

RONALD LONTOC, et al., Plaintiffs and Appellants,
v.
BANK OF AMERICA, N.A., et al., Defendants and Respondents.
[No. A145819.](#)
Court of Appeals of California, First District, Division Two.

Filed November 14, 2016.

Appeal from the Contra Costa County, Superior Court No. MSC14-01109.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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RICHMAN, J.

In 2006, appellants Ronald and Mariel Lontoc (Lontocs) borrowed \$545,550 from First Magnus Financial Corporation, via a promissory note secured by a deed of trust. The Lontocs went into default, and in early 2012, a notice of default was recorded. In late 2012, a foreclosure sale was scheduled, ultimately to be rescheduled several times via later notices. The foreclosure sale never occurred.

In June 2014, the Lontocs filed a complaint alleging four causes of action: wrongful foreclosure; quiet title; violation of Business and Professions Code section 17200; and unjust enrichment. Defendants demurred, and the trial court sustained the demurrer with leave to amend. The Lontocs amended, defendants again demurred, and this time the trial court sustained the demurrers without leave to amend. We affirm, concluding that the Lontocs have not alleged, and cannot allege, a claim for wrongful foreclosure, the cause of action that is the cornerstone of their complaint—indeed, the only cause of action they discuss on appeal.

BACKGROUND

Introduction

As indicated, in 2006, the Lontocs obtained a \$545,550 loan from First

Magnus Financial Corporation (First Magnus). The Lontocs signed a promissory note that provided among other things:

— "Lender may transfer this Note";

— "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the `Note Holder'";

— "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount"; and

"In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed . . . protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note."

The note was secured by a deed of trust that identified First Magnus as the lender, First American Title as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, "solely as a nominee for Lender and Lender's successors and assigns." The deed of trust also provided that "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. . . ." The deed of trust also provided that "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the `Loan Servicer') that collects Period Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law."

As explained, for example, by the Court of Appeals in [*Rajamin v. Deutsche Bank Nat'l Trust Co.* \(2d Cir. 2014\) 757 F.3d 79, 81-82 \(*Rajamin*\)](#), the originating lenders frequently pool residential loans and sell them to a securitization trust, and the trustee, typically a bank, owns and holds the loans for the benefit of investors in the securitization trust. It parcels the right to receive the borrowers' payments into interests represented by certificates, and sells these residential "mortgage-backed securities" to investors. The trustee retains a loan servicer to administer the loans. A trust agreement, usually called a pooling and servicing agreement (PSA), creates the trust and governs the rights, duties, and obligations of the seller,

depositor, trustee, and servicer.

The Lontocs' opening brief devotes much of its 15-page statement of facts to a recitation of the history of their loan and deed of trust, and the various assignments involved, and how those (or at least some of those) assignments are claimed to be "null and void." We see no need to recite those facts in detail here. Suffice to say that the Lontocs went into default on the loan, and in February 2012, Recontrust Company, N.A. (Recontrust), which had been substituted in by Bank of America as the trustee on the deed of trust, recorded a notice of default. In October 2012, Recontrust recorded the first of three notices of trustee sale. A fourth notice of trustee sale was recorded in May 2014, this by the Wolf Firm, a Law Corporation, as trustee. No foreclosure sale ever took place.

The Lawsuit

On June 12, 2014, the Lontocs filed their complaint, naming four defendants: Bank of America; The Bank of New York Mellon f/k/a The Bank of New York as Trustee for the Alternative Loan Trust 2006-OA2 Mortgage Pass-Through Certificates, Series 2006-OA2^[1]; the Wolf Firm; and MERS. The complaint alleged four causes of action: (1) wrongful foreclosure; (2) quiet title; (3) violation of Business and Professions Code section 17200; and (4) unjust enrichment (i.e., quasi-contract for restitution based on unjust enrichment). The wrongful foreclosure cause of action alleged an illegal, fraudulent, and void transfer of title by Bank of New York, and that Bank of America, Recontrust, and the Wolf Firm knowingly filed void foreclosure documents.

The complaint also alleged that: the Lontocs "contend that the securitization of their loan, without more, extinguished any interest in their loan," the securitization was "defective" and "in direct contravention of the binding PSA," and the result was that MERS's assignment of the deed of trust to the Series 2006-OA2 trust was "void."

Bank of America, Bank of New York, and MERS filed a demurrer. The Lontocs filed opposition, and defendants a reply. The trial court sustained the demurrer with leave to amend, in an order that provided in pertinent part as follows: "All four causes of action are based on two theories arising from the securitization of plaintiffs' loan. Both theories lack merit. First, securitization in and of itself does not render a mortgage unenforceable. . . .

Second, plaintiffs lack standing to assert defective securitization."

