4th Civ. No. E078068

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALEXIS ASHLEY DOWNIE,

Plaintiff and Appellant,

v.

THE RAMA FUND, LLC, et al.,

Defendants and Respondents.

Appeal from the Riverside County Superior Court,
Case No. PSC2004861
Honorable Randolph Rogers, Judge

RESPONDENTS' BRIEF

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Court of Appeal
State of California
Fourth Appellate District

CERTIFICATE OF INTERESTED ENTITIES

Court of Appeal Case No: E078068

Case Name: Downie v. The Rama Fund, LLC, et al.

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Michael W. Griffith	Trustee of the Griffith Family Trust, Owner of FCI Lender Services, Inc.
2. Timothy D. Griffith	50% Owner of California TD Specialists
3. Jeffrey M. Griffith	50% Owner of California TD Specialists
4. Rama Capital Partners, LLC	Manages The Rama Fund, LLC

/s/ *Joseph V. Bui*
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INTRODUCTION

This case is plaintiff and appellant's latest meritless attempt to contest foreclosure on a rental property securing a business loan that she failed to repay.[1]

After plaintiff delayed a foreclosure sale set for December 2019 by initiating four frivolous bankruptcies, defendants agreed to give plaintiff one last opportunity to preserve her interest in the property.

The resulting settlement provided that plaintiff would either pay off the $1.85 million balance on the loan across four, timely-made installments or allow defendants to finally foreclose on the property—this time, in a foreclosure that was supposed to be "uncontested *in all respects*." (4CT-984, § 2.A.5, italics added.)

But plaintiff defaulted on the second of the four installments. Plaintiff then tried to impede and undo the foreclosure at every turn, despite promising not to contest it—both by initiating this case, in which plaintiff sued for wrongful foreclosure, and by attempting to consolidate this case with the unlawful detainer action that allowed defendants to take possession of the property.

After allowing plaintiff *two chances* to amend the complaint, the trial court concluded that plaintiff's latest attempt

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[1] Although the Opening Brief refers to multiple "Appellants," the notice of appeal and docket reflect that there's only one appellant, Alexis Downie, as Successor Trustee of the Brookville Trust. (Compare AOB-7, with 20CT-4976 [Notice of Appeal].)

to challenge the foreclosure was meritless too. Nothing plaintiff has said in her opening brief establishes that the trial court committed reversible error in so doing.

Wrongful Foreclosure. Plaintiff argues that defendants failed to timely respond to her request for a payoff demand and that, as a result, plaintiff was unable to close a refinancing transaction that would have allowed her to stop the foreclosure by paying off the entire loan. On this basis, she argues that defendants wrongfully foreclosed on the property.

But plaintiff is precluded from even bringing a wrongful foreclosure claim in light of her agreement in the settlement not to contest foreclosure after the latest default.

Plaintiff is also wrong, in any case. The exhibits plaintiff attached to the Second Amended Complaint make clear that plaintiff *did not* timely ask defendants for the one thing plaintiff allegedly needed to complete a refinancing transaction that would allow her to stop the foreclosure: a *payoff demand* for the total amount owed on the loan.

Plaintiff cites to a declaration from her escrow officer indicating that the officer had asked for a payoff demand. But that same declaration shows that defendants provided plaintiff with a payoff demand the very next day—well within the 21 days that the Civil Code allows mortgagees to respond to such a request. (Civ. Code, § 2943, subd. (c).) That plaintiff had some undisclosed need for that payoff demand even sooner is irrelevant. Plaintiff's failure to timely request a payoff demand is

her own fault; she cannot blame defendants for precluding her from securing the funds necessary to pay off the loan.

Quiet Title. Plaintiff assumes her quiet title claim rises and falls with her wrongful foreclosure claim. It therefore fails for the same reasons as the wrongful foreclosure claim.

Plaintiff's quiet title claim equally fails due to plaintiff's failure to separately address the quiet title claim. Quiet title and wrongful foreclosure are distinct claims with distinct elements. This means that, as the party challenging the presumptively correct judgment, plaintiff had to demonstrate in her opening brief that she alleged each distinct element to a quiet title claim. But plaintiff's brief does not even identify the elements to a quiet title claim—let alone develop an argument as to how plaintiff satisfied those elements. That deficient briefing forfeits the issue.

Breach of Contract/Covenant of Good Faith. Plaintiff argues that defendants breached some unidentified contract by failing to pay taxes on the property. This argument fails too.

Plaintiff has not and cannot allege performance under whatever contract she's referring to—having defaulted on both the Loan and the Settlement Agreement. Nor can she allege a breach given that the tax records *plaintiff* attached to the Second Amended Complaint make clear that defendants *have timely paid* all property taxes owed—as do other publicly-available and judicially-noticeable county tax records. Nor can she allege

damages over unpaid taxes to a property she has no entitlement to.

Leave to Amend. Plaintiff has failed to state a claim in any of her three iterations of the complaint, and there's no reason to believe she could do so if given yet another chance. Plaintiff has in fact forfeited her chance to make that showing by raising only the most conclusory argument as to her entitlement to leave to amend: that there are some unidentified documents in the record that could cure unidentified defects in the Second Amended Complaint.

The Consolidation Attempt. Plaintiff fares no better in challenging the trial court's denial of her ex parte application to consolidate this action with the unlawful detainer action. The trial court acted within its discretion in rejecting plaintiff's efforts in light of: (1) the several procedural deficiencies with plaintiff's attempts, which plaintiff failed to correct even when given a chance to do so; (2) the Legislature's interest in ensuring that unlawful detainer actions are resolved well before other civil cases like this one; and (3) plaintiff's inability to show any resulting prejudice given that each court independently determined that she has no interest in the property at issue.

Simply put, plaintiff has failed to show that she has stated a claim, that she could cure the defects to her claims if given leave to amend, or that the trial court should have consolidated her procedurally defective, meritless wrongful foreclose case with an unlawful detainer action in which she also lost.

The Court should affirm.

STATEMENT OF THE CASE

A. Factual Background.

Because this appeal arises from a demurrer to plaintiff's Second Amended Complaint, we take the facts from the allegations in that complaint, documents plaintiff attached to the complaint, and judicially noticeable documents that were presented to the trial court in connection with the demurrer proceedings. (See *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 438-439 (*Debrunner*); *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 600 (*Nealy*) [all three are considered on a demurrer].)

1. Plaintiff takes a nearly $1.6 million loan, secured against one of her beneficiary's multiple properties.

In March 2014, Billie Jo Frye purchased a property at 79405 Brookville in La Quinta, California (the "Property") in her capacity as Trustee of Brookville Trust. The Trust's sole beneficiary, and CEO, is Thomas Downie. (4CT-908, ¶¶ 22-24.)

Mr. Downie resides in Washington. (4CT-906, ¶ 3.) He "uses the [P]roperty [either] as a rental" or as a vacation home when he's in town. (4CT-908, ¶ 24.) The Property is not his primary residence, nor the primary residence of Brookville 79405, Inc. ("Brookville Entity") or plaintiff Alexis Downie, Successor Trustee of the Brookville Trust. (See 4CT-908, ¶ 24.)

In October 2018, Athas Capital Group provided Ms. Frye with a $1,592,500 loan "for business purposes." (4CT-908, ¶ 25; 957, § 43.) The parties memorialized the Loan in a note that Athas secured through a deed of trust recorded against the Property. (4CT-908, ¶ 25; 983.)

Athas assigned the Loan to defendant The Rama Fund, LLC. (4CT-909, ¶ 26.) The Deed of Trust identifies Commonwealth Land Title Insurance Company as the Trustee; FCI Lender Services, Inc. is the servicer of the Note; and TD Specialists is allegedly an agent for The Rama Fund. (4CT-909, ¶¶ 27-28, 32.) FCI and TD Specialists join The Rama Fund as defendants and respondents in this action.[2] (4CT-909, ¶¶ 27-28, 32.)

[2] Although the Second Amended Complaint identifies Commonwealth Land Title Insurance Company as a defendant, it is not a party to the case because plaintiff failed to serve Commonwealth the Second Amended Complaint. (See 4CT-1020 [serving the Second Amended Complaint on July 6, 2021 only on Blank Rome]; 21CT-5005 [identifying Blank Rome as attorneys for The Rama Fund, FCI, and TD Specialists—and not for Commonwealth]; RA-4 [docket indicating that "Commonwealth has been "[w]aiting [for] [s]ervice as of 07/06/2021," the date defendants filed the Second Amended Complaint].)

2. The Brookville Trust defaults on the Loan and initiates four, quickly dismissed bankruptcy proceedings.

The Brookville Trust defaulted on the Loan less than a year in, prompting defendants to record a Notice of Default and to schedule a foreclosure sale for December 2019. (4CT-909, ¶ 32.)

But the foreclosure sale did not take place in December 2019. Instead, plaintiff delayed foreclosure by initiating a series of bankruptcy proceedings from January 2020 to April 2020—three in the Central District of California and a fourth in the Western District of Washington.[3] (4CT-909, ¶ 35; 983.) Each court overseeing the proceedings dismissed the respective bankruptcy action within a month or so of plaintiff filing it. (4CT-983.)

