for attorney fees to reimburse them for the expenses of bringing this action. They cite *Rosenfeld v. JPMorgan Chase Bank, N.A.* (N.D.Cal. 2010) 732 F.Supp.2d 952, for the inapposite proposition **that "[a] private person has standing to assert an unfair competition claim only if he or she `has suffered injury in fact' and `has lost money or property as a result of the unfair competition.**' [Citation.]" (*Id.* at p. 973.)

As this court has previously observed, however, "`the question of which persons have been injured by [a statutory violation] is analytically distinct from the question of which persons have sustained injuries too removed to

give them standing.'" (*Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1042-1043; see also *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 937 (*Yvanova*) [**distinguishing between the concept of "injury" for purposes of standing and "prejudice as a possible element of the wrongful foreclosure tort"]**.) While "[a] foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests" (*Yvanova, supra,* at p. 937), **where the borrower relies on a procedural irregularity as the basis for a foreclosure action, he or she must allege that the *irregularity* caused an injury**. (See, e.g., *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93-94 ["**slight procedural irregularity" in the service of foreclosure sale notice was not prejudicial because it "did not cause any injury" to the borrowers** (italics omitted)].) The Lawsons do not contend on appeal that the allegedly false declaration caused them specific injury. Accordingly, we affirm the trial court's order sustaining the demurrer to their first and third causes of action.[8]

In reaching this conclusion, we reject the Lawsons' argument, citing several rules of statutory construction—but no on point authority—that a borrower must be permitted to file suit to postpone a foreclosure sale based on an alleged violation of the declaration requirement (former § 2923.5, subd. (b)), **even if there is no alleged violation of the contact requirements** (former § 2923.5, subds. (a), (g)). The provisions "talk about different things," the Lawsons contend, and include "independent command[s]." To avoid rendering the declaration requirement surplusage, therefore, they submit, it must be construed as operating independently, authorizing a separate cause of action. We are unpersuaded.

As the Lawsons themselves note, the declaration requirement serves the independent purpose of providing a reminder for those filing notices of default to ensure that the contact requirements have been met or do not apply. **The contact requirements and the declaration requirement are unavoidably interrelated, however, together serving the statutory goal of avoiding unnecessary foreclosures by ensuring early communications between lenders, specified borrowers, and their agents to explore options and facilitate "modification or restructuring of loans in appropriate circumstances.**" (Stats. 2008, *supra,* at § 1, subd. (g), p. 225.) **Allowing an independent action based solely on a technical violation of subdivision (b), where the contact requirements were met, would not further that specific statutory goal.** (See, e.g., *People v. DeLeon* (2017) 3

Cal.5th 640, 648 [We construe the words of a statute "`"`"in context, keeping in mind the nature and obvious purpose of the statute"""""].) Nor would it serve the purposes of the comprehensive statutory framework governing nonjudicial foreclosure sales, discussed above, by either (1) providing the lender "a quick, inexpensive and efficient remedy against a defaulting" borrower, (2) protecting the borrower "from wrongful loss of property," or (3) ensuring "that a properly conducted sale is final." (*Rossberg, supra*, 219 Cal.App.4th at p. 1492; see also *People v. DeLeon, supra*, 3 Cal.5th at p. 648 **[In interpreting a statute, we consider a "`"`particular clause or section in the context of the statutory framework as a whole'"'"].)**

Finally, we reject the Lawsons' request for leave to amend their complaint a third time. To obtain such relief, the Lawsons were obligated "to identify specific facts showing the complaint can be amended to state a viable cause of action." (*Minnick, supra*, 13 Cal.App.5th at p. 1004.) They did not do so. Instead, they contend (1) the trial court never adequately advised them they needed to allege the banks violated the contact requirements stated in former section 2923.5, subdivision (a), and (2) the trial court previously found they already had alleged and proven a violation of the contact requirements.

The first contention is inaccurate. In their demurrer to the first amended complaint, the banks contended the Lawsons failed to state a violation of former section 2923.5 because they did not allege facts showing that the section applied to them, that the banks violated the section by failing to contact them, or that there was resulting prejudice. The trial court agreed, and sustained the demurrer as to the first and third causes of action of the first amended complaint. It then granted leave to amend, specifically advising the Lawsons they needed to allege facts showing both that former section 2923.5 applied to them *and that the banks "did not in fact comply with this section (i.e., did not contact [them] to assess their financial situation and explore options to prevent foreclosure).*" (Italics added.) When the Lawsons nonetheless failed to include such allegations in their second amended complaint, the trial court concluded they were unable to do so, and sustained the subsequent demurrer to those causes of action without leave to amend. On appeal, the Lawsons request leave to add a charge that the banks violated the contact requirements, without identifying any specific facts showing they could make the requisite allegations. This did not satisfy their burden on appeal. (*Minnick, supra*, 13 Cal.App.5th at p. 1004.)

