BRIAN R. BOOTH, Plaintiff and Appellant,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

No. D070108.

Court of Appeals of California, Fourth District, Division One.

Filed May 22, 2017.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2015-00002816-CU-OR-CTL, Jacqueline M. Stern, Judge. Affirmed.

Law Office of Ronald H. Freshman and Ronald H. Freshman for Plaintiff and Appellant.

Reed Smith, Kasey J. Curtis and Elena O. Gekker, for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

HALLER, J.

Brian Booth brought an action alleging numerous causes of action against numerous parties arising from the nonjudicial foreclosure sale of his home. The court sustained defendants' demurrer without leave to amend on all causes of action against all defendants.

In this appeal, Booth challenges the judgment against two defendants: (1) Bank of America, N.A. (the successor to the original lender and an alleged loan servicer) and (2) ReconTrust Company, N.A. (ReconTrust) (the original trustee on the deed of trust). Booth contends the court erred in determining his complaint did not state a viable cause of action against these defendants and/or concluding he could not amend the complaint to allege a valid cause of action. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL SUMMARY

We summarize the facts based on the properly pleaded allegations, information in materials attached to the complaint, and matters subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*); *Crowley v. Katleman* (1984) 8 Cal.4th 666, 672, fn. 2.)

Factual Background

In April 2007, Booth borrowed $528,000 from Countrywide Home Loans, Inc. (Countrywide) to refinance the loan on his Oceanside home. The refinance loan was reflected in a promissory note (Note) signed by the parties, and was secured by a deed of trust (Deed of Trust) on Booth's home. The Deed of Trust identified Booth as the borrower; Countrywide as the lender; and ReconTrust as the trustee.

The Deed of Trust named Mortgage Electronic Registration Systems (MERS) as a beneficiary and the lender's nominee, stating: "[MERS] is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. . . ." The Deed of Trust provided: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." The Deed of Trust additionally stated: "The Note . . . (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

The next year, in 2008, Bank of America purchased Countrywide and its parent, and thus became the Lender on the Deed of Trust. Bank of America's subsidiary (BAC Home Loan Servicing, LP (BAC)) then acted as the loan servicer on the Note. After Bank of America allegedly merged with BAC, Bank of America allegedly "became the loan servicer."

About two years later, on July 27, 2010, MERS assigned the Note and Deed of Trust to Bank of New York Mellon (Mellon Bank), as trustee for a securitized investment trust, which we refer to as the Mortgage Series trust.[1] This assignment (First Assignment) was signed by T. Sevillano, who was identified on the document as a MERS "Assistant Secretary." According to Booth's complaint, the Mortgage Series trust is organized under New York laws and is governed by a pooling and servicing agreement (PSA), which requires that under certain

circumstances the "Master Servicer" make certain "Advances" on delinquent loan accounts.

The next day on July 28, ReconTrust recorded a notice of default (2010 Notice of Default) stating that Booth owed $35,254.26 on the secured loan and this amount would increase until his account becomes current. The notice was signed by an employee of ReconTrust. The notice stated that to arrange for payment, Booth should contact Mellon Bank, in care of BAC, the loan servicer.

About one week later, on August 6, ReconTrust recorded the First Assignment.

Four years later, in March 2014, MERS executed a second assignment (Second Assignment) which duplicated the First Assignment. The Assignment again transferred "all beneficial interest" under the Deed of Trust to Mellon Bank, as trustee for the same beneficiary (the Mortgage Series trust). This document was recorded on April 3, 2014.

The next month, on May 9, Mellon Bank (the then-holder of the Note and Deed of Trust) recorded a substitution of trustee (Substitution of Trustee), substituting First American Title Insurance Company (First American) for the prior trustee (ReconTrust). The document was signed on May 6, 2014 by an employee of Residential Credit Solutions, Inc. (Residential Credit) as "Attorney-in-Fact" for Mellon Bank. Booth alleges Residential Credit was a loan servicer of the Note.

On May 28, 2014, First American recorded a second notice of default (2014 Notice of Default). The notice stated Booth owed $203,118.60 and this amount would "increase until your account becomes current." The notice also stated that to "find out the amount you must pay, or to arrange for payment to stop the foreclosure," Booth should contact Mellon Bank "c/o First American."

