CHRISTOPHER BAKER et al., Plaintiffs and Appellants,
v.
CITI MORTGAGE, INC., et al., Defendants and Respondents.

No. A148458.

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

Filed April 16, 2018.

Appeal from the Alameda County, Superior Court No. RG14731273.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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BRUINIERS, J.

Plaintiffs Christopher Baker and Caroline Baker sued their home loan servicer, Citi Mortgage, Inc. (Citi), the trustee of the securitized trust holding their loan, U.S. Bank N.A., and the successor trustee under their deed of trust, Quality Loan Service Corporation (Quality), in an attempt to prevent sale of their home through nonjudicial foreclosure. (Civ. Code, § 2924.)[1] The trial court granted respondents' motion for summary judgment. The Bakers argue a declaration submitted in support of respondents' 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. They also challenge the trial court's conclusion they did not establish triable issues of material fact regarding whether foreclosure was initiated by an unauthorized party. We conclude the trial court did not abuse its discretion in overruling the Bakers' evidentiary objections and they did not establish a triable issue of material fact. Accordingly, we affirm.

I. LEGAL BACKGROUND

"California's nonjudicial foreclosure scheme is set forth in . . . sections 2924 through 2924k, which `provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale

contained in a deed of trust.' (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) `**These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.**' (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.)" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 (*Gomes*).) Because of the exhaustive nature of the nonjudicial foreclosure scheme, appellate courts are reluctant to read in additional requirements. (See *Moeller,* at p. 834; *I. E. Associates,* at p. 288.)

"A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. `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 v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 926 (*Yvanova*).)

"While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent. (§ 2924, subd. (a)(1) [notice of default may be filed for record only by `[t]he trustee, mortgagee, or beneficiary']; [citations].)" (*Yvanova, supra,* 62 Cal.4th at p. 927; accord, § 2924, subd. (a)(6).)

"`[Mortgage Electronic Registration Systems, Inc. (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*).)

II. FACTUAL AND PROCEDURAL BACKGROUND

The Bakers purchased real property located at 38526 Canyon Heights Drive in Fremont, California (the Property). They financed their purchase by obtaining a $504,000 loan from American Home Mortgage (AHM). On August 24, 2006, they signed a promissory note (Note) and deed of trust securing the Note (Deed of Trust). The Deed of Trust designates the Bakers as "borrower[s]," AHM as "lender," and Alliance Title Company as "trustee." The Deed of Trust names MERS "the beneficiary" under the Deed of Trust, acting "solely as a nominee for Lender and Lender's successors and assigns."

Under the Deed of Trust, the Bakers "irrevocably grant[ed] and convey[ed] [the Property] to Trustee, in trust, with power of sale" in the event they defaulted on the loan. The Deed of Trust explains: "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold." The Deed of Trust also provides that the underlying Note, together with the Deed of Trust, could be sold one or more times without any notice to the Bakers. Paragraph 24 of the Deed of Trust also provides: "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. . . . [T]he successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law."

In August 2007, AHM filed for Chapter 11 bankruptcy protection. California's Secretary of State suspended AHM's authority to conduct business within the state. In 2012, the Bakers stopped making loan payments and defaulted on the loan.

On April 3, 2013, MERS, acting "as nominee for [AHM]," assigned the Deed of Trust to "U.S. Bank National Association as trustee for CMALT

REMIC 2006-A6 PRAA-REMIC Pass-Through Certificate Series 2006-A6" (the Series 2006-A6 Trust).[2] The assignment of the Deed of Trust (the Assignment) was recorded in the official records of Alameda County on April 16, 2013.

On February 19, 2014, Citi, acting as "attorney-in-fact" for U.S. Bank, executed a substitution of Quality as trustee under the Deed of Trust (the Substitution of Trustee). The Substitution of Trustee was recorded on February 27, 2014. Shortly thereafter, on March 7, 2014, Quality recorded a notice of default and election to sell under deed of trust (Notice of Default). The Notice of Default stated the Bakers owed "$68,129.80 as of 3/5/2014" and informed them to contact U.S. Bank, via Quality, to "find out the amount [they] must pay, or arrange for payment to stop the foreclosure." After the instant litigation commenced, the notice of default was rescinded. No foreclosure sale has taken place.

