



MARTIN v. MORTGAGE ELECTRONIC REGIS

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Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2012**Highlighting **MARTIN v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.** [Remove highlighting](#)**RENEÉ L. MARTIN, Plaintiff and Appellant,
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. et al.,
Defendants and Respondents.**[No. A129937.](#)**Court of Appeals of California, First District, Division Three.**

Filed January 31, 2012.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McGUINNESS, P.J.

Reneé L. **Martin** (appellant), *in pro per*, brought an action against **Mortgage Electronic Registration Systems, Inc.**, Bank of America Corp., Bank of New York, ReconTrust Company, and Countrywide Home Loans, **Inc.** (together, respondents) after she defaulted on a secured real estate loan and foreclosure proceedings were initiated. The trial court sustained respondents' demurrer without leave to amend and granted their motion to strike appellant's "request for attorney's fees, punitive damages and damages for emotional distress." Appellant contends the trial court erred in sustaining the demurrer without leave to amend because respondents had no legal authority to initiate foreclosure proceedings. She also contends the trial court erred in granting the motion to strike because her complaint "is proper and does not need to be . . . amended; nothing should be stricken from [appellant's] pleadings." We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the complaint and from documents of which the trial court took judicial notice.^[1] In December 2004, appellant borrowed \$290,000 from lender WMC **Mortgage Corp.** (WMC) to finance the purchase of real estate located in Fairfield, California (the Property). The Deed of Trust identified WMC as the lender and Westwood Associates as the trustee. It identified **Mortgage Electronic Registration Systems, Inc.** (MERS) as "acting solely as a nominee for Lender and Lender's successors and assigns," and stated that MERS was "the beneficiary under this Security Instrument." The Deed of Trust further stated that "Borrower [i.e., appellant] understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

On August 11, 2008, ReconTrust Company (ReconTrust), acting as an agent for MERS, filed a Notice of Default and Election to Sell Under Deed of Trust (the Notice of Default) in the Solano County Recorder's Office. According to the Notice of Default, appellant owed \$10,969.66 as of August 7, 2008. On March 2, 2010, MERS recorded a Substitution of

Trustee substituting ReconTrust in place of Westwood Associates as the trustee on the Deed of Trust. That same day, ReconTrust recorded a Notice of Trustee's Sale, notifying appellant that the Property might be sold at a public sale unless he took action to protect the Property. The total unpaid balance with interest and various costs was \$321,274.47.

On March 15, 2010, appellant, *in pro per*, filed a complaint against respondents alleging the following causes of action: (1) fraud and deceit; (2) unclean hands; (3) slander to title; (4) wantonness; and (5) negligence. According to the complaint, MERS, "c/o Countrywide Home Loans, **Inc.**," and ReconTrust initiated the foreclosure action despite the fact that they "did not then or does not now possess any licenses which would regulate its conduct by the State of California. Therefore, these entities are operating unlawfully by fraudulent practices and techniques in the State of California." Appellant further alleged the Notice of Default was "invalid" because MERS, Countrywide Home Loans, **Inc.** (Countrywide), and ReconTrust were not in the chain of title.

Under her first cause of action for fraud and deceit, appellant alleged that MERS had no "enforceable right to foreclose upon" the Property because it was "listed on the security instrument solely for the purpose [of] defraud[ing] this Court. . . ." She alleged that MERS and "the other named defendant[s]" "did not take the application, underwrite the loan, ma[k]e decisions on whether to extend payments, h[o]ld escrows for taxes and insurance or provide[] any loan servicing functions whatsoever. MERS merely tracks electronically title searches for its paid membership clients. [¶] Thus the practices of MERS creates the opportunity for substantial fraudulent abuse and prejudice to mortgagors and it deceives the mortgagor that it falsely represent[s] that it has authority to act as a mortgagee." Appellant further alleged that the Notice of Trustee Sale did not "bear any signature, which ma[de] it defective." Finally, appellant alleged that Bank of America Corp. (Bank of America), by and through its agents, engaged in "unlawful intrusion upon" the Property when it "broke and entered" the Property "by cutting the locks on [the Property's] gates" and posted a note on a window in an effort to prevent appellant and others from entering the Property.

