

**ALISO ENTERPRISES, LLC, Plaintiff and Appellant,**  
**v.**  
**CITIMORTGAGE, INC., Defendant and Respondent.**

No. G052339.

**Court of Appeals of California, Fourth District, Division Three.**

Filed January 13, 2017.

Appeal from a judgment of the Superior Court of Orange County, Super. Ct. No. 30-2014-00742178, Gregory H. Lewis, Judge. Affirmed. Motion for judicial notice. Granted.

Imperiale Law Group and James T. Imperiale for Plaintiff and Appellant.

Aldridge Pite, Peter J. Salmon, Christopher L. Peterson and Matthew S. Vesterdahl for Defendant and Respondent.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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**OPINION**

FYBEL, J.

**INTRODUCTION**

Plaintiff and appellant Aliso Enterprises, LLC (Aliso), sued defendant and respondent CitiMortgage, Inc. (CitiMortgage), for quiet title to real property, cancellation of instruments, and slander of title. CitiMortgage had initiated proceedings to foreclose a deed of trust on the real property that is the subject of the quiet title cause of action, and the trustee had issued a notice of default and notice of trustee's sale. The deed of trust secured a loan made to Michael Younessi (Younessi), who is not a party to this action. The trial court sustained without leave to amend CitiMortgage's demurrer to the first amended complaint, and we affirm.

All three causes of action asserted by Aliso were based on allegations that a substitution of trustee was void because it was not signed by an attorney in fact of CitiMortgage and the signature on the substitution of trustee of CitiMortgage's authorized representative was forged. Aliso alleged that because the substitution of trustee was void, the notice of default and notice of trustee's sale, which were issued by the substitute trustee, also were void.

The allegations regarding the validity of the substitution of trustee do not form any basis for relief. A substitution of trustee does not have to be signed by an attorney in fact of the lender/beneficiary. Even if the signature on the substitution of trustee of CitiMortgage's authorized representative was forged, a principal can ratify a forgery, and Aliso alleged that CitiMortgage ratified the allegedly forged signature on the substitution of trustee. Further, Aliso does not, and cannot, allege that it suffered prejudice from the substitution of trustee or that there is a causal connection between the substitution and any harm suffered. Aliso did not allege the note or the deed of trust is invalid, Younessi was not in default of the note, CitiMortgage did not have the power to change trustees and intended to do so, or CitiMortgage did not properly instruct the trustee to initiate foreclosure proceedings.

## **FACTS**

In October 2007, Younessi acquired the real property located at 4022 Morning Star Drive, Huntington Beach, California (the Property), by a grant deed recorded on December 18, 2007. In March 2008, Younessi obtained a loan in the amount of \$2,631,321 from CitiMortgage. The loan was evidenced by a promissory note (the Note) and secured by a deed of trust recorded in March 2008 (the Deed of Trust) against the Property. The Deed of Trust identifies Younessi as the borrower, CitiMortgage as the lender, and Verdugo Trustee Service Corporation (Verdugo) as the trustee.

In July 2011, Younessi signed a quitclaim deed to the Property in favor of "The MJK Family Trust, Michael Younessi as Trustee" (some capitalization omitted). The quitclaim deed was recorded in October 2011. From January 2012 until July 2013, the Property was conveyed by quitclaim deed five times. The final quitclaim deed, recorded on July 26, 2013, conveyed the Property to Aliso.

In March 2014, a substitution of trustee (the Substitution of Trustee) was executed and recorded. The Substitution of Trustee substituted Quality Loan Service Corporation (QLSC) as the trustee under the Deed of Trust in place of Verdugo.

The Substitution of Trustee was signed by Vladimir Madrid as the "Authorized Representative" of CitiMortgage.

On March 18, 2014, at QLSC's request, a notice of default and election to sell under deed of trust was recorded against the Property. According to the notice of default, the amount of past due loan payments was \$351,653.80 as of March 17, 2014. At QLSC's request, a notice of trustee's sale was recorded on August 4, 2014. According to the notice of trustee's sale, the amount of the unpaid balance and other charges on the loan was \$2,947,307.59. The date of the sale was August 28, 2014.