Three months later, on August 25, First American recorded a Notice of Trustee's Sale, stating Booth remained in default on the Note and his property would be sold at a public auction on September 18, 2014. The notice stated: "The total amount of the unpaid balance of the [secured] obligation . . . and reasonable estimated costs, expenses and advances . . . is $741,005.45. The beneficiary under [the] Deed of Trust has deposited all documents evidencing the obligations secured by the Deed of Trust and has declared all sums secured thereby immediately due and payable. . . ." The sale was then postponed for a few months.

On January 26, 2015, Booth filed this action seeking to prevent or preclude the foreclosure sale.

Several months later, on March 23, 2015, First American conducted the foreclosure sale and sold the property for $436,700 to the highest bidder, Eagle Vista Equities, LLC. One week later, on April 3, a trustee's deed upon sale (Trustee's Deed) was recorded. In the deed, First American conveyed the property to Eagle Vista Equities.

First Amended Complaint

About six weeks after the foreclosure sale, in May 2015, Booth filed a first amended complaint against numerous parties including Mellon Bank, Residential Credit, Bank of America, and ReconTrust (the latter two are the respondents in this appeal). Against Bank of America, the complaint alleged: (1) wrongful foreclosure; (2) cancellation of instruments; (3) tortious interference with contract; (4) fraud; (5) violation of the California Homeowners Bill of Rights; (6) violation of California's unfair competition law (UCL; Bus. & Prof. Code, § 17200); and (7) breach of contract. Booth asserted the same causes of action against ReconTrust except he did not include ReconTrust in the cancellation of instruments or breach of contract claims. Booth also asserted many of the same causes of action against Mellon Bank and Residential Credit. Booth sought damages, declaratory relief, and injunctive relief. Booth also sought an accounting from Bank of America and Mellon Bank.

Booth attached numerous recorded documents to his complaint, including the Deed of Trust, the First Assignment, the Second Assignment, the 2010 Notice of Default, the 2014 Notice of Default, the 2014 Substitution of Trustee, the August 2014 Notice of Trustee's Sale, and the 2015 Trustee's Deed.

Of relevance to this appeal, Booth sought to hold Bank of America and ReconTrust liable for the loss of his home based primarily on his allegations that MERS had no authority to assign the Note and Deed of Trust, and that Bank of America (as an alleged loan servicer) interfered with his ability to meet his loan obligations by allegedly advancing mortgage payments pursuant to internal PSA obligations. To support this latter theory, Booth attached to his complaint a copy of the PSA governing the Mortgage Series trust, which provided for a "Master Servicer" to make "Advances" on delinquent loan accounts under certain circumstances. Booth also attached a one-page document, which he alleged reflected that his loan was not in default and/or that the outstanding loan amount was less than the amounts stated in the 2014 Notice of Default and the Notice of Trustee's Sale. Booth also alleged various recorded documents were void because they were not signed by an authorized party.

Booth made many of these same arguments against Mellon Bank (the foreclosing entity) and Residential Credit (another alleged loan servicer). He alleged, for example, that Mellon Bank was not a lawful owner of the secured debt and thus had no standing to foreclose because Mellon Bank obtained ownership through assignments from MERS, and MERS had no authority to make the transfers.

Demurrer

Mellon Bank and Residential Credit successfully demurred without leave to amend. Bank of America and ReconTrust (collectively, respondents) then filed a demurrer on many of the same grounds. In their demurrer, respondents described the elements of each cause of action, and set forth grounds to show that Booth's allegations failed to establish a basis for recovery under each asserted claim. For example, they argued that Booth's challenges to MERS's authority to transfer interests were legally unmeritorious and inconsistent with settled law; neither Bank of America nor ReconTrust had any involvement in the 2015 foreclosure sale and thus could not be liable for wrongful foreclosure; Booth could not recover on the wrongful foreclosure claim because he failed to allege tender of amounts owed; the allegations did not support that the recorded documents were void; Booth's fraud claims lacked the necessary specificity; and Booth did not allege any prejudice resulting from respondents' challenged actions. They also requested the court to grant judicial notice of the recorded documents on the Property (most of which had been attached to Booth's amended complaint).