On March 5, 2015, the Bakers filed the operative second amended complaint (SAC) against Citi, U.S. Bank, and Quality. The SAC alleged the following causes of action: (1) cancellation of instruments (§ 3412); (2) violation of the unfair competition law (Bus. & Prof. Code, § 17200); (3) declaratory relief; (4) wrongful foreclosure; and (5) breach of contract. In relevant part, the Bakers alleged the Notice of Default was void because a substitution of trustee naming Quality as trustee under the Deed of Trust had never been recorded. The Bakers also alleged U.S. Bank never acquired an interest in their loan. Specifically, they alleged an endorsement of the Note was forged and the Assignment to U.S. Bank was void due to AHM's bankruptcy.

Respondents filed a motion for summary judgment, arguing there were no triable issues of material fact on any of the Bakers' claims. In support of their motion, respondents filed a declaration from Citi's custodian of records, Jennifer Oakes, as well as a request for judicial notice. In opposition, the Bakers objected to much of respondents' evidence. They also insisted triable issues of fact exist, foreclosing summary judgment or adjudication with respect to their cancellation of instruments and unfair competition causes of action. Specifically, the Bakers argued they had standing to challenge respondents' authority to foreclose because "[a] triable issue of material fact exists as to whether the [A]ssignment is valid and whether U.S. Bank was assigned a beneficial interest" in their loan. The Bakers also pressed a derivative argument—that if U.S. Bank had no beneficial interest in the loan, it could not substitute Quality as trustee.

The trial court granted the motion for summary judgment, agreeing with respondents that the Bakers' cancellation of instruments and declaratory relief causes of action constitute "a preemptive judicial action challenging the authority of the assignee of record to foreclose," for which there is no legal basis under California's nonjudicial foreclosure statutes. The court explained: "Previously, this court determined [the Bakers'] allegations were sufficient [to withstand demurrer] because they alleged that no Substitution of Trustee had been recorded. But now [respondents] have shown a Substitution of Trustee was recorded substituting Quality as the trustee . . . in February 2014. Therefore, there is no longer a factual basis for the allegation the foreclosure was initiated by the wrong party."

The trial court also found no triable issue of material fact supported the Bakers' assertion MERS did not have authority to assign the Deed of Trust to U.S. Bank in 2013 because of AHM's intervening bankruptcy. The court was "not convinced that the chapter 11 bankruptcy of the lender in 2007 precluded MERS from transferring the loan to U.S. Bank. (See, e.g., *Miller v. Carrington Mortgage Services* (N.D.Cal., Sept. 19, 2013) 2013 WL 5291939, at *2 [`The bankruptcy of the holder of the loan thus did not preclude its transfer to Wells Fargo'].) Generally, a debtor-in-possession under Chapter 11 bankruptcy may still take actions including transferring loans and [the Bakers] present no evidence that AHM was not a debtor-in-possession." The trial court sustained the Bakers' objections to portions of the Oakes Declaration that related to the employment status of certain Citi employees and Citi's possession of the original Note. However, the Bakers' remaining objections were overruled. The trial court entered judgment in respondents' favor. The Bakers filed a timely notice of appeal.

III. DISCUSSION

Although the arguments presented in the Bakers' opening brief are hardly a model of clarity, they appear to challenge the trial court's summary judgment ruling with respect to their cancellation of instruments and declaratory relief causes of action.[3] Specifically, they contend the trial court abused its discretion in overruling certain of their evidentiary objections and, accordingly, respondents failed to meet their burden as the party moving for summary judgment. In the alternative, the Bakers assert triable issues of material fact exist. We address each argument in turn.

