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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MERCEDES PERLAS et al., **Plaintiffs and Appellants,** **v.** **GMAC MORTGAGE, LLC, et al.,** **Defendants and Respondents.**	**A125212** **(Contra Costa County Super. Ct. No. C08-02513)**

Plaintiffs Mercedes Perlas and Len Villacorta (appellants) appeal the dismissal of their action against defendants GMAC Mortgage, LLC (GMAC), and ETS Services, LLC (ETS)[1] (collectively, respondents). Appellants borrowed money from GMAC, a commercial mortgage lender. Following their failure to make the required loan payments, the underlying security was foreclosed upon. In the published portion of this decision, we reject appellants' claim that they could rely upon GMAC's knowingly false determination that they *qualified* for the loans as a determination by GMAC that they could *afford* the loans. In the unpublished portion, we reject appellants' other contentions.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II., III., IV.B., V., VI., and VII.

1 Elsewhere in the record, ETS is referred to as Executive Trustee Services, Inc., and Executive Trustee Services, LLC.

BACKGROUND[2]

Appellants own real property located on Drakes Circle in Discovery Bay (the Property). GMAC is a mortgage lender. Prior to November 27, 2007, appellants sought to refinance the Property by obtaining a loan from GMAC "and/or one or more of the Doe defendants" in the principal amount of $417,000 (the Loan). In connection with the Loan, GMAC provided a note setting forth a fixed interest rate of 6.375 percent and monthly payments of $2,601.54 (the Note). Respondents also provided appellants a truth-in-lending disclosure statement showing monthly payments of $2,601.54 for a 360-month term at a fixed rate of 6.393 percent. At the time appellants applied for the Loan, they provided information regarding their actual gross income "to one or more of the Doe defendants." One of the documents tendered at closing was a "purported" application for the Loan (Application), which appellants had neither prepared nor reviewed. The Application stated appellants' "total income" was $9,466 per month, which was substantially greater than the actual income information appellants provided to GMAC. This material change in appellants' income information was not disclosed to them prior to December 21, 2007, and appellants were never requested to confirm the accuracy of the information contained in the Application. At closing, appellants signed the preprinted Application and other documents without being given an opportunity to read or review them.

Along with the other documents regarding the Loan, GMAC prepared and tendered to appellants a deed of trust (Deed). The Deed identifies GMAC as " 'Lender.' " The Deed identifies unnamed defendant Mortgage Electronic Registration Systems, Inc. (MERS),[3] as a "separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this [Deed]." The Deed identifies ETS as "trustee" of the Deed. Unbeknownst to appellants,

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[2] The background facts are derived primarily from the first amended and operative complaint (FAC).

[3] MERS is not a party to this appeal.

the Deed included substantial language which constituted an addendum to the Note. Moreover, the beneficial interest in the Deed is separate from the Note, and appellants were not advised that such bifurcation is contrary to California law and without legal force or effect.

On or about December 21, 2007, appellants executed documents prepared by GMAC for a home equity line of credit (Credit Line), which was also intended to refinance the Property. The entire amount of the Credit Line, $114,000, was advanced as part of the refinance of the Property. However, the Credit Line application was neither prepared nor reviewed by appellants, and bears a preprinted date of November 27, 2007 on the applicant's signature line. On December 27, 2007, a deed of trust and assignment of rents was recorded to secure the Credit Line (Credit Line Deed).[4]

At no time did appellants' income permit them to make the payments called for in the Loan documents. On June 9, 2008, ETS recorded a notice of default and election to sell under the deed of trust (notice of default). ETS signed the notice of default "as agent for beneficiary." On September 19, 2008, ETS recorded a notice of trustee's sale.

On October 2, 2008, appellants filed their original complaint against respondents. On January 16, 2009, appellants filed the FAC against respondents and unnamed defendants alleging: slander of title (first cause of action), fraud (misrepresentation) (second cause of action), fraud (concealment) (third cause of action), conspiracy to commit fraud (fourth cause of action), to void contract (fifth cause of action), to void and cancel deed of trust (sixth cause of action), breach of fiduciary duty (seventh cause of action), violation of Business and Professions Code section 17200 et seq. (eighth cause of action), intentional infliction of emotional distress (ninth cause of action), declaratory relief (10th cause of action), injunctive relief (11th cause of action), violation of Civil

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4 The Deed and Credit Line Deed are collectively referred to as "the Deeds." The Loan and the Credit Line are collectively referred to as "the loans."