In opposition, Booth's primary argument on the wrongful foreclosure cause of action was that MERS had no legal capacity to contract and therefore the Deed of Trust and all later assignments were void. He also argued that the First and Second Assignments were void because MERS did not disclose the name of its principal on the documents and the Assignments violated the statute of frauds. On the breach of contract claim, Booth discussed legal principles regarding conditions precedent, and argued that Bank of America failed to provide Booth with valid notices of default. On the tortious interference claim, Booth asserted that respondents wrongfully interfered with the Note and Deed of Trust based primarily on the advanced payments made under the PSA. On the fraud claim, Booth argued he was not required to allege specific facts because those facts were "fully within the knowledge and possession of the [d]efendants." On the Homeowners Bill of Rights claim, Booth argued the First Assignment and Second Assignment were "void on their face as a matter of law" and that respondents violated the statutory scheme "each time they executed and recorded one of [the documents in the chain of

title]. . . ." On the UCL claim, Booth argued he was entitled to recover based on the "unlawful and unfair acts" alleged in the complaint.

After a hearing, the court sustained the demurrer without leave to amend. In a lengthy order, the court discussed each of the causes of action, and detailed the reasons for its conclusion that Booth's claims were unsupported by the factual allegations under applicable law. Among the court's conclusions, the court found MERS's involvement in the assignments of the secured loan did not show a factual basis for the causes of action; respondents had no liability for the wrongful foreclosure because they "were not involved in" the 2015 foreclosure sale or events leading to the sale; Booth's theory was unmeritorious that his loan was not in default because the PSA provides for the Master Servicer to advance funds to cover borrower-payment deficiencies; and Booth did not show any prejudice from the alleged wrongful acts. The court also granted respondents' judicial notice request. The court denied leave to amend, finding no factual or legal basis for an amendment and entered judgment in favor of respondents.

Booth appealed this judgment and also separately appealed the judgment entered in favor of Mellon Bank and Residential Credit. While Booth's appeal in the instant case was pending, we affirmed the judgment in favor of Mellon Bank and Residential Credit. (*Booth v. Residential Credit Solutions* (Mar. 9, 2017, D069333 [nonpub. opn.] (*Booth I*).) On our own motion, we take judicial notice of this unpublished opinion. (Evid. Code, §§ 451, subd. (a); 459, subd. (a); Cal. Rules of Court, rule 8.1115(b)(1).) Booth filed his reply brief in this case after the *Booth I* decision was filed.

DISCUSSION

I. *Review Standards*

A demurrer tests the sufficiency of a pleading as a matter of law. It is therefore "error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory. . . ." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.) We apply the de novo review standard in considering whether the complaint states a cause of action. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813 (*Saterbak*).) We assume the truth of all facts properly pleaded in the complaint, and those facts that may fairly be implied or inferred from the allegations. (*Ibid.; Cobb v. O'Connell* (2005) 134 Cal.App.4th 91, 95.) We also consider facts properly subject to judicial notice and information in exhibits attached to the complaint. (*Yvanova, supra,* 62

Cal.4th at p. 924; *Duncan v. The McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 360, disapproved on other grounds in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1176, 1182.) These facts are given precedence if they contradict the factual allegations. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300; *Duncan*, at p. 360; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044-1045.) We do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Cobb*, at p. 95.)

We are governed by an abuse-of-discretion standard in reviewing the court's refusal to permit an amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The court abuses its discretion if there is a reasonable possibility an amendment would cure the defects. (*Ibid.*) The appellant has the burden to identify specific facts showing the complaint can be amended to state a viable cause of action. (*Ibid.*) An appellant can meet this burden by identifying new facts or theories on appeal. (Code Civ. Proc., § 472c, subd. (a); *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044.)

II. *Booth Failed to Satisfy His Appellate Burden to Show Error*

A trial court's judgment is presumed correct, and a plaintiff must affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799 (*Dietz*).) Under this principle, an appellant challenging a judgment sustaining a demurrer must identify the elements of each challenged cause of action and explain why the factual allegations of the operative complaint state a claim under these elements.

Booth's appellate counsel made no attempt to meet this rule. Booth alleged seven substantive causes of action (wrongful foreclosure, cancellation of instrument, tortious interference, breach of contract, fraud, violation of Homeowners Bill of Rights, and violation of the UCL), and argues the court erred because "he did . . . properly make the factual allegations to state [each of] his causes of action." But on appeal Booth's counsel did not describe or discuss the elements of these causes of action, and instead engaged in a lengthy and often unintelligible discussion of various facts asserted (or which he claims he asserted) in his amended complaint.

