THOMAS BORGES et al., Plaintiffs and Appellants,
v.
WESTERN PROGRESSIVE, LLC et al., Defendants and Respondents.

No. A151077.

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

Filed November 9, 2018.

Appeal from the Napa County, Superior Court No. 26-67925.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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RICHMAN, J.

Plaintiffs Thomas Borges and Rhonda Borges (when referred to collectively, appellants) appeal from a judgment of dismissal entered after the trial court sustained a demurrer to their second amended complaint without leave to amend. We affirm.

BACKGROUND

The General Setting[1]

In July 2007, appellants obtained a $1,102,500 loan from the Bank of America, N.A. (BANA). The loan was secured by a deed of trust against real property in Napa (the property) that was recorded on July 20, 2007 (the deed of trust). PRLAP, Inc. was the trustee under the deed of trust; BANA was the lender and beneficiary.

Appellants defaulted on the loan, and on December 13, 2011, a notice of default was recorded, indicating that appellants were in arrears $182,213.44 (2011 notice of default). The 2011 notice of default also notified appellants that the arrearages "will increase until your account becomes current."

On March 26, 2012, BANA, by Saxon Mortgage Services, Inc. as its attorney in fact, substituted The Wolf Firm, a Law Corporation, as the trustee of the deed of trust by a recorded substitution of trustee.

On October 31, 2014, an assignment of deed of trust was recorded in which BANA, by Ocwen Loan Servicing, LLC (Ocwen) as its attorney in fact, assigned and transferred its right, title, and interest in the deed of trust to "Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, Not in Its Individual Capacity but as Trustee of ARLP TRUST 5" (Christiana Trust).

On January 15, 2015, a substitution of trustee was recorded in which Christiana Trust, by Ocwen, substituted Western Progressive, LLC (Western Progressive) as the trustee under the deed of trust.

On April 27, 2015, Western Progressive recorded a notice of default indicating that as of April 8, 2015 appellants' arrearage had grown to $589,959.09 (2015 notice of default). The next day, Western Progressive recorded a notice of rescission of notice of default, rescinding the 2011 notice of default.

Servicing on the loan was transferred to Fay Servicing, and on August 26, 2015, Western Progressive, as trustee for the beneficiary, recorded a notice of trustee's sale, indicating that the unpaid balance on the loan was more than $1.5 million dollars. This notice also informed appellants that a sale would take place if they did not reinstate the loan; it also provided a telephone number and website by which appellants could obtain information about the sale.

On November 30, 2015, the property was sold to Christiana Trust for $949,000, some $600,000 less than the amount due on the loan—and far less than the original loan. The deed upon sale was recorded on December 18, 2015.

The Proceedings Below

On December 22, 2015, represented by counsel Michael Rooney, appellants filed a complaint. It named three defendants, Western Progressive, Ocwen, and Christiana Trust,[2] and alleged three causes of action, for cancellation of instruments, declaratory judgment, and wrongful foreclosure. Some two

months later, on February 2, 2016, appellants recorded a notice of pendency of action (lis pendens).

Ocwen and Christiana Trust both filed demurrers, the former on February 18, 2016, the latter on March 8. Christiana Trust also moved to expunge the lis pendens.

On March 30, appellants filed a consolidated opposition to both demurrers and the motion to expunge. Ocwen and Christiana Trust both filed replies. And because appellants' opposition was improperly served on Christiana Trust, the trial court allowed Christiana Trust to amend its reply, which was filed on April 22.

A tentative ruling was issued sustaining both demurrers with leave to amend and granting the motion to expunge the lis pendens. The trial court determined that the complaint failed to state any claim for relief against defendants and was based on "speculation." Appellants did not request oral argument, and did not appear at the hearing, and on April 29 the court entered orders sustaining the demurrers with leave to amend and expunging the lis pendens.[3]

In early May, appellants filed a substitution of attorneys, substituting themselves in for Mr. Rooney, following which on six separate occasions the trial court extended appellants' time to file a first amended complaint until they obtained new counsel.

They did, and on October 12, through counsel Linda Fessler, appellants filed a verified first amended complaint (FAC), again asserting the same three causes of action, for cancellation of instruments, declaratory judgment, and wrongful foreclosure.

On October 20, Christiana Trust filed a demurrer to the FAC, and also moved to strike certain portions of it, set for hearing on November 18. Appellants filed their oppositions, and Christiana Trust its reply. Meanwhile, on November 16, Ocwen filed its demurrer to the FAC, set for hearing on January 12, 2017.