The Lawsons' second contention, that the trial court previously granted their request for a preliminary injunction, based on ambiguous assertions in their supporting declarations, does not fill this gap.[9] In granting the preliminary injunction, the trial court observed that the Lawsons did not "unequivocally" deny defendants had contacted them. But, the court concluded, their declarations "*suggest[ed]*" they had never "discuss[ed]" foreclosure alternatives with defendants. (Italics added.) **In ruling on a demurrer, however, a court may only consider the complaint and matters that are properly the subject of judicial notice**. (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1190, 1192.) Notably, despite having twice amended their complaint since the court originally issued the preliminary injunction, the Lawsons have never included specific factual allegations that defendants failed to contact them, in person or by telephone, to assess their financial situation or explore options to avoid foreclosure. Because, on appeal, they still do not identify specific facts confirming they could present such allegations if granted leave to amend their complaint a third time, we will affirm the trial court's sustaining of the demurrers without leave to amend.

C. Summary Judgment

1. Background

The Lawsons also appeal the trial court's order granting the banks' motion for summary judgment. The order disposed of the (remaining) second, fourth, fifth, and sixth causes of action, as alleged in the Lawsons' second amended complaint. Before considering the parties' arguments on appeal, we provide additional background relevant to our analysis.

a. The Lawsons' Second Amended Complaint

In their second amended complaint, the Lawsons alleged, on information and belief, that the defendants held the following roles relevant to their loan: (1) Wells Fargo was "either the purchaser/owner of [their] loan or an indenture trustee for a securitized trust . . . to which [their] . . . loan . . . was sold (or intended to be sold)"; (2) PNC Bank was their loan servicer "(or agent) of any beneficiary"; (3) Cal-Western was the beneficiary's agent or sub-agent; and (4) each of the three "served as a principal or agent or participated with [the other defendants] in a joint venture for the actions complained of" in the second amended complaint.

Having thus set the stage, the Lawsons alleged in their second and fourth causes of action that Wells Fargo and PNC Bank committed wrongful foreclosure, violating section 2924 and by extension the UCL: (1) by allowing Cal-Western to act as a substitute trustee, issuing the notice of default and the notice of sale, although they knew Cal-Western was not properly authorized to do so; and (2) by allowing Cal-Western to issue foreclosure documents containing false information. Wells Fargo and PNC Bank knew the substitution purporting to authorize Cal-Western to act as trustee was executed before, but not mailed to the Lawsons until after, the notice of default was recorded, a violation of section 2924a, the Lawsons alleged. Further, the Lawsons alleged, Wells Fargo and PNC Bank "caused or permitted" Cal-Western to issue the substitution of trustee, the notice of default, and the notice of sale, knowing that all three documents incorrectly identified PNC Bank as the loan beneficiary, when—as PNC Bank later advised the Lawsons in a letter—PNC Bank actually was the loan servicer and Wells Fargo was the loan investor.

The Lawsons further alleged, in their fifth cause of action, that the banks violated Penal Code section 115, and by extension the UCL, when they recorded the substitution of trustee with the county. **Under section 115, it is a felony for a person to knowingly offer a false instrument to be recorded in any public office in California.**[10] The Lawsons alleged the banks violated this law when they recorded the substitution because they knew the substitution was mailed too late and, therefore, was ineffective. Finally, in their sixth cause of action, the Lawsons sought declaratory relief. Observing that PNC had advised them Wells Fargo was the loan beneficiary or investor, the Lawsons alleged they did not find anything "on record" confirming the transfer to Wells Fargo of such an interest. Accordingly, they requested a court determination regarding "who [was] the true [loan] Beneficiary . . . and who [was the] proper trustee".

b. *The Banks' Motion for Summary Judgment*

The banks moved for summary judgment. Regarding the Lawsons' second cause of action for wrongful foreclosure, they contended Cal-Western was properly authorized to record the notice of default and provide the notice of the sale, regardless of whether the substitution naming Cal-Western was effective. **Under section 2924, subdivisions (a)(1) and (a)(3),** respectively, the banks noted, **the authorized agent of a beneficiary or trustee may record a notice of default, and an authorized person may give notice of**

the sale.[11] Here, the banks submitted, there was no dispute the loan beneficiary, Wells Fargo, and the beneficiary's servicing agent, PNC Bank, authorized Cal-Western to issue the referenced documents and this sufficed under the statute. The Lawsons themselves had alleged the following in their second amended complaint: (1) PNC Bank serviced their loan as agent for the beneficiary; (2) Wells Fargo was the "purchaser/owner" of their loan and, thus, its beneficiary; and (3) "PNC [Bank] and Wells Fargo . . . together instructed CalWestern to issue the [notice of default] and [the notice of sale]." The banks also offered the declaration of Dorothy J. Thomas, Assistant Vice President for PNC Mortgage, a division of PNC Bank (Thomas Declaration), which they contended confirmed these points as well.

The fact that the three foreclosure documents—the substitution of trustee, the notice of default, and the notice of sale—identified PNC Bank as the loan beneficiary, rather than Wells Fargo, also did not suffice to establish a violation of section 2924, absent a showing of prejudice, the banks contended, citing *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 231-232, and the Lawsons were unable to show prejudice. Prejudice could only have resulted, the banks reasoned, if the notice of default supplied erroneous contact information, preventing the Lawsons from acting to reinstate their loan. PNC Bank, as the loan servicer, would have been the proper entity for them to contact, the banks contended. But, in their discovery responses, the Lawsons confirmed they did not use the contact information provided in the notice of default to assist them in reinstating their loan; their discovery responses also did not assert resulting prejudice.