This form of argument does not satisfy Booth's appellate burden. A factual contention untethered to any discussion of the legal elements of the cause of action does not show a court erred in sustaining a demurrer. (See *Landry v. Berryessa*

Union School Dist. (1995) 39 Cal.App.4th 691, 699-700 **["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary**"]; see also *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) **"`It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness.'"** (*Dietz, supra*, 177 Cal.App.4th at p. 799.)

The deficiencies in Booth's briefing are not cured by his counsel's repeated assertions that respondents "hijacked" his amended complaint by "delet[ing] allegations not to their liking [and] insert[ing] other contrary allegations." Even assuming respondents did not accurately state his factual allegations in moving for the demurrer, it was Booth's appellate burden to accurately identify the material factual allegations *and show how those allegations state a viable claim* under the asserted causes of action in his first amended complaint. Booth's counsel did not do this. On this ground alone, we find Booth's appeal is without merit.[2]

In the interests of justice, we have additionally examined each cause of action and the facts alleged. On this independent review, we are satisfied the court properly sustained the demurrer without leave to amend on each cause of action alleged by Booth against respondents. We highlight our reasons in the sections below.

III. *Wrongful Foreclosure Cause of Action*

Generally, the elements of a wrongful foreclosure cause of action are: "`(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; and (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.'" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408; see *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.)

The first element requires the plaintiff to establish the defendant engaged in some conduct or activity that *caused* an "`illegal, fraudulent, or wil[l]fully oppressive'" foreclosure sale. (*Miles, supra*, 236 Cal.App.4th at p. 408; see *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7.) In this case, Booth has not alleged a viable cause of action because he did not allege facts showing respondents engaged in any conduct causing the foreclosure sale.

ReconTrust's involvement with the Property ended when Mellon Bank recorded the Substitution of Trustee on May 9, 2014, replacing ReconTrust with First American. (See Civ. Code, § 2934a, subd. (d); *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 871.) Several weeks later, First American, as "the duly appointed substitute trustee," recorded the 2014 Notice of Default. When Booth failed to pay the outstanding amounts identified in *this* default notice, First American recorded the Notice of Trustee's Sale, which scheduled the foreclosure sale. First American then conducted the March 2015 nonjudicial foreclosure sale and executed the Trustee's Deed.

ReconTrust's actions did not *cause* the foreclosure sale. Its only alleged relevant activity was to record the 2010 Notice of Default. There are no alleged facts showing a connection between this earlier recording and the nonjudicial foreclosure sale that occurred five years later. **BECAUSE A HOMEOWNER HAS THE OPPORTUNITY TO CURE A DEFAULT AFTER A DEFAULT NOTICE IS RECORDED**, a second notice of default supplants the earlier default notice. On this record, there is no basis for holding ReconTrust liable for an alleged wrongful foreclosure.

The same conclusion applies to Booth's wrongful foreclosure claim against Bank of America. Bank of America's involvement as a holder/owner of the Note and Deed of Trust ended in 2010 when MERS assigned the Note and Deed of Trust to Mellon Bank. **Booth contends this assignment was invalid because MERS had no authority to make the assignment. As explained below, this argument is legally unsupported**. But even if we were to assume there was some merit to the argument**, THE ASSIGNMENT ITSELF DID NOT CAUSE THE FORECLOSURE SALE TO OCCUR. THAT SALE OCCURRED BECAUSE BOOTH DID NOT PAY THE REQUIRED MONTHLY PAYMENTS ON HIS NOTE**. Bank of America's status as the predecessor lender whose rights were assigned to a third party does not support a wrongful-foreclosure cause of action against Bank of America.

Contrary to Booth's contentions, *Yvanova* has no effect on these conclusions. (*Yvanova, supra*, 62 Cal.4th 919.) The sole issue in *Yvanova* was whether the plaintiff could prevail on a challenge to a foreclosure sale based on the action *of the foreclosing entity or its agent in conducting the sale* when the foreclosing entity allegedly was not the true owner of the secured loan. (*Id.* at pp. 924, 935.) *Yvanova* held a party has standing to bring a wrongful foreclosure claim *against the foreclosing entity or its agent* if the entity or its agent claimed ownership through a void, as opposed to a voidable, transfer. (*Id.* at pp. 926-943.)