On August 26, 2014, a grant deed was executed conveying the Property from Aliso to an entity identified as "The 4022 Morning Star Drive Partnership, a Joint Venture consisting of Aliso Enterprises LLC, Kathy Younessi Managing Member as General Partner, Consuelo Arcadia as General Partner, Sandra Arias as General Partner and Myung Kil Lee as General Partner each holding a 25% interest." (Boldface, underscoring, & some capitalization omitted.) The grant deed was recorded on August 27, 2014. Also on August 27, 2014, Aliso initiated this lawsuit

On August 21, 2014, a petition for individual bankruptcy was filed under the name of Consuelo Arcadia, and another petition for individual bankruptcy was filed under the name of Sandra Arias. On September 9, 2014, an order was entered dismissing the Arcadia bankruptcy petition for failure to file all the required documents. Three days later, an order was entered dismissing the Arias bankruptcy petition for the same reason.

## **PROCEDURAL HISTORY**

Aliso's complaint asserted causes of action for quiet title, cancellation of instruments, and slander of title. CitiMortgage demurred to the complaint.<sup>[1]</sup> The trial court sustained the demurrer to the quiet title and cancellation of instruments causes of action on the ground that Aliso had conveyed the Property to the 4022 Morning Star Drive Partnership and, therefore, "the [P]roperty does not belong to [Aliso] anymore." The trial court sustained the demurrer to the slander of title cause of action on the ground the Substitution of Trustee did not create a cloud on title. Aliso was given 15 days in which to amend the complaint.

Aliso filed an amended complaint that included the same three causes of action that were in the original complaint. The amended complaint was the same as the complaint in every respect except that the amended complaint alleged, and included as an exhibit, a grant deed executed and recorded in November 2014

purporting to convey an interest in the Property from "Ramon N. Salinas, Margaret Lucille Carswell, and Mark J. Hernandez as General Partners of the 4022 Morning Star Drive Partnership # 3" to "Aliso Enterprises LLC, Kathy Younessi Managing Member." (Boldface, underscoring, & some capitalization omitted.)

The amended complaint alleged that Madrid, who signed the Substitution of Trustee, was never an officer or employee of CitiMortgage, was not authorized to sign the Substitution of Trustee, and did not have the authority to act on CitiMortgage's behalf to sign the Substitution of Trustee. The amended complaint also alleged: "[Aliso] is informed and believes and thereon alleges, that the signature of Vladimir Madrid does not match other signatures of Vladimir Madrid found by [Aliso] during its due diligence, and further upon locating Vladimir Madrid regarding the validity [of] his signature on the [Substitution of Trustee], he did not confirm the signature on the [Substitution of Trustee] was his. On this basis [Aliso] asserts the [Substitution of Trustee] is void due to a falsified, forged and fraudulent [Substitution of Trustee]. . . ."

As relief, the amended complaint sought (1) a decree quieting title to the Property "solely and exclusively" in the name of Aliso; (2) a decree that CitiMortgage had no right to foreclose the Deed of Trust; (3) a decree cancelling the Note, the Deed of Trust, the Substitution of Trustee, notice of default, and notice of trustee's sale and declaring them invalid; (4) a permanent injunction requiring CitiMortgage to "remove the derogatory credit information" relating to the loan from all credit reporting agencies; (5) damages; and (6) injunctive relief to prevent foreclosure of the Deed of Trust.

CitiMortgage demurred to the amended complaint and in support submitted a request for judicial notice of various recorded documents, the Arcadia and Arias bankruptcy petitions, and the orders dismissing those petitions. Aliso opposed the demurrer and objected to the request for judicial notice.

The trial court sustained CitiMortgage's demurrer without leave to amend. As to the quiet title cause of action, the court stated: "[Aliso] seeks to quiet title as of 03/14/08 or as of 03/06/14, dates on which it is not clear that it had title. . . . [Aliso] cannot quiet title as of any date in which it had no interest in the [P]roperty, as it must prevail on the strength of its own title rather than on the weakness of [CitiMortgage]'s. [Citation.] Moreover, [Aliso] took title to the [P]roperty with notice of [CitiMortgage]'s lien, and must tender the debt in order to quiet title. [Citation.] [Aliso] has not adequately alleged any exception to the tender rule requirement, as the Substitution of Trustee was not void on its face. The

Substitution [of Trustee] was not signed by an attorney in fact, and did not convey an interest in real property. [Citation.] Moreover, it does not appear to have contravened Civil Code § 2934a(b). [Aliso] states no facts to support its allegation that the Substitution [of Trustee] was forged."