[3] In particular, "Downie commenced a Chapter 13 bankruptcy proceeding in the Central District of California on September 10, 2018, which was dismissed on September 25, 2018; a Chapter 13 bankruptcy proceeding in the Central District of California on January 28, 2020, which was dismissed on February 26, 2020; and a Chapter 13 bankruptcy proceeding in the Central District of California on March 3, 2020, which was dismissed on April 7, 2020." (4CT-983.) And "on April 7, 2020, [the Brookville Trust] commenced a Chapter 11 Bankruptcy proceeding in the Western District of Washington under cause number 20-11094, in which the Loan was a subject, which was dismissed on June 5, 2020." (4CT-983.)

3. To avoid foreclosure, the Brookville Trust agrees to either timely pay off the loan or to finally allow foreclosure to proceed without contesting it in any way.

Shortly after plaintiff's fourth bankruptcy dismissal in June 2020 (4CT-983), the parties reached a settlement agreement that would give plaintiff (via the Brookeville Trust) one more opportunity to salvage her interest in the Property by making good on the Loan. (4CT-909-910, ¶ 36; 983-986.)

The written Settlement Agreement required the Brookville Trust to wire The Rama Fund the $1.85 million then owed on the Loan in four installments, subject to various provisions. (4CT-983-984, § 2.A.)

The first three installments were to be $275,000 each, due in July, August, and September of 2020. The fourth installment for the remaining $1,025,000 was due by September 30, 2020. (4CT-984, § 2.A.)

The agreement provides that "[i]f any of the First Payment, Second Payment, Third Payment, or Fourth Payment are not received timely," "RAMA, or its successors and assigns, shall have the right to foreclose on the Property, which shall be *uncontested in all respects by* [the Brookville Trust] or Downie." (4CT-984, § 2.A.5.)

The agreement expressly precludes the Brookville Trust, "including any and all of its members or beneficiaries and Downie" from "us[ing] future bankruptcy filings as a tactic to delay the sale of the Property"—or from "transfer[ing] the

Property to any bankruptcy-eligible entity without the prior written consent of RAMA." (4CT-984, § 2.B.)

4. The Brookville Trust defaults on the second installment and files yet another bankruptcy; the bankruptcy court finds the transfer to be "part of a scheme to hinder, delay, or defraud creditors".

The Brookville Trust did not live up to its contractual obligations this time either.

The Brookville Trust failed to make the second scheduled installment, due in August 2020. (4CT-910, ¶ 37)

Then, contravening the Settlement Agreement's bar on transferring the Property to a bankruptcy-eligible entity without Rama's prior consent, in early September the Brookville Trust apparently transferred the Property to the entity "Brookville 79405 Inc.," which had filed *yet another* bankruptcy petition. (3CT-752.) The bankruptcy court concluded that the petition was "'part of a scheme to hinder, delay, or defraud creditors' that involved the transfer of the Property without the consent of Rama." (3CT-752, quoting 3CT-621.)

The bankruptcy court dismissed the case (3CT-752, citing 3CT-585), and ultimately sanctioned the Brookville Entity and its counsel for filing a frivolous petition "simply to delay the Creditor from foreclosing the Property . . . *after* previously failing three times to similarly attempt to frustrate the Creditor through improper bankruptcy filings." (7CT-1874-1875, original emphasis

[tentative order], 1871 [adopting the tentative as the final ruling of the court].)

5. Plaintiff asks for a reinstatement quote, even though she actually needs a payoff demand to refinance the property and stop the foreclosure.

Despite impermissibly filing a bankruptcy proceeding that the court determined to be just the latest frivolous attempt to frustrate defendants, plaintiff faults *defendants* for precluding her, as successor trustee of the Brookville Trust, from either paying off the entirety of the Loan or the amount necessary to reinstate it. Plaintiff alleges that:

- Plaintiff intended to "payoff the RAMA Fund mortgage in full" by refinancing the Property (4CT-910, ¶ 39);
- Her escrow officer could only complete the refinance transaction if provided with "a beneficiary payoff demand" (4CT-910, ¶ 40);
- Plaintiff or her agents therefore requested a "[p]ayoff [d]emand" from defendant FCI Lender Services in "true and accurate cop[ies]" of communications that they "attached" to the Complaint (see 4CT-911, ¶¶ 40, 41 [alleging, for instance, that "***[a] true and accurate copy of the Beneficiary Payoff Demand Request is attached hereto as Exhibit 10,"*** original italics and boldface].)
- Defendants' refusal to timely provide her with the payoff demand she requested "prevent[ed] Plaintiff from being

able to obtain the required payoff demand and save the Property from foreclosure." (4CT-911, ¶ 45.)

The actual communications that plaintiff attached to the operative complaint as proof of her requests, however, *do not* show that plaintiff or her agents ever asked defendants for a "payoff demand"—that is, a demand for "the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement." (Civ. Code, § 2943, subd. (H)(5).)

The attached communications instead show that—despite needing a "payoff demand" for the full amount of the Loan to complete the refinance transaction—plaintiff had asked only for a "Reinstatement Quote *to bring the mortgage current*." (4CT-998, italics added.)

B. Procedural History.

1. Plaintiff files a complaint and quickly amends it.

Rather than paying off the Loan in full (or any amount owed, for that matter), plaintiff sued defendants for wrongful foreclosure and quiet title on the basis that defendants had failed to timely provide her with information on amounts owed that she needed to stop the foreclosure within the time permitted to do so. (1CT-33-36.)

Plaintiff also alleged a claim for breach of contract or the implied covenant of good faith on the basis that defendants violated some contractual duty to pay certain property taxes

(1CT-37)—in addition to various claims that are no longer part of this case. (1CT-28.)

Defendants, in turn, filed a demurrer seeking dismissal of all of plaintiff's causes of action. (1CT-139.)

Before the court could rule on the demurrer or the request for judicial notice, plaintiff filed her First Amended Complaint, prompting the court to deem defendants' demurrer to the initial complaint moot. (2CT-450.)

2. The trial court dismisses plaintiff's First Amended Complaint and provides plaintiff with her second opportunity to amend.

Defendants demurred to the First Amended Complaint and requested that the court take judicial notice of an order in plaintiff's latest bankruptcy proceeding and of public records confirming that all property taxes had been paid. (3CT-489 [demurrer]; 517 [request for judicial notice of 618-622 [bankruptcy court order], and 624-627 [county tax records].)

Defendants' Arguments. Defendants argued that plaintiff had not stated a claim for wrongful foreclosure because (1) the Settlement Agreement entitled them to proceed with foreclosure on default (3CT-500, citing 2CT-418-419, § 2.A.5), and (2) plaintiff had not and could not allege tender of "'the full amount due'"—or "an exception to the tender requirement." (3CT-502; 504, quoting *Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1165.)

Defendants argued that plaintiff had not stated a claim for quiet title either, for the same reasons her wrongful foreclosure claim failed, plus plaintiff's failure to allege "adverse claims to title," an element specific to quiet title claims. (See 3CT-507-508, boldface omitted.)

Defendants argued that plaintiff's claim for breach of contract and/or the covenant of good faith and fair dealing fared no better: Plaintiff could not plead performance due to her defaults to the Note and the Settlement Agreement—and could not plead a breach based on the nonpayment of property taxes since "judicially noticeable records of the County Assessor . . . [that] confirm that property taxes have been fully paid." (3CT-507.)

Plaintiff's Arguments. Plaintiff, in turn, insisted that she had adequately stated claims for wrongful foreclosure and quiet title. Plaintiff *did not*, however, respond to defendants' argument that the foreclosure could not have been wrongful because defendants had a right to foreclose under the Settlement Agreement. (See 3CT-728-730.) Plaintiff instead argued only that she "requested a payoff demand, and other information to which Plaintiff[] w[as] entitled, and Defendants refused to provide said information" and that she should be "excused from tender[]" under these circumstances. (3CT-728-729.)

Plaintiff maintained that she had also stated a claim for breach of contract and/or the covenant of good faith. She

acknowledged that she had defaulted on the Loan but argued that she was excused from performing. (3CT-729-730.)

Trial Court's Ruling. The trial court agreed with defendants and sustained the demurrer as to all causes of action.

The trial court held that plaintiff had failed to state claims for wrongful foreclosure and quiet title, because (1) plaintiff had already agreed in the Settlement to provide Rama with the "unequivocal[]" "right to" foreclose on default, (2) plaintiff had not alleged tender, and (3) the equities did not merit an excuse from tender in this case. (3CT-752-753.)

The trial court dismissed plaintiff's claim for breach of contract and the covenant of good faith too, reasoning that plaintiff had failed to even specify "what term of what agreement was breached." (3CT-753.)

The trial court nevertheless provided plaintiff with a second chance to amend her complaint. (3CT-752.)

3. Defendants demur to plaintiff's Second Amended Complaint.

Plaintiff filed a Second Amended Complaint in July 2021. (12CT-2734-2747.) Defendants demurred again, largely for the same reasons articulated in the prior round of briefing. (7CT-1647.) Defendants also filed another request for judicial notice that now included a new order in plaintiff's bankruptcy case imposing sanctions on plaintiff and her counsel. (7CT-1678-1679 [seeking judicial notice of the same documents as before (as

relevant here, 7CT-1782-1784, 1785-1788), plus the sanctions order (7CT-1871-1874)].)