In her second cause of action for unclean hands, appellant alleged that respondents engaged in deceitful conduct by "hid[ing] behind MERS to initiate a foreclosure proceeding knowing[] that it was in the care of [Countrywide], signed by [ReconTrust]. MERS had no real interest in [the Property]" and none of the respondents had "loaned any monies, collected any payments or made any decisions regarding . . . the application [for] a loan." In her third cause of action for slander to title, appellant alleged that Westwood Associates was the trustee according to the Deed of Trust and that Westwood Associates would have had to "duly assign another trustee . . . which was not done and therefore, no other trustee [was entitled to] assert that right" She alleged she suffered "great mental anguish, economic and emotional damages" as a result of respondents' conduct.

In her fourth cause of action for wantonness, appellant alleged respondents acted recklessly "with disregard to the consequences, knowing that MERS and all other [respondents] do not have any interest in subject property and that MERS' name was only on the deed of trust for the sole purpose to deceive and confuse the Court." In her fifth cause of action for negligence, appellant alleged MERS was "negligent in it[s] `Notice of Default'" because none of the respondents was an "actual holder of the note." Rather, the true holders of the note were "a pool of investors"—the identity or identities of which MERS had refused to disclose to appellant. Appellant alleged that "the pool of certificate holders on trust or a duly acknowledged trustee" were the only individuals who had the right to initiate a foreclosure action on the Property. She further alleged that MERS did not possess the original note signed by appellant and "the Investor(s) who secured the property through a deed of trust. This information remains unknown to [appellant] and if [respondents] are the true holders of the note, the original note should be in their possession." She alleged that the Substitution of Trustee that MERS sent her was "fraudulent" because it stated that the original of the document was being sent for recording, when in fact, the copy that was provided to appellant was not signed. Finally, she alleged the Substitution of Trustee was defective because there were no signatures on the document. Appellant requested damages, including the cancellation of the trustee sale, a finding that respondents were not the "true parties to bring a foreclosure action," a lis pendens on the Property, "damages and legal costs" to appellant, and punitive

damages.

On April 16, 2010, respondents filed a demurrer and a motion to strike appellant's "prayer for attorney's fees, punitive damages and emotional distress." The trial court issued a tentative ruling sustaining the demurrer without leave to amend and granting the motion to strike. The court adopted the tentative ruling as its order after neither party contested it. As to the first cause of action, the court found that no cause of action for fraud was stated. It found: "As beneficiary and nominee of lender, MERS has the right to assign its interests to third parties, and to appoint a successor trustee. [Citation.] Creation of debt or mortgages, liens or security interests on real property does not constitute transaction of interstate business, and such activity is exempted by statute. [Citations.] Assignment of a promissory note to a trust pool does not cause a loss of rights to the lender, its nominee, the beneficiary, and the [t]rustee. [Citations.] Plaintiff has not alleged tender."

As to the second cause of action, the court found that unclean hands is an affirmative defense, not the basis for a cause of action. As to the third cause of action, the court found no cause of action for slander of title was stated because a beneficiary of a deed of trust may make a substitution of trustee to conduct foreclosure. "ReconTrust acted as agent for the beneficiary when it recorded the Notice of Default." As to the fourth cause of action for wantonness, the court found no such cause of action exists. Finally, the court found appellant had not stated a cause of action for negligence because a lender or the lender's assignee owes no duty to a borrower, and there is no requirement that a copy of the substitution of trustee or the affidavit of mailing be signed before it is sent to the borrower. The court also found that appellant had not alleged tender.