In granting leave to amend, the trial court's order provided that "plaintiffs shall clarify the seeming discrepancy between paragraph 3 of the Complaint and the balance of the Complaint." Specifically, the court noted that "[i]n paragraph 3, plaintiffs allege that their causes of action do not depend on defective securitization," but "in the balance of the Complaint, plaintiffs allege defective securitization." And, the trial court advised: "If plaintiffs are relying on the theory stated in paragraph 3, it would appear that the extraneous allegations concerning defective securitization should be omitted from any further amended complaint. If instead plaintiffs are relying on defective securitization, it would appear that the allegations of paragraph 3 should be omitted. If plaintiffs are relying on some hybrid theory, the nature of that hybrid theory shall be more clearly alleged."

The Lontocs filed a first amended complaint, alleging the same four causes of action. The first numbered paragraph stated: "The thrust of Plaintiffs' complaint is that none of the named party defendants has standing to sell their home in foreclosure or to collect monthly mortgage payments from them." The Lontocs' brief states that, in response to the trial court's ruling, the first amended complaint "omitted . . . everything alleging defective securitization, as well as securitization in general. . . . Instead, Plaintiffs focused their allegations . . . on void documents . . . (including but not limited to the void Assignment of Deed of Trust), alleging that Defendants lacked authority to foreclose."

Defendants again demurred. Following full briefing, this time the court sustained the demurrer without leave to amend, setting forth three separate, and independent, bases for its decision:

"First, plaintiffs themselves affirmatively allege a clean and unbroken chain of title from the original lender to the currently foreclosing beneficiary. This chain of title was completed as of March 30, 2006, less than two months after loan origination and long before the loan went into foreclosure. . . .
"Second, plaintiffs' allegations concerning the allegedly defective nature of the recorded assignment are immaterial, because California law does not require that the assignment of a promissory note secured by a deed of trust be recorded at all. While defendants voluntarily chose to record an assignment in order to make the transfer of the beneficial interest to the current beneficiary a matter of public record, any defect in the performance

of that superfluous act cannot have voided an otherwise valid notice of default or notice of trustee's sale. [¶] . . . [¶]

"[Third], Plaintiffs allege and argue that the transfer of the beneficial interest from the original lender to the next entity in the chain of title somehow terminated the role of defendant Mortgage Electronic Registration Systems, Inc. ('MERS') as the nominal beneficiary. . . . MERS derives its role as the nominal beneficiary, not from a transitory agency relationship with the original lender, but rather from the contractual terms of the deed of trust itself. Changing that role would require a contractual modification of the deed of trust negotiated between the borrowers and the beneficiary, or a voluntary relinquishment of the nominee role on the part of MERS. Mere changes in the ownership of the beneficial interest from time to time—changes that the MERS system is designed to facilitate—cannot have the paradoxical effect of removing MERS from the picture."

Judgment was thereafter entered dismissing the complaint, from which the Lontocs filed a timely appeal.

DISCUSSION

Standard of Review

On appeal from a judgment after the court sustains a general demurrer without leave to amend, we determine whether the complaint states facts sufficient to constitute a cause of action. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions. We also consider matters that can be judicially noticed. And we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When the demurrer is sustained without leave to amend, we reverse if there is a reasonable possibility that the defect can be cured by amendment. ([Blank v. Kirwan \(1985\) 39 Cal.3d 311, 318.](#))

We also consider documents attached to the complaint, as well as matters subject to judicial notice. ([Hoffman v. Smithwoods RV Park, LLC \(2009\) 179 Cal.App.4th 390, 400.](#)) And "when the allegations of the complaint contradict or are inconsistent with [the judicially noticeable facts], we accept the latter and reject the former." ([Blatty v. New York Times Co. \(1986\) 42 Cal.3d 1033, 1040.](#)) As we have summed it up, "allegations in a complaint must yield to contrary allegations contained in exhibits to a complaint." ([Vallejo Development Co. v. Beck Development Co. \(1994\) 24 Cal.App.4th](#)

[929, 946.](#))

Introduction to the Analysis

Against the background of that settled authority, the Lontocs' brief has 15 pages of argument, addressing what they assert are the "three primary issues presented" by their appeal, described as follows:

"(1) Whether the Court erred by not considering allegations stated in the originally-pleaded complaint;

"(2) In an action for Wrongful Foreclosure on a Deed of Trust securing a home loan, whether a borrower has standing to challenge an assignment of the Note and Deed of Trust on the basis of defects allegedly rendering the assignment void; and

"(3) Whether a trial court commits reversible error when it sustains a demurrer without leave to amend where the plaintiffs have alleged facts showing entitlement to relief under *any* available theory."