4. While the demurrer is pending, plaintiff unsuccessfully seeks to consolidate this action with a separate, unlawful detainer action.

While the demurrer was pending, plaintiff filed an ex parte application to consolidate this case with an unlawful detainer action that Rama had recently filed in another court. (8CT-1970.)

The trial court denied the application without prejudice to plaintiff's ability to bring a regularly noticed motion. (8CT-2014.) It reasoned that plaintiff had not stated any "emergency" that would justify resolving the issue on an ex parte basis, without input from defendants. (8CT-2014.)

The next day, rather than filing a noticed motion to consolidate, as the trial court invited—which could have been followed by an ex parte application to shorten the briefing schedule—plaintiff filed another ex parte application for consolidation. (10CT-2346.) The only fact she added was that the unlawful detainer case had been set for trial. (Compare 8CT-1970-1978, with 10CT-2345-2355.)

The trial court denied the second ex parte application for the same reason as the first. (11CT-2706.) It later sanctioned plaintiff and her counsel for filing what they now should have known was "frivolous." (20CT-4958.)

After the second ex parte application was denied, plaintiff filed another ex parte application, this time seeking a temporary protective order to enjoin her eviction. (13CT-3020-3032.) The court denied the application. (13CT-3213.)

Plaintiff ultimately filed a noticed motion to consolidate only after judgment in the unlawful detainer action was entered. (14CT-3390.) The trial court denied the motion, reasoning that plaintiff had failed to (1) serve all necessary parties, (2) timely file it, or even (3) provide facts justifying such relief. (20CT-4844, citing Cal. Rules of Court, Rule 3.350(a).)

5. The trial court sustains defendants' demurrer and dismisses plaintiff's claims with prejudice.

The trial court sustained defendants' demurrer to the Second Amended Complaint, this time without providing plaintiff a third opportunity to amend. (20CT-4848.) After resolving other miscellaneous issues, the trial court dismissed the action with prejudice on October 8, 2021. (20CT-4967.)

6. Plaintiff timely appeals.

Plaintiff filed her notice of appeal on November 4, 2021 and designated a 21-volume Clerk's Transcript. (20CT-4976, 4987.)

STANDARD OF REVIEW

Plaintiff argues that the trial court committed reversible error in (1) sustaining defendants' demurrer to the Second Amended Complaint, (2) denying her a third opportunity to

amend her complaint, and (3) denying her requests to consolidate this case with an unlawful detainer proceeding. (AOB-12, 23, 24.)

The Court reviews an order sustaining a demurrer de novo. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173 (*Czajkowski*).) It assumes the truth of all properly pleaded factual allegations, but *not* allegations contradicted *either* by judicially noticeable facts *or* by exhibits attached to the complaint. (*Debrunner, supra,* 204 Cal.App.4th at pp. 438-439; *Nealy, supra,* 54 Cal.App.5th at p. 600.)

The Court reviews for an abuse of discretion the denial of plaintiff's requests for leave to amend and to consolidate this case with the unlawful detainer action. (*Czajkowski, supra,* 208 Cal.App.4th at p. 173 [leave to amend]; *People v. Morgan* (1955) 134 Cal.App.2d 97, 98, fn. 6 [motion to consolidate].)

ARGUMENT

I. Plaintiff Has Not Shown That The Trial Court Committed Reversible Error In Sustaining The Demurrer To Her Second Amended Complaint.

Plaintiff has not shown that she had stated a claim on any of her causes of action. There, thus, is no basis to reverse the demurrer ruling.

A. Plaintiff has not shown that the trial court committed reversible error in dismissing her wrongful foreclosure claim.

Plaintiff has not shown that the trial court was wrong as a matter of law to sustain the demurrer on her wrongful foreclosure claim. She has not even *argued* that she satisfied

each of the four elements to a wrongful foreclosure claim, nor is there any legitimate basis to so argue.

1. Plaintiff has not shown that she alleged facts establishing prejudice or that she had not breached a contract term that would empower defendants to proceed with an uncontested foreclosure.

As the appellant, plaintiff has the burden of affirmatively showing error. (*Boynton v. McKales* (1956) 139 Cal.App.2d 777, 784; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 (*Paulus*).) To meet her burden on an appeal from a demurrer, plaintiff must affirmatively "show[] that the facts pleaded are sufficient to establish every element of [each] cause of action.'" (*Nealy, supra,* 54 Cal.App.5th at p. 600.) Plaintiff has failed to make that showing here for two, independent reasons.

***First*,** plaintiff failed to make *any showing* that she pleaded two of the elements of a wrongful foreclosure claim. There are *four* elements that plaintiff had to plead to bring a wrongful foreclosure claim—namely that:

1) The trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust;

2) The party attacking the sale was prejudiced or harmed;

3) In cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering; and

4) The mortgagor or trustor did not breach a condition or fail to perform, as would authorize the foreclosure.

(*Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1306-1307 (*Majd*).)

Plaintiff's opening brief does not argue that she adequately pleaded either that she suffered prejudice or harm (Element No. 2)—or that she did not breach some condition or fail to perform an obligation that would give defendants the absolute authority to foreclose or exercise the power of sale (Element No. 4).

Plaintiff instead assumes, without explanation, that prejudice/harm is not at issue in this case. And she never even acknowledges the fourth element: that she did not commit a breach that would authorize the foreclosure. (See AOB-14-15 ["The common law tort claim of wrongful foreclosure claim has three elements. . . . The first and third elements are at issue here"].)

As this District has held in comparable cases, an appellant's failure to put forth an argument that she pleaded all four elements of a wrongful foreclosure claim dooms the appeal as to that claim. (E.g., *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1502 (*Rossberg*).) After all, appellate courts presume that a challenged order is correct until the appellant establishes otherwise. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609 (*Jameson*).) It is not the court's obligation to help appellants "'to develop [appellate] arguments for them.'" (*Rossberg, supra,*

219 Cal.App.4th at pp. 1490, 1502, quoting *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

Any attempt plaintiff may make on reply to establish either prejudice or harm from the defendants' allegedly wrongful conduct or that she had not committed a breach authorizing foreclosure would come too late. (*High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102, 111 & fn. 2.) An appellant cannot "salvage" an already-forfeited argument by raising it in her reply brief only "after the respondent's brief note[s] [this threshold] failure." (*Paulus, supra,* 139 Cal.App.4th at p. 685 ["Paulus's belated attempt to address the abuse of process and interference with contract claims in his reply brief—after the respondents' brief noted his failure to address the striking of these claims—did not salvage these abandoned issues."]; accord *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821 (*Aviel*); *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18 (*SCI California*).)

The Court should thus affirm the judgment, which remains presumptively correct due to plaintiff's failure to affirmatively "'show[] that the facts pleaded are sufficient to establish every element of [each] cause of action.'" (*Nealy, supra,* 54 Cal.App.5th at p. 600.)

***Second*,** even if plaintiff was permitted to raise new arguments on reply, any attempt to establish prejudice or that

plaintiff did not breach a condition or fail to perform would lack merit. (*Majd, supra,* 243 Cal.App.4th at pp. 1306-1307.)

That's because plaintiff's breach of the Settlement Agreement authorized defendants to move forward with the foreclosure regardless of whatever plaintiff's quibbles are with the foreclosure process. (See 3CT-753 [court: "[T]here is no inequity in Rama proceeding with the foreclosure after Plaintiff failed to make the second payment because the Settlement Agreement expressly and unequivocally gives Rama the right to do so"].)

Indeed, after plaintiff's first default on the Loan and the series of meritless bankruptcy proceedings she initiated afterwards (see Statement of the Case, § I.A.2, *ante*), defendants were willing to give plaintiff one more chance to make good on her debts—but only on the condition that plaintiff would either make the timely payments or allow foreclosure to finally proceed without objection. The resulting settlement is explicit: "If any of the First Payment, Second Payment, Third Payment, or Fourth Payment are not received timely, nonpayment of any installment shall be considered an event of default under both the Deed of Trust and Note, and RAMA, or its successors and assigns, shall have the right to foreclose on the Property, *which shall be uncontested in all respects by Borrower or Downie.*" (4CT-984, italics added.)

It follows that on plaintiff's failure to timely pay the second installment (4CT-910), defendants had the right proceed with a

foreclosure that plaintiff lacked any authority to "impede" or "interfere with" in any way. (Law Insider Dict., *Uncontested Foreclosure* definition[4] [as of Nov. 23, 2022].)

Courts have held that a plaintiff breaches substantially similar provisions by opposing a foreclosure—even when the plaintiff invokes statutory rights that it would have had if she had not waived the right to object. (E.g., *Lansing v. Wells Fargo Bank, N.A.* (8th Cir. 2018) 894 F.3d 967, 970, 973 (*Lansing*) [holding that plaintiff breached a provision "'waiv[ing] the right to challenge any deficiencies'" in a "'future foreclosure'" by filing a suit alleging "that Wells Fargo violated Minn. Stat. § 582.043 when it proceeded to seek a foreclosure judgment after receiving Lansing's loan modification," italics omitted].)

