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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FRANK A. MCDOWELL et al.,

Plaintiffs and Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,  
as Trustee, etc., et al.,

Defendants and Respondents.

A129293

(Contra Costa County  
Super. Ct. No. C09-03148)

After appellants Frank A. and Deborah A. McDowell (the McDowells)<sup>1</sup> lost their Brentwood home in a foreclosure sale, they brought an action to cancel the trustee's sale and quiet title. The trial court sustained without leave to amend the demurrer of respondents U.S. Bank National Association (U.S. Bank) and others. Judgment dismissing the action was entered. The McDowells appeal,<sup>2</sup> contending that the trial

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<sup>1</sup> The McDowells represent themselves in pro. per. on appeal. We were not assisted in the resolution of the issues on appeal by the appendix they provided in lieu of a clerk's transcript, which did not include documents needed for proper resolution of the issues on appeal and which was not properly indexed. (Cal. Rules of Court, rules 8.122(b), 8.124(b).) As the McDowells act in pro. per., we have overlooked these irregularities and have attempted to resolve the issues they raise based on the record we have before us.

<sup>2</sup> The McDowells filed an August 3, 2010 notice of appeal from a proposed order sustaining U.S. Bank's demurrer to their first amended complaint. An order sustaining a demurrer is not an appealable order. (See *Beazell v. Schrader* (1963) 59 Cal.2d 577, 579-580; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 154, pp. 230-231.) However, as the judgment based on the order sustaining the demurrer was filed August

court erred in its interpretation of a key statutory provision and should have allowed their action to proceed. (Civ. Code., § 2923.5 (section 2923.5).) We affirm the judgment.

## **I. FACTS**

In July 2004, the McDowells purchased a home in Brentwood. In May 2005, they obtained a loan, executing a promissory note and a deed of trust encumbering the Brentwood house as security for the loan. In December 2007, the loan and related deed of trust were assigned by the former lender to U.S. Bank, as trustee for the Structured Asset Investment Loan Trust. Respondent Wells Fargo Bank (Wells Fargo) serviced the loan.

In February 2009, Wells Fargo recorded a notice of default of the McDowells' deed of trust. At that time, they owed more than \$24,000 on their loan. The notice was accompanied by a declaration stating that the requirements of section 2923.5 had been satisfied.

The McDowells contacted Wells Fargo about obtaining a loan modification and had obtained verbal assurance that they would qualify for one. A notice of trustee's sale was recorded in May 2009. Wells Fargo sent the McDowells a letter on July 9, 2009, advising them that their request for loan modification had been denied because their monthly expenses exceeded their income.<sup>3</sup> On July 21, 2009, the Brentwood property was sold at a trustee's sale and a trustee's deed was recorded conveying it to U.S. Bank in its capacity as trustee for the Structured Asset Investment Loan Trust. In August 2009, U.S. Bank brought an unlawful detainer action against the McDowells.

In November 2009, the McDowells filed their own action against respondents U.S. Bank, as trustee for the Structured Asset Investment Loan Trust; and Wells Fargo Home Mortgage, Inc.<sup>4</sup> In it, the McDowells alleged inter alia causes of action to quiet title;

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2, 2010, we liberally construe the notice of appeal to perfect an appeal from that judgment. (Cal. Rules of Court, rule 8.100(a)(2).) As so construed, the notice of appeal is timely. (*Id.*, rule 8.104(a).)

<sup>3</sup> The McDowells assert that they did not receive this notice until July 15, 2009.

<sup>4</sup> NDEx West, LLC was also named as a defendant, but that aspect of the action was dismissed in June 2010 for lack of prosecution.

failure to comply with statutory requirements for foreclosure; and fraud, misrepresentation and breach of the covenant of good faith and fair dealing. (§ 2923.5.) They sought to quiet title to the Brentwood property, to set aside the foreclosure, and to obtain injunctive relief and damages.<sup>5</sup>

U.S. Bank demurred to the McDowell complaint in December 2009. In February 2010, the McDowells filed a first amended complaint, adding a cause of action for unfair business practices. In March 2010, U.S. Bank demurred to the first amended complaint. After a July 2010 hearing, the trial court found that tender was required under section 2923.5 and that the McDowells failed to make that tender. Ruling that the remainder of their claims were barred, it sustained the bank's demurrer to the first amended complaint without leave to amend. Judgment dismissing the McDowells' action against U.S. Bank and Wells Fargo with prejudice was entered.

## **II. STATUTORY CAUSES OF ACTION**

The McDowells urge us to conclude that the trial court erred in sustaining the demurrer. Two of their causes of action are based on violation of section 2923.5, which provides some protection against foreclosure to homeowners. That provision requires that a lender contact a borrower to explore alternatives to avoid foreclosure before a lender may file a notice of default. (§ 2923.5, subds. (a)(2), (b).) The trial court ruled that the recent decision in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208 interpreting section 2923.5 barred the McDowells' causes of action. That decision held that the postponement of sale remedy codified in section 2923.5 applies only before the trustee sells the underlying property. Once the sale has occurred, noncompliance with the statutory foreclosure provisions is not actionable. (*Id.* at p. 235.) As the McDowells' property was sold in July 2009, they cannot state a cause of action for violation of section

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<sup>5</sup> In December 2009, the McDowells' motion to consolidate the two actions was denied.

2923.5 in their November 2009 complaint. Thus, the trial court properly sustained U.S. Bank's demurrer to the second and third causes of action.<sup>6</sup>

### III. OTHER CAUSES OF ACTION

On three of their remaining causes of action to quiet title and to cancel the trustee's sale, the trial court ruled that because they did not make a tender of the full amount they owed to U.S. Bank, they cannot quiet title to the Brentwood property or cancel the trustee's deed.<sup>7</sup> The McDowells dispute that any such tender is required. We disagree. A borrower must allege tender of the amount of the debt to challenge any irregularity in the sale procedures and to void the sale. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; see *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) The McDowells did not allege or attempt tender. To the extent that they contend that it would be inequitable to require them to make a tender, their first amended complaint does not allege facts supporting a finding of inequity. (See, e.g., *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424.) Their request for loan modification was considered and denied. Those facts do not establish inequity on the part of the lender. Thus, we conclude that the trial court properly sustained the demurrer to the McDowells' first, fourth and fifth causes of action.

Finally, as the McDowells acknowledged in the trial court, the remaining causes of action cannot stand alone. The sixth cause of action for injunctive relief is, in essence, a prayer for a remedy to which the McDowells are entitled only if they establish some other cause of action against U.S. Bank or Wells Fargo. (See *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159.) Likewise, the seventh cause of action for unfair business practices depends on the validity of some other cause of action. (*Krantz v. BT*

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<sup>6</sup> We granted U.S. Bank's request for judicial notice in December 2010, without a finding of relevance. In light of this ruling, we find that the proffered material about foreclosure legislation is not relevant to our determination.

<sup>7</sup> The McDowells offered to deposit with the court \$1,500 per month which they set as the fair rental value of the property.

*Visual Images* (2001) 89 Cal.App.4th 164, 178.) As none of the other five causes of action are viable, these two dependent claims also lack merit.<sup>8</sup>

The judgment is affirmed.

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Reardon, Acting P.J.

We concur:

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Sepulveda, J.

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Rivera, J.

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<sup>8</sup> As the same reasons that all causes of action against Wells Fargo were properly dismissed, no prejudice could result from the trial court's dismissal for lack of prosecution of part of the action alleged against Wells Fargo subsidiary NDEX.