

**BRIAN BOOTH, Plaintiff and Appellant,**  
**v.**  
**RESIDENTIAL CREDIT SOLUTIONS et al., Defendants and Respondents.**

No. D069333.

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

Filed March 10, 2017.

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

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

Wright, Finlay & Zak, Jonathan D. Fink and Magdalena D. Kozinska, for Defendants and Respondents.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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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) the entity that instituted the foreclosure sale (The Bank of New York Mellon (Mellon Bank), as trustee for a securitized investment trust); and (2) one of the entities that serviced Booth's secured loan (Residential Credit Solutions, Inc. (Residential Credit)).

Booth contends the court erred in determining his complaint did not state a viable cause of action against these defendants and/or in 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; Recon Trust Company, N.A. (Recon Trust) as the trustee; and Mortgage Electronic Registration Systems (MERS) as beneficiary and "nominee for Lender and Lender's successors and assigns."

**The Deed of Trust stated: "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 . . . 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 also stated: "The Note . . . (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."**

On July 27, 2010, MERS assigned the Note and Deed of Trust to Mellon Bank, as trustee for a securitized investment trust, which we refer to as the Mortgage Series trust.<sup>[1]</sup> This assignment (First Assignment) was signed by T. Sevillano, who was identified on the document as an "Assistant Secretary." The assignment was recorded on August 6, 2010. 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.

One day after this First Assignment was executed, Recon Trust (the then-trustee on the Deed of Trust) recorded a notice of default on the property, stating the amount owed was \$35,254.26.

Four years later, in March 2014, MERS executed a second assignment (Second Assignment) which essentially 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). The Second Assignment was signed by Pamela Stoddard, identified as a vice-president of MERS. This document was recorded on April 3, 2014.

The next month, Mellon Bank (as trustee for the Mortgage Series trust) recorded a Substitution of Trustee, substituting First American Title Insurance Company (First American) for the prior trustee (Recon Trust). The document was signed on May 6, 2014 by Lori Jones, identified as "Assistant Vice President — Servicing" for Residential Credit, as "Attorney-in-Fact" for Mellon Bank.

On May 28, 2014, First American recorded a notice of default (Notice of Default). The notice stated the amount owed is "\$203,118.60, and will increase until the account becomes current." The notice 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." Attached to this notice was a statement signed by a Residential Credit employee, stating that pursuant to Civil Code section 2923.55, Residential Credit had attempted with due diligence to contact the borrower to discuss payment deficiencies, but it was unable to do so.

On August 25, 2014, First American recorded a Notice of Trustee's Sale, stating Booth remained in default on the loan 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, 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 was recorded. In the Trustee's 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 respondents Mellon Bank (as trustee for the Mortgage Series trust) and Residential Credit. Against Mellon Bank, the complaint alleged: (1) wrongful foreclosure; (2) cancellation of instruments; (3) fraud and deceit; (4) violation of the California Homeowner's Bill of Rights; and (5) violation of the unlawful competition law (Bus. & Prof. Code, § 17200.) Booth asserted the same causes of action against Residential Credit except he added an intentional interference with contract claim, and did not include Residential Credit in the fraud claim. Booth sought damages, declaratory relief, and injunctive relief against both defendants, and also sought an accounting against Mellon Bank.

Booth's amended complaint "advanced two [primary] theories of recovery." First, Booth alleged the "wrong parties had foreclosed on his property." In support, Booth claimed the foreclosing entity (Mellon Bank, as trustee for the Mortgage Series trust) was not a lawful owner of the secured debt because it obtained ownership through assignments from MERS, and MERS had no authority to make the transfers. Booth also alleged various recorded documents were void because they were not signed by an authorized party.

Second, Booth claimed he was not in default on the Note because a third party had made "advances" on his loan. To support this 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 Notice of Default and Notice of Trustee's Sale.

### *Demurrer*

Mellon Bank and Residential Credit demurred to the first amended complaint on numerous grounds. Of relevance here, they argued Booth had no standing to challenge the securitization of the loan; the recorded documents are valid; and Booth did not allege any prejudice resulting from defendants' challenged actions. They also argued that Booth's theory his loan was "being paid down by" a third

party was not a valid ground for a wrongful foreclosure claim. Respondents additionally argued that several of the causes of action did not satisfy pleading requirements because Booth failed to allege specific facts supporting his claims.

