GREG HOCK et al., Plaintiffs and Appellants,
v.
JPMORGAN CHASE BANK, N.A. et al., Defendants and Respondents.

No. C077748.

Court of Appeals of California, Third District, Amador.

Filed November 9, 2017.

Appeal from the Superior Court No. 14-CV-8686.

NOT TO BE PUBLISHED

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BUTZ, Acting P.J.

Plaintiffs Greg and Bonnie Hock, spouses who were the owners of the subject real property, were first declared in default in October 2010 on the subject 2006 loan of $1.5 million in which defendant JPMorgan Chase Bank, N.A. (Chase), claimed an interest. (A concomitant deed of trust names defendant California Reconveyance Company (defendant trustee) as the trustee, but does not name Chase as beneficiary.)[1] Defendant Chase acquired title to the property in January 2012 upon a trustee's sale.

Plaintiffs brought this action in January 2014, asserting theories of wrongful foreclosure, fraud/negligent misrepresentation, and violations of the statutory proscription against unfair business practices. Simultaneously with a tentative ruling to sustain the initial demurrer of defendants, plaintiffs filed an amended pleading (on the day before the hearing) that reiterated almost verbatim the original allegations.

Defendants renewed their demurrer. Plaintiffs' opposition did not propose any significant amendments to their pleading in response.[2] The trial court sustained the renewed demurrer without leave to amend.[3]

The trial court entered its judgment of dismissal in August 2014; plaintiffs filed their notice of appeal in October 2014. The appeal was fully briefed in April 2017 (plaintiffs' opening brief itself taking until October 2016 to appear). Plaintiffs contend they have adequately alleged their legal theories, and in any event should be given leave to amend. We shall affirm the judgment in part, and reverse and remand three counts for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

"In an appeal from a judgment resulting from the sustaining of a demurrer without leave to amend, we assume the truth of well-pleaded factual allegations . . . shorn of any legal conclusions." (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 959 (*Fuller*).) In connection with assessing the sufficiency of the pleading, we may also take into account extrinsic matter that is properly subject to judicial notice, which is limited to the existence of documents and the contents of judicial filings such as findings of fact, conclusions of law, orders, and judgments. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865 (*Bach*).) Defendants filed a request for judicial notice of documents in connection with their demurrer. We supplement the details in the introduction with the following from these two sources.

Although plaintiffs allege the 2006 loan was for the purpose of *purchasing* the subject property, their deed is dated 2000 and the loan therefore was presumably for a refinancing. The original 2006 deed of trust (appearing as an exhibit to the amended pleading) identified a different bank as lender and beneficiary of the deed. As is typical, the deed of trust granted *the lender-beneficiary* the right to invoke the power of sale for a default on the loan, or cause the trustee to do so. **"[O]nly the entity holding the beneficial interest under [a] deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure."** (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 935 (*Yvanova*).)

A *contract* included in the request for judicial notice reflects that Chase acquired the assets and liabilities of the former bank from the bank's receiver in September 2008 "purchased pursuant to Section 3.1," except for assets explicitly excluded in a schedule to the contract. These included the former bank's loans, along with all powers and benefits the

former bank held under them, which included "all mortgage servicing rights and obligations."

In January 2010, plaintiffs allege they entered into a written modification agreement with Chase. The agreement itself is conveniently not part of the complaint, nor has Chase provided a copy in its request for judicial notice. Plaintiffs allege that pursuant to this modification program, making three payments under a trial plan would earn them approval for a permanent modification. The only written memorialization of the agreement appears in a letter dated February 19, 2010, in which Chase reminded plaintiffs that approval of a permanent loan modification was conditioned on *timely* payments under a trial plan offer; "[f]ailure to remit trial payments on time may impact your eligibility" in the modification program. The letter referenced only a payment due on March 1, but *plaintiffs* allege that payments were due in both February and March. Plaintiffs purportedly made a $7,400 payment dated February 19 and another $7,400 payment dated March 19 (although the checks attached as exhibits show only the fronts and not the endorsement sides). Chase refused to accept an April payment.[4]

