

WALTER OLSZEWSKI, Plaintiff and Appellant,
v.
HSBC BANK USA NATIONAL ASSOCIATION et al., Defendants and
Respondents.

[No. B287644.](#)

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

Filed May 1, 2019.

APPEAL from a judgment of the Superior Court of Los Angeles County, Super. Ct. No. BC673156, Deirdre H. Hill, Judge. Affirmed.

Walter Olszewski, in pro. per., for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Ruby J. Chavez for Defendants and Respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

LEIS, J. ^[*]

Walter Olszewski appeals from the trial court's dismissal of his first amended complaint for wrongful foreclosure after the trial court sustained the demurrer of respondents HSBC Bank USA National Association, as Trustee on behalf of the certificate holders of the Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-OA3; National Default Servicing Corporation; and, Select Portfolio Services, Inc. He also appeals from the trial court's order denying consolidation of his wrongful foreclosure case with an unlawful detainer case filed against him. We affirm in full.

FACTUAL AND PROCEDURAL HISTORY

This case turns on, among other things, the interplay between appellant Walter Olszewski's successive complaints alleging the same causes of action against

respondents in two separate cases in two different departments of the Los Angeles Superior Court. Because this appeal is from a dismissal following the trial court's sustaining of a demurrer, we assume for the purposes of review the truth of all properly pleaded facts in the complaint and matters subject to judicial notice. We disregard, however, the complaint's legal conclusions, contentions, or deductions. ([*Blank v. Kirwan* \(1985\) 39 Cal.3d 311, 318.](#))

In March 2007, appellant Walter Olszewski refinanced his Altadena, California home by borrowing \$632,000 from AFTRA SAG Federal Credit Union (AFTRA). He signed a promissory note for the loan, which was secured by a deed of trust recorded in March 2007. The beneficiary under the deed of trust was Mortgage Electronic Registration Systems, Inc. (MERS), which also acted as the lender's nominee.

In July 2014, MERS executed and recorded on behalf of lender AFTRA a corporate assignment of the deed of trust. MERS's assignment was in favor of respondent HSBC Bank USA National Association, as Trustee on behalf of the certificate holders of the Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-OA3 (HSBC). A few weeks later, respondent National Default Servicing Corporation (NDS) substituted in to replace respondent Select Portfolio Services, Inc., as trustee. Later that same day, NDS recorded on HSBC's behalf a notice of default against appellant.

Almost two years later in May 2016, with the appellate record revealing very little having happened that is pertinent to this appeal, appellant mailed to HSBC and AFTRA his notice purportedly rescinding the loan. The notice claimed HSBC and AFTRA had allegedly not complied with Civil Code section 2923.5. That statute requires, in relevant part, that before a mortgage servicer — here, NDS — may file a notice of default against a delinquent borrower on a home loan, the servicer must first try to contact the borrower to discuss the borrower's "financial situation" and possible alternatives to foreclosure. (See Civ. Code, § 2923.55, subd. (c).) Appellant alleges that respondents violated the statute by not contacting him to discuss alternatives to foreclosure before NDS filed the notice of default against him in July 2014.

A week-and-a-half after appellant mailed his notice of rescission, NDS filed a second Notice of Trustee's Sale. (NDS's first Notice of Trustee's Sale had expired in February 2015 without a sale taking place.) While the re-noticed trustee's sale was pending, appellant filed his complaint in December 2016 against respondents (the Prior Action) in Department 46 of the Los Angeles Superior Court alleging

causes of action for cancellation of instrument and declaratory relief. (Case No. BC643324.) A month later in January 2017, respondents demurred to the Prior Action's complaint on the grounds the complaint was unintelligible and failed to state a cause of action. While respondents' demurrer was pending, appellant's home was sold at foreclosure in February 2017, and HSBC took title under a trustee's deed of sale. Despite the trustee's foreclosure sale, appellant pressed on and a few weeks later filed his opposition to respondents' demurrer. Appellant's opposition asserted a new claim not raised in his complaint, namely HSBC's deed of trust on his home and foreclosure were allegedly void because appellant had rescinded his home loan.