A. *Standard of Review*

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); accord, Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense to the action. (§ 437c, subds. (o), (p)(2); *Aguilar,* at p. 850.) A defendant moving for summary judgment may satisfy this initial burden of production by presenting evidence that conclusively negates an element of the plaintiff's cause of action or by relying on plaintiff's factually devoid discovery responses to show that plaintiff does not possess, and cannot reasonably obtain, evidence to establish that element. (*Aguilar,* at pp. 854-855; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1593.)

If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "In deciding whether a plaintiff has met [his] burden of proof, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the defendant." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) "The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true. [Citation.] Nor may the trial court grant summary judgment based on the court's evaluation of credibility." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

On review of an order granting summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) "In performing our de novo review, we view the evidence in the light most favorable to plaintiffs as the losing parties. [Citation.] [W]e liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Ibid.*) "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. . . . [¶] 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, italics added.)

B. *Evidentiary Objections*

We begin by addressing the Bakers' position respondents failed to meet their burden as the moving party. Specifically, they argue: "Over [the Bakers'] objection the trial court wrongfully admitted Respondents [*sic*] Exhibit Nos. `3-6, 8-11' through the Declaration of Jennifer Oakes (apparently under the business records exception to the hearsay rule.)" The Bakers contend they, as the opposing party, had no obligation to show a triable issue of material fact unless and until respondents met their burden. (See *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 743-744.)

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.) Code of Civil Procedure, section 437c, subdivision (d), provides in relevant part: "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated [therein.]"

The first problem with the Bakers' argument is that they do not explain precisely what evidence was improperly considered by the trial court or include adequately detailed citations to the record to otherwise indicate precisely which rulings they challenge. Their briefing refers to exhibits they identify only as "`3-6, 8-11.'" Their use of quotation marks is strange; we

certainly cannot identify any exhibit proffered by respondents bearing the title "3-6, 8-11." Respondents appear as confused by this label as we are. The Bakers may be challenging the trial court's reliance on exhibits to the Oakes Declaration numbered three through six and eight through 11. However, they fail to direct us to the trial court's rulings on objections to such exhibits, and no exhibit 11 is in the record before us.

By failing to adequately identify the challenged rulings, the Bakers have forfeited their argument on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["[t]he appellate court is not required to search the record on its own seeking error"]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellate court may disregard any assertion that is unsupported by citations to the record].) However, the Bakers' argument also fails on its merits. As best as we can discern, the Bakers take issue with the trial court's consideration of the recorded Assignment and Substitution of Trustee. They appear to argue these documents are hearsay and that the Oakes Declaration did not lay the necessary foundation for application of the business records exception (Evid. Code, § 1271).

We are unpersuaded. **"`Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated**. . . . Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subds. (a), (b).) One exception to the hearsay rule is for business records. Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

We need not consider whether the business records requirements have been established **because THE RECORDED ASSIGNMENT AND SUBSTITUTION OF TRUSTEE ARE NOT HEARSAY. "`[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; accord, *Jazayeri v.*

Mao (2009) 174 Cal.App.4th 301, 316 **["documents containing operative facts, such as the words forming an agreement, are not hearsay**"].) Furthermore, **the trial 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, supra,* 62 Cal.4th at p. 939, fn. 13; accord, *Yvanova,* at p. 924, fn. 1; *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754 ["[w]here, as here, judicial notice is requested of a legally operative document-like a contract—the court may take judicial notice not only of the fact of the document and its recording . . . but also facts that clearly derive from its legal effect . . . [if] the fact is not reasonably subject to dispute" (italics omitted)]; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 537 (*Jenkins*), disapproved on other grounds in *Yvanova,* at p. 939, fn. 13.) The trial court did not abuse its discretion in overruling the Bakers' hearsay objections.