In October 2010, defendant trustee filed a notice of default and election to sell. Quoting from the deed of trust that identifies the former bank as beneficiary, the notice asserted that the (unspecified) "`present beneficiary'" under the deed of trust had executed a declaration requesting the trustee to exercise the power of sale (which is not part of the record). The notice described arrearages of almost $112,000; it informed plaintiffs that they could obtain the exact amount on written request from "the beneficiary," and then referred plaintiffs to *Chase* to determine arrearages and arrange for payment to avoid the foreclosure. Up to this point, Chase had identified itself to plaintiffs only as a servicer of the loan and not as the beneficial holder of the deed of trust. The diligence declaration appended to the notice identified Chase as "mortgagee, beneficiary[,] *or* authorized agent." (Italics added.)

Thereafter, in January 2011, defendant trustee recorded a notice of trustee's sale initially set for February 2011. This again identified the beneficiary of the deed of trust as the former bank and an outstanding indebtedness of a little more than $1.7 million. Plaintiffs allege the arrearages included in this total were substantially in excess of what would have been due under the modification agreement.

In January 2012, defendant trustee recorded a trustee's deed. It recited that the trustee, acting pursuant to the authority of the deed of trust, sold the property to Chase as grantee on January 3, 2012. It described Chase as the foreclosing beneficiary. Chase acquired the property for a little more than $548,000 on an indebtedness of over $1.8 million.

Plaintiffs tether their first "cause of action"[5] for wrongful foreclosure (count 1) to these allegations. They characterize the refusal to accept the third payment and proceed with a permanent modification as a "breach" of the agreement between the parties leading to a foreclosure that would not have happened if Chase had proceeded with the modification.

With respect to the second "cause of action" for misrepresentation (count 2), plaintiffs identified a promise "that if the trial payments were made the plaintiffs['] loan would be permanently modified" as being false, and that it was asserted without any intention to honor it. The allegations do not specify the nature of the reliance that the alleged misrepresentation induced.

In a third "cause of action" for wrongful foreclosure (count 3), plaintiffs reasserted that Chase did not appear on the deed of trust and had never identified itself to them in that capacity. "[F]or [Chase] to have become the servicer and therefore have the power to foreclose as the agent for the beneficiary or to direct the trustee . . . to foreclose," plaintiffs' loan had to be part of one of the trusts compiled of the former bank's loans that Chase purchased (because the receiver did not sell any other loans to Chase outside the trusts), and plaintiffs alleged their investigation determined that their loan was not part of any such trust. Plaintiffs thus asserted the legal conclusion that Chase consequently did not have authority as a servicer of the former bank's loans to initiate the foreclosure under the deed of trust. Alternatively, in a fourth "cause of action" for wrongful foreclosure (count 4), plaintiffs alleged that even if their loan had been transferred to the trust that Chase purchased, the proper procedures were not followed in the assignment, and thus they again asserted the legal conclusion that Chase lacked authority. Plaintiffs further asserted the legal conclusion that they had standing to raise both of these arguments.

In their final and fifth "cause of action," plaintiffs contended defendants' conduct amounted to unfair business practices (Bus. & Prof. Code, § 17200) (count 5). Beyond legal conclusions, the only facts plaintiffs specifically alleged in this regard were their previous allegations, the execution and

recording of documents (without legal authority), the acting as trustees and beneficiaries (without legal authority), and "[o]ther deceptive business practices."

We do not have a transcript of the hearing on the demurrer. Neither the tentative ruling nor the judgment incorporating the order sustaining the demurrer elaborates on the trial court's reasoning as to any count.

