

YEHEZKEL HEZI KASHANIAN, Plaintiff and Appellant,
v.
INDYMAC VENTURE, LLC, Defendant and Respondent.

[No. B271113.](#)

Court of Appeals of California, Second District, Division Two.

Filed June 29, 2017.

APPEAL from a judgment of the Superior Court of Los Angeles County, Super. Ct. No. BC587983, Malcolm H. Mackey, Judge. Affirmed.

Saied Kashani for Plaintiff and Appellant.

Dykema Gossett, J. Kevin Snyder, Brian H. Newman for Defendant and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

GOODMAN, J.^[*]

Appellant Yehezkel Hezi Kashanian appeals from a judgment of dismissal after the trial court sustained without leave to amend a demurrer to the first amended complaint filed by respondent IndyMac Venture, LLC (IndyMac). After the nonjudicial foreclosure of his home, Kashanian sued IndyMac for damages, alleging it lacked authority to foreclose because the assignment through which it purportedly became the beneficiary of the deed of trust was void. The trial court, citing [Jenkins v. JP Morgan Chase Bank, N.A. \(2013\) 216 Cal.App.4th 497, 514-515](#), sustained IndyMac's demurrer principally on the ground that Kashanian lacked standing to challenge an invalid assignment. Several months later, in [Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919 \(Yvanova\)](#), our Supreme Court held that a homeowner has standing to challenge an assignment that is allegedly void, even though the homeowner was in default on the loan and was not a party to the assignment. On appeal, Kashanian contends *Yvanova*

requires reversal of the judgment below. We disagree, and affirm the judgment of dismissal.

BACKGROUND

On July 18, 2007, Kashanian obtained a \$5 million loan from IndyMac Bank, F.S.B. (IndyMac Bank), secured by real property located at 13870 Mulholland Drive, Los Angeles, California (the property). The deed of trust named IndyMac Bank as its beneficiary. On July 11, 2008, IndyMac Bank's assets were put into receivership with the Federal Deposit Insurance Corporation (FDIC).

On June 30, 2009, a Corporation Assignment of Deed of Trust was recorded assigning all rights under the deed of trust together with "the note(s) described or referred to" in the deed of trust from the FDIC to IndyMac.^[1] On December 15, 2011, a Notice of Default was recorded. That same date, an Assignment of Deed of Trust was recorded assigning "all beneficial interest" under the deed of trust "together with the note or notes therein described and secured thereby" in the deed of trust from IndyMac to OneWest Bank, F.S.B. (OneWest).

On July 9, 2012, at the direction of IndyMac, the property was sold at a trustee's sale. On July 10, 2012, the "Assistant Secretary" of OneWest obtained a notarization of her signature on an Assignment of Deed of Trust which assigned "all beneficial interest" under the deed of trust together with "the note or notes therein described and secured thereby" in the deed of trust from OneWest to IndyMac (Assignment). The Assignment contained the following statement: "Effective Date: July 9, 2012." Kashanian alleged the Assignment was not actually signed until July 10, 2012, and was then backdated to July 9, 2012. The Assignment was recorded on July 16, 2012, the same date a Trustee's Deed Upon Sale was recorded stating the property had been purchased by IndyMac. Kashanian later discovered the property was purchased by credit bid, a process available only to the "present beneficiary" of the deed of trust, by which "the beneficiary `bids' up to the amount due on the loan, and this bid is `credited' against the loan with no cash or money actually changing hands." Thereafter, Kashanian was evicted from the property.

On July 14, 2015, Kashanian filed a complaint against IndyMac and Meridian Foreclosure Service^[2] in the Los Angeles Superior Court. After amendment on November 2, 2015, the complaint alleged causes of action for: (1) slander of title, (2) trespass, (3) wrongful eviction, and (4) wrongful foreclosure.^[3] Kashanian's claims were based on the theory that IndyMac had no authority to conduct the

foreclosure sale because the assignment from OneWest to IndyMac was improperly "backdated" making it legally void. Kashanian alleged "the instrument was not *signed* until July 10, 2012, otherwise, [OneWest] would have put the date of signature as July 9 and not 'effective date' July 9." (Original italics.) He further alleged it "makes no sense that [OneWest] would sign the instrument on July 9, 2012 and then wait until July 10 to take it to a notary *in [OneWest's] own office* to notarize the instrument." (Original italics.)