Remington Investments, Inc. v. Hamedani (1997) 55 Cal.App.4th 1033 (*Remington Investments*) does not advance the Bakers' argument. *Remington Investments* concerned the requirements for proving a debt owing to a bank taken over by the FDIC. The failed bank's assets, including the lender's position in a revolving line of credit, were assigned to the plaintiff. The line of credit was evidenced by a document entitled "Promissory Note." Despite its title, it "was not a promissory note for a specific sum, but rather provided that defendant was liable for all sums which might either be `advanced' to the defendant or `credited to any of [the defendant's] accounts with [the bank].'" (*Id.* at p. 1035.) The promissory note itself did not reveal exactly how much was advanced or how much was repaid. (*Ibid.*) The plaintiff sued, moved for summary judgment, and offered a copy of the failed bank's note ledger, recording advances and payments, to show the amount claimed to be owing on the line of credit. To lay a foundation for admission of the note ledger, the plaintiff presented the declaration of its vice-president who declared his familiarity with the plaintiff's commercial paper records, including the promissory note and the note ledger. He declared he found the note ledger in the records received from the FDIC. However, the plaintiff presented no evidence of the recordkeeping practices of the failed bank

during the period allegedly recorded on the note ledger. There was also no evidence of the manner in which the note ledger was prepared or the origin of the information it contained. (*Id.* at pp. 1036, 1043.) The trial court sustained the defendant's hearsay objection to the note ledger and denied the plaintiff's summary judgment motion. (*Id.* at pp. 1036-1037.)

The Second District Court of Appeal observed that the plaintiff bore the burden of proving the amount defendant owed. The plaintiff "attempted to meet that burden by attempting to prove the content of the bank's records through an offer of the [n]ote [l]edger. The [n]ote [l]edger was hearsay, and its offer into evidence raised the question of its admissibility to prove the truth of its contents. . . . [¶] . . . [¶] . . . The [n]ote [l]edger was claimed to record advances, payments, interest accruals, etc. It was submitted to prove the factual accuracy of the periodic events it allegedly recorded. It was therefore not admissible over a hearsay objection unless supported by the foundation specified in Evidence Code section 1271. . . ." (*Remington Investments, supra,* 55 Cal.App.4th at pp. 1038-1039, 1043.)

The sustained hearsay objection in *Remington Investments* was to the note ledger only. (*Remington Investments, supra,* 55 Cal.App.4th at pp. 1036-1037, 1042.) There is no comparable document here. The Assignment of the Deed of Trust and Substitution of Trustee at issue in this case are analogous to the promissory note referenced in *Remington Investments.* "**The [p]romissory [n]ote document itself is not a business record as that term is used in the law of hearsay, but rather is an operative contractual document admissible merely upon adequate evidence of authenticity.** Sufficient evidence of authenticity to support admission of the [p]romissory [n]ote document could be supplied by numerous means, at least some of which would likely be available even to the FDIC or its assignees. (See Evid. Code, § 1400 et seq.)" (*Remington Investments,* at p. 1042.)

The Bakers also rely on *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366 (*Herrera*), wherein the plaintiffs asserted Deutsche Bank had no interest in a loan and that the purported trustee (CRC) had no authority to conduct a foreclosure sale. (*Id.* at p. 1374.) To establish CRC's authority to conduct the trustee's sale, the defendants requested that the trial court take judicial notice of the recorded assignment of deed of trust, which stated Deutsche Bank was the beneficiary. The defendants also requested that the trial court take judicial notice of the recorded substitution of trustee, which showed Deutsche Bank, as beneficiary, had substituted

CRC as trustee. (*Ibid.*) *Herrera* holds that a trial court, in ruling on a summary judgment motion, could not take judicial notice of the legal effect of an assignment of a particular deed of trust, because the record failed to show that such assignment was made by a person having the authority to do so within the chain of title. (*Id.* at p. 1375.) In particular, the disputed assignment stated that "JPMorgan Chase Bank, `successor in interest to Washington Mutual Bank, Successor in Interest to Long Beach Mortgage Company'" assigned its interest to Deutsche Bank. (*Ibid.,* capitalization omitted.) The recitation that JPMorgan Chase Bank was the successor in interest to Long Beach Mortgage Company, through Washington Mutual, was hearsay because the chain of title was incomplete. The defendants offered no evidence to establish that JPMorgan Chase Bank had the beneficial interest *to assign* to Deutsche Bank. Thus, judicial notice did not establish that Deutsche Bank was the beneficiary. (*Ibid.*)