Civil Code section 2953, which precludes borrowers from waiving certain rights either "at the time of or in connection with the making of or renewing of any loan," makes no difference here. Our Supreme Court has long recognized that a separate agreement that (1) is reached *after* an initial default and (2) provides the mortgagee with the right to "conveyance of the subject property" either outright or "upon default after a further time extension granted in the contract made subsequent to default" *is not subject to section 2953.* (*Hamud v. Hawthorne* (1959) 52 Cal.2d 78, 84 [distinguishing several such post-default

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[4] <https://www.lawinsider.com/dictionary/uncontested-foreclosure>

agreements from one in which "the agreement purporting to waive or restrain redemption rights is made at the time of the loan"].)

For good reason. Such agreements neither create a "new" loan nor "renew" the terms of the original loan for another term. (See *Morello v. Metzenbaum* (1944) 25 Cal.2d 494, 500 ["[a] covenant providing for the renewal of a lease at the option of the lessee[, which] imports the giving of a new lease" is distinct from an agreement that extends the terms of an existing loan].)

They are instead separate contracts in which the mortgagee "grant[s] [the borrower] a loan extension in exchange for a swifter and less complicated means of recouping its losses if [the borrower[s] were to default [again]." (*Guam Hakubotan, Inc. v. Furusawa Inv. Corp.* (9th Cir. 1991) 947 F.2d 398, 402 (*Guam*) [looking to California law to hold that such an agreement is not a "mortgage" subject to prohibitions against waivers found in the Guam Civil Code, which is modeled after the California Civil Code]; *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 324 [deeming section 2953 inapplicable because a "forbearance agreement" that "does not amend or modify the note or deed of trust" does not constitute "a renewal of the loan"].) Indeed, a contrary interpretation would "eliminate incentives for creditors to grant loan extensions sought by debtors and instead create an incentive for creditors simply to initiate foreclosure." (*Guam, supra,* 947 F.2d at p. 402.)

That's this case. After plaintiff filed four bankruptcies to delay the foreclosure sale scheduled following her initial default, defendants agreed to (1) accept the monthly installments "to settle the amount and means for satisfying the secured debt owed to RAMA and/or Athas" under the Loan; (2) "forbear from any collection activity relating to the Loan;" and (3) upon receipt of the installments, "postpone the foreclosure sale" in exchange for a swifter and less complicated means for recouping its losses: the right to foreclose without contest from plaintiff. (See 4CT-983-984, §§ 2.A., 3.)

Because the Settlement Agreement neither creates a different loan obligation, nor renews the original loan for another term, Civil Code section 2953 has no application.

For these reasons, plaintiff can neither show that she had not committed a breach that would authorize the foreclosure or that she was prejudiced by any alleged defect in the foreclosure process when she had already agreed that, by defaulting again, defendants were entitled to proceed with a foreclosure that would be "uncontested *in all respects*." (4CT-984, italics added.)

2. Plaintiff has not shown that she alleged facts establishing that the sale was illegal, fraudulent, or willfully oppressive.

Plaintiff's wrongful foreclosure claim equally fails because, even assuming plaintiff hadn't already waived her right to bring such a claim, plaintiff has not alleged facts establishing another element of the claim: that the sale was illegal, fraudulent, or willfully oppressive.

Plaintiff accuses defendants of two Civil Code section 2924c violations: failing to provide her with a requested (1) payoff demand and/or (2) a reinstatement quote. Neither allegation renders the foreclosure illegal, fraudulent, or willfully oppressive.

a. The complaint exhibits belie plaintiff's allegation that she requested a "payoff demand."

Plaintiff says defendants precluded her from completing a refinancing that would have allowed her to pay off the Loan and stop foreclosure, based on the allegations that:

- "[T]o payoff the Rama Fund mortgage in full, Plaintiff['s] new lender as well as the escrow company handling the transaction required Defendant RAMA to submit a beneficiary payoff demand to the escrow company, The Escrow Palace," (4CT-910, ¶ 39);
- Starting 11 days before the foreclosure sale, plaintiff "request[ed] a payoff demand" on multiple occasions, as shown in "true and accurate cop[ies]" of her payoff requests attached as exhibits.[5] (4CT-910, ¶¶ 40-43, italics and boldface omitted);

[5] Plaintiff's Second Amended Complaint appears to inadvertently refer to the exhibits reflecting her demands for a payoff amount as Exhibits 9 and 10 when those communications are in fact found at Exhibits 10 through 12. After all, Exhibit 9 to the Second Amended Complaint is the parties' Settlement Agreement.

- Defendants engaged in delay tactics "to prevent Plaintiff[] from being able to obtain the required payoff demand and save the Property from foreclosure" (4CT-911, ¶¶ 44-45);
- "Without [the] beneficiary payoff demand, the refinance transaction was not able to be completed." (4CT-910, ¶ 40);
- By "intentionally refus[ing] to provide the payoff," defendants "deprived Plaintiff[] of the opportunity to reinstate the loan" or to pay it off "in full" "within the time allowed." (4CT-911, ¶¶ 49-51.)

(See AOB-15 ["[T]he foreclosure sale of the subject property was illegal, fraudulent, and/or willfully oppressive because of respondents' failure to comply with its statutory obligations and provide an accurate payoff amount to appellants at least five business days prior to the foreclosure sale, so as to allow appellant[] adequate time to bring [her] payments current"].)

But the exhibits that plaintiff attached to her complaint belie her allegations. A payoff amount is the amount necessary "to fully satisfy all obligations secured by the loan." (Civ. Code, § 2943, subd. (H)(5).) The "true and correct copies" of requests for payoff demand attached to plaintiff's operative complaint (4CT-910, ¶¶ 40-41, italics and boldface omitted) show she had never made such a request. Plaintiff instead only sought a "reinstatement quote," which calls for the total amount in default—that is, the "entire amount *then due*" and *not* "the

portion of the principal that would *not then be due had no default occurred*." (Compare 5 Geier & Tiemstra, Miller & Starr California Real Estate (4th ed. 2022) § 13:232, italics added [discussing amount for loan "reinstatement"], with *id.* § 13:119 ["A payoff demand statement must set forth the amount required to *fully satisfy all obligations that are secured by the deed of trust*," in addition to other amounts, italics added].) In particular:

- Exhibits 10 and 11 to the Second Amended Complaint reflect that on October 9, 2020, plaintiff sent FCI Lender Services and California TD Specialists a "request for reinstatement" (4CT-988) that calls for "the full *past-due* balance and all charges authorized by California," (4CT-990, 995); and
- Exhibit 12 to the Second Amended Complaint reflects that, on October 12, 2020, plaintiff reminded FCI Lender Services and California TD Specialists of her various prior requests "for a Reinstatement Quote to bring the mortgage current," both in writing and over the phone. (4CT-998; e.g., id. ["I spoke with Janina from Cal TD Specialists several times today regarding . . . my clients' legal right to have the *reinstatement quote*," italics added].)

"The facts contained in the[se] exhibits" show that plaintiff *only* asked for a reinstatement quote. Those facts "take precedence over and supersede [plaintiff's] inconsistent or contrary allegations" that, in those requests, plaintiff *also* made a demand

for information on the full payoff amount. (See *Nealy, supra,* 54 Cal.App.4th at p. 597.)

There are thus no factual allegations establishing the key premise of the "illegal, fraudulent, or willfully oppressive" conduct that plaintiff invokes here: that *defendants* somehow precluded her from remortgaging the Property—and securing the funds necessary for tender—by failing to respond to a payoff demand.

Plaintiff's own complaint exhibits show that plaintiff asked for a reinstatement quote, not a payoff demand. (See AOB-19.) Defendants had no obligation to provide plaintiff with a payoff demand that she never asked for. (See AOB-17 [explaining that the debtor "*may obtain* the amount required to pay off or reinstate the loan *by communicating with the lender or beneficiary . . .*," quoting *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 777-778, italics added].)

b. Even if the Court were to consider a payoff-demand request that is cited in the opening brief but not attached to the complaint, defendants' response to the request provides no basis for a wrongful foreclosure claim.

Although plaintiff's complaint exhibits only show that she requested a reinstatement quote, not a payoff demand, plaintiff's opening brief cites a declaration filed *after* the complaint, regarding an escrow officer asking FCI Lender Services for a

payoff demand on October 15, 2020. (See AOB-21, citing only to 12CT 2933-2937.) Plaintiff submitted that declaration in support of an unsuccessful application for a temporary restraining order while the demurrer was pending. (13CT-3020-3032; 12CT-2933-2937.) She cannot rely on matters outside of the complaint and complaint attachments to defeat a demurrer. (See *Tri-County Special Educ. Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 569 ["Because judgment was entered upon the granting of demurrer, our summary of facts is limited to those pled in the complaint, together with facts judicially noticeable"]; accord AOB-22, fn. 3, citing *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

Nor would the assertions in the declaration and documents attached to it salvage plaintiff's wrongful foreclosure claim even if they were considered. The declaration shows that defendants promptly provided plaintiff with a written payoff demand—*just one day after the escrow agent sent a request*. (12CT-2934, ¶ 11; see also 12CT-2937.) Defendants' next-day response is well within the *21 days* that Civil Code section 2943 provides for mortgagees to provide a payoff demand following such a request. (See Civ. Code, §§ 2943, subd. (c) [providing "beneficiaries" this time period], 2943, subd. (a)(1) [defining a "'[b]eneficiary'" as "a

mortgagee or beneficiary of a mortgage or deed of trust, or his or her assignees"].)[6]

Plaintiff has not cited any statute requiring the mortgagee to provide a payoff demand "immediately" or "within 24 hours" merely because plaintiff's escrow officer waited until the last moment to seek it—despite having opened escrow *a month* before the foreclosure sale. (See 12CT-2936 [October 15, 2022, email asking for payoff demand], 2934, ¶ 4 [declaration indicating that she had opened escrow on or around September 15, 2022].) There surely is no such requirement where, as here, the escrow officer's letter did not inform defendants about the need for a payoff demand *by the following morning*. (See 12CT-2936.) Defendants haven't violated section 2924c merely for taking a day to respond to a request that, unbeknownst to them, plaintiff apparently needed in even less time.