After a hearing, the court sustained the demurrer without leave to amend. In a detailed order, the court discussed each of the causes of action, and explained its conclusion that Booth's claims were unsupported by the factual allegations and/or applicable law. The court found MERS's involvement in the assignments of the secured loan did not show a factual basis for the causes of action, and rejected Booth's theory that his loan was not in default because the PSA provides for the Master Servicer to advance funds to cover borrower-payment deficiencies.

Booth appeals.

## 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 \(\*Saterbak\*\).](#)) "[W]e assume the truth of all facts properly pleaded in the complaint and its exhibits or attachments, as well as those facts that may fairly be implied or inferred from the express allegations. [Citation.] 'We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.' [Citation.]" ([\*Cobb v. O'Connell\* \(2005\) 134 Cal.App.4th 91, 95.](#)) Facts contained "in exhibits attached to a complaint will . . . be accepted as true and will be given precedence over any contrary allegations in the pleadings." ([\*Banis Restaurant Design, Inc. v. Serrano\*\(2005\) 134 Cal.App.4th 1035, 1044-1045.](#))

In reviewing the court's refusal to permit an amendment, we are governed by an abuse-of-discretion standard. ([\*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. Procedure, § 472c, subd. (a); [\*Sanowicz v. Bacal\*\(2015\) 234 Cal.App.4th 1027, 1044.](#))

## **II. Wrongful Foreclosure Cause of Action**

### **A. Governing Law**

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.](#))

With respect to the first element, a "foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action. [Citations.] [O]nly the original beneficiary, its assignee or an agent of one of these has the authority to instruct the trustee to initiate and complete a nonjudicial foreclosure sale." ([\*Yvanova, supra\*, 62 Cal.4th at p. 929.](#)) In *Yvanova*, the California Supreme Court held a borrower has standing to raise such a challenge to a completed foreclosure sale based on an alleged void loan assignment to the foreclosing beneficiary. (*Id.* at pp. 929-943.) California courts have since reaffirmed that *Yvanova's* holding applies only after a completed foreclosure sale and only if the alleged defective assignment was a void rather than a voidable transaction. (See [\*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.\)](#)

Booth contends he pled a viable basis for recovering on his wrongful foreclosure claim based on his allegations that: (1) the assignments from MERS to Mellon Bank (as trustee for the Mortgage Series trust) were void; (2) the advance payments made under the PSA established his loan was not in default; (3) the Notice of Default and Notice of Trustee's Sale were void; and (4) the Substitution of Trustee document was void. For the reasons explained below, we find these allegations do not support Booth's wrongful foreclosure cause of action.

### **B. Allegations Assignments to Mellon Bank Are Void Based on MERS Lack of Authority**

As his primary appellate challenge, Booth contends the court erred in sustaining the demurrer on his wrongful foreclosure claim because Mellon Bank lacked authority to foreclose as it obtained ownership of the Note and Deed of Trust

through a void assignment. **Specifically, he argues the assigning entity (MERS) lacked authority to execute the assignment documents.**

**The argument is without merit. The Deed of Trust allows the Lender to transfer the Note and Deed of Trust "one or more times without prior notice to Borrower." The Deed of Trust also expressly states that MERS may act on behalf of the Lender (or the Lender's successors and assigns), including to "exercise any or all of the Lender's interests." These provisions provide MERS with the right to transfer the Note and Deed of Trust on the Lender's behalf to a third party.** (*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.)

Booth recognizes these general principles, but 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 (Countrywide) and without this written identification, the assignment was void. Booth further argues the trial court was required to review the "agency agreement" to determine whether MERS could assign the Note and Deed of Trust.

**These arguments are unavailing. 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.<sup>[2]</sup> However, even assuming section 1624, subdivision (a)(3) applies to deeds of trust, this writing requirement was satisfied because **the Deed of Trust contained language expressly authorizing MERS to act on Countrywide's behalf. Both Countrywide 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 Countrywide's interests in the secured loan.**

Booth's reliance on *Fisher v. Salmon* (1851) 1 Cal. 413 is also 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,<sup>[3]</sup> *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 contends the First Assignment is void because the individual who signed the First Assignment on behalf of MERS failed to identify his or her agency with MERS. The First Assignment specifically identifies T. Sevillano (whose signature on the document was notarized) as "Assistant Secretary." This was sufficient to establish Sevillano's authorized status to sign the document. In his complaint, Booth alleged that Sevillano "claimed to act as an authorized officer of MERS, . . . though T. Sevillano had no written authorization from MERS to act as an officer of MERS and therefore the [First Assignment] is null and void." In his brief, Booth suggests that Sevillano is an employee of Recon Trust or Security Connections (an alleged agent of Mellon Bank).

