**DAVID A. OCHSNER, Plaintiff and Appellant,**
**v.**
**DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee, etc., Defendant and Respondent.**

No. C081748.

**Court of Appeals of California, Third District, Placer.**

Filed October 3, 2017.

Appeal from the Superior Court No. SCV0034396.

**NOT TO BE PUBLISHED**

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RENNER, J.

Plaintiff David A. Ochsner appeals from the trial court's entry of judgment after it granted defendant Deutsche Bank National Trust Company's (Deutsche Bank) motion for summary judgment on Ochsner's complaint challenging the nonjudicial foreclosure sale of his residence. Ochsner argues a declaration submitted in support of Deutsche Bank's motion did not lay a proper foundation to show that documents establishing the chain of title qualified for the business records exception to the hearsay rule. We conclude the trial court did not abuse its discretion in overruling Ochsner's evidentiary objections because the relevant documents were subject to judicial notice and not hearsay as to their operative facts. Ochsner also raises various arguments to support his wrongful foreclosure claim that have been rejected by courts of appeal, including our own, but he fails to acknowledge the authorities adverse to his position. We affirm.

## I. BACKGROUND

Ochsner's operative complaint alleges seven causes of action including a claim for wrongful foreclosure against Deutsche Bank, as trustee for IXIS Real Estate Capital Trust 2006-HE3 Mortgage Pass Through Certificates,

Series 2006-HE3 (the Trust), and Western Progressive, LLC. Deutsche Bank moved for summary judgment on the ground that there were no triable issues of material fact to support any of Ochsner's claims.

The facts Deutsche Bank introduced regarding Ochsner's claim for wrongful foreclosure are as follows:

In 2005, Ochsner and his wife took out a loan from First NLC Financial Services, LLC, secured by a deed of trust. In March 2012, an assignment of the deed of trust was recorded that was executed by Mortgage Electronic Registration Systems, Inc. (MERS)[1] to Deutsche Bank as trustee for the Trust. In April 2012, Western Progressive, as agent for the beneficiary, recorded a "Notice of Default and Election to Sell Under Deed of Trust." Ochsner was in default on his payments, and did not cure the default. In August 2012, a substitution of trustee was recorded that was dated May 4, 2012, substituting Western Progressive as trustee, in lieu of Deutsche Bank, under the deed of trust. In June 2013, Western Progressive recorded a notice of trustee's sale to occur on July 23, 2013. The sale did in fact occur on that date.

The trial court granted Deutsche Bank's motion on the basis that Ochsner was unable to establish a triable issue of material fact as to any of his causes of action. Judgment was entered accordingly. Ochsner dismissed his claims against Western Progressive, and then timely appealed.

## II. DISCUSSION

### *A. Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment "bears the burden of persuasion that `one or more elements of' the `cause of action' in question `cannot be established,' or that `there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; see also Code Civ. Proc., § 437c, subd. (p)(2).) The defendant "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co., supra,* at p. 850.) Once the defendant meets its initial burden, the burden shifts to the plaintiff to demonstrate the existence of a triable

issue of material fact. (*Ibid.*) "The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

"Although we independently assess the grant of summary judgment, our inquiry is subject to two constraints. Under the summary judgment statute, we examine the evidence submitted in connection with the summary judgment motion, with the exception of evidence to which objections have been appropriately sustained. [Citations.] . . . [¶] Furthermore, our review is governed by a fundamental principle of appellate procedure, namely, that `"[a] judgment or order of the lower court is presumed correct,"' and thus, `"error must be affirmatively shown."' [Citations.] Under this principle, [the appellant] bear[s] the burden of establishing error on appeal, even though [the respondent] had the burden of proving its right to summary judgment before the trial court. [Citation.] For this reason, our review is limited to contentions adequately raised in the [appellant]'s briefs." (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 644-645.)

"To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, `it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations.] Hence, conclusory claims of error will fail." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

The appellant must also "[s]tate each point under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "This is not a mere technical requirement." (*In re S.C., supra,* 138 Cal.App.4th at p. 408.) It is designed so that we may be advised of "`the exact question under consideration, instead of being compelled to extricate it from the mass."' (*Ibid.*) "Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.)