Booth's claims against Bank of America and ReconTrust do not fall within this rule because these entities were not parties to the foreclosure sale and there are no allegations showing they were acting as Mellon Bank's agent in the foreclosure sale. Respondents did not engage in any actions to initiate or cause the foreclosure sale. Therefore they cannot be held liable for an allegation that the foreclosing entity did not have a proper ownership interest. ***Yvanova* did not create a new rule that a beneficiary has standing to sue an entity merely because the entity was in the chain of ownership of a secured loan, nor did it alter well-settled contract law privity rules or tort law duty requirements.**

Additionally, even if Bank of America acted (at unspecified times) as a loan servicer, there are no allegations showing it had any involvement with the 2015 foreclosure sale in this role or engaged in any wrongful conduct with respect to the sale. To establish wrongful conduct, Booth mainly focuses on defects in the assignments and related documents. However, there are no *factual* allegations (as opposed to contentions or legal conclusions) supporting that these alleged defects were created or caused by Bank of America.

Moreover**, a party may challenge a foreclosure sale based on an alleged defective assignment only if that assignment was a void rather than a voidable transaction**. (See *Yvanova, supra*, 62 Cal.4th at p. 935; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810-820 (*Mendoza*); *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1256-1257; *Saterbak, supra*, 245 Cal.App.4th at p. 815.) In his appellate briefs, Booth suggests he pled a viable basis for establishing a voidable transaction because MERS did not, and could not have, registered to do business in California until July 27, 2010, several years after the Deed of Trust was executed. **Booth relies on the statutory requirement that a foreign corporation may not conduct intrastate business without first obtaining a "certificate of qualification" from the Secretary of State. (Corp. Code, § 2105, subd. (a).)**

This requirement is inapplicable in this case. A foreign corporation does not conduct intrastate business by "[c]reating evidences of debt or mortgages, liens or security interests on real or personal property." (Corp. Code, § 191, subd. (c)(7).) A foreign corporation also does not conduct intrastate business by engaging in activities necessary for "[t]he ownership of any loans and the enforcement of any loans by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise." (*Id.*, subds. (d)(3) & (7).) Under these rules, MERS's failure to obtain a certificate of qualification before it was named a nominee and beneficiary in the Deed of Trust did not limit its authority to

assign the loan documents. (See *Castaneda v. Saxon Mortg. Servs.* (E.D.Cal. 2009) 687 F.Supp.2d 1191, 1195, fn. 3; *Ramirez v. Right-Away Mortg., Inc.* (N.D.Cal. Aug. 11, 2011, No. C 11-01839 WHA) 2011 WL 3515931, *2; *Baidoobonso-Iam v. Bank of America (Home Loans)* (C.D.Cal. Nov. 22, 2011) 2011 WL 5870065, * 4 **["COURTS HAVE ROUTINELY RECOGNIZED THAT MERS'S CONDUCT IN CALIFORNIA IS WITHIN THE PERMISSIBLE SCOPE FOR AN UNREGISTERED FOREIGN CORPORATION**"].) **Further, even if there was some obligation to register, this failure would not render the entity's actions void or cause any prejudice to the borrower**. (See *Perlas v. Mortgage Electronic Registration Systems, Inc.* (N.D.Cal. Aug. 6, 2010) 2010 U.S. Dist. LEXIS 79705, *3 ["**even assuming MERS was obligated to register with the state, its failure has not caused any injury to [the] Plaintiffs. There is no authority for the argument that because MERS was unregistered, its contractual obligations are void**"].)

Booth also devotes large portions of his appellate briefs to his assertions that MERS had no authority to assign the Note and Deed of Trust. Even if these arguments had some relevance to respondents (which were not the foreclosing entities), they are wholly without merit. The Deed of Trust states that MERS is a "beneficiary" of the secured loan and a "nominee for Lender and Lender's successors and assigns," and that MERS may act on behalf of the Lender (or the Lender's successors and assigns) to "exercise any or all of [the Lender's] interests." CALIFORNIA COURTS, INCLUDING THIS COURT, HAVE REPEATEDLY HELD THAT THIS LANGUAGE "`NECESSARILY INCLUDES [MERS'S] AUTHORITY TO ASSIGN THE DEED OF TRUST.' " (*Saterbak, supra*, 245 Cal.App.4th at p. 816; see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270, disapproved on another ground by *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13; *Lane v. Vitek Real Estate Industries Group* (E.D. Cal. 2010) 713 F.Supp.2d 1092, 1099.) In light of this settled law, Booth's arguments to the contrary are frivolous.