Code section 2923.5 (12th cause of action), and restitution (unjust enrichment) (13th cause of action).[5]

On February 20, 2009, respondents demurred to the first through sixth and eighth through 13th causes of action of the FAC on the grounds they failed to state a cause of action and were uncertain and ambiguous. Respondents also moved to strike various portions of the FAC. Respondents requested that the court take judicial notice of the June 9, 2008 notice of default, the notice of trustee's sale recorded on September 19, 2008, and a copy of Civil Code section 2923.5. Appellants opposed the motion to strike and demurrer, asserting the FAC stated the alleged causes of action, and, if not, requesting the opportunity to amend.

None of the parties attended the hearing on the demurrer and motion to strike. In sustaining the demurrer to the FAC without leave to amend, the court ruled that the slander of title cause of action failed because the Deed specifically identifies ETS as the trustee under the Deed, and the remaining causes of action failed to state facts sufficient to state a cause of action. The court granted respondents' request for judicial notice and ruled the motion to strike was moot.

DISCUSSION

I. *Standard of Review*

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of

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[5] The first cause of action was alleged against ETS, the fifth cause of action was alleged against GMAC and MERS, the seventh cause of action was alleged solely against the Doe defendants, the 11th cause of action was alleged against ETS and MERS, and the 13th cause of action was alleged against GMAC. The remaining causes of action were alleged against respondents.

action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. *Appellants Have Not Waived Their Claims of Error*[*]

Preliminarily, we reject respondents' assertion that by failing to object to the trial court's tentative ruling denying leave to amend, appellants waived their right to claim the court abused its discretion in sustaining the demurrer without leave to amend. Code of Civil Procedure section 472c, subdivision (a) provides: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open to appeal even though no request to amend such pleading was made." Therefore, appellants are entitled by statute to argue that leave to amend should have been granted, despite their failure to attempt amendment in the trial court. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 411.)

We also reject respondents' assertion that appellants may not, for the first time on appeal, raise new theories of relief to defeat the demurrer. As Witkin explains, "The rule against raising a new theory for the first time on appeal applies to an appeal after a trial. The rule is grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. At the pleading stage, these considerations are not applicable. Thus, on an appeal from a judgment on demurrer, the court will examine the pleaded facts to see if they make out a claim for relief under any theory. [Citations.]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 414, p. 473.)

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[*] See footnote, *ante*, page 1.

III. *Numerous Causes of Action Are Deemed Abandoned*[*]

Respondents correctly note that appellants fail to mention or discuss the following causes of action to which the demurrer was sustained without leave to amend: the first cause of action for slander of title, the fourth cause of action for conspiracy to commit fraud, the fifth cause of action to void contract, the seventh cause of action for breach of fiduciary duty, the eighth cause of action for violation of Business and Professions Code section 17200 et seq., the ninth cause of action for intentional infliction of emotional distress, the 10th cause of action for declaratory relief, the 11th cause of action for injunctive relief, and the 13th cause of action for restitution.

An appellant's failure to challenge an issue in its opening brief constitutes a waiver or abandonment of the issue on appeal. This rule has been applied even when, as here, the appellant is challenging the sustaining of a demurrer without leave to amend. (*Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 980, fn. 10; *Aragon-Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, 241.)

IV. *Appellants Cannot Amend to State a Cause of Action for Fraudulent Misrepresentation or Fraudulent Concealment*

Appellants contend they can amend the FAC to allege facts sufficient to constitute causes of action for fraudulent misrepresentation and fraudulent concealment against GMAC.[6]

A. *Fraudulent Misrepresentation*

To establish a claim for fraudulent misrepresentation, the plaintiff must prove: "(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation;

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[*] See footnote, *ante*, page 1.

[6] Appellants' failure to assert that the fraudulent misrepresentation and fraudulent concealment causes of action can be amended to sufficiently allege those causes of action against ETS constitutes an abandonment of those claims as to ETS.