**Booth does not cite to any legal authority for his argument that a person who signs a document on behalf of MERS is required to have written authorization to do so, or that the individual cannot also be employed by another entity. In any event, the absence of such written authority makes the assignment at most voidable, not void.** (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.) An alleged voidable assignment does not support a wrongful foreclosure cause of action under California law. ([\*Yvanova, supra\*](#), 62 Cal.4th at pp. 929-943.)

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. In support, Booth states that he has alleged Mellon Bank is not a MERS member, and therefore MERS's authority was terminated upon the initial transfer of the secured loan to Mellon Bank. (See [\*Culhane v. Aurora Loan Services of Neb.\*](#) (1st Cir. 2013) 708 F.3d 282, 287.) We need not reach this argument. Even assuming MERS had no additional authority after executing the First Assignment, 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 Mellon Bank's ownership of the Note and Deed of Trust and its foreclosure right.

In this portion of his brief, Booth contends there is no evidence the Note was a negotiable note, and he can allege the Note "is a paid to order Note." By failing to cite to applicable authority or factually and legally develop this argument, Booth forfeited the contention.

### *C. Alleged Advance Payments*

Booth next contends the court erred in sustaining the demurrer on his wrongful foreclosure claim **because his complaint contains allegations that he was not in default at the time of the foreclosure sale. He claims an unidentified third party made payments on his loan, reducing or eliminating the outstanding loan balance.**

To determine whether these allegations state a cause of action for wrongful foreclosure, we first examine the relevant portions of Booth's complaint. We then determine whether there is a legal basis for a wrongful foreclosure claim based on these factual allegations.

**In his complaint, Booth alleged that the PSA requires the "servicer" to "advance payments on the debt."** In support, Booth attached two pages of the PSA, which state that under certain circumstances the trust's "Master Servicer" (identified 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 additionally alleged that the amounts due on his loan as stated in the May 2014 Notice of Default and the August 2014 Notice of Trustee's Sale were inaccurate because these amounts "conflict[ ]" with Mellon Bank's "report[ ] [of] the balance of the loan as \$523,732.15 and no past principal and interest payments due." Booth attached a copy of this one-page report, dated May 24, 2014. Booth alleged this document shows his loan was "current and in decline as of May 24, 2014" and reflects that there was "no default."

These allegations do not show a viable wrongful foreclosure cause of action. First, the May 2014 report attached to the complaint conflicts with Booth's appellate assertions. Assuming the document was prepared by Mellon Bank *and* that the figures relied upon by Booth actually refer to Booth's loan (issues that are not

entirely clear), the document indicates the subject loan *has been "Delinquent" for 54 months* and states that the "Current Balance" is \$525,732.15. (Italics added.) From this information, the only reasonable inference is that in May 2014, Booth's loan had been in default for more than two years, and the balance owed on the loan as of that date was \$525,732.15 (unclear whether this amount includes interest and late charges). This information does not suggest the amount stated on the May 2014 Notice of Default (\$203,118.60) was inaccurate, as the \$203,118.60 figure pertains to the amount necessary to reinstate the loan, not the total balance owing on the loan. Likewise, the report does not support a falsity claim with respect to the amount stated on the August 2014 Notice of Trustee's Sale (\$741,005.45) since this latter figure represents the total amount owed on the loan, which may include interest, late charges, and costs of the sale.