A tentative ruling was issued on Christiana Trust's demurrer and motion to strike, sustaining the demurrer and granting the motion to strike, with leave to amend. The tentative ruling noted that the "First Amended Complaint fails to allege any new facts, other than at paragraph 17, and those new

allegations are again speculative regarding where documents were actually signed." The trial court gave appellants "one final opportunity to plead facts sufficient." Again, appellants did not request oral argument, and did not appear at the hearing, and the trial court adopted the tentative ruling. And on November 30 entered an order reflecting this ruling.

On December 5, represented by Ms. Fessler, appellants filed their second amended complaint (SAC). The SAC again asserted the same three causes of action asserted in the prior complaints—cancellation, wrongful foreclosure, and declaratory judgment—and added six new causes of action, for: slander of title; violation of Business and Professions Code section 17200 et seq.; breach of the implied covenant of good faith and fair dealing; negligent infliction of emotional distress; intentional infliction of emotional distress; and quiet title. The SAC largely restated the prior two complaints, and asserted that all defendants lacked authority to foreclose because the assignment to Christiana Trust was void, both substitutions were void, and there was no operative notice of default.

On December 21, Christiana Trust filed a demurrer to the SAC, set for hearing on January 20, 2017. Appellants filed opposition, and Christiana Trust its reply.

Meanwhile, on January 6, Ocwen filed its own demurrer, set for hearing on January 31. Appellants filed their opposition on January 18, and Ocwen its reply.

A tentative ruling was issued sustaining Christiana Trust's demurrer without leave to amend and observing that Ocwen's demurrer was unnecessary in light of the trial court's ruling on Christiana Trust's demurrer. The trial court gave similar reasoning as it did when it sustained the demurrers to the original complaint and the FAC, and noted that the SAC added "nearly 20 pages of legal argument, but fail[ed] to allege any new facts." And the court added much more, specifically:

The trial court found that all the claims were "based on speculation that the agents for the trustee and beneficiary were not authorized, but there are no facts alleged to support these claims." And, the court continued, "The trustee, mortgagee, or beneficiary, or any of their authorized agents may initiate a non-judicial foreclosure. (Civ. Code 2924(a)(1).) There is no requirement that the power of attorney must be recorded under the facts of

this case; Civil Code section 2933 applies to cases where a mortgage is executed on behalf of a principal."

Further, the court also noted that *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), belatedly cited by appellants, did not support appellants' claims because it "applies to cases where the assignment at issue is void, not merely voidable, and considering the judicially noticed documents in this case, it does not appear [appellants] can properly allege any void assignment."

On the issue of the notice of default, the trial court held that "the first Notice of Default was rescinded, leaving only the second Notice of Default." There was no "authority prohibiting these filings."

Finally, the trial court dismissed the six newly added causes of action because a "plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so."

Appellants, still represented by counsel, did not request oral argument, and on January 31, the trial court adopted its tentative ruling. The order following the ruling was entered on February 6, and judgment entered on February 9.

On April 11, appellants filed a notice of appeal.

DISCUSSION

Introduction

Representing themselves, appellants have filed a 2567-word opening brief that cites one case—a 1929 decision from Florida—and mentions, without any discussion, eight California statutes, most of which have nothing to do with the issue at hand.[4] The brief is 16 pages long, though in reality it is much shorter, as many of the pages consist of only several lines of text. And the "Argument" reads in its entirety as follows:

"I. DUE PROCESS OF THE LAW
"A THE STANDARD OF REVIEW
"B ELEMENTS OF ACTION."

The standard of review passage says nothing about the standard of review. Rather, it begins as follows: "A. The Standard of Review. The Superior Court erred in awarding a judgment to the Defendants without Due Process as there is no substantial evidence to support that finding. On review, the appellate court looks to the record to see if there are facts to support Superior Courts findings. If there is any substantial evidence to support the verdict, the court will affirm. If there are conflicts in the facts, the court will resolve the conflict in favor of the party in which it is due or make a determination as the court sees fit."

Then, after mention of "[d]ue process of law" and the Sixth Amendment of the United States Constitution, it ends with this: "Due process was not served in this case. All of the allegations, citations and evidence provided by the Plaintiff pre-trial were disregarded, overturned and the rulings continually favored the Defendants."

And this is how appellants sum it up in their reply: "The assertion of the Appellant remains that the trial courts continual rejections were unfair and due process was not availed. Is it possible that both attorneys representing the Plaintiffs Appellants, in all volumes of the record, have not presented anything substantial? Additionally, is it not the process of depositions, discovery and a fair trial, where facts are presented, including expert witness testimonies, as to the substance and factual evidence to be decided by a jury? I remain in my contention, with the agreement of both of Appellants previous represented council, that due process was not served in the trial court."