In June 2017, Department 46 sustained without leave to amend respondents' demurrer in the Prior Action. After sustaining the demurrer, Department 46 informed appellant that the court would postpone dismissing his case in order to let appellant file a motion for leave to file a first amended complaint with new causes of action. The court ordered that appellant must file his motion no later than August 8, 2017, otherwise the court would dismiss the case. (*Olszewski v. HSBC Bank USA National Assn.* (Jan. 24, 2019, B285991) [nonpub. opn.] p. 2.)

Appellant did not accept Department 46's invitation; instead, appellant attempted to file a first amended complaint without the court's leave after the court's August 8 deadline passed. Appellant's first amended complaint alleged the *same eight causes of action* that are at issue in this appeal. Based on appellant's failure to timely file a motion for leave to file a first amended complaint, Department 46 dismissed the Prior Action, from which appellant appealed. In a nonpublished opinion in January 2019, our colleagues in Division 5 affirmed the dismissal. (*Olszewski v. HSBC Bank USA National Assn.*, *supra*, B285991.)

In the meantime, several days before Department 46 dismissed the Prior Action, appellant filed in Los Angeles Superior Court Department 49 the case on appeal before us. While the appeal in the Prior Action from Department 46 was pending before our colleagues in Division 5, respondents demurred to appellant's first amended complaint in Department 49. Respondents correctly argued that appellant's causes of action in Department 49 repeated the Prior Action's causes of action. Thus, respondents contended, res judicata and collateral estoppel barred appellant's attempt in Department 49 to revive the Prior Action's dismissed causes of action. Moreover, according to respondents, the causes of action failed on their merits even if they could be revived. Appellant did not file an opposition to respondents' demurrer.

In December 2017, Department 49 sustained respondents' demurrer without leave to amend, finding that res judicata barred appellant's claims. The trial court further found, in the alternative, that each cause of action was legally deficient and thus each one failed on its merits for reasons that we shall discuss, *post*. The trial court entered its judgment of dismissal on February 8, 2018, and this appeal followed.

STANDARD OF REVIEW

"In examining the sufficiency of the complaint, "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citations.] "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." [Citation.]" ([*State of California ex rel. Bowen v. Bank of America Corp.* \(2005\) 126 Cal.App.4th 225, 239.](#))

DISCUSSION

Demurrer was Properly Sustained

Appellant's first amended complaint (FAC) in this appeal alleged the following causes of action: wrongful foreclosure; violation of Civil Code section 2924.17 (a part of California Homeowner Bill of Rights, Cal. Civ. Code, § 2923.4 et seq.); to vacate and set aside the trustee's sale; cancellation of trustee's deed upon sale; cancellation of instrument (Civ. Code, § 3412); quiet title; violation of Business and Professions Code section 17200 (also known as an Unfair Business Practice); and, cancellation of the mortgage. The trial court found that appellant's FAC alleged the very same causes of action that Department 46 had dismissed in the Prior Action.^[1] The trial court thus sustained respondents' demurrer based on res judicata. (See [*Wilson v. Wilson* \(1978\) 78 Cal.App.3d 226, 230](#) [**final judgment sustaining a demurrer is res judicata as to the matters pleaded in the complaint**].)

Appellant contends the trial court erred by relying on res judicata because Department 46 had invited appellant to file in the Prior Action a new complaint

stating new causes of action besides the Prior Action's dismissed causes of action for cancellation of instrument and declaratory relief. Appellant's contention misses the mark because, even if one assumes res judicata did not apply, appellant has not addressed with cogent argument supported by authority the alternative grounds on which the trial court sustained respondents' demurrer: the legal insufficiency of every cause of action. ([Calvert v. Al Binali \(2018\) 29 Cal.App.5th 954, 964](#); [In re Marriage of Falcone & Fyke \(2008\) 164 Cal.App.4th 814, 830.](#)) We now turn to each of those causes of action.

Wrongful Foreclosure:

The trial court found appellant did not state a cause of action for wrongful foreclosure for multiple reasons. First, **appellant did not allege he had tendered repayment of his loan.** (See, e.g., [Chavez v. Indymac Mortgage Services \(2013\) 219 Cal.App.4th 1052, 1062.](#)) Second, the trial court found respondents had authority to foreclose on appellant's home because case law established that **MERS could lawfully assign the deed of trust to HSBC.** Third, appellant's effort to enforce the purported rescission of the loan was untimely.