But even assuming the May 2014 report can be read as supporting Booth's argument that his loan was not in default, **Booth does not suggest that he met his payment obligations on the loan before the foreclosure sale. He instead argues he is entitled to a claimed reduced balance because the "Master Servicer" or other unnamed third party made payments on the loan under the PSA. Assuming his complaint can be interpreted to properly allege these facts, the federal courts have consistently rejected similar arguments.** (See, e.g., *Casault v. Federal Nat. Mortg. Assn.* (C.D. Cal. 2012) 915 F.Supp.2d 1113, 1135-1136 (*Casault*) [dismissal of complaint proper "even if [court] accepts as true that Servicer Defendants made Advances to the Trustee Defendants when the Plaintiffs were delinquent on their loan payments"]; *In re Rivera* (Jul. 28, 2016, BAP No. NC-15-1120-KiTaJu) 2016 WL 5868693, at \*10-\*11 (*Rivera*); *Pulliam v. PennyMac Mortg. Investment Trust Holding I LLC* (D.Me. July 31, 2014) No. 2:13-CV-456-JDL, 2014 WL 3784238, at \*3-\*4 (*Pulliam*); *Ouch v. Fed. Nat. Mortg Assn.* (D.Mass. Jan. 10, 2013) No. 11-12090-RW2, 2013 WL 139765, at \*3-\*4 (*Ouch*); *In re Schmeclar* (Bankr. N.D. Ill. 2015) 531 B.R. 735, 739-740 (*Schmeclar*).)

These courts reason that a **BORROWER CANNOT TAKE ADVANTAGE OF ADVANCES MADE BY A PARTY TO AN INVESTMENT POOLING AGREEMENT BECAUSE THE ADVANCES ARE NOT MADE ON BEHALF OF, OR FOR THE BENEFIT OF, THE BORROWER.** Instead the payments are made pursuant to an internal contractual obligation for the sole benefit of the parties to the agreement. (See *Rivera, supra*, 2016 WL 5868693, at \*10-\*11; *Pulliam, supra*, No. 2:13-CV-456-JDL, 2014 WL 3784238, at \*4.) A borrower is not a party to, or a third-party beneficiary of, the securitized investment agreement. (See *Schmeclar, supra*, 531 B.R. at p. 739; *Pulliam*,

*supra*, 2014 WL 3784238, at \*4; *Ouch*, *supra*, 2013 WL 139765, at \*3; see also *Casault*, *supra*, 915 F.Supp.2d at p. 1135.) Thus, **the securitized trust agreement's internally-generated advances do not reduce or negate a borrower's loan obligations.**

We agree with this reasoning as applied to this case. **The Master Servicer's alleged advances were made solely under its own contractual obligations owed to the parties to the PSA, and there is no allegation they were intended to benefit Booth. Additionally, because the PSA provides the advances are reimbursable, the advances do not replace or satisfy Booth's obligation to repay his loan.** (See *Casault*, *supra*, 915 F.Supp.2d at p. 1135; *Rivera*, *supra*, 2016 WL 5868693 at \*11.)

**The language of the Deed of Trust supports this conclusion. The Deed of Trust authorizes the successor lender (Mellon Bank) to initiate a foreclosure sale against the borrower when the borrower has failed to make his mortgage payments or is otherwise in default. The Deed of Trust permits the foreclosure when there is a default even if the Lender has "accept[ed] payments from third persons. . . ." Under these terms, if the Borrower fails to perform the covenants and agreements contained in the Deed of Trust, the Lender may "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Agreement. . . ." **Because the PSA is independent of the borrower's obligations and the Deed of Trust can be read to authorize a foreclosure against the borrower even when the lender has made arrangements with a third party to cover its losses, the alleged advances by the Master Servicer did not preclude the lender from exercising foreclosure rights.** (See *In re Rivera*, *supra*, 2016 WL 5868693, at \*10-\*11.)**

This conclusion does not suggest a secured lender may disregard payments made *on the borrower's behalf*; for example, by a relative or friend to assist the borrower with his or her contractual obligations. **But the advances allegedly made in this case were derived from an independent contract among the parties to the securitized pooling arrangement (including the beneficiary and the "Master Servicer") and were not made to reduce Booth's loan obligation.**

Booth argues the advances mean that he now owes his debt to the Master Servicer (and not to the lender or successor lender), and the Master Servicer (as an unsecured lender based on the advances) had no standing to assert foreclosure rights. This argument does not support a wrongful foreclosure claim. The alleged facts do not reflect that the Lender (or the successor lender, here Mellon Bank, as

trustee for the Mortgage Series trust) lost its status as a secured creditor by accepting payments under a separate contract, to which Booth was not a party.