(5) the plaintiff *reasonably relied on the representation*; (6) the plaintiff was harmed; and, (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. [Citations.]" (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.) "Each element in a cause of action for fraud . . . must be factually and specifically alleged. [Citation.]" (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) In a fraud claim against a corporation, a plaintiff must allege the names of the persons who made the misrepresentations, their authority to speak for the corporation, to whom they spoke, what they said or wrote, and when it was said or written. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

The fraudulent misrepresentation cause of action of the FAC alleges that respondents and the unnamed defendants (Lender Defendants)[7] knew or should have known, at the time the documents were prepared and tendered by GMAC to appellants for the Loan and Credit Line, that it was not possible for appellants to make the payments called for in the Loan and Credit Line based upon the income information actually provided to GMAC. By preparing and tendering the documents to appellants, the Lender Defendants represented to appellants that appellants could, in fact, make the payments called for in the loans and failed to disclose to appellants that they could not possibly afford the payments called for in the loans.

Respondents' demurrer argued that appellants failed to allege a misrepresentation of fact as to their payment obligations because appellants admit they executed all of the loan documents required to obtain the loans and, thereby, agreed to all the terms stated in those documents. Respondents also argued that preparing and tendering documents to appellants for their execution cannot be deemed a representation outside the written terms of the agreement that appellants executed and thereby adopted. Respondents also argued that, even assuming appellants alleged representations of fact, appellants failed to allege who made the representations, when they were made and to whom they were made; how

[7] The FAC refers to respondents and the unnamed defendants collectively as the "Lender Defendants," and we will do so here.

the representations are false; that respondents knew they were false; that respondents intended for appellants to rely on such representations and appellants did in fact rely on such misrepresentations.

Appellants argue they can amend the FAC to allege: (1) GMAC represented to them that they qualified for the loans based upon their "true income," which appellants provided to GMAC when they applied for the loans; (2) the representation was false since appellants' qualification for the loans was based upon a "fabricated, inflated income;" (3) GMAC knew the representation was false; (4) GMAC demonstrated its intent that appellants rely on the false representation by requesting "true" financial data from appellants, inserting false financial data into appellants' Application, failing to inform appellants that the Application contained an inflated gross monthly income for appellants, and failing to provide appellants with an opportunity to read or review the Application and other loan documents; (5) appellants relied on the misrepresentation and obtained the loans believing that GMAC's approval of the Loan indicated that GMAC thought appellants "could afford" the loans; and (6) appellants were damaged by the misrepresentation because they would not have obtained the loans had they known their qualification was based upon a fabricated, inflated statement of their income.

Appellants also argue they can specifically allege the following: "GMAC represented to [appellants] they qualified for the loans based upon their true income." Based on information and belief, Nick Dutra was "a loan consultant for [GMAC]." In the fall of 2007, Dutra had a telephone interview with appellants during which they told Dutra their true gross income was $50,000 a year. A couple of days later, Dutra called appellants and told them they qualified for their loans. Appellants were never informed that their qualification for the loans was based upon a fabricated, inflated income of $9,466 a month. At the time of his misrepresentations, Dutra was located at a Pleasanton address. On information and belief, appellants can allege that Dutra had authority from GMAC to interview and gather financial information from prospective borrowers to submit for GMAC's loan approval, and to fabricate and inflate a prospective borrower's income on his or her loan application without the borrower's knowledge and consent.

Neither the FAC nor appellants' proposed amendments allege that GMAC expressly represented to appellants that they had the ability to make the loan payments specified in the loan documents. Appellants appear to conflate loan qualification and loan affordability. In effect, appellants argue that they were entitled to rely upon GMAC's determination that they *qualified* for the loans in order to decide if they could *afford* the loans. Appellants cite no authority for this proposition, and it ignores the nature of the lender-borrower relationship. "[A]bsent special circumstances . . . a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender. [Citations.]" (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.) A commercial lender pursues its own economic interests in lending money. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) A lender "owes no duty of care to the [borrowers] in approving their loan." (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35.) A lender is under no duty "to determine the borrower's ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's." (*Renteria v. U.S.* (D.Ariz. 2006) 452 F.Supp.2d 910, 922-923 [borrowers rely on their own judgment and risk assessment in deciding whether to accept the loan]; accord, *Cross v. Downey Savings and Loan Association* (C.D.Cal., Feb. 23, 2009, CV09-317 CAS(SSx)) 2009 WL 481482 [nonpub. opn.].) Thus, appellants fail to demonstrate they can sufficiently amend the FAC to state a cause of action for fraudulent misrepresentation.