This case is nothing like *Herrera* because there is no hearsay recitation within the Assignment or Substitution of Trustee; the legally operative documents show no break in the chain of title. **The Deed of Trust itself establishes MERS's status as nominee and beneficiary, the Assignment establishes U.S. Bank's status as successor beneficiary, and the Substitution of Trustee establishes Quality's status as successor trustee.**

The gist of the Bakers' remaining argument appears to be that Oakes, as a Citi employee, could not authenticate the Assignment or the Substitution of Trustee because she was not an employee of MERS, U.S. Bank, or Quality. But Citi began servicing the Bakers' loan in May 2012, well before the Assignment or Substitution of Trustee were executed or recorded. Both the face of the Assignment and the Oakes Declaration show that Citi recorded the Assignment in April 2013. Again, the face of the Substitution of Trustee and the Oakes Declaration show the Substitution of Trustee was executed by Citi, acting as attorney in fact for U.S. Bank, in February 2014.[4] Oakes was the custodian of Citi's records of the subject loan and, as such, was competent to establish the authenticity of the loan documents.

Furthermore, **the Bakers attached the Assignment as an exhibit to their SAC. "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is.** . . ." (Evid. Code, § 1400.) **The Bakers may have alleged the Assignment was void, but they did not question its authenticity**. (*Id.,* § 1414 **["[a] writing may be authenticated**

by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered"].) The trial court did not abuse its discretion in overruling the Bakers' objections to admission of the Assignment and Substitution of Trustee.

C. ***Cancellation of Instruments/Declaratory Relief***

Because respondents satisfied their burden as the party moving for summary judgment, the burden shifted to the Bakers to present evidence showing there was a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 850.) The Bakers contend there is a triable issue of material fact as to their cancellation of instruments and declaratory relief causes of action based on their claim AHM's bankruptcy meant a beneficial interest in the Deed of Trust never passed to U.S. Bank. They contend that consequently neither U.S. Bank nor Quality were authorized to initiate a foreclosure. However, they have established no triable issue of material fact.

Relying on *Yvanova, supra,* 62 Cal.4th 919, the Bakers insist that a borrower, facing the imminent threat of losing his or her home at a trustee sale, has standing to challenge whether an entity "actually owns the loan." We agree with respondents that the trial court correctly concluded the Bakers lack standing to preemptively challenge foreclosure **because they failed to produce any evidence the Assignment was void**. (*Yvanova,* at pp. 939-940; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 811; *Saterbak, supra,* 245 Cal.App.4th at p. 815.)

In *Yvanova,* our Supreme Court held a borrower has standing to assert a wrongful foreclosure action *after a trustee's sale has taken place,* based on allegations an assignment was void, and not merely voidable at the request of the parties to the assignment. (*Yvanova, supra,* 62 Cal.4th at p. 923.) The borrower in *Yvanova* executed a deed of trust in favor of the lender, New Century Mortgage Corporation. The lender later filed for bankruptcy and its assets were transferred to a liquidation trust. Despite its earlier dissolution, the lender executed a purported assignment of the deed of trust to Deutsche Bank, as trustee for a Morgan Stanley investment trust. (*Id.* at pp. 924-925.) The borrower alleged, in her quiet title action, that this purported assignment was void for two reasons: "New Century's assets had previously, in 2008, been transferred to a bankruptcy trustee; and the Morgan Stanley investment trust had closed to new loans [almost five years

before the purported assignment]." (*Id.* at p. 925.) The defendants' demurrer was sustained without leave to amend because the borrower could not state a quiet title cause of action nor amend to plead wrongful foreclosure. With respect to the latter cause of action, she lacked standing, as a third party, to challenge the purportedly void assignment. (*Id.* at p. 926.)