Appellant does not address on appeal any of the grounds on which the court found appellant had failed to state a cause of action for wrongful foreclosure. Instead, appellant contends foreclosure was wrongful because he had rescinded the loan, meaning respondents lacked authority to foreclose. In support, appellant cites [Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919](#), which states "A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure. [Citations.] A foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action." (*Id.* at p. 929.)

Appellant contradicts himself, however, about why and when he purportedly rescinded the loan. The FAC alleges appellant rescinded the loan in January 2010 based on lender AFTRA's violation of Regulation Z disclosure requirements involving the lender's identity and the actual loan amount and finance charges. (See [Jesinoski v. Countrywide Home Loans, Inc. \(2015\) ___ U.S. ___ \[135 S.Ct. 790, 190 L.Ed.2d 650\]](#) [borrower's right to rescind home loan under Truth in Lending Act for lender's failure to comply with disclosure provisions of TILA requires only written notice of intent to seek rescission rather than filing suit].) But the only notice of rescission in the record is the May 18, 2016, notice that appellant mailed to AFTRA and HSBC in which appellant alleged they had not complied with Civil Code section 2923.5. That statute requires that the mortgage servicer attempt to

contact the borrower to discuss the borrower's "financial situation" and alternatives to foreclosure before filing a notice of default.

Appellant's contradictory allegations create a quandary appellant does not resolve. If — as the FAC alleges — appellant relied on the Truth in Lending Act to rescind his loan in 2010, the trial court found appellant's cause of action was untimely — a point appellant does not address. On the other hand, if appellant purported to rescind the loan in 2016 because of the mortgage servicer's failure to contact appellant before filing the notice of default, **appellant's sole remedy is postponing the foreclosure sale.** ([Lueras v. BAC Home Loans Servicing, LP \(2013\) 221 Cal.App.4th 49, 77.](#)) And, **when the sale has occurred as in this case, there is no remedy.** ([Stebly v. Litton Loan Servicing, LLP \(2011\) 202 Cal.App.4th 522, 526.](#)) Appellant addresses neither point. Given appellant's failure to address the trial court's reasoning, he does not show that the trial court erred in sustaining the demurrer to his cause of action for wrongful disclosure. ([Keyes v. Bowen \(2010\) 189 Cal.App.4th 647, 655](#); [Niko v. Foreman \(2006\) 144 Cal.App.4th 344, 368.](#))

Violation of Civil Code section 2924.17:

Appellant's second cause of action alleged violation of Civil Code section 2924.17. The trial court found appellant's allegations were too conclusory and did not state how respondents had violated the statute. Because appellant does not address the court's reasoning, appellant does not show the court erred. ([Keyes v. Bowen, supra, 189 Cal.App.4th at p. 655](#); [Niko v. Foreman, supra, 144 Cal.App.4th at p. 368.](#))

Vacate and Set Aside Trustee's Sale:

Appellant's third cause of action sought to vacate and set aside the trustee's sale. The trial court noted this cause of action was similar to the cause of action for wrongful foreclosure and failed for the same reasons. Because appellant does not address the court's reasoning, appellant does not show the court erred. ([Keyes v. Bowen, supra, 189 Cal.App.4th at p. 655](#); [Niko v. Foreman, supra, 144 Cal.App.4th at p. 368.](#))

Cancellation of Instruments:

Appellant's fourth, fifth, and eighth causes of action sought cancellation of instruments (Cancellation of Trustee's Deed Upon Sale, Cancellation of Instrument, and Cancellation of Mortgage.) The trial court found appellant failed to state causes of action for the same reasons appellant's cause of action for wrongful

foreclosure failed. Because appellant does not address the court's reasoning, appellant does not show the court erred. ([Keyes v. Bowen, supra, 189 Cal.App.4th at p. 655](#); [Niko v. Foreman, supra, 144 Cal.App.4th at p. 368.](#))

Quiet Title:

Appellant's sixth cause of action sought to quiet title. The trial court found the cause of action failed because it rested on the flawed claim for wrongful foreclosure. The court additionally found appellant failed to state a cause of action because appellant had not alleged he had tendered his offer to repay the loan. Because appellant does not address the court's reasoning, appellant does not show the court erred. ([Keyes v. Bowen, supra, 189 Cal.App.4th at p. 655](#); [Niko v. Foreman, supra, 144 Cal.App.4th at p. 368.](#))