Finally, as relevant to this appeal, the banks sought summary judgment as to the fourth and fifth causes of action under the UCL, asserting the Lawsons could not establish the necessary predicate violations of Civil Code section 2924 and Penal Code section 115. They contended summary judgment also was appropriate as to the sixth cause of action for declaratory relief, because there was no dispute either that Wells Fargo was the loan beneficiary or that PNC Bank was the loan servicer.

c. *The Lawsons' Opposition*

In their opposition to summary judgment, the Lawsons rejected the suggestion they had conceded Cal-Western was authorized to issue the foreclosure notices by alleging PNC Bank and Wells Fargo together instructed Cal-Western to take that action. The allegation was made on

information and belief, the Lawsons pointed out and, therefore, was equivocal, a "tacit" admission, and not fairly considered a binding judicial admission. Although they agreed PNC Bank had acted "in a servicing agent role", they claimed to dispute it acted for the beneficiary in doing so. They also objected to portions of the Thomas declaration and attached exhibits. Responding to the banks' argument about the element of prejudice, the Lawsons argued, in the alternative, (1) that the requirement did not apply to a suit preemptively seeking to prevent a foreclosure sale, and (2) that the banks' statutory violations were so substantial they should be considered de facto prejudicial, or as effectively amounting to an absence of the required foreclosure notices. They also challenged the validity of the substitution of trustee on various grounds.

Relying on all of the same arguments, the Lawsons contended they could establish the predicate statutory offenses supporting their fourth and fifth causes of action under the UCL. Their sixth cause of action for declaratory relief also remained viable, they asserted, because the banks' discovery responses did not definitely confirm Wells Fargo was the loan beneficiary. Wells Fargo stated in its discovery responses, for example, they observed, that a different bank, U.S. Bank, N.A. (U.S. Bank), actually had custody of their note.

d. *The Banks' Reply*

The banks' reply brief reiterated that the Lawsons were bound by their complaint allegations and again cited the Thomas declaration as providing supporting evidence. The banks also clarified that U.S. Bank held the Lawsons' note *as custodian for Wells Fargo.* After pointing out that the Lawsons had not presented evidence of any prejudice resulting from the alleged statutory violations, the banks contended the Lawsons also failed to raise a triable issue of fact regarding Well Fargo's status as the loan beneficiary or PNC Bank's status as the loan servicer and submitted a declaratory judgment, therefore, was unnecessary.

e. *The Trial Court's Order Granting Summary Judgment*

On April 11, 2014, the trial court heard argument regarding the banks' motion for summary judgment and then issued a ruling granting the motion. Regarding the Lawsons' second cause of action for wrongful foreclosure, the court ruled the undisputed evidence established that Wells Fargo was the

loan beneficiary and that PNC Bank acted as Wells Fargo's agent in executing the substitution of trustee. As support for its finding, the trial court cited, among other things, the Lawsons' complaint allegations and the Thomas declaration, and it overruled in part and sustained in part the Lawsons' objections to the latter. The court expressly rejected the suggestion that U.S. Bank's custody of the note created a dispute about whether U.S. Bank might be the beneficiary.

The fact the substitution of trustee referred to PNC Bank as "beneficiary," rather than as "agent of the beneficiary," did not alone warrant relief absent a showing of prejudice, the court concluded; the Lawsons made no showing of prejudice; and the alleged statutory violations did not qualify as de facto prejudice. The Lawsons therefore raised no triable issue regarding the validity of the substitution of trustee, the court found. As their claims regarding the validity of the notice of default and notice of sale hinged on a finding that the substitution of trustee was defective, those claims also failed, the court ruled.

Because the Lawsons had not raised a triable issue that the banks violated the foreclosure laws, the trial court reasoned, they also failed to raise a triable issue as to the predicate acts supporting their fourth and fifth causes of action under the UCL. Nor was there a basis for declaratory relief under the sixth cause of action, the court concluded, because, as discussed, there was no triable issue about Wells Fargo's status as beneficiary or about whether Cal-Western was properly substituted as trustee.

2. Standard of Review

**"`A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail**. [Citation.]' [Citation.] Generally, `the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.' [Citation.] **In moving for summary judgment, `all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*.'** [Citation.] "`"Review of a summary judgment motion by an appellate court

involves application of the same three-step process required of the trial court. [Citation.]'" [Citation.] The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. [Citation.]" (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1123-1124 (*Food Safety*).)

"`A defendant moving for summary judgment need address only the issues raised by the complaint.'"** (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585.) **Plaintiffs "`cannot bring up new, unpleaded issues in [their] opposing papers'" (*ibid.*), or create a triable issue by contradicting the complaint's factual allegations (*Food Safety, supra*, 209 Cal.App.4th at p. 1129). Our review of an order granting summary judgment is de novo (*Soria, supra*, at p. 582), and is restricted to contentions raised in the appellant's opening brief (*Food Safety, supra*, at p. 1124).