B. *Fraudulent Concealment*[*]

" '[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if

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[*] See footnote, *ante*, page 1.

he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citation.]" (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 96.)

The fraudulent concealment cause of action in the FAC alleges that respondents and the unnamed defendants knew or should have known that it was impossible for appellants to afford to make the payments called for in the loans and, at the time the loan documents were tendered and at all times thereafter, they concealed this fact from appellants. Like fraudulent misrepresentation, each element in a cause of action for fraudulent concealment must be factually and specifically alleged. (*Cadlo v. Owens-Illinois, Inc., supra,* 125 Cal.App.4th at p. 519.) And, when alleged against a corporation, a plaintiff must allege the names of the persons who committed the fraud, their authority to speak for the corporation, to whom they spoke, what they said or wrote and when it was said or written. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.)

Respondents demurred to the fraudulent concealment cause of action on the ground that appellants were presented with all of the loan documents, which included the monthly loan payment amounts and the income on which qualification was based. If any of the loan terms were unsatisfactory, appellants could have refused to execute the loan documents. Alternatively, respondents argued that even if concealment of a fact was alleged, the complaint failed to state that respondents were under any duty to disclose the concealed fact, that respondent intentionally concealed such fact and that appellants were unaware they could not afford the terms set forth in the loans. Respondents also argued that appellants failed to allege who made the concealment, and when, where, to whom and by what means the concealment was made.

Appellants argue they can amend the FAC to allege: (1) At the time of closing, Dutra concealed from appellants that the loan application reflected an amount for appellants' income that was fabricated and inflated and appellants' qualification for the loans was based on the inflated income amount. (2) "GMAC owed [appellants] a fiduciary duty. GMAC was and is licensed by the department of real estate, license [No.] 00755312. Therefore, GMAC also was a mortgage loan broker to [appellants] in addition

to being their lender. [Appellants] went directly to GMAC to obtain their loans." (3) GMAC never told appellants an inflated income was inserted in the loan applications, appellants did not have the opportunity to read and review the loan documents at closing, and therefore did not see that the income listed on the loan applications was inflated and fabricated. (4) GMAC intentionally concealed the fact of the inflated, fabricated income shown on the loan applications because it knew appellants would not have the opportunity to read the loan documents at the closing of the loans.

In their reply brief, appellants cite Financial Code section 4979.5, which provides: "(a) A person who provides brokerage services to a borrower in a covered loan transaction by soliciting lenders or otherwise negotiating a consumer loan secured by real property, is the fiduciary of the consumer, and any violation of the person's fiduciary duties shall be a violation of this section. A broker who arranges a covered loan owes this fiduciary duty to the consumer regardless of who else the broker may be acting as an agent for in the course of the loan transaction. [¶] (b) Except for a broker or a person who provides brokerage services, no licensed person or subsequent assignee shall have administrative, civil, or criminal liability for a violation of this section." Appellants' allegation that GMAC owed them a fiduciary duty because "GMAC was and is licensed by the department of real estate, license [No.] 00755312," and appellants "went directly to GMAC to obtain their loans" is conclusory and insufficient to establish that GMAC was a fiduciary of appellants pursuant to Financial Code section 4979.5. Moreover, appellants have not alleged that GMAC acted as a broker at any time in its dealings with appellants. Having failed to sufficiently allege a fiduciary duty, appellants' cause of action for fraudulent concealment fails.

V. *Appellants Cannot Amend to State a Cause of Action to Void and Cancel Deed*[*]

Next, appellants contend they can amend the FAC to allege facts sufficient to constitute a cause of action to void and cancel the Deeds against respondents and MERS.

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[*] See footnote, *ante*, page 1.

The cause of action in the FAC to void and cancel the deed of trust alleged that the Deeds are void and voidable because the specific terms of the Deeds were inconsistent with the nature of a deed of trust. Respondents demurred on the ground that the claim is vague and ambiguous, appellants failed to allege how the Deeds are void or voidable, and appellants failed to show they would be able to provide any restoration of consideration in exchange for a decree of cancellation.

