SHAMIL ALUKAY, Plaintiff and Appellant,
v.
CENTRAL MORTGAGE COMPANY et al., Defendants and Respondents.

No. A146940.

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

Filed October 13, 2017.

Appeal from the San Mateo County, Superior Court No. CIV528847.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.115

DONDERO, J.

Plaintiff Shamil Alukay defaulted on his mortgage. Foreclosure proceedings were instituted and his property was sold. He commenced this lawsuit by alleging the foreclosure was initiated on behalf of an entity to which the deed of trust was never validly assigned. Defendants Deutsche Bank National Trust Company (Deutsche Bank), Central Mortgage Company (CMC), PLM Loan Management Services, Inc. (PLM), and Mortgage Electronic Registration Systems, Inc. (MERS) demurred to his amended complaint, and the trial court sustained the demurrer without leave to amend. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Background

Because this appeal arises from the sustaining of a demurrer, in summarizing the history of the dispute we draw primarily from the facts asserted in the operative pleading, plaintiff's July 22, 2015 first amended complaint (FAC). In examining the FAC, "we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be

judicially noticed." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

On April 29, 2005, plaintiff obtained a $648,000 loan (Loan) evidenced by a promissory note (Note) secured by a deed of trust (DOT) recorded against his real property in San Bruno. The DOT identifies Downey Savings and Loan Association, F.A. (Downey) as the lender and beneficiary, and DSL Service Company as the trustee.

On or before June 30, 2005, Downey sold the Loan to the DSLA Mortgage Loan Trust 2005-AR4, for which Deutsche Bank serves as trustee. CMC was made the servicer of the Loan for Deutsche Bank.

On December 13, 2005, Downey executed an assignment of DOT (ADOT1), purporting to assign the DOT to MERS,[1] as nominee for CMC. The ADOT1 was executed by Crystal Moore, an alleged "notorious robo-signer," who signed the document falsely holding herself out as "Vice President" of Downey.

On January 4, 2006, the ADOT1 was recorded, evidencing the assignment of the DOT from Downey to MERS.

On October 31, 2008, CMC issued a notice of default (NOD1).

On March 17, 2009, plaintiff entered into a loan modification agreement (Agreement). The Agreement confirmed that CMC was acting as the lender with full authority to modify the Loan and enforce the DOT. The NOD1 was later rescinded.

On January 13, 2014, Jesse R. Womack, acting as assistant secretary of MERS, executed a second assignment of deed of trust (ADOT2), alleging that MERS was transferring its interest in the DOT to CMC.

On January 21, 2014, CMC executed a substitution of trustee, substituting PLM as trustee under the deed of trust

On January 24, 2014, PLM executed a notice of default (NOD2) on behalf of CMC. PLM also executed a notice of trustee's sale.

On January 27, 2014, the ADOT2 was recorded, evidencing the assignment of the DOT from MERS to CMC.

On March 9, 2015, PLM sold the property, transferring title from plaintiff to MOAB Investment Group, LLC (MOAB) through a trustee's deed upon sale.

II. Procedural History

On July 22, 2015, plaintiff filed the operative FAC. The FAC alleges causes of action for (1) wrongful foreclosure, (2) quiet title, (3) unfair business practices in violation of Business and Professions Code section 17200 et seq., and (4) accounting.

In his FAC, plaintiff alleged the Loan was securitized "[o]n or before June 30, 2005," and asserted that "the securitization of his loan, without more, extinguished any interest in his loan held by Downey." As a result, plaintiff claimed that Downey "had no interest to convey" to MERS on December 13, 2005. Thus, according to plaintiff, the ADOT1 recorded on January 4, 2006 (indicating the assignment of the DOT from Downey to MERS, as nominee for CMC) was void, and all subsequent assignments and recordings were equally invalid. In addition, plaintiff challenged the NOD2, claiming that it was "fatally defective, null and void" because it was executed by PLM on January 24, 2014, three days before the recording of the substitution of trustee appointing PLM.[2]

On August 7, 2015 defendants served their demurrer on plaintiff, along with a request for judicial notice. They demurred to the first, third, and fourth causes of action.[3]

On September 28, 2015 plaintiff filed his opposition to the demurrer.