3. Analysis

The Lawsons filed this action against Wells Fargo and PNC Bank to prevent a foreclosure sale, alleging in their second amended complaint that, as the loan beneficiary and the loan servicer, respectively, the two banks violated statutory requirements by (1) causing or permitting Cal-Western to act as trustee, knowing the substitution was defective (because the substitution form was mailed too late to the Lawsons and named PNC Bank as beneficiary, rather than Wells Fargo), and (2) causing or permitting Cal-Western to issue foreclosure notices that were defective (because they named or referred to PNC Bank as the beneficiary, when in fact PNC Bank was the beneficiary's agent). Effectively, the suit challenged *Cal-Western's* authority to foreclose on the Lawsons' property. Although, in their sixth cause of action, the Lawsons requested a declaratory judgment determining the identity of the loan beneficiary and trustee, alleging they had not located record of the requisite assignments,[12] their first five causes of action against Wells Fargo and PNC Bank relied on allegations that the latter were, respectively, "the only party who may purport to be the beneficiary" and the loan servicer and agent of the beneficiary.

In opposing summary judgment, however, the Lawsons, among other things, "disputed" that Wells Fargo was the loan beneficiary. This "dispute"

suggested an entirely new theory for their case not included in the second amended complaint, namely, that Wells Fargo was not the actual beneficiary and, therefore, acted without authority in instructing PNC Bank and Cal-Western to institute foreclosure proceedings. (But see *Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1383 ["**a plaintiff may not oppose summary judgment with a new unpleaded legal theory"].)** Now, on appeal, seeking reversal of the trial court's order granting summary judgment, the Lawsons double down on the new theory—claiming a dispute existed about whether Wells Fargo was the "actual" or "true" beneficiary, or was "falsely posing as the actual beneficiary" and, by extension, that PNC Bank may have been acting as Wells Fargo's agent rather than as the agent of the actual beneficiary—abandoning other arguments they raised before the trial court concerning the validity of the foreclosure documents.[13] In the alternative, the Lawsons also briefly contend they were not obligated to prove the alleged defects in the foreclosure documents caused them injury, and they nonetheless did offer evidence sufficient to raise a triable issue that the defects injured them. We address these three arguments in turn below.

a. *Wells Fargo's status as beneficiary*

"[A] judicial admission is ordinarily *a factual allegation by one party that is admitted by the opposing party.* The factual allegation is removed from the issues in the litigation because the parties *agree* as to its truth. Thus, facts to which adverse parties stipulate are judicially admitted. [Citation.]" (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452.) "**A judicial admission is . . . conclusive both as to the admitting party *and as to that party's opponent.* [Citation.] Thus, if a factual allegation is treated as a judicial admission, then neither party may attempt to contradict it—the admitted fact is effectively conceded *by both sides.*" (*Ibid.*) "A defendant may rely on judicial admissions in moving for summary judgment.** [Citation.]" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456.)

In their second amended complaint, the Lawsons alleged Wells Fargo was the "purchaser/owner" of their loan and, therefore, the loan beneficiary. They also alleged PNC Bank was the loan servicer and "agent of any beneficiary." In that capacity, they alleged, Wells Fargo and PNC Bank contributed to violations of the foreclosure laws and the UCL by causing and permitting Cal-Western to commence and pursue foreclosure proceedings, knowing that the substitution of trustee purporting to authorize Cal-Western,

and the foreclosure notices that Cal-Western issued, were defective. The Lawsons sought a judgment against Wells Fargo and PNC Bank based on these allegations, asking that the court permanently enjoin the banks from foreclosing on their property, determine the relationship between the parties, award the Lawsons attorneys' fees and costs, and grant them "such other further relief" as it deemed proper.

In moving for summary judgment, Wells Fargo and PNC Bank did not dispute that they were, respectively, the loan beneficiary and the beneficiary's servicing agent, but, instead, expressly admitted those points, essentially stipulating to the truth of those allegations. In the banks' separate statement of undisputed material facts, Wells Fargo agreed it had "been, since on or before the date of the Notice of Default, the beneficiary of the Subject Loan and Deed of Trust"; and PNC Bank agreed it had been the beneficiary's servicing agent "since on or before the date of the Notice of Default." In discovery responses that the Lawsons attached to their opposition, the banks: (1) explained that Wells Fargo acquired the Lawsons' note and deed of trust in March 2010, (2) explained that the original trustee and loan servicer, National City Bank of Indiana merged into PNC Bank in November 2009, and (3) described the chain of transfers and mergers culminating in these actions. Now on appeal, the Lawsons contended these foundational factual allegations—and, particularly, the allegation that Wells Fargo was the beneficiary—upon which they based their suit cannot be considered judicial admissions because, in their second amended complaint, they included the qualifier that they were offered "on information and belief." Quoting *Lopez v. University Partners* (1997) 54 Cal.App.4th 1117 (*Lopez*), they observe that **"[d]eclarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment. .** . . [citation]" (*id.* at p. 1124), and they contend the same should be true for "alleged admissions in pleadings."

