GERALD CARROLL, Plaintiff and Appellant,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.

No. G053336.

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

Filed August 24, 2017.

Appeal from a judgment of the Superior Court of Orange County, Super. Ct. No. 30-2014-00726336, Craig L. Griffin, Judge. Affirmed.

Joseph La Costa for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Elizabeth Holt Andrews for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OPINION

IKOLA, J.

Plaintiff Gerald Carroll defaulted on a $1.9 million loan and sued various institutions for declaratory relief, negligence, quiet title, slander of title, unfair business practices (Bus. & Prof. Code, § 17200), and cancellation of instruments. He appeals from the judgment entered following the sustaining of defendants' demurrer to his second amended complaint for negligence and unfair business practices without leave to amend. His argument on appeal, however, is limited to the trial court's ruling sustaining without leave to amend the demurrer to the cause of action for declaratory relief alleged in the first amended complaint (FAC).[1] Finding no error, we affirm.

FACTS

In September 2006, Carroll obtained a loan from Countrywide Bank, N.A. (Countrywide),[2] secured by a deed of trust (DOT) on real property located in Laguna Beach. The DOT listed Countrywide as the lender, ReconTrust Company, N.A (ReconTrust) as the trustee, and Mortgage Electonic Registration Systems, Inc. (MERS)[3] as the nominee and beneficiary.

The DOT, signed by Carroll, states that both the DOT and the underlying promissory note (note) "can be sold one or more times without prior notice to Borrower." In November 2011, MERS, at BofA's request, recorded an assignment of the DOT to The Bank of New York Mellon fka The Bank of New York (Mellon) as Trustee for the Holders of Structured Asset Mortgage Investments II Trust 2006-AR8, Mortgage Pass-Through Certificates Series 2006-AR8 (2006-AR8 trust). The 2006-AR8 trust is a real estate mortgage investment conduit trust; its terms are set forth in a pooling and servicing agreement (PSA) for the trust, which is governed by New York or Delaware law. Under the PSA, all loans had to be transferred to the 2006-AR8 trust before October 15, 2006.

In January 2012, ReconTrust recorded a notice of default. Several months later, ReconTrust recorded a notice of trustee's sale set for May 7, 2012. The sale never took place and in July 2013, BofA recorded an assignment of the DOT to Nationstar Mortgage, LLC (Nationstar).[4] Thereafter in December 2013, ReconTrust recorded a notice of rescission of the declaration/notice of default and demand/election to sell.

Carroll sued BofA, Mellon, and Specialized Loan Servicing (SLS), and his former loan servicer, for, among other things, declaratory relief, negligence, and unfair business practices. The case was removed to federal court but remanded back to state court after Carroll's two federal claims were dismissed.

Defendants demurred to the complaint, but before the date of the hearing, Carroll filed the FAC, in which he added Nationstar as a defendant and causes of action for quiet title, slander of title, and cancellation of instruments. In the cause of action for declaratory relief, alleged against Mellon, BofA, and Nationstar, Carroll pleaded an actual controversy existed because "none of the parties claiming payment is due is the real party holding the note and the right to collect." Carroll alleged Mellon and BofA did not have any right or interest in his note, DOT, or property, or to enforce the note or DOT because: (1) the 2011 assignment was ineffective to transfer

the note and DOT from BofA to Mellon as trustee for the 2006-AR8 trust because the trust had closed in 2006, before the execution of the assignment; and (2) the 2013 assignment from BofA to Nationstar was ineffective to transfer the note and DOT to Nationstar because after they were assigned to Mellon, there was "no subsequent assignment to" BofA.

The trial court sustained defendants' demurrer to the FAC with leave to amend the causes of action for negligence and unfair business practices, but without leave to amend those for declaratory relief, quiet title, slander of title, and cancellation of instruments. Carroll filed a second amended complaint for negligence and unfair business practices and defendants again demurred. The trial court sustained the demurrer to both causes of action without leave to amend.

DISCUSSION

We review a trial court's order sustaining a demurrer de novo and apply the abuse of discretion standard in reviewing the court's denial of leave to amend the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1250-1252.) Where the court sustains a demurrer without leave to amend, we decide if "there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] . . . [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "In conducting our de novo review, we `must "give [] the complaint a reasonable interpretation, and treat[ ] the demurrer as admitting all material facts properly pleaded." [Citation.] Because only factual allegations are considered on demurrer, we must disregard any "contentions, deductions or conclusions of fact or law alleged. . . ."'" (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 151.)

To maintain a cause of action for declaratory relief, Carroll must allege an actual controversy. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Carroll contends the actual controversy is whether "the [d]efendant has standing to collect payments on the relevant mortgage note," given the "break in the chain of title" caused by the 2011 and 2013 assignments of the note and DOT. Carroll does not identify which defendant he is referring to. But that doesn't matter because Carroll lacks standing to challenge the assignments.