As to the cancellation of instruments cause of action and the slander of title cause of action, the court stated: "[Aliso] does not adequately allege facts to indicate that the Substitution of Trustee, Notice of Default, and Notice of Trustee's Sale were void" and "[Aliso] fails to allege a causal connection between the recording of these documents and any direct pecuniary harm."

A judgment of dismissal had not been entered when Aliso filed its notice of appeal. In February 2016, we ordered Aliso to submit a signed order or judgment of dismissal. An order/judgment of dismissal was entered on March 11, 2016.

## **STANDARD OF REVIEW**

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] 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. [Citation.]" ([\*City of Dinuba v. County of Tulare\* \(2007\) 41 Cal.4th 859, 865.](#))

In reviewing the sustaining of a demurrer, we address whether the results, and not the trial court's reasons, are correct. ([\*Perkin v. San Diego Gas & Electric Co.\*\(2014\) 225 Cal.App.4th 492, 500.](#)) We apply the abuse of discretion standard to the trial court's decision to deny leave to amend. ([\*Schifando v. City of Los Angeles\*\(2003\) 31 Cal.4th 1074, 1081.](#)) If there was a reasonable probability the plaintiff could cure the defect in the complaint by an amendment, then the trial court abused its discretion. (*Ibid.*)

## **DISCUSSION**

The basis for all three causes of action of Aliso's complaint and amended complaint was the allegation that the Substitution of Trustee was void on its face

because it was not signed by an attorney in fact for CitiMortgage and that the signature of CitiMortgage's authorized representative on the Substitution of Trustee was forged. Aliso contends that, because the Substitution of Trustee was void on its face, the notice of default and the notice of trustee's sale were void too.

### **I. Civil Code Section 1095 Is Inapplicable.**

Aliso's theory that the Substitution of Trustee is void is premised on Civil Code section 1095, which states: "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." An attorney in fact is an agent owing fiduciary duties to the principal. ([\*Tran v. Farmers Group, Inc.\* \(2002\) 104 Cal.App.4th 1202, 1213.](#)) Aliso argues that Madrid did not sign the Substitution of Trustee attorney in fact for CitiMortgage. Instead, he signed as the authorized representative of CitiMortgage.<sup>[2]</sup>

Civil Code section 1095 does not state that a substitution of trustee in a trust deed must be executed by an attorney in fact. Section 1095 states that *when* an attorney in fact executes any instrument transferring an interest in real property, the attorney in fact must subscribe the name of the principal.

Substitutions of trustees in trust deeds are governed by Civil Code section 2934a. Subdivision (a)(1) of section 2934a states, in relevant part: "The trustee under a trust deed upon real property or an estate for years therein given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by . . . all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968." Section 2934a, subdivision (a)(1) does not require a substitution of trustee be signed by the beneficiary's attorney in fact.

### **THE PARTIES TO A DEED OF TRUST MAY LAWFULLY CONTRACT THAT THE FORM AND PROCEDURE OF A SUBSTITUTION OF TRUSTEE NEED NOT COMPLY WITH STATUTORY REQUIREMENTS.**

([\*Ram v. OneWest Bank, FSB\* \(2015\) 234 Cal.App.4th 1, 15-16.](#)) Section 24 of the Deed of Trust states that the lender "may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county

in which the Property is located" and that the substitution "shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee." The Deed of Trust did not require the Substitution of Trustee to be signed by the lender's attorney in fact.

**In addition, a substitution of trustee does not purport to transfer or convey any estate in the property. A trustee under a deed of trust does not have a "true trustee's interest in, and control over, the trust's property."** (*Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 463.) In practical effect, **a deed of trust is a lien on real property, and the trustee's interest is limited to what is necessary to enforce the operative provisions of the deed of trust.** (*Id.* at p. 460.) **A trustee under a deed of trust holds only "bare legal title — sufficient only to permit him to convey the property at the out of court sale."** (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 510.) **"[A] trustee under a deed of trust `carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt."** (*Id.* at p. 511.) **The trustee acts only "as an agent for the borrower-trustor and lender-beneficiary."** (*Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th at p. 927.)