We do not understand the significance of the first argument, and in any event would necessarily conclude that it could not be reversible error, not in light of our decision on the second, and fundamental, issue, the Lontocs' claim they had standing to assert a claim for wrongful foreclosure.

The Lontocs Do Not State, and Cannot State, a Claim for Wrongful Foreclosure

As indicated, the focus of the Lontocs' argument is on their first cause of action, for wrongful foreclosure, an argument premised in great part on the recent case of [Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919 \(Yvanova\)](#). The argument first quotes the trial court's order that they "lack standing," and then proceeds as follows:

"The California Fifth District Court of Appeal found standing for wrongful foreclosure based on void transfers in the securitization against another Plaintiff whose case is on point with Plaintiffs'/Appellants' case. [Glaski v. Bank of Am., N.A., 218 Cal.App.4th 1079 \(2013\)](#). After the *Glaski* Court made its ruling, various banks vigorously attempted to persuade the California Supreme Court to depublish the *Glaski* Court opinion, but the California Supreme Court, instead, rejected such efforts. [¶] . . . [¶]

"As far as alleging standing to challenge illegal, fraudulent and void

assignments relating to their Note and Deed of Trust, the Appellate Courts, prior to February 18, 2016, lacked uniformity in this issue. In fact, the California Appellate Courts[] rulings varied throughout California on this issue.

"However, on February 18, 2016, in reviewing *Yvanova v. New Century Mortgage Corporation, Et. Al.* (Supreme Court case number: S218973), the California Supreme Court concluded; [¶] `that because in a nonjudicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure.'

"The *Yvanova* case is very similar to Plaintiffs'/Appellants' case in that Plaintiff (Yvanova) alleged in her Complaint that the assignment of deed of trust was void based on defective securitization of her loan into a securitization trust, rendering her assignment void, not voidable." By no means. *Yvanova* is not "very similar" to the Lontocs' case. Indeed, as the Supreme Court expressly noted, their case was not involved. Yvanova borrowed \$483,000 in 2006, in connection with which she executed a deed of trust securing the loan on a residential property in Woodland Hills. (*Yvanova, supra, 62 Cal.4th at p. 924.*) Various assignments of the deed of trust occurred, the last substituting Western Progressive, LLC as trustee. (*Id.* at p. 925.) Then, as the Supreme Court described it, "A recorded trustee's deed upon sale dated December 24, 2012, states that plaintiff's Woodland Hills property was sold at public auction on September 14, 2012. The deed conveys the property from Western Progressive, LLC, as trustee, to the purchaser at auction." (*Ibid.*)

Yvanova sued, her operative second amended complaint alleging just one cause of action, for quiet title. Defendants demurred, and the trial court sustained the demurrer without leave to amend. Again in the words of the Supreme Court, "The Court of Appeal affirmed the judgment for defendants on their demurrer. The pleaded cause of action for quiet title failed fatally, the court held, because plaintiff did not allege she had tendered payment of her debt. The court went on to discuss the question, on which it had sought and received briefing, of whether plaintiff could, on the facts alleged, amend her complaint to plead a cause of action for wrongful foreclosure." (*Yvanova, supra, 62 Cal.4th at pp. 925-926.*)

The Supreme Court went on to observe that the Court of Appeal concluded leave to amend was not warranted, relying on *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*). (*Yvanova, supra*, 62 Cal.4th at p. 926.) But that court also "acknowledged that plaintiff's authority, *Glaski v. Bank of America, supra*, 218 Cal.App.4th 1079 (*Glaski*), conflicted with *Jenkins* on the standing issue, but **THE COURT AGREED WITH THE REASONING OF JENKINS AND DECLINED TO FOLLOW GLASKI.**" (*Yvanova*, at p. 926.) The Supreme Court "granted plaintiff's petition for review, limiting the issue to be briefed and argued to the following: `In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?'" (*Ibid.*)

The Supreme Court went on to answer that question in the affirmative, but not in any way applicable here. To the contrary, in the very introduction of the opinion, the Supreme Court observed as follows: "Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. **We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements.**" (*Yvanova, supra*, 62 Cal.4th at p. 924.)

While the Supreme Court went on to disapprove four opinions, including *Jenkins*, it did so only "to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void." (*Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.) As its invocation of *Jenkins*' holding on preemptive challenges to foreclosure authority confirms, the Supreme Court made it clear that these decisions otherwise remain valid: "This aspect of *Jenkins*, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review. . . ." (*Yvanova*, at p. 934.) Or, as the court said at an earlier point, "We do not hold or suggest that a

borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Id.* at p. 924.) That, of course, is the Lontocs' position here.