DISCUSSION

1.0 The Misrepresentation Claim Is Time-barred as a Matter of Law (count 2)

We do not need to detail the elements of deceit or negligent misrepresentation and analyze whether plaintiffs' allegations satisfy the particularly exacting requirements for these causes of action (see *Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 901), a dubious proposition. Even if the refusal of Chase to accept the necessary third payment under the trial plan in April 2010 were not sufficient communication that its promise to give plaintiffs a permanent modification of their loan was false, the notice of default in October 2010 was a shrieking train whistle that the modification was never going to happen, absent any allegations of continuing efforts on plaintiffs' part to try to persuade Chase to reconsider modification, or representations on Chase's part that it was still considering modification even while Chase was pursuing foreclosure. Plaintiffs have failed to allege or propose any such objective allegations. It is not enough for plaintiffs to suggest that they simply hoped subjectively that Chase *in theory* could have revived the modification plan sua sponte. Confronted with the *initiation* of a process that would lead to a foreclosure, premised on a purported misrepresentation, plaintiffs should have raised this legal challenge within the three-year statute of limitations (*Fuller, supra,* 216 Cal.App.4th at p. 963), which would have been October 2013 at the latest. As this action was not brought until January 2014, this count is time-barred. We simply reject any of plaintiffs' arguments to the contrary as unpersuasive.

Plaintiffs do not propose any amended allegations that would justify their failure to take any legal action on this theory within three years of the notice of default. We therefore conclude the trial court did not abuse its discretion in failing to grant leave to amend this count.

2.0 The Foreclosure Is Not Wrongful Because of a Breach of Contract (count 1)

Regardless of Chase's intent, plaintiffs contend the foreclosure is nonetheless wrongful because Chase breached the contracted modification process when it refused to accept the third trial payment that was a prerequisite to permanent modification, leading plaintiffs to default on the unmodified payments due. They further claim that, like the plaintiff in *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299 (*Rufini*), this excuses them from alleging an offer to tender their outstanding indebtedness; they do not contend that they can amend to include such an allegation.

The problem with the theory of this count is that their allegations fail to establish a breach on *Chase's* part in the modification process. Unlike *Rufini*, plaintiffs were *not* making regular timely payments under an alleged modification agreement (*Rufini, supra*, 227 Cal.App.4th at pp. 302-303). The February 2010 Chase letter indicated a due date of March 1 for the March payment; inferentially, the due date for the February payment (that plaintiffs alleged) would have been the same. Contrary to the representation in their brief, plaintiffs notably did *not* allege that the February and March payments were timely. Indeed, assuming the payment checks in the exhibits reliably reflect actual payments (something that cannot be determined without the endorsement side of the two checks), they are dated more than *two weeks* after the due date, despite the February letter's emphasis that "a condition of approval for a permanent modification" was timely payments because **"[f]ailure to remit trial payments on time may impact your eligibility. . . ."** As plaintiffs failed to establish their *own* satisfactory performance of the condition for a permanent modification, they cannot characterize Chase's refusal to continue with a trial process leading to permanent loan modification as a breach of any kind. Given that this count fails irremediably as a matter of law on this basis, we do not need to consider plaintiffs' claim that they do not need to have made a tender of their outstanding indebtedness that is ordinarily a precondition of a party seeking to set aside a foreclosure. (See *Rufini, supra*, 227 Cal.App.4th at p. 307.)

In their reply brief and at oral argument, plaintiffs assert that their own allegations "clearly" were erroneous (although how Chase, the trial court, or this court were to discern this is left unexplained), because they *meant* to allege that trial payments were due in March and April, because no one would bring an action based on untimely payments. **As this court is well**

aware, people file complaints all the time premised on facts that do not support a cause of action, so we do not have any basis for presuming that this "must" have been an error. Nor, as plaintiffs have suggested, do we have any basis for inferring an unpleaded species of estoppel from the acceptance of the untimely payments; Chase may simply have been giving plaintiffs a second chance after the belated February payment, after which the belated March payment was the final straw.

Nonetheless, as plaintiffs represent that they wish to amend their complaint to state the purportedly true facts of the due dates for the payments that they purportedly rendered in timely fashion (and their extremely belated allegation of the basis for the refusal of Chase to accept their third payment), we are compelled to give them leave to do so. Chase is then free to answer and move for summary judgment on the basis of any documentation it may have that refutes these allegations and, if they indeed prove to be false, the trial court may enter judgment based on the law of the case that we have just stated above; **CHASE MAY SEEK SANCTIONS FOR THE UNWARRANTED PERPETUATION OF A BASELESS COUNT**. (Code Civ. Proc., § 128.7.)