Moreover, the actual payoff demand contradicts the escrow officer's claim that the demand was set to expire on October 16. (See 12CT-2934-2935, ¶ 12.)[7] The payoff demand sets forth "[t]he

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[6] To the extent the "notice of sale" had issued, defendants did not have to respond the escrow officer's request for a payoff demand at all. (See Civ. Code, § 2943, subd. (c) [applying this exception to cases where, as here, "the loan is subject to a recorded notice of default"].)

[7] Plaintiff's counsel attached the payoff demand to a declaration filed concurrently with the escrow officer's declaration. We acknowledge that the actual demand is not attached to or referenced in the Second Amended Complaint. We cite it only to

[*Footnote Continued On Next Page*]

amount to pay off the above referenced loan as of **10/19/2020**" (12CT-2995, original boldface), the date by which the escrow officer had planned to complete the refinancing (and just before the October 20 foreclosure sale) (12CT-2934-2935, ¶ 12). It was the *reinstatement quote* that had an expiration date of October 16. (12CT-2992.)

Plus, any October 16 expiration date would make no difference: It was the escrow officer's failure to ask for a payoff demand sooner that doomed any chance the plaintiff had to refinance on the Property ahead of foreclosure. (See 12CT-2934-2935, ¶ 12 [nonreceipt of payoff demand by "early in the day of October 16, 2020" precluded escrow officer from completing refinance transaction]; *Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 951 (*Citrus*) [procedural irregularity only makes the foreclosure illegal, fraudulent, or willfully oppressive if plaintiff "demonstrat[es] that the defect impaired [her] 'ability to protect [her] interest in the property,'" quoting *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 (*Ram*)].)

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show that any amendment relying on the escrow officer's assertion that the payoff demand expired on October 16, 2020 would be struck for being inconsistent with a document (the payoff demand) incorporated by reference. (See *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955 ["Any allegations in the complaint which are inconsistent with facts set out in an unambiguous written instrument, incorporated by reference, may be stricken"].)

Plaintiff is not excused from an inability to tender when she had not asked defendants for the payoff demand needed to complete a refinancing that could have staved off foreclosure—certainly not in time to have made any difference.

c. The alleged failure to provide a timely reinstatement quote is immaterial.

Because the exhibits attached to the Complaint establish that plaintiff has never timely asked defendants for a payoff demand (Argument, § I.A.2, *ante*), the only "irregularity" in the foreclosure proceedings that appears on the face of the Second Amended Complaint is a failure to timely provide plaintiff with "a Reinstatement Quote to bring the mortgage current." (4CT-998.)

That allegation contradicts allegations in the First Amended Complaint, which make clear that defendants *had provided plaintiff* with a reinstatement quote by phone—one which the First Amended Complaint never suggests was untimely.[8] (See 2CT-359, ¶ 61 [suggesting without explanation that quote was deficient for supposed defects that plaintiff

[8] Plaintiff's apparent decision to omit this allegation from the Second Amended Complaint cannot salvage her wrongful foreclosure claim. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742-743 [""Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation"""].)

necessarily fails to address by never acknowledging this reinstatement quote].)

Plus, by plaintiff's own admission, providing her with a reinstatement quote wouldn't have "impaired [her] ability to protect [her] interest in the property,'" as required to transform a technical irregularity in foreclosure proceedings into an illegal, fraudulent, or willfully oppressive one. (*Citrus, supra,* 32 Cal.App.5th at p. 951, quoting *Ram, supra,* 234 Cal.App.4th at p. 11; Argument, § I.A.2.c, *ante*.) The Second Amended Complaint is explicit: "Without a beneficiary *payoff demand*, the refinance transaction" needed to stave off foreclosure "was not able to be completed," period. (4CT-910, ¶ 40, italics added.)

That plaintiff also alleged, in passing, that she could have completed the refinance transaction with either "a reinstatement quote or payoff demand statement" makes no difference. (4CT-911, ¶ 48.) Courts do not accept the truth of such conclusory allegations on a demurrer. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) That's doubly true where those allegations are refuted by "the specific allegations upon which [that] conclusion must be based." (*Gentry v. Ebay, Inc.* (2002) 99 Cal.App.4th 816, 817 ["[W]here there is any inconsistency between the specific allegations upon which a conclusion must be based and the conclusion, the specific allegations control," citing *Stowe v. Fritzie Hotels* (1955) 44 Cal.2d 416, 422, among several other cases].)

Again, that's this case. As shown, plaintiff alleged several facts establishing why she specifically needed a payoff demand

(for the *full amount* of the loan, and not just *past-due* amounts). She said she intended to refinance so that she could "pay off the Rama Fund mortgage in full," that her escrow officer needed a "payoff demand" to do so, and that she could not complete "the refinance transaction" without a "payoff demand." (See Argument, § I.A.2.a *ante* [discussing 4CT-910, ¶¶ 38-40].) Those specific factual allegations cancel out any conclusory allegation that a reinstatement quote would have been enough to complete a refinancing that, by definition, could not proceed without knowledge of the full amount of the existing loan (i.e., the amount to satisfy the payoff demand) *that the new lender is satisfying and replacing in its entirety*. (See Hall, Mortgage and Consumer Loan and Lease Disclosure Handbook § 8:3 ["A refinancing occurs when an existing residential property loan is satisfied and replaced by a new loan taken by the same borrower with either the same or a new lender"].)

Any failure to timely provide a reinstatement quote is a mere technical violation that does not render the foreclosure illegal, fraudulent, or willfully oppressive as a result.

3. Plaintiff has not shown that she alleged facts that would equitably excuse the need to tender payment.

Plaintiff's attempt to revive her wrongful foreclosure claim fails for yet another independent reason: her failure to allege tender or an equitable excuse from it.

To allege tender, plaintiff must plead facts establishing either that she has tendered "'the full amount of the debt for

which the property was security'" (*Ram, supra,* 234 Cal.App.4th at p. 11) or that she qualifies for an "equitable exception[]" to that requirement. (AOB-19 [discussing requirement for "tender of the full amount of the loan" or an "equitable exception[] to this rule"].)

Here, plaintiff argues only that the equities excuse the tender requirement on the theory that defendants' own wrongful conduct precluded her from tendering the full amount of the loan. Plaintiff's argument fails for two reasons.

First, as shown, the key premise supporting her argument is wrong: that defendants' "failure" to provide her with either a payoff demand or a reinstatement quote precluded her from completing a refinance that would have allowed her to use those funds to pay off the loan. (See AOB-21 [blaming defendants' supposed failure to timely provide a payoff demand or a reinstatement quote for plaintiff's inability to make tender].)

Plaintiff cannot fault defendants for not providing her with the payoff demand she needed to stop the foreclosure when she never (timely) asked for that payoff demand, and she cannot allege in good faith that defendants failed to comply with the statutory 21-day window to provide such a demand upon request. (See Argument, §§ I.A.2.a, b, *ante*.)

Nor does any failure to timely provide a reinstatement quote render the foreclosure sale illegal, fraudulent, or willfully oppressive when the Second Amended Complaint's specific factual allegations show that timely providing her with that

information wouldn't have made any difference anyway. (See Argument, § I.A.2.c, *ante*.)

***Second*,** even if plaintiff had alleged facts allowing her to blame defendants for her inability to make tender, to demonstrate affirmative error, plaintiff would also have to show that the trial court abused its discretion in rejecting her equitable excuse for failing to tender. This requires showing that the trial court's refusal to exercise its equitable powers under the facts alleged "exceeds the bounds of all reason." (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 292 ["We review the trial court's exercise of its equitable powers—including its decision to excuse a trustee for breach of trust under section 16440(b)—for abuse of discretion," citing *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1256].)

Plaintiff has not and cannot make that showing here. "It is axiomatic that one who seeks equity must be willing to do equity.'" (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180 (*Cortez*) [ruling on this basis that courts must consider "the equities on both sides of dispute" when "exercis[ing] an equitable power"].) Courts have thus long recognized that a party isn't entitled to invoke equities that would allow that party to benefit from their own wrongs. (E.g., *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [denying an equitable offset on the basis that "'[n]o one can take advantage of his own wrong,'" quoting Civ. Code, § 3517].)

That's why in *Lynn v. Duckel* (1956) 46 Cal.2d 845, 846, 850 (*Lynn*), the Supreme Court held that a plaintiff that had graded a roadway "to make it available for vehicular traffic"—without securing a permit that would only be granted after a hearing—was not entitled to an injunction that would have "direct[ed] defendant to remove obstructions erected in and across the entrance" to the roadway. The Court reasoned that, by bypassing the permit process, the plaintiff had already "nullif[ied] the procedure established by law, deni[ed] the public the hearing to which it is entitled, and flout[ed] the public interest in which the procedure was designed to protect"—which had already injured the party from whom it sought equitable relief in the form of an injunction (since the defendant represented the public). (*Id.* at pp. 850-851.)