**A substitution of trustee therefore does not transfer an estate in real property. Section 24 of the Deed of Trust expressly provides, "[w]ithout conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law." Compliance with Civil Code section 1095 was not required for the Substitution of Trustee to be valid because the substitution did not transfer an estate in real property.**

The Substitution of Trustee was signed by Madrid as CitiMortgage's authorized representative. The Substitution of Trustee included the information required by the Deed of Trust and stated that CitiMortgage is the beneficiary of the Deed of Trust and "desires . . . to substitute a new Trustee under said Deed of Trust." Neither Civil Code section 2934a nor the Deed of Trust required anything more.<sup>[3]</sup>

## **II. CitiMortgage Ratified the Alleged Forgery.**

The amended complaint also alleged the signature of Madrid was forged on the Substitution of Trustee. CitiMortgage argues, and the trial court concluded, that Aliso did not allege facts supporting the allegation of forgery. The flaw in the

forgery allegations is not lack of a factual basis. Aliso alleged on information and belief that "the signature of Vladimir Madrid does not match other signatures of Vladimir Madrid found by [Aliso] during its due diligence, and further upon locating Vladimir Madrid regarding the validity [of] his signature on the [Substitution of Trustee], he did not confirm the signature on the [Substitution of Trustee] was his." We accept the allegations as true.

But the allegations of forgery, accepted as true, do not support any form of legal recovery because CitiMortgage ratified any alleged forgery. **"[I]T IS WELL SETTLED IN CALIFORNIA THAT A PRINCIPAL MAY RATIFY THE FORGERY OF HIS SIGNATURE BY HIS AGENT** [citations]." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73-74.) In addition, an agency may be created and authority conferred by subsequent ratification. (Civ. Code, § 2307.) The first amended complaint alleged that "Defendant CitiMortgage has *ratified* the aforementioned falsified forged and void documents knowing they were false, by their continued intentional conduct to use these documents to foreclose on the Plaintiff's home." (Italics added.) Indeed, Aliso never alleged that CitiMortgage did not intend to substitute the trustee, which was CitiMortgage's right under the Deed of Trust. Because, by Aliso's own allegations, CitiMortgage ratified the Substitution of Trustee, that substitution and the acts of the substitute trustee are valid.

### **III. Aliso Failed to Allege Prejudice or a Causal Connection.**

Aliso did not allege the purported forgery caused it to suffer prejudice or that there was any causal connection between the Substitution of Trustee and Aliso's damages. Aliso does not deny the validity of the Note or the Deed of Trust, which gave CitiMortgage, as beneficiary, the right to substitute the trustee. Aliso does not deny the default under the Note. **The genuineness of the signature on a substitution of trustee form is relevant only to whether the lender authorized a change of trustee. THE BENEFICIARY HAS THE ABSOLUTE RIGHT TO SUBSTITUTE THE TRUSTEE, AND WHO THE TRUSTEE IS MAKES NO DIFFERENCE TO THE BORROWER.** (*U. S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 85.) **The Note and the Deed of Trust permitted initiation of the nonjudicial foreclosure process regardless of who the trustee was. CitiMortgage therefore had the power and right to instruct the trustee to issue the notice of default and commence foreclosure proceedings. The Substitution of Trustee did not adversely affect the default under the Note or the failure to cure, as long as the successor trustee named in the Substitution of Trustee followed** the statutory process.

In *Yvanova v. New Century Mortgage Corp.*, *supra*, 62 Cal.4th at pages 942-943, the California Supreme Court concluded a home loan borrower had standing to assert a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing lender took a beneficial interest in a deed of trust was void, thereby depriving the foreclosing lender of any authority to order a trustee's sale. The borrower's loss of ownership in the home in the allegedly illegal trustee's sale was an invasion of a legally protected interest sufficient to confer standing even though the borrower did not dispute the default. (*Id.* at p. 937.) The identified harm of an illegal foreclosure was directly traceable to the beneficiary's authority purportedly conferred by the assignment of the deed of trust. (*Ibid.*) **"It is no mere `procedural nicety,' from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so."** (*Id.* at p. 938.)