Saterbak v. JPMorgan Chase Bank, N.A. (2016) 245 Cal.App.4th 808, 814 (*Saterbak*) is instructive. There, the plaintiff purchased real property and received a grant deed. She executed a promissory note secured by DOT, naming MERS as the beneficiary with the right, among other things, to foreclose and sell the property. At some point, MERS assigned the DOT to "`Citibank, N.A. as Trustee for the [2007-AR7 trust].'" (*Id.* at p. 811.) When the plaintiff fell behind in her payments, Citibank substituted and appointed a default servicing corporation (NDS) as trustee under the DOT. NDS recorded a notice of default and later a notice of trustee's sale, with a date set for a foreclosure sale. (*Id.* at pp. 811-812.)

The plaintiff sued, seeking to cancel the assignment of the DOT to the 2007-AR7 trust and obtain judicial relief on the ground the assignment was void because it did not occur "until years after the closing date" of the trust and also "the signature . . . on the assignment document was forged or robo-signed." (*Saterbak, supra,* 245 Cal.App.4th at p. 814.) The appellate court held, "Saterbak lacks standing to pursue these theories. The crux of Saterbak's argument is that she may bring a preemptive action to determine whether the 2007-AR7 trust may initiate a nonjudicial foreclosure. . . . However, **California courts do not allow such preemptive suits because they `would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.'** [Citations.] . . . **`[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that [the foreclosing party] demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.' [Citation.]"** (*Id.* at pp. 814-815.)

Saterbak noted the California Supreme Court had recently held that a borrower had standing to sue for wrongful foreclosure where an alleged defect in an assignment rendered the assignment void. (*Saterbak, supra,* 245 Cal.App.4th at p. 815, citing *Yvanova, supra,* 62 Cal.4th at pp. 942-943.) But *Saterbak* noted ***Yvanova's* ruling was expressly limited to post-foreclosure actions.** (*Saterbak,* at p. 815.) Moreover, as *Saterbak* explained, even in the post-foreclosure context, ***Yvanova* recognizes borrower standing to challenge an assignment "only where the defect in the assignment renders the assignment *void,* rather than *voidable.*"** (*Saterbak,* at p. 815.)

Yvanova declined to consider "whether a postclosing date transfer into a New York securitized trust," such as that at issue here, "is void or merely voidable. . . ." (*Yvanova, supra,* 62 Cal.4th at p. 931.) *Saterbak,* however, squarely addressed the issue and concluded **AN UNTIMELY ASSIGNMENT TO A SECURITIZED TRUST IS MERELY VOIDABLE, RATHER THAN VOID.** (*Saterbak, supra,* 245 Cal.App.4th at p. 815.) Other appellate courts have reached the same conclusion. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 42-43 [Third Appellate District]; *Mendoza v. JPMorgan Case Bank, N.A.* (2016) 6 Cal.App.5th 802, 811-817 [Third Appellate District]; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1256-1260 [Second Appellate District, Division One].)

We follow this consistent line of authority and conclude the assignment of the note to the trust was at most voidable, rather than void. Carroll does not have standing to challenge a voidable assignment. (*Saterbak, supra,* 245 Cal.App.4th at p. 815.)

Abuse of Discretion

Carroll claims he should be given leave to amend his complaint for a third time. He bears "the burden of demonstrating that sustaining the demurrer without leave to amend was an abuse of discretion." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 444.) This means he must show a reasonable possibility that an amendment will cure the defects in the operative pleading. (*Ibid.*) Carroll did not provide a proposed amendment to cure the flaws in their pleading or suggest on appeal how he might cure those defects if given an opportunity to amend. Because Carroll has not demonstrated a reasonable possibility that a further amendment will cure his defects, he has not carried his burden of showing the court abused its discretion in denying leave to amend.

DISPOSITION

The judgment is affirmed. Respondent's shall recover their costs on appeal.

BEDSWORTH, ACTING P. J. and MOORE, J., concurs.

[1] Although "`an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884), this rule does not apply when a demurrer has been sustained without leave to

amend as to some causes of action but not others. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 208-209, superseded by statute on a different point as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228-229.) Here, the court sustained the demurrer to the declaratory relief cause of action without leave to amend, while allowing amendment to other causes of action.

[2] Bank of America, N.A. (BofA) is Countrywide's successor by merger.

[3] "MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender's `nominee,' having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 931, fn. 7 (*Yvanova*).)

[4] Defendants correctly note the 2013 assignment has not been included in the record on appeal and argue Carroll has therefore waived any argument about it. But in reviewing a trial court's order sustaining a demurrer without leave to amend, we must "`"treat the demurrer as admitting all material facts properly pleaded""' (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173) and "assume the truth of the properly pleaded factual allegations. . . ." (*Freemont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.) Although we may "also consider the facts appearing in exhibits attached to the complaint (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 733), defendants have cited no authority requiring written documents to be attached to a complaint where no breach of contract cause of action is asserted. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489 [breach of contract claim requires pleading of a contract by setting "out verbatim in the complaint or [attaching] a copy of the contract . . . to the complaint . . . or [pleading] its legal effect"].)

In Carroll's opening brief on appeal, he acknowledges that the alleged 2013 assignment to Nationstar was done by MERS on behalf of BofA.