Appellants assert that the thrust of the FAC's cause of action to void and cancel a deed of trust is that the Deed, attached as exhibit C to the FAC, is not actually a deed of trust, but instead "is a contract to permit MERS to foreclose upon the Property." Appellants argue that "Since the true character and essential terms of the Deed were concealed from [appellants], [appellants'] signature upon the Deed constitutes fraud in the inducement/execution, rendering the Deed void." As a result, appellants argue they may state a statutory cause of action for cancellation of instruments. (Civ. Code, § 3412.)[8] Alternatively, appellants argue the Deed is voidable under Revenue and Taxation Code section 23304.1 because MERS conducts business in California without paying state taxes. They argue that their claim to void and cancel the Deed is not based on fraud in the inducement, but is based on "fraud in the execution/inception."

A. *Fraud in the Execution of the Deed*

Appellants argue they can allege facts demonstrating that the Deed, which secured the Loan, did not meet the definition of a deed of trust,[9] but instead was a contract which permitted MERS to foreclose upon the Property.

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[8] Civil Code section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

[9] "A real property loan generally involves two documents, a promissory note and a security instrument. The security instrument secures the promissory note. This instrument 'entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust (with the debtor and creditor known as trustor and beneficiary and a neutral third party known as trustee). . . .'

Appellants argue the Deed is void for fraud in the execution. "When a plaintiff alleges fraud in the inducement, the plaintiff is asserting it understood the contract it was signing, but that its consent to the contract was induced by fraud. In contrast, when a plaintiff alleges fraud in the execution, the plaintiff is asserting that it was deceived as to the very nature of the contract execution, and did not know what it was signing. A contract fraudulently induced is voidable; but a contract fraudulently executed is void, because there never was an agreement. [Citation.]" (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 958 (*Brown*).)

Appellants assert they can amend the FAC to allege the following language contained in the Deed: "The beneficiary of this Security Instrument**[10]** is MERS (solely as nominee for [GMAC] and [GMAC's] successors and assigns) and the successors and assigns of MERS. [T]his Security Instrument secures to [GMAC]: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of [appellants'] covenants and agreements under this Security Instrument and the Note. For this purpose, [appellants] irrevocably grant[] and convey[] to [ETS], in trust, with power of sale, the [Property] . . . : [¶] . . . [¶] TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. . . . [*Appellants*] *understand*[] *and agree*[] *that MERS holds only legal title to the interests granted by* [*appellants*] *in this Security Instrument, but, if necessary to comply with law or custom, MERS* (*as nominee for* [*GMAC*] *and* [*GMAC's*] *successors and assigns*) *has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property*; and to take any action required of [GMAC] including, but not limited to, releasing and canceling this Security Instrument." (Italics added.) Appellants argue the italicized language in the Deed demonstrates that the Deed is not securing the

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[Citation.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235, fn. omitted.)

10 The Deed defines "Security Instrument" as the Deed document together with all riders thereto.

debt for GMAC, and the Deed does not permit GMAC to reach an asset if appellants default. Instead, it is a contract pursuant to which appellants agree that MERS may foreclose on the property.

Appellants impliedly acknowledge that reasonable reliance is a necessary element of fraud in the execution. That is, "[t]he contract is only considered void when the plaintiff's failure to discover the true nature of the document executed was without negligence on the plaintiff's part. [Citation.]" (*Brown, supra*, 168 Cal.App.4th at pp. 958-959.) Citing *Brown*, at page 959, appellants note that where parties to a contract are in a fiduciary relationship requiring the defendant to explain the terms of the contract between them, the plaintiff's failure to read the contract is reasonable and the defendant's failure to exercise its fiduciary duty may constitute constructive fraud.

Appellants argue they can amend the FAC to allege: (1) GMAC owed appellants a fiduciary duty as their mortgage broker, not as a lender; (2) GMAC failed to inform appellants the Deed was actually a contract which permits MERS to foreclose, a fact unknown to appellants; and (3) appellants' failure to read the Deed was reasonable given GMAC's fiduciary duty. Based on such allegations, appellants assert they can allege sufficient facts to state a cause of action to void and cancel the Deed against GMAC, ETS, and MERS due to fraud in the execution.