On review, our Supreme Court observed that the trustee of a deed of trust "acts merely as an agent for the borrower-trustor and lender-beneficiary" and, under section 2924, subdivision (a)(1), may initiate nonjudicial foreclosure "only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent. [Citations.] [¶] . . . [¶] **[I]f the borrower defaults on the loan, only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process."** (*Yvanova, supra,* 62 Cal.4th at pp. 927-928.) However, the court also recognized that **promissory notes and deeds of trust are negotiable instruments that may be sold by a lender without any notice to the borrower and "that a borrower can generally raise no objection to the assignment of the note and deed of trust."** (*Id.* at p. 927.) The *Yvanova* court concluded: "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority," and the borrower would have standing to sue for wrongful foreclosure after such an unauthorized sale. (*Id.* at p. 935.) The court reasoned that a contrary ruling would completely deprive California borrowers whose loans are secured by a deed of trust of any means to assert their legal protections. (*Ibid.*) The court also explained: "A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity's hands. No more is required for standing to sue." (*Id.* at p. 939.) The court disapproved a line of Court of Appeal decisions to the extent "they held borrowers lack standing to challenge an assignment of the deed of trust as void." (*Id.* at p. 939, fn. 13; see *Jenkins, supra,* 216 Cal.App.4th 497; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495; *Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th 256.)

However, the *Yvanova* court emphasized that its holding was narrow: "We hold only that a borrower who *has suffered* a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly *void*

assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. ***We do not hold* or suggest that a borrower may attempt to *preempt* a *threatened* nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts**. Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (*Yvanova, supra,* 62 Cal.4th at p. 924, italics added.)

Despite its explicitly limited holding, the Bakers read *Yvanova* as suggesting their preforeclosure cancellation of instruments and declaratory relief causes of action are sufficient to survive summary judgment. We are unpersuaded. Not only did the *Yvanova* court couch its holding in very narrow terms, but the Bakers also overlook the line of authority rejecting preemptive lawsuits, like theirs, which merely challenge a bank's authority to conduct a trustee sale that has not yet taken place. (See *Jenkins, supra,* 216 Cal.App.4th at pp. 511-512; *Gomes, supra,* 192 Cal.App.4th at p. 1155; *Saterbak, supra,* 245 Cal.App.4th at p. 813.) We conclude this authority survives *Yvanova.* (*Yvanova, supra,* 62 Cal.4th at p. 924; *Saterbak,* at p. 813.)

Saterbak, supra, 245 Cal.App.4th 808 is on point. In that case, a borrower defaulted on her mortgage, and then attempted to cancel an assignment and obtain declaratory relief after a notice of trustee's sale was recorded, but before the sale occurred. She alleged an assignment of her loan to a securitized trust was invalid because it was untimely under the terms of the trust's pooling and servicing agreement. (*Id.* at pp. 811-812, & fn. 1, 814.) The *Saterbak* court distinguished *Yvanova* on two grounds. First, *Yvanova*'s holding only applies to cases where the trustee's sale has been completed. (*Saterbak,* at p. 815; see *Yvanova, supra,* 62 Cal.4th at pp. 934-935.) Second, *Saterbak* also distinguished *Yvanova* because the allegation of a transfer that was untimely under the securitization agreement suggested an assignment that was merely voidable, not void. (*Saterbak,* at p. 815.) The *Saterbak* court explicitly observed: "The crux of [the borrower's] argument is that she may bring a preemptive action to determine whether the [securitized] trust may initiate a nonjudicial foreclosure. . . . However, California courts do not allow such preemptive suits because they `would result in the impermissible interjection of the courts into a *nonjudicial* scheme enacted by the California Legislature.' (*Jenkins*[*, supra,*] 216