On October 13, 2015, the trial court sustained defendants' demurrer without leave to amend. As to the wrongful foreclosure claim, the court concluded that even if the chain of transfers following the 2005 ADOT1 was void, plaintiff had not alleged why defendants did not have standing to enforce the 2009 Agreement, as the Agreement modifying the Loan was accompanied by a notice of rescission of all earlier foreclosure-related documents. With respect to the cause of action for unfair business practices, plaintiff had not pleaded facts to show that the alleged acts are likely to deceive the public at large. As to the cause of action for accounting, the court observed an accounting is merely a remedy and plaintiff had not alleged any basis for recovery of that form of equitable relief.

Notice of entry of the trial court's order was filed on November 10, 2015. This appeal followed.

DISCUSSION

I. Appealability

Plaintiff appeals from an order sustaining the demurrer to his complaint without leave to amend. But such an order is not appealable. As courts have stated many times, the "general rule of appealability is this: `An order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a [judgment of] dismissal on such an order.' [Citation.] But `when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order [sustaining the demurrer] to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1 (*Melton*).) A judgment of dismissal that leaves no issue remaining to be determined as to one of multiple parties is final as to that party and may be appealed. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568, disapproved on another ground as stated in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171 and *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 880.) That some of the named defendants were not parties to the demurrer does not render any judgment of dismissal unappealable.

In many cases, the prevailing party on a demurrer either neglects to obtain a judgment of dismissal, or does not have an opportunity to do so because the notice of appeal is filed prematurely. But since the trial court sustained the demurrer to all of plaintiff's causes of action without leave to amend as to defendants, they are entitled to a judgment of dismissal. "`We will accordingly deem the order on the demurrer to incorporate a judgment of dismissal and will review the order.'" (*Melton, supra*, 183 Cal.App.4th at pp. 527-528, fn. 1; see *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 906 [notice of appeal filed after minute order but before entry of signed written order treated as filed immediately after entry of written order]; but see *Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1180 [4th Dist. Court App., Div. 2, discontinued its policy of "saving" premature appeals and reaffirmed that "the responsibility to perfect appeals is firmly on the shoulders of appellants"].)

II. Standard of Review

The rules governing our review of the trial court's ruling are well settled. "A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons." (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.)

III. Wrongful Foreclosure

A. Background Legal Principles

"The financing or refinancing of real property in California is generally accomplished by the use of a deed of trust." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.) The legal context for wrongful foreclosure claims is set forth in the Supreme Court's recent decision in *Yvanova, supra*, 62 Cal.4th 919.[4] As *Yvanova* explained, **a deed of trust securing a promissory note has three parties: the borrower (the trustor), the lender (the beneficiary), and the trustee.** (*Id.* at p. 926.)

The trustee is not a true trustee and has no fiduciary obligations; its function is to act as an agent for the lender in initiating the foreclosure process in the event of default by the borrower: "`The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.' [Citation.] The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the

parties and conclusive as to a bona fide purchaser." (*Yvanova, supra*, 62 Cal.4th at p. 926.)

"The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. (Civ. Code, § 2924, subd. (a)(1).) **After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale.** ([Civ. Code,] §§ 2924, subd. (a)(2), 2924f, subd. (b).) If the sale is not postponed **and the borrower does not exercise his or her rights of reinstatement or redemption**, the property is sold at auction to the highest bidder. ([Civ. Code,] § 2924g, subd. (a).)" (*Yvanova, supra*, 62 Cal.4th at p. 927, fn. omitted.)

AS A NEGOTIABLE INSTRUMENT, THE PROMISSORY NOTE MAY BE TRANSFERRED WITHOUT THE APPROVAL OF, OR EVEN NOTICE TO, THE BORROWER. However, if the borrower defaults, only the current owner of the note has the authority to direct the trustee to undertake foreclosure proceedings. The initiation of nonjudicial foreclosure by a person without the legal authority to do so subjects that person and the trustee to liability for wrongful foreclosure. (*Yvanova, supra*, 62 Cal.4th at pp. 927-929.)