Lopez, however, addressed different circumstances. There, the plaintiff presented, as evidence *supporting* the allegations of his complaint, his own self-serving declaration, and the declaration of his expert, both offering factual assertions on information and belief, without any showing of personal knowledge. (*Id.* at pp. 1124-1125.) In contrast, the Lawsons here presented allegations in their complaint, on information and belief, as the basis for a court judgment, and now attempt to *contradict* those same allegations to create a triable issue of material fact and, thereby, survive

summary judgment. A party may not "`play fast and loose' with the judicial system" in this way. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 613 [**plaintiff cannot make statements in a declaration in one case to induce a court to grant a judgment, and then present contrary statements on the same subject in a related case].)**

The Lawsons submit that only unequivocal allegations qualify as judicial admissions and theirs, by definition, must be considered equivocal because they were offered on information and belief. Black's Law Dictionary, they point out, provides that **a statement made on information and belief is just one "`based on secondhand information that the declarant believes is true.'" (Quoting Black's Law Dict. (7th ed. 1999) p. 783.)** We are unpersuaded. While **"[a] court may disregard fragmentary and equivocal statements, especially when contradicted by other credible evidence"** (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 516), the Lawsons' allegation here that Wells Fargo was the beneficiary was not equivocal. **Black's Law Dictionary defines "equivocal" as something that is either "questionable" or "ambiguous."** (Black's Law Dict. (10th ed. 2014) p. 658, col. 1; cf. *Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 385 [no binding judicial admission based on party statement that could be construed in multiple ways, made at a hearing before initiation of lawsuit].) Although the Lawsons made the allegation here on information and belief, they also explained the basis for their belief. In their second amended complaint—and previously, in seeking leave to add Wells Fargo as a defendant—the Lawsons explained that a party in a position to know, i.e., their loan servicer, PNC Bank, expressly (and repeatedly) told them Wells Fargo was the beneficiary. The Lawsons have suggested no reason, and have presented no evidence, that PNC Bank would be motivated to mislead them on this point, misidentifying the beneficiary (to whom their monthly loan payments would have been forwarded), or that PNC Bank's statements to them actually were inaccurate. **They offered no evidence that an entity other than Wells Fargo was the "true" or "actual" beneficiary**. (See, e.g., *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1211 [a complaint admission may not bind the plaintiff on summary judgment in certain contexts "*if he* [*or she*] *proffers countervailing evidence in opposition to the summary judgment motion*"].)

The Lawsons contend, without citation to the record, that "[d]iscovery answers . . . strongly suggest[ed] . . . Wells Fargo [was] not the loan owner." (See Cal. Rules of Court, rule 8.204(a)(1)(C) [appellate briefs must support

any reference to a matter in the record by citation].) We presume they refer to Wells Fargo's statement, in responding to a special interrogatory, that U.S. Bank held the note and the deed of trust "*as custodian on behalf of Wells Fargo*." (Italics added.) But that statement did not suggest U.S. Bank was the actual beneficiary. (See, e.g., Black's Law Dict. (10th ed. 2014) p. 467, col. 1 [a "custodian" of property generally secures, safeguards, and maintains the property in the condition received, accounting for any changes].) Nor did the Lawsons create a dispute of fact, avoiding a judicial admission, as they contend, by propounding discovery seeking evidence that they would need to prove their complaint allegations, i.e., that Wells Fargo was the beneficiary and PNC Bank the loan servicer and agent of the beneficiary.

The Lawsons further contend their allegation that Wells Fargo owned their loan and, therefore, was the beneficiary cannot be treated as a judicial admission because it involved mixed questions of law and fact. We disagree. The allegation is factual, not legal, in nature. (See, e.g., *Ieremia v. Hilmar Unified School Dist.* (2008) 166 Cal.App.4th 324, 328 ["ownership was . . . a disputed *factual* question"], italics added.) Although the truth of the fact has legal significance, it is not a legal assertion.[14]

Finally, in their reply brief, the Lawsons contend, without explanation, that, "[i]n effect, after completing discovery, they amended the [discussed] `information and belief' statements made in the [second amended complaint]." "If this effective amendment [was] not clear," they submit, they should be permitted to further amend their complaint now to disclaim their prior allegations, which they suggest were the result of "`*inadequate knowledge of the facts*.'" The case they quote for this proposition does not contain the quoted text or support their argument. (See *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120 [affirming ruling that the party was bound by his judicial admission].)

Other case law confirms, however, that the Lawsons were obligated to request leave to further amend their complaint before the hearing on the summary judgment motion. (See, e.g., *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257.) Although they did, in one sentence at the end of their summary judgment opposition, request a continuance to amend their complaint "to conform to the facts" if the trial court was inclined to grant summary judgment, the Lawsons **did not file a formal motion to amend or make the required evidentiary showing.** (See Cal. Rules of Court, rule

3.1324.) Further, after the court ruled on the summary judgment motion without addressing this cursory request for leave to amend, the Lawsons failed to bring the matter to the court's attention. We may infer from their actions that the Lawsons made a tactical decision to abandon seeking leave to amend. **"Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error.** [Citation.]" (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) It is thus apparent that the Lawsons did not preserve any challenge to the trial court's failure to grant leave to amend.

b. *Requirement to show prejudice*

The Lawsons next contend the trial court erred in concluding they were obligated to show the banks' alleged noncompliance with foreclosure statute requirements was prejudicial to them. They submit the rule requiring prejudice was developed to protect interests implicated only in suits involving completed foreclosure sales, and that the rule therefore does not apply to suits such as theirs filed in advance of a sale. Alternatively, they contend, a showing of prejudice is not required here because the banks' statutory violations were substantive, not procedural, and any foreclosure sale therefore would be void, obviating the need to show prejudice. In their reply brief, the Lawsons additionally contend that requiring a showing of prejudice would be inconsistent with public policy.