3.0 Plaintiffs Do Not Have Standing to Allege Irregularities in the Transfer of Their Loan to the Trusts That Chase Purchased (count 4)

In our court's recent decision of *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802 (*Mendoza*), we concluded that **any defects in the process of transferring loans to trusts established to hold them result only in a voidable transaction, not a void transaction**. Therefore, a plaintiff borrower (being a stranger to the transaction) does not have any standing to raise such irregularities on the ground they divested a foreclosing beneficiary entity from the power under the trust to initiate a foreclosure, because **A TRUST BENEFICIARY HAS THE POWER TO RATIFY IRREGULARITIES**. (*Id.* at pp. 805, 811, 813.) Accordingly, as plaintiffs appear to concede, a theory that the foreclosure is wrongful because transfer irregularities divested Chase of authority to initiate it is not viable under *Mendoza*. As a result, we do not need to consider whether this claim is also barred for want of a tender of the indebtedness.

4.0 The Claim That Chase Never Acquired Title to Plaintiffs' Loan Cannot Be Pierced by Means of a Demurrer (count 3)

Under the narrow decision in *Yvanova*, a plaintiff borrower *does* have standing to allege facts to establish that an assignment was *void*, but the case did not decide whether the allegations at issue established a void transaction. (*Yvanova, supra*, 62 Cal.4th at pp. 923-924, 928, 931, 935; see *Mendoza, supra*, 6 Cal.App.5th at pp. 805, 810-811.)

In this count, plaintiffs alleged that their diligent investigation did not locate their particular loan in any of the trusts for which Chase purchased the servicing rights from the former bank's receiver that would give it authority to initiate a foreclosure. As a result, they allege on information and belief that Chase was without authority to initiate the foreclosure, and as a result it was unlawful. In their view, their loan is now in a phantom zone, without anyone holding the beneficial interest under the deed of trust because the former bank does not exist any longer. They conclude this renders the transaction void, which both gives them standing to raise the issue under *Yvanova*, and absolves them from being required to tender the outstanding indebtedness (see *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 113).

Chase's opposition rests wholly on the contract (noted above) of which it asked the trial court to take judicial notice. Chase contends this contract establishes that it did not acquire the rights to service the former bank's loan through any trust but through the contract, which applied to *all* of the former bank's loans. Given that it disagrees with the premise that the transaction is void, Chase does not address the exception to the need for a tender of outstanding indebtedness. Chase's argument, however, exceeds the proper limits of judicial notice.

In ruling on a demurrer, it is error to take judicial notice of the contents of an ordinary document submitted in support of the demurrer *or* interpret the terms of the document; "a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 115; accord, *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1103-1104; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605; cf. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 653 [administrative record for one cause of action noted as being outside scope of review of demurrer to other].) The Supreme Court long ago exploded the notion that the language of a document has an inviolate plain meaning that

cannot be challenged. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33.) A defendant cannot through a request for judicial notice of a document in the course of a demurrer preclude a plaintiff from invoking this principle.

As noted in a vintage case from this court, "The trial court erred in sustaining a demurrer to a complaint properly pleading a transfer of described water rights on the basis of evidence dehors the complaint, even though such evidence was the written instrument of transfer *mentioned in, but not made a part of, the complaint.*" (*Johnson Rancho County Water Dist. v. County of Yuba* (1963) 223 Cal.App.2d 681, 684, italics added.)