In his appellate briefs, Booth also argues the First Assignment was void because MERS did not "subscribe the principal for whom it act[ed]" on the assignment document. Booth contends that when MERS signed the First Assignment, it was required to identify its principal and identify the agency agreement, and that without this written identification, the assignment was void.

Even assuming the argument has some relevance to Booth's claims against the parties here (respondents were not the foreclosing entities), we rejected this identical argument in *Booth I*, and for these reasons, we also reject the argument on

this appeal**. Booth does not identify any legal authority supporting his assertions that a beneficiary's nominee or agent must expressly state on whose authority it acts and must attach an agency agreement when it makes an assignment of a secured loan.** In asking this court to adopt such a rule, Booth relies on Civil Code section 1624, subdivision (a)(3), which requires a writing for certain real property transfers.[3] However, even assuming this code section applies to deeds of trust, the writing requirement was satisfied because the Deed of Trust contained language expressly authorizing MERS to act on the lender's behalf. **Both the lender and Booth agreed to this authority by signing the Deed of Trust.** We reject Booth's argument that MERS needed to provide additional written proof of its authority to validate its assignment of Bank of America's interests in the secured loan.

Booth's reliance on *Fisher v. Salmon* (1851) 1 Cal. 413 is misplaced. In *Fisher* (a case decided more than 150 years ago), the court held a deed executed by an attorney in his own name, instead of in the name of his principal, was not binding on the principal. Even assuming this rule remains the law,[4] *Fisher* is of no help to Booth in this case. Unlike in *Fisher*, the principals here agreed in writing that the lender's nominee had the authority to transfer property interests on behalf of the lender. Based on that writing, Booth cannot prevail on a challenge to the nominee's authority.

Booth additionally challenges the First Assignment on grounds that ReconTrust "disguised itself as MERS" in creating the document because the individual who signed the First Assignment (T. Sevillano) was allegedly a ReconTrust employee. The First Assignment identifies "T. Sevillano" as a MERS "Assistant Secretary." This was sufficient to establish Sevillano's authority to sign the document. **The courts have recognized that MERS regularly retains employees of another entity to act as MERS's agent in signing assignment documents and have not found this arrangement establishes an improper transfer**. (See *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040 ["MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS"]; see also *Davis v. Countrywide Home Loans, Inc.* (S.D.Tex. 2014) 1 F.Supp.3d 638, 643, fn. 6; *Margaritis v. BAC Home Loans Servicing LP* (D.Ariz. 2012) 2012 WL 12885712, *1, fn. 1.) In any event, the absence of such written authority makes the assignment at most voidable, not void, and is thus not a basis for a viable claim by Booth. (See *Mendoza, supra*, 6 Cal.App.5th at pp. 819-820; see also *Pratap v. Wells Fargo Bank, N.A.* (N.D.Cal. 2014) 63 F.Supp.3d 1101, 1109; *Maynard v. Wells Fargo*

Bank, N.A. (S.D.Cal. 2013) 2013 WL 4883202, at pp. *8-*9; *Bennett v. Wells Fargo Bank, N.A.* (N.D.Cal. 2013) 2013 WL 4104076, at pp. *5-*6.)

Booth alternatively argues that even if the First Assignment was valid, the Second Assignment (the 2014 assignment of the secured loan from MERS to Mellon Bank, as trustee for the Mortgage Series) was void because the First Assignment terminated MERS's authority to act on the Lender's behalf. As we explained in *Booth I*, the Second Assignment is legally irrelevant to the validity of the foreclosure sale. The Second Assignment did nothing more than repeat the First Assignment. Because the First Assignment was legally effective to assign the Deed of Trust and Note, the Second Assignment's validity had no effect on Booth's rights.

IV. *Cancellation of Instrument*

Booth alleged a cancellation of written instrument claim against Bank of America, challenging the validity of the Deed of Trust and the First and Second Assignments. (Civ. Code, § 3412.)

Civil Code section 3412 provides the grounds for a cancellation of instruments cause of action: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." A cause of action under this code section is an equitable claim. (*M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 200.) Booth did not allege a valid legal or factual basis to prevail on this claim.