The Lawsons' first argument, that prejudice is not a required element of an action to *prevent* a foreclosure sale, is contradicted by case law. (See, e.g., *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 538 (*Jenkins*) [**a plaintiff may only halt the foreclosure process by showing noncompliance with statute and that the "*noncompliance somehow prejudiced the plaintiff*" (italics added)]** disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13; *Debrunner, supra*, 204 Cal.App.4th at pp. 443-444 [**the plaintiff in an action to prevent a foreclosure sale must show prejudice].)** Although the trial court here cited *Jenkins* in its order granting summary judgment, and the banks cited *Debrunner* in their respondents' brief on appeal, the Lawsons do not address or acknowledge those decisions in the relevant portions of their briefs. Nor do they cite contrary on-point authority.[15]

The Lawsons' reasoning on this point also is not supported by the authority they cite. They submit the rule requiring prejudice for postsale wrongful foreclosure suits was developed to protect the rights of bona fide purchasers and that the requirement is unnecessary where a sale has not occurred. They cite *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, but that case merely confirms prejudice is an element of a wrongful foreclosure suit challenging a completed sale; the decision does not discuss the origin of the prejudice requirement. (*Id.* at p. 1258; but see, e.g., *Yvanova, supra*, 62 Cal.4th at p. 926 **[The nonjudicial foreclosure system is designed to protect the interests of the lender-beneficiary, the defaulting borrower, and the bona fide purchaser].)**

The Lawsons alternatively contend that prejudice need only be shown in cases involving alleged procedural errors, and not in cases like this one involving a substantive error that rendered the foreclosure void. The error here was substantive, they assert, signifying that no showing of prejudice was required. As support for this argument, they cite *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, and *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1. But neither case compels the conclusion that the alleged defects here were substantive voiding any future sale and obviating the need to show prejudice.

In *Glaski*, the court agreed that a borrower might sue contending a completed foreclosure sale was void on grounds "`a party alleged not to be the true beneficiary instruct[ed] the trustee to file a Notice of Default and initiate nonjudicial foreclosure.' [Citation.]" (*Glaski v. Bank of America, supra*, 218 Cal.App.4th at p. 1094.) *Glaski* does not assist the Lawsons, however, because the second amended complaint did not include such an allegation. Rather, as discussed, it alleged that Wells Fargo, as the beneficiary, instructed Cal-Western to initiate nonjudicial foreclosure, but then failed to ensure Cal-Western issued foreclosure documents complying with all statutory requirements.

Ram v. OneWest Bank, FSB, supra, 234 Cal.App.4th 1, is not more helpful to the Lawsons. **The court there did confirm both that a foreclosure sale is void when conducted by an entity who lacks authority, and that evidence of prejudice is not required in that context**. (*Id.* at pp. 10-11.) But, it then rejected the borrower's argument that the sale there was void because the entity that issued the notice of default was not formally named as trustee until several weeks later. (*Id.* at pp. 12-14.) According to the

borrowers' own allegations, the court observed, the entity acted at all times as the beneficiary's agent and, therefore, was authorized to issue the notice of default initiating foreclosure. (*Id.* at p. 14; accord, *Jenkins, supra*, 216 Cal.App.4th at p. 513 [**the statutory provisions "broadly authorize a `trustee, mortgagee, or beneficiary, or *any of their authorized agents*' to initiate a nonjudicial foreclosure**"].) Here, as noted, the Lawsons similarly alleged that Cal-Western acted as "`the agent for the beneficiary'" in initiating nonjudicial foreclosure. As discussed above, therefore, their own allegations preclude them from contending that any foreclosure sale here would be void on grounds discussed in *Glaski* and *Ram.* By extension, their argument that they were not required to show prejudice also fails.[16]

In their reply brief, the Lawsons attempt two additional policy arguments, i.e., that (1) it would be unfair to require a showing of prejudice "in addition to requiring" a showing of damages, and (2) such a requirement would interfere with public policy forbidding unauthorized foreclosure proceedings by making it harder for borrowers to prove violations of foreclosure statutes. We reject these arguments because the Lawsons did not present them to the trial court, did not raise them in their opening brief, and did not provide any reason for raising them for the first time in their reply brief on appeal. (See, e.g., *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 [**On an appeal challenging a trial court's grant of summary judgment, a reviewing court will not consider theories not advanced in the trial court**]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 **["`"points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before"'"**].) Additionally, the arguments are not fully developed. As support for the first argument, the Lawsons cite an insurance case for the proposition that, "ordinarily," one must allege damages as part of a cause of action asserting a tort or breach of contract. But, they suggest, citing no authority, a separate showing of prejudice is only required in service of a "strong public policy." Requiring a showing of prejudice here, they submit, actually would undercut a policy that the nonjudicial foreclosure laws are intended to serve, by making it harder for debtors to avoid a wrongful loss of property. Even if the Lawsons had not forfeited these arguments, we would reject them because they do not acknowledge or address on-point authority, discussed above, affirming that a showing of prejudice is required in this context; and they are not supported by pertinent authority. (See, e.g., *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