***B. Evidentiary Objections***

We begin with Ochsner's final challenge to the judgment—his assertion that the trial court erroneously admitted a pooling and servicing agreement, a mortgage loan schedule, the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale because the documents were hearsay and the declaration to which these exhibits were attached did not lay the necessary foundation required by Evidence Code section 1271. We review the trial court's ruling on evidentiary objections for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) "Discretion is abused only when in its exercise, the trial court `exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

Evidence Code section 1271 sets forth the business records exception to the hearsay rule. Ochsner does not identify how these documents were put to an improper hearsay use. This omission is significant because "`[w]ritten or oral utterances, which are acts in themselves constituting legal results in issue in the case, do not come under the hearsay rule.'" (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 524; see *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316 **["documents containing operative facts, such as the words forming an agreement, are not hearsay"]**; *Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1042 **[operative contractual documents do not fall within the hearsay rule]**.) Moreover, "a court 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 a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265, disapproved on another point in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13; see also *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754 ["Where, as here, judicial notice is requested of a *legally operative* document—like a contract—the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its *legal effect*"].) *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366 (*Herrera*), relied upon by Ochsner, is instructive. There, we held that the trial court improperly took judicial notice of disputed facts contained within two recorded documents—an assignment of trust and a substitution of trustee—that purported to show

that Deutsche Bank was the beneficiary under the deed of trust. (*Id.* at pp. 1374-1375.) That fact was hearsay and disputed because the chain of title was incomplete. (*Id.* at p. 1375.) The defendants had not, for instance, offered the deed of trust itself as evidence of the beneficiary under the deed of trust. (*Ibid.*)

Here, the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale were all recorded. There is no genuine dispute regarding their authenticity.[2] Indeed, all but the notice of trustee's sale were attached to Ochsner's first amended complaint. Further, unlike in *Herrera,* the documents that make up the property's chain of title are complete. As such, their legally operative language is judicially noticeable and we therefore conclude the court did not abuse its discretion in overruling Ochsner's objections to the admission of these documents. Thus, we turn to Ochsner's other assertions of error.

***C. Wrongful Foreclosure***

Ochsner argues on appeal that he has stated a cause of action for wrongful foreclosure. He makes no mention of the other causes of action in his complaint. His primary theory appears to be that the assignment to Deutsche Bank was void because the Trust was governed by a pooling and servicing agreement that required the loan to be transferred into the Trust by a specific cutoff date. As we will explain, he has no standing to bring such a claim.

**A borrower bringing a wrongful foreclosure action does not have standing to challenge an assignment that is merely voidable.** (*Yvanova v. New Century Mortgage Corp., supra,* 62 Cal.4th at pp. 939-940; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 811 (*Mendoza*).) We agree with Deutsche Bank that the alleged failure to comply with the securitized trust's pooling and servicing agreement would not establish a void assignment. As is apparently typical, the pooling and servicing agreement states that it is to be governed by New York law. **There is a "mountain of authority" that assignments in violation of a pooling and servicing agreement governed by New York law are merely voidable and that "as a result, borrowers do not have standing to challenge late transfers or other defects in the securitization process."** (*Mendoza, supra,* at pp. 817, 815; see also *Yhudai v. Impac Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259 (*Yhudai*); *Saterbak, supra,* 245 Cal.App.4th at p.

815.)[3] Ochsner did not file a reply brief, and his opening brief fails to acknowledge the weight of the authority against his argument. Instead, he relies principally upon a single case—*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*)—that has been the subject of "[a]n avalanche of criticism" on this point. (*Mendoza, supra,* at p. 812; see also *id.* at p. 814 ["**WE CAN FIND NO STATE OR FEDERAL CASES TO SUPPORT THE *GLASKI* ANALYSIS and will follow the federal lead in rejecting this minority holding on the issue presented in this case**"]; *Yhudai, supra,* at p. 1259 ["Because the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected, we decline to follow *Glaski* on this point"].) We too follow this line of authority and conclude the assignment was at most voidable, rather than void. Ochsner does not have standing to challenge a voidable assignment. (*Saterbak, supra,* at p. 815.) His cause of action for wrongful foreclosure therefore fails.