The "Argument" in appellants' opening brief does discuss for some two and a half-pages one of their claimed causes of action, "Cancellation of Instruments." It then mentions, each in two lines without any discussion, "Declaratory Judgment" and "Wrongful Foreclosure." There is no mention in the "Argument" of the other six causes of action in the SAC, other than an earlier mention that they were included in the SAC.

In light of this, any claims as to those eight causes of action—all but cancellation of instruments—are waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 **["WHEN AN APPELLANT FAILS TO RAISE A POINT, OR ASSERTS IT BUT FAILS TO SUPPORT IT WITH REASONED ARGUMENT AND CITATIONS TO AUTHORITY, WE TREAT THE POINT AS WAIVED."]**; *Landry v.*

Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700 ["**When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary."].)**

We thus turn to discussion of the claim for cancellation of instruments.

Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. `We 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.' [Citation.] Further, we 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.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Our standard of review is de novo: "Treating as true all material facts properly pleaded, we determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory, regardless of the title under which the factual basis for relief is stated. [Citation.]" (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.)

"[T]he cardinal rule of appellate review [is] that a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) `In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."' (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) This general principle of appellate practice is an aspect of the constitutional

doctrine of reversible error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.)

In order to prevail on an appeal from an order sustaining a demurrer, appellants must affirmatively demonstrate error, that is, they must show that the facts pleaded are sufficient to "establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.)

Finally, and particularly apt here, are two admonitions from the Supreme Court: (1) Although we assume the truth of material factual allegations, we do not assume the truth of "mere contentions or assertions contradicted by judicially noticeable facts" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20); and (2) We will accept facts subject to judicial notice and reject allegations that "contradict or are inconsistent with such facts." (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040.)

Appellants Have Not Demonstrated Error as to the Cancellation of Instruments Cause of Action

As indicated, the bulk of appellants' opening brief is focused on the theory that the trial court's decision was not "fair" because it "disregarded" the "allegations, citations and evidence" put forth by appellants in support of their claims. Appellants baldly assert that the trial court violated their "due process" rights by disregarding their allegations, but they fail to explain how their allegations were sufficient. And they were not.

Generally speaking, **a cancellation of instruments claim must allege that a reasonable apprehension that an instrument left standing might cause serious injury to plaintiff; the instrument is invalid on its face; the instrument is void or voidable; the instrument was in existence or under defendant's control when the action was filed; and if the instrument is voidable rather than void, that plaintiff acted promptly to rescind.** (See generally Civ. Code, §§ 3412, 3413; *Hironymous v. Hiatt* (1921) 52 Cal.App. 727, 731.) The SAC does not measure up.

Reading appellants' brief as giving them the benefit of all doubts, as best we can tell they make three claims, that: (1) Ocwen was "not the attorney-in-fact" when it recorded the assignment to Christiana Trust and the

substitution of trustee to Western Progressive, and thus these documents are "void"; (2) Ocwen and Western Progressive were not the "Lender[s]" under the deed of trust with authority to foreclose; and (3) "[t]here was no operative" notice of default prior to the foreclosure. We consider them in turn—and conclude none has merit.

As to the "attorney-in-fact" claim, a preliminary question is whether appellants can perhaps make the claim, in light of the fact that they are not parties to the document and, even more significantly, because **Civil Code section 2934a, subdivision (d) states that "[o]nce recorded, the substitution [of trustee] shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section."** (See *Pullen v. Heyman Bros.* (1945) 71 Cal.App.2d 444, 452 **["Conclusive evidence" may not be contradicted**].)

But assuming appellants can make the claim, their allegations—made, we note on no more than "information and belief"—claim that a power of attorney needs to be recorded under Civil Code section 2933. As the trial court noted, however, this code section "applies to cases where a mortgage is executed on behalf of a principal." That, of course, is not the situation here.

Additionally, **appellants necessarily admit they executed the deed of trust, and thus recognize that the note (or a partial interest in it) can be sold one or more times without prior notice to the borrower.** Thus, and as was held in *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 817, **there is no reasonable expectation from this language that the parties intended to allow appellants to challenge future assignments made to unrelated third parties.**

Finally, **since an assignment of a deed of trust or the transfer of a note merely substitutes one beneficiary or creditor for another, any alleged impropriety in an assignment affects only the parties to the assignment, not appellants. The "true victim [would] be an individual or entity that believes it has a present beneficial interest in the promissory note [and deed of trust] and [has] suffer[ed] the unauthorized loss of its interest."** (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at pp. 939-941.)