c. *Showing of prejudice*

Finally, in the alternative, the Lawsons contend that the banks' alleged actions caused them prejudice because they were obligated to incur attorney fees to investigate and protect their rights. The Lawsons forfeited consideration of this argument, however, by failing to raise it in the trial court. (*Christina C. v. County of Orange, supra*, 220 Cal.App.4th at p. 1383 [**following the grant of summary judgment, appellant may not adopt a new theory on appeal**].) Before the trial court, the Lawsons argued only that a showing of prejudice was not required in an action to prevent a foreclosure sale or, if it was required, that the banks' statutory violations were so substantial they amounted to de facto prejudice. They did not claim to have suffered any actual prejudice either in their opposition to summary judgment or in discovery responses stating all the facts supporting their wrongful foreclosure cause of action. (See, e.g., *Great American Ins. Cos. v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 451 **["A defendant moving for summary judgment may rely on `factually devoid discovery responses' to show that the plaintiff's cause of action has no merit"].)**

Even if they had not forfeited the argument, however, the Lawsons cite no authority confirming that expenditures on attorney fees, to secure advice and representation before a foreclosure sale, establish the element of prejudice for a wrongful foreclosure action. In their cursory argument, they cite a single case, *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, as authority for the broad proposition that "[a]ttorney's fees are damages." The case confirmed attorney fees may qualify as damages *in a slander of title case*, if title was disparaged in a recorded instrument, and litigation was necessary as a result "`to remove the doubt cast' upon the vendibility or value of a plaintiff's property. [Citations.]" (*Id.* at pp. 1030-1031.) **"`[C]ASES ARE NOT AUTHORITY FOR PROPOSITIONS NOT CONSIDERED,'"** (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1366), however, and *Sumner Hill Homeowners' Assn.* did not consider the requirements of establishing prejudice in a wrongful foreclosure action.

Nor do the Lawsons convincingly explain how the alleged defects in the foreclosure documents necessitated their expenditure of attorney fees. The Lawsons contend they had to retain an attorney because they were "confused" by the assertedly false statement in the notice of default that the contact requirements of former section 2923.5 did not apply to them, did not

understand PNC Bank's role, and did not know who was the loan beneficiary. But their discovery responses indicate they retained an attorney without first availing themselves of the cost-free option for securing information provided in the notice of default, i.e., without calling the number, or writing to the mailing address, provided in the notice of default. We are unconvinced by their claim of prejudice.

IV. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs.

Streeter, J. and Kennedy, J.,[*] concurs.

[1] A third defendant, Cal-Western Reconveyance Corporation (Cal-Western), settled with the Lawsons and is not a party to this appeal.

[2] The Lawsons simultaneously applied for a temporary restraining order and a preliminary injunction enjoining Cal-Western and PNC Bank from foreclosing on their home. The trial court granted those requests, but conditioned its preliminary injunction on the Lawsons' posting a $15,000 bond and making their monthly loan payments to the court. The Lawsons complied, posting the bond and making monthly loan payments for a period. In January 2014, however**, the trial court dissolved the preliminary injunction after they missed several monthly payments.**

[3] All undesignated statutory references below are to the Civil Code.

[4] Although there have been amendments to some individual statutory provisions since the Lawsons filed their appeal (see, e.g., Stats. 2012, chs. 86, § 10, 87, § 10, 556, § 2.5), those amendments have not altered the general framework outlined in this section.

[5] As amended by Statutes 2009, chapter 43, section 1, former section 2923.5 (former section 2923.5), subdivision (a) provided in full as follows: "(a)(1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g). [¶] (2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department

of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically."

[6] Subdivision (g) of former section 2923.5 provided in full as follows: "(g) A notice of default may be filed pursuant to Section 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent. For purposes of this section, `due diligence' shall require and mean all of the following: [¶] (1) A mortgagee, beneficiary, or authorized agent shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency. [¶] (2)(A) After the letter has been sent, the mortgagee, beneficiary, or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file. [¶] (B) A mortgagee, beneficiary, or authorized agent may attempt to contact a borrower using an automated system to dial borrowers, provided that, if the telephone call is answered, the call is connected to a live representative of the mortgagee, beneficiary, or authorized agent. [¶] (C) A mortgagee, beneficiary, or authorized agent satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrowers' primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.[¶] (3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgagee, beneficiary, or authorized agent shall then send a certified letter, with return receipt requested. [¶] (4) The mortgagee, beneficiary, or authorized agent shall provide a means for the borrower to contact it in a timely manner, including a toll-free telephone number that will provide access to a live representative during business hours. [¶] (5) The mortgagee, beneficiary, or authorized agent has posted a prominent link on the homepage of its Internet Web site, if any, to the following information: [¶] (A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options. [¶] (B) A list of financial documents borrowers should collect and be prepared to present to the mortgagee, beneficiary, or authorized agent when discussing options for avoiding foreclosure. [¶] (C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgagee, beneficiary, or authorized agent. [¶] (D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency."