The short answer to appellants' claim for fraud in the execution of the Deed is that, as we noted above, appellants have failed to demonstrate that they can sufficiently allege any special circumstances that would establish a fiduciary duty on the part of GMAC in its dealings with appellants.

B. *Revenue and Taxation Code Violation*

Appellants appear to argue that the Deed is really a contract between them and MERS and this contract is void because MERS is unlawfully transacting business in California. The argument lacks merit.

"A deed of trust involves three parties: the trustor, the trustee, and the beneficiary. The trustor is the debtor owning the property that is conveyed to the trustee as security for the obligation owed to the beneficiary." (4 Miller & Starr, Cal. Real Estate (3d. ed.

2003) § 10:3, p. 20.) The Deed expressly designates appellants as the trustors, ETS as the trustee and MERS as the beneficiary "acting solely as nominee for [GMAC] and [GMAC's] successors and assigns." The copy of the Deed attached to the complaint is unsigned and has signature lines only for "Borrower." However, the Deed contains "uniform covenants" and "non-uniform covenants," both of which state: "Borrower and Lender covenant and agree as follows:" Nothing in the proposed amending language suggested by appellants or in their supporting argument establishes that the Deed is a contract solely between them and MERS. Consequently, they have failed to establish that the Deed is voidable and subject to cancellation.

VI. *Appellants Cannot Amend to Allege a Violation of Civil Code Section 2923.5*[*]

Appellants next contend they can amend the FAC to allege sufficient facts to allege a violation of Civil Code section 2923.5.[11]

The FAC merely alleged that none of the defendants made any attempt to comply with section 2923.5. Respondents demurred on the ground that either the statutory requirements were complied with or the statute does not apply.

Appellants note that, at the time the notice of trustee's sale was filed, section 2923.5 provided in part:

"(a)(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. . . .

"(b) A notice of default filed pursuant to Section 2924 shall include a declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the

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[*] See footnote, *ante*, page 1.

[11] All further undesignated section references are to the Civil Code.

borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.[12]

"(c) If a mortgagee, trustee, beneficiary, or authorized agent had already filed the notice of default prior to the enactment of this section and did not subsequently file a notice of rescission, then the mortgagee, trustee, beneficiary, or authorized agent shall, as part of the notice of sale filed pursuant to Section 2924f, include a declaration that either: [¶] (1) States that the borrower was contacted to assess the borrower's financial situation and to explore options for the borrower to avoid foreclosure. [¶] (2) Lists the efforts made, if any, to contact the borrower in the event no contact was made." (Stats. 2008, ch. 69, § 2.)

Appellants concede that because the notice of default was recorded on June 9, 2008, prior to the date section 2923.5 became operative, a declaration pursuant to subdivision (b) of section 2923.5 was not required. However, they assert that since the notice of trustee's sale was filed on September 19, 2008, the declaration requirements of subdivision (c) of section 2923.5 were applicable.

Appellants argue they can amend to allege facts establishing a cause of action for violation of section 2923.5 by alleging that the document entitled "Beneficiary Declaration of Compliance with (or Exeption From) . . . § 2923.5(c) and Authorization of agent (for Notices of Sale Where the Notice of Default Was Recorded Prior to 9-6-08)" (hereafter, the beneficiary declaration) is not a declaration pursuant to Code of Civil Procedure section 2015.5.[13] In particular, they assert the beneficiary declaration was not

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[12] Section 2923.5 was enacted by the Legislature, effective July 8, 2008, operative September 6, 2008. (Stats. 2008, ch. 69, § 2.)

Effective January 1, 2010, subdivision (b) section 2923.5 was amended and rewritten as follows: "A notice of default filed pursuant to Section 2924 shall include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required pursuant to subdivision (h)." (Stats. 2009, ch. 43, § 1.)

[13] Code of Civil Procedure section 2015.5 provides in relevant part: "Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to

executed under penalty of perjury and does not state the date and place of execution. They also argue that the beneficiary declaration signed by Kristine Wilson, does not state whether Wilson is the mortgagee, beneficiary or authorized agent.