Unfair Business Practice:

Appellant's seventh cause of action alleged unfair business practices in violation of Business and Professions Code section 17200. The trial court found appellant failed to state a cause of action because appellant did not allege any conduct on which a viable claim of an unfair business practice could stand. Because appellant does not address the trial court's reasoning, appellant does not show the court erred. ([Keyes v. Bowen, supra, 189 Cal.App.4th at p. 655](#); [Niko v. Foreman, supra, 144 Cal.App.4th at p. 368.](#))

Appellant correctly notes that he may allege for the first time on appeal amendments to his complaint to state a cause of action. (See, e.g., [Maxton v. Western States Metals \(2012\) 203 Cal.App.4th 81, 95](#), disapproved on other grounds by [Ramos v. Brenntag Specialties, Inc. \(2016\) 63 Cal.4th 500.](#))^[2]

Appellant also correctly notes that California favors liberal adoption of amendments to pleadings. But it is not enough to state the general rules; appellant must also propose amendments. He does not do so here. For example, his brief criticizes the role of MERS in the mortgage industry, and offers a general discussion of the nature of debts, promissory notes, and mortgages. But he does not tie his discussion to the particulars of this case. ([Martine v. Heavenly Valley Limited Partnership \(2018\) 27 Cal.App.5th 715, 728](#) [**CITING AUTHORITY WITHOUT DISCUSSING THEIR APPLICATION TO THE CASE RESULTS IN FORFEITURE**].) He also asserts HSBC did not possess the right to enforce the deed of trust, but that is a legal conclusion not binding on us as we review a demurrer. ([State of California ex rel. Bowen v. Bank of America Corp., supra, 126 Cal.App.4th at p. 239.](#)) Appellant also engages in a general discussion

of the Step Transaction Doctrine, which arose from taxation cases, but his discussion does not analyze the facts of this case. Finally, he discusses what he perceives as the misapplication of presumptions involving validity of documents, but he does not cogently link his discussion to the facts of this case. Because appellant does not state what facts he would allege to state a cause of action if given leave to amend his complaint, the trial court did not err in entering judgment for respondents.

No Error in Denying Motion to Consolidate

Sometime after the foreclosure sale in February 2016 (the appellate record does not state when), HSBC filed an unlawful detainer complaint against appellant. One week after filing his initial complaint against respondents in this case, appellant filed a motion to consolidate his complaint with the unlawful detainer case against him. (Code Civ. Proc., § 1048, subd. (a).) Although the appellate record does not contain the reporter's transcript or the trial court's written ruling, appellant alleges, and respondents do not dispute, that the trial court denied consolidation in November 2017.

Appellant contends the court erred in denying consolidation. We review denial of consolidation for abuse of discretion. ([*Todd-Sternberg v. Dalkon Shield Claimants Trust* \(1996\) 48 Cal.App.4th 976, 978-979.](#)) Appellant bears the burden of showing the trial court erred. Appellant cannot meet that burden here because of the inadequate appellate record. (See, e.g., [*Foust v. San Jose Construction Co., Inc.* \(2011\) 198 Cal.App.4th 181, 186-187.](#)) Without a reporter's transcript or other record of the oral proceedings and without the court's written ruling, we are left to guess the reasons the court denied consolidation. Speculation cannot replace showing error. Appellant's contention thus fails.

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

CHANEY, Acting P. J., BENDIX, J.,

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

[1] Department 46 did not reject the Prior Action's and first amended complaint because it failed to state a cause, concurs. of action, but because appellant did not timely move for leave to file a new complaint. (*Olszewski v. HSBC Bank USA National Assn.*, *supra*, B285991, at p. 2; see conc.

opn. of Jaskol, J. [agreed with result, but questioned requiring appellant to seek leave to file an amended complaint].)

[2] Contrary to respondents' assertion, appellant's failing to request leave to amend the complaint in the trial court does not bar appellant from proposing amendments for the first time on appeal. ([*City of Stockton v. Superior Court \(Civic Partners Stockton, LLC\)* \(2007\) 42 Cal.4th 730, 746-747](#); [*Aubry v. Tri-City Hospital Dist.* \(1992\) 2 Cal.4th 962, 971](#); Code Civ. Proc., § 472c, subd. (a).)