B. Plaintiff's Claim for Wrongful Foreclosure

1. Elements of Wrongful Foreclosure

"A wrongful foreclosure is a common law tort claim. It is an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper. [Citation.] The elements of a wrongful foreclosure cause of action are: `"(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.'" [Citation.] `[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case.' [Citation.] `[A]ll proximately caused damages may be recovered.'"

(*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561-562.)

2. Allegations of Void Assignment of the DOT

Plaintiff does not dispute that he defaulted on the Loan. His position is that neither CMC nor Deutsche Bank had any authority to foreclose or enforce the DOT, based solely on his theory that the 2005 ADOT1 was void and therefore all acts flowing from the 2005 ADOT1 are void. He relies on the timing of the ADOT1 assignment recorded in the public record to argue that defendants lacked any authority to enforce the DOT at the time of foreclosure. While he further asserts that the Loan and Note were not validly transferred, he sets forth no facts specifically involving those instruments. His claim fails as a matter of law.

Per statute, the equitable right to enforce a deed of trust follows the promissory note such that any transfer of the note automatically carries with it the right to enforce the security. Civil Code section 2936 provides that "[t]he assignment of a debt secured by mortgage carries with it the security." The recorded DOT assignments were done for legal title purposes to give constructive notice of the new legal titleholder under the DOT, i.e., the 2005 ADOT1 evidenced that Downey assigned the legal title to the DOT to MERS as beneficiary as nominee for CMC and its successors and assignees. The 2014 ADOT2 evidenced that MERS assigned the legal title to the DOT from MERS to CMC as beneficiary. These assignments had no effect on the actual transfer of the underlying note, or CMC's equitable right to enforce the DOT, which, by statute, followed the promissory note without any formal recorded assignment.

"When an assignment is merely voidable, the power to ratify or void the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Yvanova, supra*, 62 Cal.4th at p. 936.)

Recent California law uniformly holds that most asserted deficiencies in the securitization process, including an allegedly late assignment to a securitized trust, render the transaction, at most, "voidable" at the election of the trust,

and the mortgagor has no standing to pursue such claims. (E.g., *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 811-817 (*Mendoza*); *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815.) *Mendoza's* discussion of this issue is particularly thorough, and we agree with it entirely. (*Mendoza,* at pp. 811-817.) Thus, at best, plaintiff's allegations of defects in the assignment of the deed of trust to the securitized trust describe an assignment that was "voidable"—allegations that are insufficient to support a wrongful foreclosure claim. (*Ibid.*)

Plaintiff also insists that a robo-signed assignment is a void assignment, and a void assignment unravels the entire nonjudicial foreclosure.[5] Although the robo-signing allegation has been launched in many cases, plaintiff fails to cite any authority in which a court set aside a trustee's sale based on a robo-signed document. To the contrary, as a federal court has explained: "[T]o the extent that an assignment was in fact robo-signed, it would be voidable, not void, at the injured party's option." (*Pratap v. Wells Fargo Bank, N.A.* (N.D.Cal. 2014) 63 F.Supp.3d 1101, 1109.) The bank, not the borrower, would be the injured party. (*Ibid.*)

C. 2009 Modification Agreement

Even if the ADOT1 was void, the FAC alleges that plaintiff's Loan was modified by the 2009 Agreement, in which he contractually acknowledged and agreed that CMC was authorized to enforce the terms of the loan and enforce the DOT securing the Loan. Per the Agreement, CMC is specifically defined as the "Lender." As conceded in the Agreement, "Borrower promises to pay the Unpaid Principal Balance, plus interest, to the order of Lender" and "[a]ll the rights and remedies, stipulations, and conditions contained in the Security Instrument relating to default in the making of payments under the Security Instrument shall also apply to default in the making of the modified payments hereunder." Plaintiff's argument that CMC has and/or had no interest in the Note and no authority to foreclose under the DOT is belied by the language of the Agreement.