In this case, CitiMortgage unquestionably had authority to foreclose the Deed of Trust. **A substitution of trustee is not the same as an assignment of the beneficial interest in a deed of trust. A substitution of trustee does not convey an interest in real property and does not change the beneficiary.** And here, CitiMortgage unquestionably had the right to substitute the trustee.

Aliso was not the borrower. Younessi was the borrower and he was in default. Younessi is not a party to this lawsuit. Aliso did not allege the Substitution of Trustee caused either Aliso or Younessi to suffer prejudice or that there was a causal connection between the Substitution of Trustee and any damage. **The Substitution of Trustee did not change Younessi's obligations under the Note, did not cause the default, and did not impair or impede Younessi's ability to cure the default and bring the loan current.** Aliso thus did not suffer prejudice sufficient to confer standing to challenge the validity of the Substitution of Trustee, the notice of default, and the notice of trustee's sale.

#### **IV. The Substitution of Trustee Is Conclusively Valid.**

Aliso cannot overcome the presumption that QLSC, the substitute trustee, had authority to act. Civil Code section 2934a, subdivision (d) provides: **"A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing herein requires that a trustee under a recorded substitution accept the substitution. Once 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."** Under this code section, once the Substitution of Trustee was recorded, QLSC was the authorized trustee to notice and conduct the sale as a matter of law. (See [\*Dimock v. Emerald Properties\* \(2000\) 81 Cal.App.4th 868, 871.](#))

## **V. No Leave to Amend**

Aliso seeks leave to amend "to add additional fact that . . . Vlad[i]mir Mad[ri]d . . . was not found in the county records on this property nor in the section for power of attorneys, nor is there any place he shows up as a corporate officer or appointed representative, which he is not." Although Aliso did not seek leave to amend in the trial court, a request for leave to amend may be made for the first time on appeal. ([\*Thornton v. California Unemployment Ins. Appeals Bd.\* \(2012\) 204 Cal.App.4th 1403, 1423.](#))

The amendment proposed by Aliso would not save the complaint. As we have explained in detail, the problem with the forgery allegations is not lack of factual specificity, but lack of legal import.

## **DISPOSITION**

The judgment is affirmed. Respondent shall recover costs on appeal.

BEDSWORTH, ACTING P. J. and IKOLA, J., concurs.

[1] CitiMortgage has submitted a motion requesting that we take judicial notice of six exhibits, including CitiMortgage's demurrer to the complaint, Aliso's opposition to the demurrer, and several other filed or recorded documents. With respect to exhibits B, C, D, and E of the motion for judicial notice, we treat the motion as one to augment the record under California Rules of Court, rule 8.155(a)(1) and grant it. With respect to exhibits A and F of the motion for judicial notice, we grant the motion. Exhibit A is the substitution of trustee recorded on March 18, 2014. We may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language. ([\*Fontenot v. Wells Fargo Bank, N.A.\* \(2011\) 198 Cal.App.4th 256, 265,](#) disapproved on another ground in [\*Yvanova v. New Century Mortgage Corp.\* \(2016\) 62 Cal.4th 919, 939, fn. 13.](#))

Exhibit F is an order entered on November 24, 2015 in the United States Bankruptcy Court, Central District of California, granting CitiMortgage's motion for relief from the automatic stay under 11 United States Code section 362. The order was recorded on December 9, 2015. We grant the motion for judicial notice of exhibit F because it is a record of a court of the United States (Evid. Code, § 452, subd. (d)) and as a recorded document ([\*Fontenot v. Wells Fargo Bank, N.A., supra\*, 198 Cal.App.4th at p. 265.](#))

[2] An estoppel arises from the acts of a duly authorized representative. (*MacGruer v. Fidelity & Casualty Co.* (1928) 89 Cal.App. 227, 235.)

[3] In *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 231-232, the borrower contended a substitution of trustee was invalid precisely because it was signed by the lender's attorney in fact. The Court of Appeal rejected that argument, stating, "[n]either Civil Code section 2934a, which governs the substitution of trustees, nor the trust deed itself precludes an attorney-in-fact from signing a substitution of attorney." (*Id.* at p. 232.) Just as Civil Code section 2934a does not bar an attorney in fact from signing a substitution of trustee, section 2934a does not require the lender's attorney in fact to sign the substitution.