On November 30, 2015, IndyMac filed a demurrer, arguing the assignment from OneWest to IndyMac was valid because: (1) California law allows parties to an agreement to retroactively fix its effective date and therefore it did not matter when the Assignment was actually signed; (2) the notarization of the Assignment had no legal significance to the asserted claims; and (3) a trial court had already determined the Assignment was effective as of July 9, 2012, in a post-foreclosure quiet title action filed by IndyMac against a junior lien holder. IndyMac further argued Kashanian must allege he was prejudiced by the Assignment and that he could have tendered the full balance of his loan, but failed to do so.

On December 23, 2015, the trial court sustained the demurrer without leave to amend. It ruled, inter alia, that "[a]s an unrelated third party to the contract, and not the victim, [Kashanian] lack[ed] standing to claim [an] invalid assignment[]." The trial court entered judgment in favor of IndyMac, dismissing the action with prejudice. On March 21, 2016, Kashanian filed a notice of appeal.

CONTENTIONS

Kashanian contends the trial court's judgment must be reversed based on *Yvanova*, which held a plaintiff has standing to challenge an assignment of deed of trust when the allegations, if true, would render the assignment "void, and not merely voidable at the behest of the parties to the assignment. . . ." ([*Yvanova, supra*, 62 Cal.4th at p. 923](#).) According to Kashanian, because a *grant* of real property is not effective unless actually signed and delivered under Civil Code^[4] sections 1053^[5] and 1054,^[6] his allegation that the *assignment* from OneWest to IndyMac was not signed until July 10, 2012, the day after the foreclosure sale, was sufficient to establish the assignment was void because "the parties cannot go back in time and sign and deliver the instrument prior to July 9." Kashanian also contends that as a result of the void assignment, IndyMac's credit bid was in violation of section 2924h,^[7] its "taking of the property was a conversion, its recording of a trustee's deed in its favor a slander of title, and its subsequent eviction of [Kashanian] and his family a trespass and wrongful."

IndyMac contends *Yvanova* is inapposite because Kashanian's allegation that "the Assignment was somehow not effective on July 9, 2012" is "directly and irrefutably contradicted by the [Assignment] itself." IndyMac contends Kashanian's description of the notary's jurat is inaccurate because "the jurat *does not* state that the Assignment was signed . . . on July 10, 2012"; rather, the jurat states only that "[OneWest] *appeared* before the notary and *acknowledged* that [it] had executed the Assignment." (Original italics.) IndyMac also contends that "because the parties to the Assignment (OneWest and [IndyMac]) agreed that the effective date of the Assignment was July 9, 2012, the Assignment was effective on that date, and the trustee's sale was valid." IndyMac further contends sections 1053 and 1054 are inapplicable to this action because an assignment of deed of trust is not a "grant" of real property.

DISCUSSION

I. Standard of Review

"The standard governing our review of an order sustaining a demurrer is well established. We review the order de novo, `exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]" ([Lefebvre v. Southern California Edison \(2016\) 244 Cal.App.4th 143, 151.](#)) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." ([Yvanova, supra, 62 Cal.4th at p. 924.](#)) "In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action." ([Schifando v. City of Los Angeles \(2003\) 31 Cal.4th 1074, 1081.](#))

II. The Trial Court Did Not Err in Sustaining IndyMac's Demurrer to the First Amended Complaint

Kashanian contends *Yvanova* requires reversal of the trial court's order sustaining the demurrer because the assignment from OneWest to IndyMac was void as result of the backdated effective date.

In *Yvanova*, our Supreme Court held that a "home loan borrower has standing to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust was not merely voidable but void, depriving the foreclosing party of any legitimate authority to order a trustee's sale." ([Yvanova, 62 Cal.4th at pp. 942-943.](#)) The Court

explained that "[a] void contract is without legal effect. . . . `Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it. . . .' [Citation.]" (*Id.* at p. 929.) "A voidable transaction, in contrast, `is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance. . . ." (*Id.* at p. 930.) Other than setting forth this basic explanation of the difference between void and voidable contracts, the Court declined to provide guidance on what type of defects might render an assignment void. (*Id.* at p. 924.)