The beneficiary declaration states, in relevant part: "The undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares that a notice of default . . . was recorded prior to September 6, 2008; that the [notice of default] has not been rescinded and: [¶] 1. [x] The beneficiary or beneficiary's authorized agent has contacted the borrower pursuant to . . . § 2923.5(c) (contact provision to 'assess the borrower's financial situation and explore options for the borrower to avoid foreclosure'). State the date 'contact' with the borrower(s) was accomplished: 8/27/2008. [¶] . . . [¶] The undersigned authorizes the trustee, foreclosure agent and/or their authorized agent to sign, on behalf of the beneficiary/authorized agent, the notice of sale containing the declaration required pursuant to. . . § 2923.5(c)." Below that statement is a signature line bearing the signature of Kristine Wilson "Limited Signing Officer" as "Beneficiary's/Authorized Agent's signature." The beneficiary declaration is dated September 12, 2008.

The short answer to appellants' claim is that they do not allege they suffered any prejudice as a result of any deficiency in the beneficiary declaration. They do not allege that they did not receive the notice of the facts stated in the declaration. Both state and federal courts have rejected claims of deficient notice where no prejudice was shown to

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the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California. . . ."

result from a procedural irregularity. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1204 [failure of declaration of due diligence to indicate it was executed in California and under penalty of perjury a technical defect under Code Civ. Proc., § 2015.5 and harmless error]; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 92-93 [where no prejudice suffered due to procedural irregularity in notice of foreclosure sale (§ 2924), sale not invalidated]; *Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1186-1187 [notice of default not deficient where no prejudice due to failure to properly identify beneficiary (§ 2924c, subd. (b)(1))].)

VII. *Appellants Cannot Amend to Allege a Void Notice of Default and Notice of Trustee's Sale*[*]

Appellants concede the FAC did not allege a cause of action to void and cancel the notice of default and notice of trustee's sale. However, they argue they can amend their FAC to state such a cause of action against ETS and MERS.

In reliance on *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231 (*Giraldo*), respondents assert that appellants' failure to present this new theory of liability or relief below prohibits them from presenting it for the first time on appeal. Respondents' reliance on *Giraldo* as well as their assertion fail. In *Giraldo*, the demurring defendants objected to the plaintiff's reliance on out-of-state authorities, complaining that she did not present them to the trial court, and therefore waived her right to argue them on appeal. *Giraldo* reiterated the general rule that theories not raised in the trial court cannot be raised for the first on appeal. However, it rejected the defendant's argument, stating it was aware of no prohibition against citation of new authority in support of an issue that was in fact raised below. (*Id.* at p. 251 & fn. 7.)

"The rule barring new theories on appeal is limited to appeals *after* trial; it does not apply to trial court dispositions at the *pleading* stage. Thus, on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, the court's review is not restricted to the theories asserted below; it will reverse if the complaint

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[*] See footnote, *ante*, page 1.

stated a claim for relief on *any* theory. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 8:242, p. 8-160.) Generally, " '[w]hen a demurrer is sustained without leave to amend the petitioner may advance on appeal a new legal theory why the allegations of the petition state a cause of action.' [Citation.]" (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259.)

The thrust of appellants' cause of action to void and cancel the notice of default and notice of trustee's sale is that a nonjudicial foreclosure cannot be initiated because (1) the Deed is void and (2) MERS is not the beneficiary under the Deed and has no interest in the Loan. Appellants argue, "If [appellants] have alleged sufficient facts to constitute a cause of action to void and cancel the deed of trust, then [appellants] have alleged sufficient facts to void and cancel the notice of default and notice of trustee's sale."

As we noted above, appellants have failed to establish that they can amend the FAC to properly state a cause of action to void and cancel the Deed based on fraud in the execution or violation of the Revenue and Taxation Code. Since they have failed to sufficiently allege that the Deed is void they cannot sufficiently allege that the notice of default and notice of trustee's sale are void.

Appellants have failed to establish that the FAC is capable of amendment. Consequently, respondents' demurrer was properly sustained without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Costs to respondents.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

Superior Court of Contra Costa County, No. C08-02513, Judith S. Craddick, Judge.

Dennis Moore and Walter Hackett for Plaintiffs and Appellants Mercedes Perlas and Len Villacorta.

Severson & Werson and Jan T. Chilton; Wolfe & Wyman, Stuart B. Wolfe and Alice M. Dostálová for Defendants and Respondent GMAC Mortgage, LLC, and ETS Services, LLC.