While plaintiff asserts CMC is not, and has never been, the "lender," there is no requirement barring a noteholder's agent from taking title in its name: "Civil Code section 2924, subdivision (a)(1), which states that a trustee, mortgagee, or beneficiary, or an agent of any of them, may initiate foreclosure, does not include a requirement that an agent demonstrate

authorization by its principal." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 268 (*Fontenot*), disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.)

D. Plaintiff Did Not Allege Prejudice.

Finally, whether a plaintiff has alleged a void or voidable sale does not matter where plaintiff has failed to allege prejudice: "[Prejudice] is required not only for small deficiencies, but for big ones as well." (*Ram v. OneWest Bank* (2015) 234 Cal.App.4th 1, 23 (*Ram*) (conc. opn. of Humes, J.).) In *Fontenot, supra*, 198 Cal.App.4th 256, we explicitly held that prejudice is required for a borrower to proceed on a claim that a foreclosure was carried out by an entity that was not properly assigned the deed of trust: "[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. [Citations.] . . . Even if [a nominee beneficiary] lacked authority to transfer the note [to the entity that eventually foreclosed], it is difficult to conceive how [the borrower] was prejudiced by . . . [the] purported assignment. . . ." (*Fontenot,* at p. 272.) "This holding recognized that the entity prejudiced in such a case is not the borrower, but rather the proper beneficiary that was entitled to recourse on the loan. Similarly, relying on *Fontenot*, *Herrera* [*v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13] held that an allegation of prejudice was required even if the purported beneficiary lacked authority to foreclose or execute a substitution of trustee." (*Ram, supra*, 234 Cal.App.4th at p. 23 (conc. opn. of Humes, J.).) Plaintiff's cause of action for wrongful foreclosure also fails because he has not alleged such prejudice.

IV. Unfair Practices Act and Accounting Causes of Action

Plaintiff's two remaining claims flow from the basic argument that defendants lacked standing to pursue the nonjudicial foreclosure of the property. Because the FAC fails to state facts showing that defendants did not have the right to foreclose, they both fail.

V. Denial of Leave to Amend

To meet the burden of showing he is entitled to leave to amend (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320; *Communities for a Better Environment v. Bay Area Air Quality Management*

Dist. (2016) 1 Cal.App.5th 715, 722), plaintiff must "`clearly and specifically'" set forth the legal authority for the claims he contends he can allege, the elements of each of those claims, and the specific factual allegations that would establish each of those elements. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 559; *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1504.) It is not sufficient to assert "`an abstract right to amend.'" (*Ibid.*)

Plaintiff has not met this burden. He states that the trial court prematurely dismissed his claims because it relied upon the demurrer, rather than the FAC's allegations. Nowhere does he provide any specific facts or citation to legal authority that show how he would amend his FAC. The court did not abuse its discretion in sustaining the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed.

Humes, P. J. and Banke, J., concurs.

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

[2] It is undisputed that the substitution was actually executed on January 21, 2014, three days *before* the NOD2 was executed. Plaintiff does not address his timing allegation on appeal, and we need not consider this point further.

[3] The second cause of action in the FAC, for quiet title, is alleged against MOAB only.

[4] The *Yvanova* court concluded that a borrower who alleged a transfer in the chain of title of the promissory note was legally void did have standing to bring an action for wrongful foreclosure. (*Yvanova, supra,* 62 Cal.4th at p. 935.)

[5] In his appellate brief, plaintiff argues the two assignments of the DOT are void because Moore and Womack generated "self-to-self assignments" in that they failed to identify that they were signing under an agency between MERS and CMC. Plaintiff does not identify any legal authority supporting his assertions that a beneficiary's nominee or agent must expressly state on whose authority it acts and must attach an agency

agreement when it makes an assignment of a secured loan. As acknowledged by the Ninth Circuit, "MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS." (*Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040.) In other words, dual agency is to be anticipated, and we are unaware of any authority that dictates a requirement that an agent acting on behalf of MERS must be employed by MERS.