Thus, our analysis in this case is two-fold: we must first determine whether the first amended complaint alleged facts sufficient to establish the Assignment was defective and, if it did, we must then determine whether the alleged defect rendered the Assignment void. Kashanian contends the Assignment is defective because under sections 1053 and 1054 "[p]rior to the date of actual signature, the `delivery' [of the Assignment] would have been of a blank, unsigned grant which is ineffective." Put differently, Kashanian contends the foreclosure sale was improper because "[IndyMac] did not hold either the [promissory] note or the deed of trust until after the sale." Kashanian's reliance on sections 1053 and 1054 is misplaced.

It is well-settled that "Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." ([Moeller v. Lien \(1994\) 25 Cal.App.4th 822, 830.](#)) Under a deed of trust, "the borrower, or `trustor,' conveys nominal title to property to an intermediary, the `trustee,' who holds that title as security for repayment of the loan to the lender, or `beneficiary.' [Citations.]" ([Kachlon v. Markowitz \(2008\) 168 Cal.App.4th 316, 334.](#)) Over the life of the loan, "[a] deed of trust may [] be assigned one or multiple times." ([Yvanova, 62 Cal.4th at p. 927.](#)) **"The deed of trust . . . is inseparable from the [promissory] note it secures, and follows it even without a separate assignment." (*Ibid.*) When a borrower defaults on a loan, "only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process."** (*Id.* at pp. 927-928.)

Notwithstanding the assignable nature of a deed of trust, **California's nonjudicial foreclosure scheme does not require that an assignment of a deed of trust must be signed and delivered prior to the foreclosure sale in order to be effective.** This reasoning is consistent with decisions of our appellate courts which have repeatedly rejected the argument that a beneficiary of a deed of trust must possess the underlying deed of trust and promissory note in order to commence and

carry out a nonjudicial foreclosure sale. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1004 ["**[W]e decline to read additional requirements into the nonjudicial foreclosure statute requiring the note and the deed of trust to be held by the same party.**"]; *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511 ["**California's statutory nonjudicial foreclosure scheme (§§ 2924-2924k) does not require that the foreclosing party have . . . physical possession of the note.**"]; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 ["**We . . . see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note.**"].)

Moreover, sections 1053 and 1054 concern "grants" rather than "assignments" and do not implicate the "comprehensive" framework of the nonjudicial foreclosure process. For this reason, we decline to apply sections 1053 and 1054 to assignments of deeds of trust. (*Debrunner v. Deutsche Bank National Trust Co.*, *supra* 204 Cal.App.4th at p. 441 ["**Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.**" [Citation.]]; see also *Moeller, supra*, 25 Cal.App.4th at p. 834 ["**It would be inconsistent with the comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.**"].) Thus, **Kashanian's contention that the alleged backdated assignment from OneWest prevented IndyMac from foreclosing on his property is without merit.**

Additionally, even assuming the backdated Assignment were defective, we are not persuaded the alleged defect would render the Assignment void. In support of his contention the Assignment is void, Kashanian relies on the holding of *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, a post-*Yvanova* decision, which he argues is "directly on point." In *Sciarratta*, the plaintiff alleged Bank of America had no authority to conduct the foreclosure sale of her property because Chase Bank, the successor in interest of her original lender, having previously assigned the rights under the deed of trust to Deutsche Bank, could not thereafter assign the same interests to Bank of America. (*Id.* at pp. 563-564.) The trial court sustained defendants' demurrer without leave to amend. (*Id.* at p. 561.) The Court of Appeal reversed, holding an assignment is void, and not merely voidable, where an assignor has nothing to assign. (*Id.* at p. 564.) This holding has no relevance here.

