

MARY C. KAUTTER, Plaintiff and Appellant,
v.
NATIONSTAR MORTGAGE LLC et al., Defendants and Respondents.

[2d Civil No. B276399.](#)

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

Filed October 4, 2017.

Appeal from the Superior Court County of San Luis Obispo, Super. Ct. No. 16CV-0013, Barry T. LaBarbera, Judge.

Mary C. Kautter, in pro. per., for Plaintiff and Appellant.

Akerman LLP, Justin D. Balsler, and Preston Ascherin for Defendants and Respondents Nationstar Mortgage LLC; The Bank of New York, Mellon Corporation, Successor Trustee to JP Morgan Chase Bank N.A., as Trustee for the SARM 2004-8 Trust Fund; and Binod K. Chhetri.

Genail M. Anderson for Defendant and Respondent Clear Recon Corp.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

GILBERT, P. J.

Plaintiff's first amended complaint filed in propria persona seeks to challenge the right of defendants to initiate foreclosure on a trust deed secured by her residence. The trial court sustained the defendants' demurrers without leave to amend. We affirm the resulting judgment.

FACTS

In April 2004, Mary C. Kautter executed a note in the amount of \$575,900 secured by a deed of trust on her home in Arroyo Grande. The deed of trust named Lehman Brothers Bank, FSB as lender; Mortgage Electronic

Registration Systems, Inc. (MERS) as beneficiary; and Chicago Title as trustee.

Recorded documents of which the trial court took judicial notice show the deed of trust was assigned from MERS to Aurora Bank on May 21, 2012; from Aurora to Nationstar Mortgage on December 5, 2012; and from Nationstar to The Bank of New York Mellon, Successor Trustee to JP Morgan Chase Bank N.A., as Trustee for the SARM 2004-8 Trust Fund (BONY), on May 29, 2015.

Kautter defaulted on her loan payments in February 2012. In May 2012, Kautter was \$12,280.87 in arrears, and a notice of default was recorded. In November 2014, Veriprise Processing Solutions, LLC was substituted as trustee. By then Kautter was \$107,275.46 in arrears, and a new notice of default was recorded.

In March 2015, Veriprise recorded a notice of sale. In November 2015, Clear Recon was substituted as trustee, and a new notice of sale was recorded with a sale date of January 19, 2016. Due to this action, however, a foreclosure sale has not yet occurred.

Kautter's first amended complaint names Nationstar, BONY, Clear Recon Corp. and Binod K. Chhetri as defendants. Chhetri is named as an employee of Nationstar. The complaint lists six causes of action in the margin next to the caption: violation of Civil Code section 2924.17¹¹; section 2924, subdivision (a)(6); section 2924, subdivision (a)(1)(C); section 2934a, subdivision (a)(1)(A); cancellation of instruments; and unjust enrichment.

Kautter alleged in her complaint that she made payments to Aurora. But she does not allege she made any payments to Nationstar or BONY.

The trial court sustained the demurrers of all defendants without leave to amend.

I

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. ([*Intengan v. BAC Home Loans Servicing LP* \(2013\) 214 Cal.App.4th 1047, 1052.](#)) We assume the truth of all facts properly pleaded, as well as facts of

which the trial court properly took judicial notice. (*Ibid.*) Our review of the trial court's decision is de novo. (*Ibid.*)

We review the trial court's decision to allow an amendment to the complaint for an abuse of discretion. ([Fontenot v. Wells Fargo Bank, N.A. \(2011\) 198 Cal.App.4th 256, 273-274.](#)) Where there is no reasonable possibility that plaintiff can cure the defect with an amendment, sustaining a demurrer without leave to amend is not an abuse of discretion. (*Id.* at p. 274.)

II

Kautter's first amended complaint is 74 pages long. With exhibits, it is 930 pages. It is incomprehensible. Her briefs on appeal are also incomprehensible. We could dismiss her appeal as abandoned for failure to state any intelligible legal argument. ([Berger v. Godden \(1985\) 163 Cal.App.3d 1113, 1119.](#)) We elect not to do so. But having given it our best effort, Kautter will not be heard to complain if we miss what she believes is her argument.