To the extent the Lontocs also rely on *Glaski*, that reliance, too, is unavailing. While the Supreme Court did adopt the *Glaski* view that standing may exist when a foreclosed borrower alleges facts showing an assignment is void, **it did not "hold or suggest that plaintiff in this case has alleged facts showing the assignment is void."** (*Yvanova, supra*, 62 Cal.4th at p. 924.) **And it did not reach the fundamental question of whether an assignment in violation of a PSA was void. Referring to the Second Circuit's rebuke of *Glaski*'s interpretation of New York law in *Rajamin, supra*, 757 F.3d 79, the Supreme Court wrote: "*Rajamin*'s expressed disagreement with *Glaski* . . . was on the question whether, under New York law, an assignment to a securitized trust made after the trust's closing date is void or merely voidable. . . . [T]hat question is outside the scope of our review and we express no opinion as to *Glaski*'s correctness on the point."** (*Yvanova*, at pp. 940-941.)

A month after *Yvanova*, the Fourth District Court of Appeal filed *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808 (*Saterbak*). It is dispositive of the Lontocs' position, holding as follows: "The California Supreme Court recently held that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment renders the assignment void. (*Yvanova, supra*, 62 Cal.4th at pp. 942-943.) However, *Yvanova*'s ruling is expressly limited to the post-foreclosure context. (*Id.* at pp. 934-935 [*narrow question*' under review was whether a borrower seeking remedies for *wrongful foreclosure* has standing, not whether a borrower could *preempt* a nonjudicial foreclosure].) Because *Saterbak* brings a preforeclosure suit challenging Defendant's ability to foreclose, *Yvanova* does not alter her standing obligations.

"Moreover, *Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment *void*, rather than *voidable*. (*Yvanova, supra*, 62 Cal.4th at pp. 942-943.) 'Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire.' (*Id.* at p. 936.) *Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely voidable. (*Id.* at pp. 940-941.) We conclude such an assignment is merely voidable. (See *Rajamin v. Deutsche Bank*

National Trust Co. (2d Cir. 2014) 757 F.3d 79, 88, 89 (Rajamin) [**the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the [PSAs] rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law'; `an unauthorized act by the trustee is not void but merely voidable by the beneficiary'**].) Consequently, Saterbak lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007-AR7 trust." (Saterbak, supra, 245 Cal.App.4th at p. 815, fns. omitted.)

The Supreme Court denied review.

Sciarratta v. U.S. Bank National Assn. (2016) 247 Cal.App.4th 552, belatedly cited at oral argument and on which we allowed supplemental briefing, is unresponsive to the Lontocs for the same reason. It involved "a homeowner who has been foreclosed on," which homeowner is necessarily "harmed by losing her home to an entity with no legal right to take it." (*Id.* at p. 555.)

Defendants' brief devotes six pages to a discussion of *Glaski*, a discussion that asserts that *Glaski's* interpretation of New York law was "mistaken." Defendants point out that *Glaski's* conclusion was not only rejected by the Second Circuit in Rajamin, supra, 757 F.3d at p. 90, they go on to state that "In Pike v. Deutsche Bank Nat'l Trust Co., 121 A.3d 279 (N.H. 2015), the Supreme Court of New Hampshire joined the Supreme Courts of Nevada, Rhode Island, and Vermont as well as six U.S. Courts of Appeal and a myriad of state intermediate courts in holding that borrowers lack standing to challenge the assignment of a Note and/or Deed of Trust as allegedly violative of a PSA." And defendants go on to cite to two state Supreme Courts, the First, Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeal, and intermediate state Appellate Courts of New Mexico, Hawaii, and Massachusetts. As defendants sum up, "Every appellate court to express an opinion as to *Glaski's* correctness on the point—including at least four state Supreme Courts, six U.S. Courts of Appeals, and intermediate courts in California and across the country—has concluded that an assignment proved to be in violation of a PSA would be voidable, not void."

Defendants' showing is, in a word, persuasive. The Lontocs did not even file a reply brief.

The Lontocs' third argument, that the trial court erred in not giving them leave to amend, does not even mention what they could allege by way of any

amendment—indeed, does not even mention the elements of any of their causes of action, let alone even mention the other three causes of action. The Lontocs entire argument on this point is as follows: "Here, Plaintiffs can cure any pleading insufficiencies by pleading with more supporting facts, including more specificity in their causes of action, through an allowed Second Amended Complaint. It is noteworthy that Plaintiffs have only filed a First Amended Complaint, in this case. [¶] Therefore, Plaintiffs allege that the Superior Court erred in refusing to allow Plaintiffs to amend their First Amended Complaint." It is manifestly insufficient.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. Kline, P.J. and Stewart, J., concurs.

[1] According to the Lontocs, "`Alternative Loan Trust 2006-OA2 Mortgage Pass-Through Certificates, Series 2006-OA2' refers to an investment trust that, at some point, purports to have acquired the Lontocs' mortgage note . . . and Deed of Trust."