**Booth contends in his appellate brief that he has never admitted he is in default on his loan. Although this may be true, Booth has also never alleged he has paid the outstanding amounts owed on the loan.** Booth's factual allegations challenging the accuracy of the stated amounts of the loan default are based on: (1) the PSA provisions relating to "Advances"; and (2) an alleged internal lender report that indicates his loan has been delinquent for more than two years. Neither of these documents support Booth's arguments that the amounts due as stated on the Notice of Default or the Notice of Trustee's Sale are inaccurate.

In his appellate briefs, Booth identifies two other claimed inaccuracies in the Notice of Default: (1) the Notice did not state "his/her right to bring forth an action"; and (2) the Notice failed to notify him that he could "request a copy of the Note or any other evidence[ ] of his debt, a copy of the deed of trust, and assignments of deed of trust. . . ." (See Civ. Code, § 2923.55, subd. (a)(1).) Booth argues that without this information, "no rights vested in Defendants to continue with the foreclosure." **We reject this argument because it is unsupported by any legal authority.**

Additionally, to state a wrongful foreclosure claim based on an alleged defective notice of default, **the party must show the claimed deficiencies prejudiced his or her rights, e.g., an irregularity in the proceeding adversely affected an ability to protect interests in the property.** (See *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11, 17-18.) To satisfy this pleading burden, **the plaintiff must affirmatively allege prejudice**; it is not presumed from a "mere irregularit[y]" in the process." (*Fontenot, supra*, 198 Cal.App.4th at p. 272.) The only exception from this rule requiring prejudice is where the foreclosure deed is void. (*Ram, supra*, at pp. 10-11.)

In this case, Booth did not allege any facts showing he was prejudiced by the claimed defects in the Notice of Default, nor did he allege any facts that the claimed deficiencies in the notices resulted in a void foreclosure deed. (See *Ram, supra*, 234 Cal.App.4th at p. 19 [**"notice defects" are generally "deemed voidable, not void"**].)

Finally, to recover on a wrongful foreclosure claim, **the trustor must make "an offer to pay the full amount of the debt for which the property was security."** (*Ram, supra*, 234 Cal.App.4th at p. 11, 18.) **"The rationale behind the rule is**

**that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]."** (*Id.* at p. 18.) An exception to this rule applies when the alleged facts show the foreclosure deed was void. (See *Yvanova, supra*, 62 Cal.4th at p. 929, fn. 4; *Sciaratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 565, fn. 10; *Ram, supra*, 234 Cal.App.4th at p. 11.) Booth did not **allege facts showing he tendered (or could tender) the amount owed or a void foreclosure deed.**

#### ***D. Substitution of Trustee Document***

Booth next contends his wrongful foreclosure claim is actionable based on his allegation the May 2014 recorded Substitution of Trustee (substituting First American in place of Recon Trust) was void. Booth contends this document was invalid because it was executed by a Residential Credit employee as "attorney in fact" for Mellon Bank, as trustee for the Mortgage Series trust. **Booth maintains the Residential Credit employee was an improper signatory because the Deed of Trust provides that only the "Lender" can appoint a successor trustee.**

**The argument is factually unsupported. Generally a contracting party may act through an agent.** (See Civ. Code, § 2295.) In the portion of the document relied upon by Booth, the Deed of Trust states: "Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the officer of the Recorder of the county in which the Property is located." **There is nothing in this language suggesting the successor lender (Mellon Bank, as trustee for the Mortgage Series trust) was prohibited from appointing an agent or attorney-in-fact to act on its behalf in appointing a successor trustee on the Deed of Trust.** Moreover, **even assuming the Substitution of Trustee contained any procedural irregularities, the recorded appointment of the successor trustee was binding on the parties.** (See Civ. Code, § 2934a, subd. (d); *Dimock v. Emerald Properties*(2000) 81 Cal.App.4th 868, 871.)

#### ***III. Tortious Interference Cause of Action***

Booth next contends the court erred in sustaining the demurrer on his intentional interference with contract cause of action against Residential Credit.

**The elements of a cause of action for intentional interference 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*).

In his amended complaint, Booth alleged Residential Credit acted as a loan servicer on behalf of the lender, and in this role Residential Credit "tortiously interfered with [Booth's] Loan Contracts by preventing [him] from pursuing modification solutions" with the lender, and "tortiously interfered in [Booth's] Loan Contracts for [its] own personal benefit to recoup advanced payments made by 3rd parties without any subrogation rights or secured interest."