[7] In their second amended complaint, the Lawsons also alleged the declaration was defective because it did not specify a reason that the statutory contact requirements assertedly did not apply. But former section 2923.5, subdivision (b) did not expressly require such specificity and the Lawsons do not rely on this argument on appeal.

[8] In light of this conclusion, we need not address the banks' argument that there was no violation of the declaration requirement because no contact was required. The banks rely for this argument on language currently contained in section 2923.5, subdivision (b), and

in section 2920.5, subdivision (c)(1), which, respectively, referenced and defined the term "borrower" for purposes of the contact requirements. But this language was added effective January 1, 2013 (Stats. 2012, ch. 86, § 4), after the notice of default was recorded and after the trial court issued its order ruling on the demurrer to the second amended complaint, and the banks offer no argument the language should be given retroactive application. (See, e.g., *People v. Brown* (2012) 54 Cal.4th 314, 319 ["`in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application'"].)

[9] As noted, the trial court later dissolved the injunction after the Lawsons failed to make monthly loan payments as required.

[10] Penal Code section 115 provides in relevant part as follows: "(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony."

[11] Although section 2924 was amended effective January 1, 2013 (Stats. 2012, ch. 556, § 2.5), i.e., after the events relevant to this case occurred, the text of the referenced paragraphs was unaffected. Section 2924, subdivision (a) provides in pertinent as follows: "Every transfer of an interest in property . . . made only as a security for the performance of another act, is to be deemed a mortgage. . . . Where, by a mortgage . . ., a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised . . . until all of the following apply: [¶] (1) The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. [¶]. . . . [¶] (2) Not less than three months shall elapse from the filing of the notice of default. (3) . . . [A]fter the lapse of the three months . . ., the mortgagee, trustee, or other person authorized to take the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f."

[12] But see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272 **["assignments of debt . . . are commonly not recorded**"], disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.

[13] As the Lawsons have elected not to renew those arguments on appeal, we do not address them here. (See, e.g., *Food Safety, supra*, 209 Cal.App.4th at p. 1124 **["[W]e assess the propriety of summary judgment in light of the contentions raised in [appellant's] opening brief"].)**

[14] In light of our conclusion that the foregoing allegations in the Lawsons' second amended complaint are properly treated as judicial admissions, we need not address the

parties' arguments about the trial court's rulings on the admissibility of portions of the Thomas declaration and attached exhibits, which were offered to prove Wells Fargo was the beneficiary, and PNC Bank was its agent.

[15] Neither the Lawsons nor the banks address *Jenkins*' separate conclusion that **a borrower may not sue preemptively to prevent a nonjudicial foreclosure "absent a `*specific factual basis* for alleging that the foreclosure was not initiated by the correct party.'"** (*Jenkins, supra,* 216 Cal.App.4th at p. 512 [**allowing such suits "would unnecessarily `interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature, and `would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy'"];** accord, *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814.) Because the parties do not raise the issue, we do not consider it here.

[16] We note that, after briefing in this case was completed, our Supreme Court issued its decision in *Yvanova, supra*, holding that a defaulting borrower whose property was sold in a nonjudicial foreclosure initiated by an entity who lacked authority to do so suffered "an injury sufficiently concrete and personal to provide standing." (*Yvanova, supra*, 62 Cal.App.4th at p. 937; see *id.* at pp. 923-924.) The borrower, in such case, "has lost ownership to the home," the court reasoned, an event that would not have occurred absent the unauthorized foreclosure. (*Id.* at p. 937.) The fact that the borrower had defaulted did not avoid the conclusion, for purposes of standing, that the unauthorized act leading to the void sale invaded his or her legal rights. (*Id.* at p. 939; see also *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 565-566 [**a defaulting borrower sufficiently alleged prejudice to state a cause of action for wrongful foreclosure following sale of her home where the foreclosing entity had no legal interest in the property because assignment of the debt was void]**.) This holding does not affect our decision here because, as discussed, the Lawsons judicially admitted that Wells Fargo was the beneficiary, that PNC Bank was the beneficiary's agent, and that Cal-Western initiated foreclosure proceedings on their instruction. The Lawsons cannot contradict themselves now (see *Barsegian, supra,* 215 Cal.App.4th at p. 452), particularly without offering any countervailing evidence (*24 Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal.App.4th at p. 1211). As **any authorized agent may initiate a nonjudicial foreclosure** (*Jenkins, supra*, 216 Cal.App.4th at p. 513; § 2924, subd. (a)(1)), the Lawsons, unlike the borrower in *Yvanova,* cannot show a substantive error voiding any future foreclosure sale and, by extension, avoiding the need to prove prejudice. **In *Yvanova*, the Supreme Court specifically cautioned that it was not addressing the elements or factual showing necessary to prevail (as opposed to sue) on a wrongful foreclosure action**. (*Yvanova, supra*, 62 Cal.App.4th at p. 924.)

[*] Judge of the Superior Court of California, County of Contra Costa, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.