We understand the frustration of having documentary evidence such as Chase's purchase agreement that might refute a complaint. (E.g., *Bach, supra*, 207 Cal.App.3d at p. 866 & fn. 5 [even though affidavit in other case indicates the frivolous nature of claim, its contents cannot be basis for *demurrer*].) If plaintiffs continue to pursue this theory on remand, Chase is free to move for *summary judgment* on the basis of the contract and, if it is the conclusive bar to this theory that Chase asserts, **CHASE IS ALSO FREE TO SEEK SANCTIONS FOR FILING A CLAIM THAT WAS INDISPUTABLY WITHOUT MERIT**. (Code Civ. Proc., § 128.7.) However, it is not a proper basis to sustain a demurrer to this count, and Chase does not suggest any other basis;[6] we decline to act as Chase's research department. We shall accordingly reverse the judgment in this respect and remand for further proceedings that can properly take the contract into account. This disposition obviates our need to resolve whether the transaction was void (thereby giving plaintiffs standing and excusing them from the need to tender).

5.0 The Claim of Unfair Business Practices Rests on the Effect of the Judicially Noticed Contract and Should Be Addressed on Remand (count 5)

Business and Professions Code section 17200 proscribes business practices that are unlawful, unfair, *or* fraudulent—even though one might suppose "unfair" simply embraces the other two categories. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

Plaintiffs contend Chase's acts of fraudulently promising them a loan modification that it never intended to execute and foreclosing without the legal authority to do so are acts coming within the tripartite reach of the statute. The problem with the former is that, as we have explained, whatever darker purpose Chase may have had in proposing a modification it never intended to execute, plaintiffs did not satisfactorily comply with the condition precedent of making three *timely* trial payments, which thus absolved Chase from proceeding with the modification regardless of any nefarious intent not to proceed. As for the latter (which Chase again incorrectly challenges on the basis of the judicially noticed contract), this rises or falls on whether the judicially noticed contract in fact transferred authority to foreclose to Chase (the claim of irregularities in the transfer being barred). We do not see any point in resolving whether the allegation constitutes an unfair business practice, since if Chase prevails on remand on the basis of the contract then this theory falls along with the theory of an unauthorized foreclosure. We shall accordingly reverse the judgment in this respect as well for further proceedings on remand.

DISPOSITION

The judgment is reversed as to counts 1, 3 and 5; we remand for further proceedings addressing the due dates of the payments and their effect on count 1, and the substance of the judicially noticed contract and its effect on counts 3 and 5. The judgment is otherwise affirmed. Neither party shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

MURRAY, J. and RENNER, J., concurs.

[1] As Chase has never provided any document showing a substitution of Chase as the beneficiary under the deed of trust, we will assume a substitution does not exist.

[2] The record citation in plaintiffs' opening brief to their opposition to the demurrer does not reflect any proposed amendment, although elsewhere in their brief, they *did* properly cite to a proposed minor amendment. Ultimately, it does not matter whether they proposed amendments in the trial court because a plaintiff may propose amendments for the first time on appeal. (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 464.)

[3] Although the trial court's original *tentative* ruling had lifted a stay in defendant Chase's unlawful detainer action against plaintiffs (that the court had consolidated into the present case under this case number), no disposition of the stay appears in the order sustaining the renewed demurrer. The parties do not present any argument regarding the

stay on appeal, for which reason we deem the matter abandoned. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544, fn. 8.)

[4] According to plaintiffs, they could amend their complaint to allege that Chase refused to accept the third check on the false ground that it had never received *any* payments. They do not explain why they did not include this allegation in the first place.

[5] The pleading reflects the common inexactitude in failing to distinguish between the invasion of different primary rights (causes of action) and alternative legal theories that characterize a cause of action (counts). (See *Cullen v. Corwin* (2012) 206 Cal.App.4th 1074, 1076, fn. 1; *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1364.)

[6] Chase suggests that a trustee in its own right can initiate foreclosure proceedings (citing Civ. Code, § 2924, subd. (a)(1)). It is not explained in what manner a statutory procedural proscription for the initiation of foreclosure procedures invests a trustee to act independently of any beneficiary (especially in light of the statement from *Yvanova* cited above). In any event, that is not what happened in the present case—the notice of default expressly stated that the defendant trustee was acting at the instance of an unspecified present beneficiary.