First, a declaration for Bank of America to cancel or "deliver[ ] up" the loan documents would serve no effective purpose. (Civ. Code, § 3412.) Even if any recorded document satisfies the statutory criteria for cancellation, Bank of America has no continuing interest in, access to, or authority over the documents in the chain of title.

Second, Booth's allegations do not support that a declaration as to the validity of the documents is needed to avoid "serious injury" to Booth. (Civ. Code, § 3412.) At this time, the foreclosure sale has occurred, and Booth has unsuccessfully brought claims against the foreclosing parties pertaining to the validity of their ownership interests stemming from the original Note and Deed of Trust, and the related assignments. A declaration between Bank of America and Booth would

have no effect on the rights and interests of these subsequent owners, and thus would not provide any relief to Booth.

Third, as discussed above, Booth's challenges to the Deed of Trust and Note assignments have no merit.

V. *Tortious Interference Cause of Action.*

Booth asserted a cause of action for intentional interference with contract against Bank of America and ReconTrust. The elements of this cause of action are: "`(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.'" (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1603 (*Mintz*).)

Booth argues that Bank of America and ReconTrust can be held liable for this intentional interference tort "under two . . . theories": (1) "by making . . . advances [under the PSA agreement] Respondents had interfered in Booth's ability to secure a restructuring of his debt through a modification"; and (2) "Respondents had terminated the contract through a nonjudicial foreclosure to recoup their own advances, not because Booth was in default to the beneficial holder of the debt." Neither theory supports Booth's intentional interference claim.

On the first theory, Booth attached to his complaint two pages of the PSA (the document governing the Mortgage Series trust), which state that **UNDER CERTAIN CIRCUMSTANCES THE TRUST'S "MASTER SERVICER" (IDENTIFIED IN OTHER PORTIONS OF THE PSA AS COUNTRYWIDE HOME LOANS SERVICING, LP) IS REQUIRED TO MAKE AN "ADVANCE" WHEN THERE IS A DEFAULT, AND THAT THE "MASTER SERVICER SHALL BE ENTITLED TO BE REIMBURSED FROM THE CERTIFICATE ACCOUNT FOR ALL ADVANCES OF ITS OWN FUNDS MADE PURSUANT TO THIS SECTION. . . .**" Booth also alleged that these advances have reduced the amount of his default. Based on these allegations, Booth argues that these advancements allegedly created a disincentive for Bank of America (apparently acting as an alleged loan servicer) to modify Booth's loan or to encourage Mellon Bank to modify the loan.

These assertions do not support an intentional interference claim. Booth identifies valid contracts (the Note and Deed of Trust) between Booth and Mellon Bank (as the successor lender/beneficiary), but Booth does not allege any intentional acts by

Bank of America that disrupted that contractual relationship. Booth alleged that Bank of America "interfered" with his loan contract "for [its] own personal benefit to recoup advanced payments made by 3rd parties . . ." and that Bank of America did so "by preventing [Booth] from pursuing [a] modification" of his secured loan. But Booth does not identify what Bank of America did to interfere with a purported loan modification, even assuming it had an incentive to do so. For example, Booth did not allege he asked for a loan modification, nor that Bank of America had any role in, or involvement with, any loan modification discussions. Additionally, Booth did not assert that Mellon Bank had a contractual or statutory obligation to modify Booth's loan or that Mellon Bank or Bank of America had any duty to initiate a loan modification discussion. Even assuming Booth adequately alleged that Bank of America had some involvement in the Master Servicer's "advances" under the PSA, he was required to allege facts showing Bank of America engaged in conduct that resulted in an interference with the secured loan contract. Booth did not do this, nor did he show he could amend his complaint to satisfy his pleading burden on this element.

Booth's second theory that "[r]espondents had terminated the contract through a nonjudicial foreclosure to recoup their own advances" is negated by the record. Most important, the allegations and recorded documents show that neither Bank of America nor ReconTrust "terminated the contract through a nonjudicial foreclosure." The recorded documents show the foreclosure sale was instituted by Mellon Bank, with assistance from the loan servicer, Residential Credit. There are no alleged facts showing that Bank of America or ReconTrust had any involvement in the foreclosure sale.