Ocshner argues that the "clear" language in the deed of trust and the rules of interpretation of adhesion contracts confer standing. The same arguments were rejected in *Saterbak, supra,* 245 Cal.App.4th at pp. 816-817 and *Yhudai, supra,* 1 Cal.App.5th at p. 1260 after interpreting similar language in the deeds of trust at issue in those actions.

As in *Saterbak,* here the deed of trust provides that the note and deed of trust could be sold "one or more times without prior notice" to the borrowers. (*Saterbak, supra,* 245 Cal.App.4th at p. 816.) Further, both deeds of trust state: "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." (*Ibid.*)

As *Saterbak* explained, "`The authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust.' . . . [¶] [Plaintiff] nevertheless points to language in the [deed of trust] that only the `Lender' has the power to declare default and foreclose, while **THE `BORROWER' HAS THE RIGHT TO SUE PRIOR TO FORECLOSURE IN ORDER TO `"ASSERT THE NON-EXISTENCE OF A DEFAULT OR ANY OTHER DEFENSE OF BORROWER TO**

**ACCELERATION AND SALE."'** But these provisions do not change [his] standing obligations under California law; they merely give [plaintiff] the power to argue any defense *the borrower* may have to avoid foreclosure. As explained *ante,* [plaintiff] lacks standing to challenge the assignment as invalid under the [pooling and servicing agreement]." (*Saterbak, supra,* 245 Cal.App.4th at p. 816.)

Ochsner's adhesion argument has also been rejected. He asserts that because the deed of trust is an adhesion contract, it cannot be enforced against his reasonable expectations. The problem with his claim "is not that the deed of trust precludes him from alleging an invalid assignment, but that he has not sufficiently alleged an invalid assignment." (*Yhudai, supra,* 1 Cal.App.5th at p. 1260; see also *Saterbak, supra,* 245 Cal.App.4th at p. 817 [explaining **there is no reasonable expectation from the language in the deed of trust "that the parties intended to allow [plaintiff] to challenge future assignments made to unrelated third parties**"].) Again, we see no reason not to follow this reasoning.

Ochsner also contends that the deed of trust precluded Deutsche Bank from substituting trustees through the use of an attorney-in-fact. This argument is not supported by a citation to the record.[4] As such, "that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Even if it was not waived, this argument is without merit. In the portion of the document relied upon by Ochsner, the deed of trust states: "Lender, at its option, 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. . . . This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution." Nothing in this language prohibits Deutsche Bank from acting through an agent or attorney-in-fact in appointing a successor trustee on the deed of trust. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 40.) Ochsner has not demonstrated the trial court erred in determining there was no triable issue of fact as to his wrongful foreclosure claim.

## III. DISPOSITION

The judgment is affirmed. Deutsche Bank National Trust Company shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

NICHOLSON, Acting P.J., and HOCH, J., concurs.

[1] The deed of trust explains MERS "is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." "`MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as "nominee" for the lender, and granted the authority to exercise legal rights of the lender.'" (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 816, fn. 6 (*Saterbak*).)

[2] Nor does there appear to be a genuine dispute as to the authenticity of the pooling and servicing agreement or the mortgage loan schedule. Elsewhere in his brief, Ochsner cites to the pooling and servicing agreement in support of his wrongful foreclosure claim. But, as we discuss next, these documents relate to an argument Ochsner has no standing to bring. Therefore, we need not concern ourselves with their admissibility.

[3] Ochsner argues the California Homeowner Bill of Rights grants him standing to challenge an invalid assignment of a loan because Civil Code section 2924, subdivision (a)(6) states that an entity shall not initiate the foreclosure process "unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest." But Civil Code section 2924, subdivision (a)(6) is not one of the sections for which the Legislature authorized a private right action either to enjoin a foreclosure or to seek money damages after the fact. (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 159; see Civ. Code, § 2924.12.) The other sections mentioned by Ochsner have no direct application to the allegations before us. (See Civ. Code, §§ 2923.55, 2924.17.) Thus, his arguments regarding the California Homeowner Bill of Rights have no impact on our conclusion.

[4] Ochsner is apparently caught between his desire to make this argument and his desire to assert that this document should not have been admitted into evidence.