DISCUSSION

"On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

Appellant challenges the trial court's ruling on the ground that respondents had no legal authority to initiate foreclosure proceedings. As to her first cause of action, she asserts she stated a valid claim for fraud and deceit because MERS fraudulently represented itself as the beneficiary when in fact it was divested of such status when the note was securitized. This issue concerning MERS and the securitized **mortgage** market was recently discussed in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*), review denied May 18, 2011.^[2] There, the plaintiff obtained a loan from KB Home **Mortgage** Company (KB Home) to finance a real estate purchase, and executed a promissory note secured by a deed of trust naming KB Home as the lender and MERS as KB Home's nominee and beneficiary under the deed of trust. (*Id.* at p. 1151.) The deed of trust contained a provision granting MERS the power to foreclose and sell the property in the event of a default. (*Ibid.*) The plaintiff defaulted on his payments and was mailed a notice of default by ReconTrust, which identified itself as an agent for MERS. Attached was a declaration signed by Countrywide, acting as the loan servicer. (*Id.* at pp. 1151-1152.) The plaintiff brought an action against MERS, ReconTrust and Countrywide for wrongful initiation of foreclosure, alleging MERS did not have authority to initiate the foreclosure because it did not possess the note and was not authorized by its current owner to proceed with foreclosure. (*Id.* at p. 1152.) The defendants demurred, arguing, among other things, that the plaintiff was required to plead tender to maintain a cause of action for wrongful foreclosure and that the terms of the deed of trust authorized MERS to initiate a foreclosure proceeding. The trial court sustained the demurrer without leave to amend. (*Id.* at pp. 1152-1153.) The Court of Appeal affirmed, concluding the plaintiff could not seek judicial intervention in a nonjudicial foreclosure before the foreclosure has been completed. (*Gomes, supra*, 192 Cal.App.4th at p. 1154.) The Court also reached the merits of the plaintiff's claim as an independent ground for affirming the order sustaining the demurrer, concluding **MERS had the authority to initiate foreclosure proceedings**

because the deed of trust explicitly provided MERS with the authority to do so. (*Id.* at p. 1157.)

Similarly, here, there is nothing in the record indicating the foreclosure was complete. Appellant therefore cannot seek judicial intervention at this time. Moreover, the Deed of Trust she signed specifically stated: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, *the right to foreclose and sell the Property*; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (Italics added.) Appellant's agreement that MERS has the authority to foreclose precludes her from pursuing a cause of action premised on the allegation that MERS does not have the authority to do so.^[3]

Further, while *Gomes* did not address the tender issue, federal district courts in this state have upheld a beneficiary's authority to initiate foreclosure proceedings and invoke the tender rule against a defaulting borrower, even when the beneficiary is not the holder of the original promissory note. Those courts have noted that "California law `does not require possession of the note as a precondition to non-judicial foreclosure under a Deed of Trust.' [Citations.]" (E.g., *Jensen v. Quality Loan Service Corp.* (E.D.Cal.2010) 702 F.Supp.2d 1183, 1189; *Morgera v. Countrywide Home Loans, Inc.* (E.D.Cal. Jan. 11, 2010, No. 2:09-cv-01476-MCE-GGH) 2010 WL 160348, at p. *8 [MERS, as nominee of lender, has authority to initiate nonjudicial foreclosure without underlying promissory note].) Moreover, in cases involving an assignment of a deed of trust from MERS to a third party, courts have invoked the tender rule despite arguments that MERS did not have the authority to assign its interest under the deed of trust without the promissory note. (See *Lai v. Quality Loan Service Corp.* (C.D.Cal. Aug. 26, 2010, No. CV 10-2308 PSG) 2010 WL 3419179.) Appellant has not alleged tender and has offered no authority, state or federal, to support any contention that a trustee's sale should be set aside absent a full tender of all outstanding payments owed.

As to her third cause of action for slander to title, appellant asserts that MERS' involvement with the foreclosure process caused a break in the chain of title because only Westwood Associates, the original trustee under the Deed of Trust, had the authority to name ReconTrust as the successor trustee. A beneficiary of a Deed of Trust, however, is authorized to "make a substitution of trustee . . . to conduct the foreclosure and sale." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334; *Dimock v. Emerald Properties LLC* (2000) 81 Cal.App.4th 868, 871.) Thus, as beneficiary, MERS had the authority to substitute the trustee.