Additionally, even if Booth had properly alleged an act of intentional interference, **an agent cannot be liable for interfering with its principal's contracts**. (*Mintz, supra*, 172 Cal.App.4th at pp. 1603-1607; see *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 (*Applied Equipment*); *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24-25; see also *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310, 1316.) Contrary to Booth's assertions, the fact that he alleged Bank of America may have had its own interests in allegedly assisting to enforce the loan obligation does not take this case outside the settled general rule. (See *Mintz, supra*, 172 Cal.App.4th at p. 1606.)

Booth relies on *Collins v. Vickter Manor, Inc.* (1957) 47 Cal.2d 875 to support his assertion that an agent can be held liable for interfering with its principal's contracts. *Collins* held the plaintiffs (real estate agents) stated an intentional interference cause of action against two officers of a corporation after the

corporation wrongfully refused to pay the plaintiffs' brokerage fees. (*Id.* at pp. 878-880, 883.) *Collins* did not discuss or specifically consider the legal issue whether an *agent* of a contracting party can be held liable for the substantive tort of interfering with the contract. Thus, it is not binding on this court. (See *Mares v. Baughman* (2001) 92 Cal.App.4th 672, 679 [cases not authority for propositions not specifically considered by court].) Moreover, we question *Collins*'s continued viability after more recent California Supreme Court decisions have limited an agent's liability for the intentional interference tort. (See *Shoemaker v. Myers, supra*, 52 Cal.3d at p. 24; see also *Applied Equipment, supra*, 7 Cal.4th at pp. 513-514; *Mintz, supra*, 172 Cal.App.4th at p. 1604, fn. 3; *Luxul Technology Inc. v. NectarLux, LLC* (N.D.Cal. 2015) 2015 WL 4692571, *8.)

VI. *Remaining Causes of Action*

The court also sustained respondents' demurrer without leave to amend on Booth's causes of action for (1) declaratory and injunctive relief; (2) fraud; (3) violation of the California Homeowners Bill of Rights; (4) violation of Business and Professions Code section 17200; and (5) accounting. By failing to adequately discuss each of these causes of action in his appellate briefing, Booth has forfeited any challenges to the court's rulings on these claims. Additionally, we have independently reviewed the allegations pertaining to each of these causes of action, and find that none of these causes of action state a viable claim under California law.

VII. *Amendment*

An appellate court must reverse a judgment sustaining a demurrer if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.) The plaintiff has the burden of proving a reasonable possibility of curing a defect by amendment. (*Ibid.;* *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) The appellant must "`clearly and specifically' set forth . . . [the] factual allegations that sufficiently state all required elements" of a cause of action. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 559 (*Baldwin*); *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1504.)

Booth has not met this burden. Booth does not specify any facts that he could add to his amended pleading that would support a viable cause of action. He instead argues: "It is not farfetched that Respondents have engaged in unfair and deceptive

business practices to fabricate and record instruments that are false and done without authority." This unsupported accusation of unlawful conduct is improper. Further, whether something is "farfetched" is not the issue before us. To prevail on a request for leave to amend, the plaintiff "`must clearly and specifically'" state the legal and factual basis for the amendment. (*Baldwin, supra*, 1 Cal.App.5th at p. 559.) An assertion that something is not "farfetched" falls far short of this standard. (See *Rakestraw, supra*, 81 Cal.App.4th at p. 44.) The court did not abuse its discretion in denying Booth leave to amend.

DISPOSITION

Judgment affirmed. Appellant to bear respondents' costs on appeal.

McCONNELL, P. J. and AARON, J., concurs.

[1] The assignment document identified the investment trust as: "The Certificateholders CWMBS,[ ]Inc. CHL Mortgage Pass-through Trust 2007-J3 Mortgage Pass-Through Certificates, Series 2007-J3." (Bold font and some capitalization omitted.) All further references to Mellon Bank pertain solely to its status as trustee for this investment trust.

[2] **We expect the next time Booth's counsel, Ronald Freshman, files an appeal in this appellate division he will first familiarize himself with the applicable appellate rules and review standards.**

[3] Civil Code section 1624, subdivision (a)(3) states: "An agreement . . . for the sale of real property, or of an interest therein," must be in writing, and the "agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

[4] More recently, our high court observed that a "contract made in the name of an agent may be enforced against an undisclosed principal. . . ." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 773.)