In *Sciarratta*, the asserted defect could not be cured by the parties (that is, Chase Bank and Bank of America) because Deutsche Bank was the current beneficiary under the deed of trust. Here, by contrast, **because OneWest had not previously assigned its rights under the deed of trust, it could cure the alleged untimely transfer of those rights by backdating the effective date of the Assignment. Under this circumstance, the Assignment was merely voidable and was subject to ratification by the parties.** (*Yvanova*, 62 Cal.4th at p. 930 ["Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties."]; *Mortgage Associates, Inc. v. Fidelity & Deposit Co. of Maryland* (2002) 105 Cal.App.4th 28, 38, fn. 5 ["THE FACT THAT THE LOANS AND RESULTING DEEDS OF TRUST WERE OBTAINED BY FRAUD OR FORGERY WOULD MAKE THE DEEDS VOIDABLE, NOT VOID. . . ."].)

We also reject Kashanian's contention that an "unlawful credit bid is further grounds to reject any notation that the subsequent backdated assignment 'cured' or 'validated' the purchase" because "a foreclosing beneficiary could rig any sale by inviting or allowing an unauthorized entity to credit bid on the day of the sale." It appears Kashanian misunderstands the credit bid process. "At a nonjudicial foreclosure sale, if the lender chooses to bid, it does so in the capacity of a purchaser. [Citation.] The only distinction between the lender and any other bidder is that the lender is not required to pay cash, but is entitled to make a credit bid up to the amount of the outstanding indebtedness. [Citations.] The purpose of this entitlement is to avoid the inefficiency of requiring the lender to tender cash which would only be immediately returned to it." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238.) Thus, whether or not an assignment of deed of trust is backdated does not "rig" the sale of the property because the lender who makes a credit bid is treated the same as any other purchaser and must still compete with other bidders.

Accordingly, the trial court did not err in sustaining IndyMac's demurrer to the first amended complaint. *Yvanova* does not compel us to reach a different result.^[8]

III. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend

"If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not." [Citation.] "The burden of proving such reasonable possibility is squarely on the plaintiff." [Citation.] To satisfy this burden, "a plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his

pleading"" by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action." ([Graham v. Bank of America, N.A. \(2014\) 226 Cal.App.4th 594, 618.](#))

Kashanian has failed to explain how, if given the opportunity, he would amend his complaint to meet these requirements. Accordingly, there is no basis to conclude the trial court abused its discretion in denying Kashanian leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. IndyMac is to recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ASHMANN-GERST, Acting P.J. and CHAVEZ, J., concurs.

[*] Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] Despite the similarity in name, IndyMac has "no relationship whatsoever" with IndyMac Bank.

[2] Meridian Foreclosure Service is not a party to this appeal.

[3] The first amended complaint attached as exhibits the recorded notice of default, notice of trustee's sale, corporation assignment of deed of trust, assignment of deed of trust from IndyMac to OneWest, assignment of deed of trust from OneWest to IndyMac and the trustee's deed upon sale. In evaluating the ruling on demurrer, we take judicial notice of the existence and content of the recorded documents, but not of disputed or disputable facts stated in those documents. (Evid. Code, §§ 452, subds. (c) & (h), 459, subd. (a); [Yvanova, 62 Cal.4th at p. 924, fn. 1.](#))

[4] All further statutory references are to the Civil Code unless otherwise stated.

[5] Section 1053 provides: "A transfer in writing is called a grant, or conveyance, or bill of sale. The term `grant,' in this and the next two Articles, includes all these instruments, unless it is specially applied to real property."

[6] Section 1054 provides: "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."

[7] Section 2924h provides, in part: "The present beneficiary of the deed of trust under foreclosure shall have the right to offset his or her bid or bids only to the extent of the total amount due the beneficiary including the trustee's fees and expenses."

[8] Because we conclude Kashanian does not have standing to challenge the assignment of his mortgage, we do not address Kashanian's other contentions. Nor do we address the California

Homeowner Bill of Rights (Sen. Bill No. 900 (2011-2012 Reg. Sess.); Assem. Bill No. 278 (2011-2012 Reg. Sess.) July 11, 2012), as it did not become effective until after the conclusion of the transaction which is the subject of this appeal. ([*Saterbak v. JP Morgan Chase Bank, N.A.*](#) (2016) 245 Cal.App.4th 808, 818 [Homeowner Bill of Rights does not apply retroactively].)