These factual allegations do not satisfy the elements of the intentional interference tort.

First, although Booth identifies **VALID CONTRACTS (THE NOTE AND DEED OF TRUST)** between Booth and Mellon Bank (as the successor lender/beneficiary), Booth does not allege any intentional acts by Residential Credit designed to *interfere* with that contractual relationship. In his appellate briefs, Booth suggests that Residential Credit can be liable for tortious interference with the Note and Deed of Trust because Residential Credit made it more difficult for Booth "to explore modification or foreclosure alternatives." However, Booth does not identify what Residential Credit did to accomplish this result. He did not allege that he ever asked for a loan modification, or that Residential Credit had any involvement in loan modification discussions. Additionally, Booth does not assert that Mellon Bank had a contractual or statutory obligation to modify Booth's loan or that Mellon Bank or Residential Credit had any duty to initiate a loan modification discussion. At most, Booth alleged that Residential Credit "prevented [him] from pursuing modification solutions" because it had a personal interest in the payment of the loan obligation based on "advanced payments made by 3rd parties." However, this is a conclusory assertion that is insufficient to overcome a demurrer. There are no factual allegations supporting that Residential Credit had a "personal interest" in the payment obligations or that it engaged in any acts preventing Booth "from pursuing [a] modification."

The record shows **Booth breached the Note and Deed of Trust by failing to make the required payments,** and then by failing to cure the default. There are no allegations that Residential Credit induced Booth into defaulting, or that Residential Credit induced or encouraged Mellon Bank to breach or terminate the agreement. Booth suggests in his appellate brief that he could add allegations that Residential Credit "made his performance more expensive and difficult" because it

did not "explore modification or foreclosure alternatives." This allegation would not cure the pleading deficiencies because Booth never alleged he asked for the loan to be modified, and **there are no facts showing Mellon or Residential Credit had any contractual duties with respect to requested modifications.**

Additionally, even if Booth had properly alleged an act of intentional interference by Residential Credit, Residential Credit cannot be held liable for this tort **because it was acting as Mellon Bank's agent in its role as the loan servicer**. Under the Deed of Trust, **the loan servicer manages borrower's payment obligations and performs other administrative tasks on behalf of the Lender**. In performing this role, Residential Credit cannot be held liable for intentionally interfering with its principal's contracts.

**A claim for tortious interference "does not lie against a party to the contract,"** (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 (*Applied Equipment*)), or against the party's agents (*Mintz, supra*, 172 Cal.App.4th at pp. 1603-1607). **An agent cannot be liable for interfering with its principal's contracts.** (*Id.* at pp. 1603-1607; see *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24-25; see also *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310, 1316; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 739, pp. 1065-1066.) Contrary to Booth's assertions, the fact that he alleged Residential Credit may have had its own interests in enforcing 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. Myer, supra*, 52 Cal.3d at p. 24; see also *Applied Equipment Corp., supra*, 7 Cal.4th at pp. 513-514; *Mintz, supra*, 172 Cal.App.4th at p. 1604, fn. 3; *Luxul Technology Inc. v. Nectar Lux, LLC* (N.D. Cal. 2015) 2015 WL 4692571, \*8.)

#### ***IV. Remaining Causes of Action***

The court also sustained the demurrer without leave to amend on Booth's causes of action against Mellon Bank and Residential Credit for (1) cancellation of written instrument; (2) declaratory and injunctive relief; (3) fraud (against Mellon Bank only); (4) violation of the California Homeowner Bill of Rights; (5) violation of Business and Professions Code section 17200; and (6) accounting (against Mellon Bank only). 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. In any event, Booth acknowledges these causes of action were based on essentially the same factual theories as were alleged on the wrongful foreclosure cause of action. For the same reasons we find these theories do not support a wrongful foreclosure claim, we find they also fail to support these additional causes of action.

#### ***V. 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 court did not abuse its discretion in denying Booth leave to file a second amended complaint. There is nothing in the record or in Booth's lengthy appellate briefs showing he could add facts to his amended pleading that would support a viable cause of action under California law.

#### **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 CWMBBS,[ ]Inc. CHL Mortgage Pass-through Trust 2007-J3 Mortgage Pass-Through Certificates, Series 2007-J3." (Bold font and some capitalization omitted.)

[2] 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."

[3] 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.](#))