The Supreme Court's reasoning in *Lynn* is even more compelling here. *Lynn* barred a plaintiff from receiving an injunction based on *one bad act*: the unpermitted grading of a roadway. Here, in contrast, plaintiff is only able to quibble about technical deficiencies in defendants' latest foreclosure attempt because—rather than simply curing her original default or making the timely installments set forth in the Settlement Agreement—plaintiff engaged in *several bad acts* to stave off a foreclosure that should have taken place a long time ago.

This is apparent from the Second Amended Complaint, the exhibits attached thereto, and the judicially noticeable documents

that defendants presented to the trial court (Standard of Review, *ante*), which reveal that:

- After plaintiff's first default, defendants sought to foreclose in December 2019. (4CT-909, ¶ 32.)
- Plaintiff was able to delay the foreclosure by filing several frivolous bankruptcy actions between January 2020 and April 2020, each of which would be quickly dismissed. (See 4CT-909, ¶ 35; 983.)
- To stop the endless bankruptcies, defendants offered plaintiff a settlement, which she accepted (via the Brookville Trust), that was supposed to provide her with one last opportunity to save the Property from foreclosure. The settlement expressly provides that, on a default, defendants could move forward with a foreclosure that was to be "uncontested in all respects"—and that neither plaintiff for the Brookville Trust would "use future bankruptcy filings as a tactic to delay the sale of the Property" or "transfer the Property to any bankruptcy-eligible entity without the prior written consent of RAMA." (4CT-984, §§ 2.A.5., 2.B.)
- Plaintiff nevertheless quickly defaulted after just making one installment, transferred the Property to the newly created Brookville Entity (4CT-1010), and filed *yet another* quickly-dismissed bankruptcy action as part of her latest

bad-faith tactic to challenge the foreclosure. (3CT-752, citing 3CT-621.)

This narrative is not mere conjecture from an opposing party. The judicially-noticeable bankruptcy court orders show it to be true. (See Statement of the Case, §§ I.A.2, 4, *ante*; Evid. Code, § 452, subd. (d) [allowing judicial notice of the "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States"].)

The court overseeing one of the bankruptcies found that plaintiff's "filing of the petition was 'part of a scheme to hinder, delay, or defraud creditors' that involved the transfer of the Property without the consent of Rama." (3CT-752, quoting 3CT-621.)

The court then sanctioned plaintiff and her counsel for initiating the bankruptcy "simply to delay the Creditor from foreclosing the Property . . . *after* failing three times to similarly attempt to frustrate the Creditor through improper bankruptcy filings." (7CT-1873-1874 [tentative order]; 1871 [adopting the tentative as the final ruling of the court].)

Supreme Court precedent dictates that, under these circumstances, plaintiff cannot now invoke the equities to seek an excuse from tender—the only element that ensures that, this time around, plaintiff was truly willing and able to pay off a $1.85 million loan rather than blowing smoke as part of another meritless attempt to delay foreclosure on a property neither she, the Brookville Trust, or anyone else paid for but that Mr. Downie

rented out for profit. (See *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 493 [explaining that tender requires an offer to "extinguish the obligation" that is "made in good faith" by a party who is actually "willing and able to perform"].)

Plaintiff's primary case—*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516 (*Turner*)—does not hold otherwise, even if it could conflict with Supreme Court authority. (See AOB-19-22, citing *Turner* throughout). *Turner* only observed that there are "equitable exceptions to the tender rule" (27 Cal.App.5th at p. 525)—without applying that rule to the case at hand, let alone considering the *competing inequities* of excusing tender, as required whenever a court exercises an equitable power. (See *Cortez, supra,* 23 Cal.4th at p. 180 ["A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute"]; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["[A]n opinion is not authority for a proposition not therein considered"].)

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In sum, the Court can also affirm the dismissal of the wrongful foreclosure claim based on plaintiff's failure to establish her entitlement to an equitable exception to tender. Plaintiff has not alleged facts establishing that defendants precluded her from completing a refinancing transaction necessary for her to provide tender for the full amount of the loan. And even if she had, plaintiff hasn't shown that the equities required the trial court to

excuse plaintiff from pleading an actual good faith ability to pay off the Loan despite plaintiff's bad faith tactics to stall foreclosure without curing her defaults.

B. Plaintiff has not shown that the trial court committed reversible error in dismissing her quiet title claim.

Plaintiff's attempt to revive her quiet title claim fails too.

Plaintiff summarily states that her "causes of action for wrongful foreclosure and quiet title were [each] based on [defendants'] failure to . . . to provide an accurate and appropriate payoff quote, as [she] requested and as required by statute." (AOB-14.) She then contends that if she has stated a wrongful foreclosure claim, then she has stated a quiet title claim too. (*Ibid*.) Plaintiff's argument fails to revive her quiet title claim for two reasons.

First, as shown, plaintiff has not stated a wrongful foreclosure claim—which, under plaintiff's theory of the case, dooms her quiet title claim too. (See Argument, § I, *ante*.)

Second, although plaintiff treats them identically, wrongful foreclosure and quiet title *are distinct causes of action with distinct elements*. (Compare *Weeden v. Hoffman* (2021) 70 Cal.App.5th 269, 294 (*Weeden*) [discussing the five elements of a quiet title claim, as set forth in Code Civ. Proc., § 761.020, subds. (a)-(e)] with *Majd, supra,* 243 Cal.App.4th at pp. 1306-1307 [elements of wrongful foreclosure].) In addition to alleging facts establishing her claim to title (Element No. 2), a quiet title

plaintiff must also allege multiple other elements: "(1) a description of the property that is the subject of the action; . . . . (3) '[t]he adverse claims to the title of the plaintiff against which a determination is sought'; (4) the date as of which the determination is sought; and (5) a prayer for the determination of plaintiff's title 'against the adverse claims.'" (*Weeden, supra*, 70 Cal.App.5th at p. 294.)

This means that as the appellant challenging the trial court's sustaining a demurrer on this claim, plaintiff had to affirmatively "show[] that the facts pleaded are sufficient to establish" every such element to her distinct quiet title claim and not just those elements that she believes to overlap with her wrongful foreclosure claim. (*Nealy, supra,* 54 Cal.App.5th at p. 600.)

That's especially true here since defendants had previously argued that plaintiff could not satisfy those distinct elements (7CT-1667-1668), which the trial court presumably agreed with in sustaining the demurrer (20CT-4848). (See *Jameson, supra,* 5 Cal.5th at p. 609 ["In the absence of a contrary showing in the record, all presumptions are made in favor of the trial court's action"]; *Nealy, supra,* 54 Cal.App.5th at p. 600 [on appeal to sustained demurrer, the plaintiff must "show[] that the facts pleaded are sufficient to establish every element" and "also overcom[e] all of the legal grounds on which the trial court sustained the demurrer," italics and internal quotation marks omitted].)

Yet plaintiff never even identifies what the distinct elements of a quiet title claim are; and she certainly never develops an argument as to how she satisfied those elements. Plaintiff admits as much in her opening brief, which only defends the quiet title claim "[t]o the extent the alleged defects in appellant['s] wrongful [foreclosure] claim affected [her] claim for quiet title" too. (AOB-22.) She has necessarily failed to meet her burden, as the appellant, to rebut the presumption that the trial court correctly dismissed the quiet title claim as a result. (See *Jameson, supra,* 5 Cal.5th at pp. 608-609 ["[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment"].)

In fact, the closest plaintiff comes to arguing that the trial court erred is her heading that "[t]he SAC set forth sufficient allegations" to support her "quiet title cause[] of action." (AOB-14, boldface omitted.) That assertion is so conclusory that it is the same as raising no argument at all. (See *Paulus, supra,* 139 Cal.App.4th at p. 685 ["Paulus's conclusory statement at the end of his opening brief does not preserve the issue for appeal" because "'[i]ssues do not have a life of their own'" and must be "'supported by argument or citation to authority'"].) Anything plaintiff says on reply now that "the respondents' brief noted [this] failure" comes too late. (*Ibid.* ["Paulus's belated attempt to

address the abuse of process and interference with contract claims in his reply brief—after the respondents' brief noted his failure to address the striking of these claims—did not salvage these abandoned issues"].)

The Court should thus affirm the demurrer on plaintiff's quiet title claim both for plaintiff's failure to state a wrongful foreclosure claim and for her failure to raise and fully support an argument as to how she satisfied the specific elements distinct to a quiet title claim.

C. Plaintiff has not shown that the trial court committed reversible error in dismissing her claim for breach of contract or covenant of good faith.

Plaintiff cannot revive her claim for breach of contract or the covenant of good faith dealing either.

To state a breach of contract claim, plaintiff must allege "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Here, plaintiff's one-paragraph "argument" that she has stated a breach of contract claim is conclusory at best. It never identifies what contract was breached, what elements are needed to state a claim, or that she satisfied all of those elements, including performance or excuse from performance. (See AOB-22-23.) She has failed to adequately establish that the court erred in dismissing this claim as a result. (See *Nealy, supra,* 54

Cal.App.5th at p. 600; *Jameson, supra,* 5 Cal.5th at pp. 608-609; Argument, § I.B, *ante*.)