It appears the gravamen of Kautter's complaint is that the assignments of her note and trust deed were invalid. Thus defendants lacked the authority to initiate foreclosure.

But it is well settled that the **BORROWER LACKS STANDING TO CHALLENGE THE AUTHORITY OF THE DEFENDANTS TO INITIATE FORECLOSURE.** ([Gomes v. Countrywide Home Loans, Inc. \(2011\) 192 Cal.App.4th 1149, 1154.](#)) [Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919,](#) on which Kautter relies, concerns only post-foreclosure actions for wrongful foreclosure. It does not change the rule that **THE BORROWER LACKS STANDING TO CHALLENGE THE AUTHORITY TO INITIATE FORECLOSURE.**

Kautter's attempt to state statutory causes of action is nothing more than a challenge to the authority of defendants' right to initiate foreclosure.

Kautter alleges a violation of section 2924, subdivision (a)(6). That subdivision provides that no entity other than the holder of the beneficial interest or the trustee or their agent shall record a notice of default. (*Ibid.*) But **THERE IS NO PRIVATE CAUSE OF ACTION FOR ALLEGED VIOLATIONS OF SECTION 2924, SUBDIVISION (a)(6).** ([Lucioni v. Bank of America, N.A. \(2016\) 3 Cal.App.5th 150, 157-158.](#))

Section 2924, subdivision (a)(1)(C) requires a notice of default to specify the breach causing the beneficiary's election to sell. Here the notice of default specifies that Kautter is in arrears \$107,275.46 as of November 22, 2014. That is sufficient to satisfy the subdivision.

Section 2924.17, subdivision (a) requires that a notice of default, notice of sale, an assignment of deed of trust or substitution of trustee recorded by or on behalf of a mortgage servicer "be accurate and complete and supported by competent and reliable evidence."

Kautter does not allege she paid Nationstar or BONY, and the recorded assignments in BONY's chain of title appear to be proper. We cannot determine from Kautter's first amended complaint or briefs on appeal what is defendants' wrongful conduct.

If Kautter is alleging the assignment into BONY's trust was untimely, the allegation fails to state a cause of action. An **UNTIMELY ASSIGNMENT INTO TRUST IS NOT VOID, BUT ONLY VOIDABLE.** ([*Yhudai v. IMPAC Funding Corp.* \(2016\) 1 Cal.App.5th 1252, 1256.](#)) Kautter has no standing to challenge a voidable assignment. (*Id.* at p. 1257.)

Section 2934a, subdivision (a)(1)(A) requires a substitution of trustee to be signed by all beneficiaries under the trust deed or their successors. But subdivision (d) of the section provides that, once recorded, the substitution constitutes "conclusive evidence of the authority of the substituted trustee . . . to act. . . ." Because the substitution of trustee was recorded, Kautter cannot challenge the authority of the trustee to act.

Kautter is not entitled to a cancellation of her note and trust deed pursuant to section 3412. Section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Not only does Kautter's complaint fail to allege any proper ground for cancellation, **CANCELLATION WOULD REQUIRE HER TO RESTORE TO THE BENEFICIARY THE AMOUNT SHE BORROWED.** ([*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* \(1981\) 121 Cal.App.3d 447, 457.](#)) Kautter does not claim she has restored to the beneficiary the amount she borrowed.

Finally, Kautter lists as a cause of action "UNJUST ENRICHMENT THROUGH QUASI-CONTRACT." Again it is difficult to discern what she means. Given her acknowledgement that she has paid nothing on the loan since the transfer to Nationstar, none of defendants were unjustly enriched or enriched at all.

The trial court properly sustained the demurrer as to all defendants. Kautter has failed to demonstrate she could amend her complaint to state a valid cause of action.

The judgment is affirmed. Costs are awarded to respondents.

YEGAN, J. and PERREN, J., concurs.

[\[1\]](#) All statutory references are to the Civil Code.