APPELLANTS' SECOND CLAIM, THAT ONLY A "LENDER" CAN FORECLOSE, IS CONTRADICTED BY THE DEED OF TRUST

ITSELF, WHICH GIVES THE TRUSTEE THE "POWER OF SALE." Additionally, the statutory scheme set forth in the Civil Code specifically provides that **the foreclosure process may be conducted by the "trustee, mortgagee, or beneficiary *or any of their authorized agents.*"** (Civ. Code, § 2924, subds. (a)(1), (4), italics added; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) **The statutory scheme does not authorize the borrower to bring an action to determine whether the owner of the note has authorized its agent or nominee to initiate the foreclosure process.** (See *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155 **["The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures."].)** There is no factual basis alleged to even suggest that Ocwen was not the agent of Christiana Trust or that Western Progressive was not authorized to act for Christiana Trust, the beneficiary under the deed of trust. Christiana Trust as one of the respondents here makes no such contention, and, in fact has consistently asserted that Ocwen and Western Progressive were acting on its behalf.

Appellants' third claim essentially contends the 2015 notice of default was void because it was recorded before the 2011 notice of default was rescinded. This claim, once again nothing but a legal conclusion, is contradicted by the judicially noticeable documents. Thus, and as the trial court found, only the 2015 notice of default was operative at the time of foreclosure.

Throughout their opening brief, appellants repeat that the foreclosure was wrongful because the assignment of deed of trust and the substitutions of trustee were "void." But their opening brief does not address the trial court's ruling that appellants lack standing to challenge these documents in the first place, and thus any argument as to their standing to challenge these recorded documents to which they are not a party is waived. (See *Badie v. Bank of America, supra,* 67 Cal.App.4th at pp. 784-785; *Landry v. Berryessa Union School Dist., supra,* 39 Cal.App.4th at pp. 699-700.)

But even if appellants could make the claim, it would fail. While not cited by appellants on appeal, in their SAC appellants relied on *Yvanova, supra,* 62 Cal.4th 919 to support their claim that they had standing to challenge recorded documents to which they were not parties. The trial court correctly

determined that *Yvanova* provided no support to appellants because it "applies to cases where the assignment at issue is void, not merely voidable, and considering the judicially noticed documents in this case, it does not appear [appellants] can properly allege any void assignment."

The Trial Court Did Not Abuse Its Discretion in Denying Appellants Further Leave to Amend

On appeal, appellants claim that the trial court's decision was not "fair," and thus appear to assert that the trial court abused its discretion in sustaining the demurrer without leave to amend. Assuming appellants are making this claim, it must fail.

The burden of proving that a legally valid claim could have been stated by further amendment is on appellants. (*Zelig v. City of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) **To satisfy their burden, appellants "`"must show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading." [Citation.] . . . [They] must clearly and specifically set forth the "applicable substantive law" [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary.'"** (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.) This, appellants failed to do.

Appellants failed to demonstrate below that there was any possibility the defects in the SAC could be cured by a third amendment. Indeed, appellants do not even attempt to explain how they would change their complaint or what facts they would allege in a third amended complaint to plead facts sufficient to state a cause of action. To the contrary, the only potential additional allegations alluded to in the opening brief are conclusory assertions of allegedly fraudulent and predatory mortgage industry-wide practices—not facts related to this foreclosure.

DISPOSITION

The judgment is affirmed. Ocwen and Christiana Trust shall recover their costs on appeal.

Kline, P.J. and Stewart, J., concurs.

[1] This background comes from the first amended complaint and the judicially noticeable documents attached to requests for judicial notice granted by the trial court on July 5 and November 30, 2016.

[2] Western Progressive would later file a declaration of nonmonetary status and was never pursued.

[3] The order expunging the lis pendens was recorded on June 6, 2016.

[4] Called on this, appellants' reply brief, apparently authored by Rhonda Borges, says this: "Notwithstanding, Appellants as acting in pro per, not having a law degree the, failure or incapacity to cite any authority to substantiate my declarations in Appellant opening brief, as I understand is not required in an opening brief. Rule 8.204 Rule 8.204. Contents and form of briefs; indicates in (a) Contents (B): `. . . . support each point by argument and, *if possible* by citation of authority.' (Title 8. Appellate Rules Division 1. Rules Relating to the Supreme Court and Courts of Appeal). [¶] Therefore, my interpretation is `if possible' indicates it is not required of Appellant to cite authority. Yet, every argument, rendered in the reply briefs of the Defendants assert Plaintiff `failed' due to Appellant not citing authority is inconsequential and should not be considered." (Bold text omitted.)

The rule is that self-represented parties on appeal are "`to be treated like any other party and are entitled to the same, but no greater consideration than other litigants and attorneys. . . .' Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)