To the extent relevant, plaintiff could not show that she stated a breach of contract claim anyway.

Performance Or Excuse From Performance. Plaintiff does not allege that she has materially performed under the contracts that might exist between plaintiff and defendants—let alone allege that she was excused from those requirements. (See AOB-19-22 [arguing only that the equities excuse her from complying with the requirement on a wrongful foreclosure claim that she tender "the full amount of the loan," not that plaintiff was excused from *her prior defaults*].)

Indeed, she can't make that showing. The Second Amended Complaint makes clear that plaintiff has not materially performed under any of the agreements that might apply to the parties: She defaulted for missed payments owed under the Note *and* under the Settlement Agreement. (See 4CT-909-910, ¶¶ 32, 37.)

Judicially-noticeable filings show that plaintiff also breached the Settlement Agreement's terms in other ways.

For instance, in light of plaintiff's penchant for filing meritless bankruptcy proceedings (Argument, § I.A.3), the Settlement Agreement precludes plaintiff from "us[ing] future bankruptcy filings as a tactic to delay the sale of the Property" and from "transfer[ing] the Property to a bankruptcy-eligible

entity without the prior written consent of RAMA." (4CT-984, § 2.B.)

Yet after missing the Settlement Agreement's second installment, plaintiff apparently transferred the Property to the Brookville Entity, which listed the Property among its bankruptcy assets in what the bankruptcy court deemed plaintiff's latest "attempt to frustrate the Creditor through improper bankruptcy filings." (7CT-1873-1875 [tentative order]; 1871 [adopting the tentative as the final ruling of the Court].)

Similarly, the Settlement Agreement provides that, on a default, defendants would "have the right to foreclose on the Property, which shall be uncontested in all respects by [defendants]." (4CT-984, § 2.A.5.) Yet plaintiff has fought the foreclosure every step of the way, as evidenced by plaintiff's wrongful foreclosure claim in this very action. (See *Lansing, supra,* 894 F.3d at pp. 970, 973 [filing of wrongful foreclosure claim constituted breach of a settlement in which plaintiff had "waiv[ed] the right to challenge any deficiencies" in a "future foreclosure," italics omitted].)

There is nothing in the complaint that excuses these breaches—nor could there be given plaintiff's history of open defiance of her contractual obligations. (See Argument, I.A.3, *ante*.)

Breach. Plaintiff cannot establish a breach in any case. Plaintiff's pitch is that defendants had breached some obligation under an unidentified "contract" "to pay the property taxes due,

as agreed-upon and as set forth by California law." (AOB-22.) But plaintiff's allegations are disproven by the very Riverside County Tax Records she included with the Complaint here too.

Those records show that the only property taxes that still needed to be paid—as of "10/16/2020," when those records were "last update[d]"—are two installments that *were not yet due*. (See 4CT-1014 [reflecting a screenshot of an account "last update[d]" on "10/16/2020" that lists two installments that won't be due until December 2020 and April 2021].)

Defendants *also* disproved those allegations via judicially-noticeable documents that were before the trial court—other Riverside County Tax Records showing that all taxes had been paid through 2020 (7CT-1785). (See Statement of the Case, §§ I.B.2, 3, *ante* [defendants requesting judicial notice of these tax records]; Evid. Code, § 452, subd. (h) [allowing for judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"—here, a quick search on the Riverside County Office of the Treasurer-Tax Collector's website *either* using the Pin Number: 776040007, the Property Address: 79405 Brookville Law Quinta CA 92253, or the Bill Number: 2019004138335].) [9]

[9] <https://ca-riverside-ttc.publicaccessnow.com/PropertySearch.aspx> [as of Nov. 23, 2022]

Plaintiff's own exhibit to the Second Amended Complaint and these judicially-noticeable facts are dispositive on a demurrer, even if plaintiff has alleged otherwise. (See *Genis v. Schainbaum* (2021) 66 Cal.App.5th 1007, 1015 ["Where facts appearing in attached exhibits *or judicially noticed documents* contradict, or are inconsistent with, the complaint's allegations, we must rely on the facts in the exhibits and judicially noticed documents"].)

This is thus *not* a case where the trial court sustained a demurrer in spite of "conflicting evidence," as plaintiff suggests. (AOB-22, fn. 3.) Plaintiff's exhibit to the Second Amended Complaint is entirely consistent with the judicially noticeable tax records that defendants presented to the trial court: that all such taxes have been timely paid. Plaintiff has not stated any breach based on any failure to timely pay property taxes as a result.

Damages. Nor has plaintiff alleged facts establishing that she suffered damages from any such breach. How could she when she defaulted after making one $275,000 installment on the $1.85 million dollars owed? (See 4CT-910, ¶ 37 [plaintiff admitting that she missed the second installment], 984, § 2.A. [$1.85 million dollars is "total amount" owed].)

Plaintiff claims that the supposed nonpayment of property taxes led to an "improper accounting of the amounts due" and frustrated her attempts to avoid foreclosure by either reinstating the Loan or paying off the full balance. But any improper accounting is irrelevant given that (1) plaintiff has *never actually*

paid either an amount to reinstate the loan after default or to pay off the debt and, (2) as shown, plaintiff has no excuse for her own failure to do so before the foreclosure sale (see Argument, § I.A.2.c, *ante*).

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Plaintiff still hasn't even identified the contract at issue. Nor has she or can she adequately allege performance, breach, or damages. The trial court was thus entirely right in dismissing plaintiff's breach of contract/covenant of good faith claim.

II. Plaintiff Has Not Shown That The Trial Court Abused Its Discretion In Denying Her A Third Attempt To Amend Her Complaint.

There is no merit to plaintiff's argument that the trial court abused its discretion in sustaining the demurrer without leave to amend. (AOB-23-24.) As plaintiff acknowledges, the denial of leave to amend must be affirmed unless there is a reasonable probability that the complaint could have been amended to cure the defect. (AOB-23, citing *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1035 (*Berg*).) It is her burden, *as the appellant,* to demonstrate that the complaint could have been so amended. (*Berg, supra*, 178 Cal.App.4th at p. 1035, cited at AOB-23-24.)

On appeal of a sustained demurrer, the plaintiff's burden is not "pro forma." (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 559.) Rather, the plaintiff "'must show in what manner he can amend his

complaint and how that amendment will change the legal effect of his pleading.'" (*Ibid.*) That requires the plaintiff to "'clearly and specifically'" propose "'factual allegations that sufficiently state all required elements of that cause of action.'" (*Ibid.*) The allegations "'must be factual and specific, not vague or conclusionary.'" (*Ibid.*) Plaintiff has come nowhere near meeting that burden.

Plaintiff has not proposed any specific complaint amendment. She says only that "other documents filed in this case clearly demonstrate the validity of [her] claims and the ability to cure any defects in the SAC." (AOB-24.) That's it. No indication of which documents. No indication of what additional factual allegations they would support. And, no indication of how those allegations would cure the defects in the existing complaint where she could not in the three iterations of the complaint.

Plaintiff's vague assertion that some unspecified document would support some unspecified amendment is plainly insufficient to meet her burden. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 [appellant "'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'"].) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer

without leave to amend." (*Id.* at p. 44.) That is the situation here.

Plaintiff has simply provided the Court no reason to believe that she could suddenly salvage her claims if given a *third opportunity* to amend her complaint. To the contrary, because she has now amended the complaint two different times, the presumption is that she's *already* "stated as strong as case as [she] can" and simply cannot state a claim. (See *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1327 [When the plaintiff "elect[s] to stand on his complaint after making only minor changes" after a demurrer is sustained, the reviewing court "presume[s] that he has stated as strong a case he can"].)

III. Plaintiff Has Not Shown That The Trial Court Committed Reversible Error In Denying Her Ex Parte Application To Consolidate This Case With An Unlawful Detainer Proceeding.

While this case was pending, Rama filed an unlawful detainer case against Downie pursuant to Code of Civil Procedure section 1161a. (10CT-2519-2522.) Plaintiff filed two successive ex parte applications in this case, seeking to consolidate it with the unlawful detainer case. (8CT-1970-1978; 10CT 2346-2356.) Defendants opposed the applications, on procedural and substantive grounds, and the trial court denied both applications. (8CT-2019-2036; 10CT-2364-2382.) Plaintiff has not shown that those denials were an abuse of discretion, much less that any error was prejudicial.

A. Plaintiff's argument requires her to establish both an abuse of discretion and resulting prejudice.

Code of Civil Procedure section 1048 provides that a court "*may*" order actions consolidated if they involve common questions of law or fact. (Code Civ. Proc., § 1048, subd. (a), italics added.) The statute is permissive, not mandatory. (*Fisher v. Nash Bldg. Co.* (1952) 113 Cal.App.2d 397, 402 (*Fisher*) ["Consolidation is not a matter of right; it rests solely within the sound discretion of the trial judge"].)