As to her negligence cause of action, appellant asserts there were various defects in the foreclosure-related documents, including the lack of signatures on the copy of the Substitution of Trustee she received and other defects in the Notice of Default. To recover on a theory of negligence, a plaintiff must prove duty, breach, causation, and damages. (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 875.) Appellant's negligence cause of action fails because a lender owes no duty of care to a borrower unless "the lender `actively participates' in the financed enterprise `beyond the domain of the usual money lender' [citations]." (*Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35), and appellant has not alleged that any of the respondents played any role outside of their conventional roles.^[4]

Finally, we turn to whether the trial court abused its discretion in sustaining the demurrer without leave to amend. If a demurrer is sustained without leave to amend, the burden is on the plaintiff to demonstrate that an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Appellant asserts she "believes the complaint is sufficient, without the need to amend." She asks whether the trial court "erred in dismissing the entire complaint [without] the right to amend," and whether the court should "have shown some mercy or some reasonable consideration" "since real property is the subject." However, she has "made no attempt to indicate how the complaint may have been amended to state a cause of action" and has therefore "failed to establish that the trial court abused its discretion" in denying leave to amend. (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 8.)

DISPOSITION

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

Pollak, J. and Jenkins, J., concurs.

[1] On appeal, appellant asks us to take judicial notice of "the national epidemic of foreclosures" and "the fraud that is generally well known, particularly with these same Respondents . . . forcing homeowners from their homes by submitting fraudulent documents (affidavits) to . . . Courts with the intent to foreclose on the property unlawfully." Although appellant asked the trial court to take judicial notice of a settlement agreement the California Attorney General reached with Countrywide Financial Corporation, Countrywide Home Loans, **Inc.**, and Full Spectrum Lending, **Inc.**, the record does not show the trial court granted the request or that it considered the document in sustaining the demurrer and granting the motion to strike. To the extent appellant is requesting that we take judicial notice of the settlement agreement, we decline to do so. Even if we were to take judicial notice of its existence, judicial notice does not extend to its contents. Even if we were to take judicial notice of its existence, judicial notice does not extend to its contents. ([Mangini v. R.J. Reynolds Tobacco Co. \(1994\) 7 Cal.4th 1057, 1063](#) ["While courts may notice official acts and public records, we do not take judicial notice of the truth of all matters stated therein"], overruled on another ground in [In re Tobacco Cases II \(2007\) 41 Cal.4th 1257, 1276.](#)) Further, even if we were to assume the matters stated in the document were true, appellant has provided no explanation as to how this information supports her claims. (See [People ex rel. Lockyer v. Shamrock Foods Co. \(2000\) 24 Cal.4th 415, 422, fn. 2](#) ["any matter to be judicially noticed must be relevant to a material issue"].)

[2] The *Gomes* Court explained: "MERS is a private corporation that administers the MERS System, a national **electronic** registry that tracks the transfer of ownership interests and servicing rights in **mortgage** loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members." [Citation.] "A side effect of the MERS system is that a transfer of an interest in a **mortgage** loan between two MERS members is unknown to those outside the MERS system." [Citation.]" ([Gomes, supra, 192 Cal.App.4th at p. 1151.](#))

[3] Appellant also alleged in her first cause of action that the Notice of Trustee Sale did not "bear any signature, which ma[de] it defective," and that Bank of America unlawfully broke and entered the Property and posted a note on her window. She provides no legal authority or argument in support of her claim that these acts constituted fraud and deceit. ([Conroy v. Regents of Univ. of Calif. \(2009\) 45 Cal.4th 1244, 1255](#) [elements of fraud are: (1) a misrepresentation; (2) with knowledge of its falsity; (3) with the intent to induce another's reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damage].) She also provides no legal authority or argument in support of her claim that respondents had no authority to initiate foreclosure proceedings because they were not licensed to conduct business in California. By statute, respondents are not required to obtain licenses because the creation of "evidences of debt or mortgages, liens or security interests on real or personal property" is an exempted activity. (Corp. Code, §§ 191, subd. (c)(7), 2105, subd. (a).)

[4] Appellant does not present any argument or legal authority challenging the trial court's ruling that her second cause of action for unclean hands is not the basis of a cause of action and that her fourth cause of action for "wantonness" fails because no such cause of action exists. We therefore will not address whether the trial court erred in sustaining the demurrer as to these causes of action.

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