Consistent with the discretion that section 1048 vests in the trial court, a decision on whether to consolidate two actions "will not be disturbed on appeal absent a clear showing of abuse of discretion." (*Todd-Stenberg v. Dalkon Shield Claimants Trust* (1996) 48 Cal.App.4th 976, 978-979; see also *Fisher, supra*, 113 Cal.App.2d at p. 402 [same].) "[A]buse of discretion" does not merely mean that the court could have reached a different result. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 ["'wholly insufficient" for appellant to present facts that "merely afford[] an opportunity for a difference of opinion"'].) Rather, discretion is "'abused'" only when the trial court "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Moreover, as plaintiff acknowledges, an abuse of discretion does not itself warrant reversal. (AOB-28.) She must also establish that the claimed error was *prejudicial*—i.e., a

reasonable probability of a more favorable outcome but for the error. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108; see also Cal. Const., Art. VI, § 13 [no reversal for procedural error unless it "resulted in a miscarriage of justice"; Code Civ. Proc., § 475 [no reversal unless error caused prejudice and substantial injury].) Here, that means showing that the denial of her ex parte applications to consolidate was both an abuse of discretion and that if the cases had been consolidated, this case would have come out differently.

B. Plaintiff has shown no abuse of discretion.

Plaintiff argues that the court had to consolidate this case and the unlawful detainer case because the validity of Rama's title was at issue in both cases, and without consolidation there was a risk of inconsistent judgments. (AOB-27-28.) This argument fails for multiple reasons.

Procedurally flawed applications. The court rule governing consolidation requires a notice of motion that "[l]ist[s] all named parties in *each* case," [c]ontain[s] the captions of *all the cases* sought to be consolidated," and is "filed in *each* case sought to be consolidated. (Cal. Rules of Court, rule 3.350(a), italics added.) It also requires that the motion "be served on all attorneys of record and all nonrepresented parties in *all* of the cases sought to be consolidated." (*Ibid,* italics added.)

Plaintiff did not file a motion; she filed an ex parte application. (8CT-1970-1978.) She has not explained why she could not proceed by motion, as the rule contemplates. Nor is

there a reason. If she was concerned about timing, she could have filed a noticed motion that met the requirements, followed by an ex parte application to shorten time. Indeed, in denying her first ex parte application to consolidate, the trial court *expressly directed her to bring a "regularly noticed motion."* (8CT-2014, italics added.) She responded by filing a second ex parte application. (10CT-2346-2356.)[10] The court found that doing so was frivolous (20CT-4958-4959)—a finding that plaintiff has left unchallenged in her appeal.

Neither ex parte application met Rule 3.350's requirements: They listed only the parties in the civil action (not the unlawful detainer action), they only had the caption for the civil action (not the unlawful detainer action), and they were only filed in the civil action (not the unlawful detainer action). (8CT-1970-1978; 10CT-2346-2356 [applications]; see also 8CT-2028; 10CT-2373.)

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[10] After her *second* ex parte application was denied, plaintiff filed a noticed motion to consolidate. (14CT-3398.) The court denied that motion on grounds including that it was "factually unwarranted" and not served on all necessary parties. (20CT-4844.) Plaintiff's opening brief does not argue that the court erred in denying that motion. Any such argument therefore is forfeited; she cannot develop it for the first time in reply. (*Aviel, supra,* 161 Cal.App.4th at p. 821 ["We disregard issues not properly addressed in the appellant's opening brief"; reply brief "is too late" to develop an argument]; *SCI California, supra*, 203 Cal.App.4th at p. 573, fn. 18 ["An appellant cannot salvage a forfeited argument by belatedly addressing the argument in its reply brief"].)

No rule requiring consolidation. Plaintiff cites no authority for the premise of her argument that a court *must* consolidate cases where there is a risk of inconsistent judgments. No such rule is apparent from the face of the consolidation statute: It says only that a court *may* consolidate actions with common issues of law or fact, with no mention of mandatory consolidation to avoid possible insistent judgments. (Code Civ. Proc., § 1048.) Plaintiff cites no case law imposing a different rule. Without such authority, her cursory assertion that consolidation was "required" goes nowhere. (AOB-28.)

Plaintiff's argument also proves too much: If unlawful detainer actions and wrongful foreclosure actions were deemed to create a risk of inconsistent verdicts requiring consolidation, not only would consolidation be required in many, many cases—unlawful detainer actions would no longer be summary proceedings tried on a separate fast track; they would have to be tried within and at the reduced speed of a civil action. In fact, any debtor seeking to delay eviction in an unlawful detainer action could sue for wrongful foreclosure, and thereby stymie what is designed to be a summary proceeding to restore possession. (*Evans v. Superior Court* (1977) 67 Cal.App.3d 162, 168 [policy behind unlawful detainer statutes is "to provide a summary method of ouster where an occupant holds over possession after sale of the property"].) That would undermine the unlawful detainer framework. (See Cal. Rules of Court, Standard 2.2(i)(1)-(2) [recommendation that 90% of unlawful

detainer matters be concluded within 30 days of filing, and 100% within 45 days of filing]; *Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 464-465 (*Old National*) [affirming order denying stay of unlawful detainer action pending trial in fraud action that party claimed would have provided a defense to unlawful detainer action].)

No danger posed by inconsistent verdicts. "[T]he pendency of another action concerning title is immaterial to the resolution of an unlawful detainer proceeding." (*Old National, supra,* 194 Cal.App.3d at p. 465.) Unlawful detainer and wrongful foreclosure present distinct issues and trigger different remedies. In unlawful detainer actions, title is relevant only in that the plaintiff must prove that the sale was "regularly conducted" in compliance with Civil Code section 2924 and the deed of trust, and its purchase at the sale. (See *Old National, supra,* 194 Cal.App.3d at p. 465; *Vella v. Hudgins* (1977) 20 Cal.3d 251, 255.) And the remedy is simply a determination of rightful possession. Plaintiff's wrongful foreclosure action, by contrast, challenged events *before* the sale, when she claimed she was deprived of an opportunity to pay off the Loan. (4CT-905-917.)

Moreover, as it turns out, there were not even arguably inconsistent verdicts: The unlawful detainer action restored Rama to possession of the Property (16CT-3870-3871), and this action resulted in a determination that plaintiff has no cognizable

wrongful foreclosure, breach of contract, or quiet title claim (20CT-4848). Plaintiff lost across the board.

C. Plaintiff has not shown prejudice.

Plaintiff argues that denial of her request to consolidate was prejudicial because she was evicted via the unlawful detainer action "even though there were legitimate questions as to the propriety of the foreclosure proceedings." (AOB-28.) There were no legitimate questions about the propriety of foreclosure proceedings, as the outcome of this case reflects. Plaintiff has not shown, or even argued, that this case would have been decided differently if the actions had been consolidated. There's thus no basis for reversing the judgment *in this case*, the only judgment at issue in this appeal.

Moreover, plaintiff's argument fails even on its own terms, because she has not made any showing of *why* there reasonably might have been a different outcome in the unlawful detainer case if the cases had been consolidated. She asserts that validity of title and conduct surrounding the sale were at issue in both cases. (AOB-27-28.) She has not shown, or even argued, that anything prevented her from presenting her position on those issues in the unlawful detainer case. She cannot develop such an argument for the first time in reply. (*Aviel, supra,* 161 Cal.App.4th at p. 821 ["We disregard issues not properly addressed in the appellant's opening brief"; reply brief "is too late" to develop an argument]; *SCI California, supra,* 203 Cal.App.4th at p. 573, fn. 18 ["An appellant cannot salvage a

forfeited argument by belatedly addressing the argument in its reply brief"]; *Paulus, supra,* 139 Cal.App.4th at p. 685 [same].)

CONCLUSION

Plaintiff has not met her obligation to show that the trial court committed reversible error in sustaining the demurrer without leave to amend or denying her consolidation motion. In fact, as shown, plaintiff's tactics in this case are just her latest, meritless attempt to challenge the foreclosure on the Property.

Plaintiff had already contractually waived any right to challenge the foreclosure—and has not shown any basis to challenge the foreclosure in any case. The exhibits to the Second Amended Complaint make clear that plaintiff had never timely asked for a payoff demand even though, by all accounts, she needed one to stop the foreclosure. She can't blame defendants for her own failure to ask for that demand.

Plaintiff's attempts to revive her remaining claims fall short too. Indeed, plaintiff never even tries to argue that she had alleged all distinct elements to a quiet title claim. Nor has she stated a claim for breach of contract, failing to establish any breach on defendant's part—let alone her own performance or any damages flowing from that non-existent breach.

Plaintiff's attempt to challenge the trial court's discretionary decision not to consolidate this case with the unlawful detainer action fares no better. The trial court was right to deny plaintiff's ex parte applications given their procedural deficiencies, the harm consolidation would do to the

purpose of unlawful detainer actions (providing a "summary method of ouster where an occupant holds over possession after sale of the property"), and plaintiff's inability to establish prejudice when she lost both cases in any event.

The Court should affirm the judgment in all respects and finally put an end to plaintiff's litany of meritless challenges to a foreclosure on the Property that should have taken place without a hitch in December 2019.

Date: November 23, 2022

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains **13,238 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: November 23, 2022

/s/ *Joseph V. Bui*
Joseph V. Bui

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **November 23, 2022**, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

BY E-SERVICE VIA TRUEFILING: All participants in this case who are registered TrueFiling users will be served by the TrueFiling system.

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Executed on **November 23, 2022**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon

Pauletta L. Herndon

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