Cal.App.4th [at p.] 513 . . .; see *Gomes,* [*supra,*] 192 Cal.App.4th [at p.] 1156 [`**CALIFORNIA'S NONJUDICIAL FORECLOSURE LAW DOES NOT PROVIDE FOR THE FILING OF A LAWSUIT TO DETERMINE WHETHER MERS HAS BEEN AUTHORIZED BY THE HOLDER OF THE NOTE TO INITIATE A FORECLOSURE**.'].) As the court reasoned in *Gomes*: `[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . **. [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy**.' (*Gomes,* at p. 1154, fn. 5.)" (*Saterbak,* at pp. 814-815, italics added & fn. omitted.)

Notwithstanding *Saterbak*'s first ground for distinguishing *Yvanova,* the Bakers ask us to extend *Yvanova* to the preforeclosure context. They point out that a lower federal court, in an unreported decision, has predicted the California Supreme Court will eventually do so when borrowers have a specific factual basis for alleging the foreclosing bank lacks authority to foreclose. (*Lundy v. Selene Finance,* LP (N.D.Cal., Mar. 17, 2016, No. 15-cv-05676-JST) 2016 U.S.Dist. Lexis 35547, *3-*4, *31-*39 (*Lundy*).)[5] The *Lundy* court reasoned: "*Jenkins* and its progeny clearly impose some kind of bar on preforeclosure challenges to the foreclosing entity's alleged lack of authority, and do so because of those challenges' `preemptive' effect on California's nonjudicial foreclosure scheme. *What is less clear is whether that bar is limited to only those challenges that lack any `specific factual basis' in support.* [¶] . . . [T]his Court does conclude that if the California Supreme Court decides to adopt *Jenkins*'s bar to pre-foreclosure challenges, it will limit that bar only to claims that lack any "specific factual basis," as in *Gomes*. . . . [¶] But extending the bar further to reach all preforeclosure challenges would not comport with either *Gomes* and similar cases or the reasoning of *Yvanova.* Imposing such a bar would mean that even if a plaintiff offers plausible support for the claim that the entity foreclosing on her property lacks any authority to do so, that plaintiff would nevertheless have to sit by idly until an allegedly improper foreclosure sale was completed before bringing her otherwise valid challenge in court." (*Lundy,* at *37-*39, italics omitted.)

We need not decide if *Lundy* was correctly decided, despite its failure to consider *Saterbak, supra,* 245 Cal.App.4th 808, **which was decided only one day before.** Even if a borrower, in a preforeclosure case, can avoid

demurrer when he or she "identifie[s] a specific factual basis for alleging that the foreclosure was not initiated by the correct party" (*Gomes, supra,* 192 Cal.App.4th at p. 1156, italics omitted), the Bakers' case cannot survive summary judgment on the record before us. Respondents rightfully point out *Saterbak* was decided on demurrer and the instant appeal involves a motion for summary judgment. Thus, they assert: "In responding to the [m]otion for [s]ummary [j]udgment, [the Bakers] were required to provide evidence the [Assignment] was either void or voidable against them. [The Bakers] failed to adduce any evidence which contradicted that demonstrating MERS had authority to transfer its beneficial interest in the [Deed of Trust], or that MERS was divested of authority when AHM filed for chapter 11 bankruptcy protection."

In their SAC, the Bakers contend MERS lacked authority to transfer a beneficial interest in the Deed of Trust to U.S. Bank. They also contend Quality was not authorized to act as trustee. However, these assertions are flatly contradicted by the Deed of Trust, the Assignment, and the Substitution of Trustee. **CALIFORNIA COURTS "HAVE UNIVERSALLY HELD THAT MERS, AS NOMINEE BENEFICIARY, HAS THE POWER TO ASSIGN ITS INTEREST UNDER A [DEED OF TRUST]."** (*Herrera v. Federal National Mortgage Assn., supra,* 205 Cal.App.4th 1495 at p. 1498.) And U.S. Bank, as beneficiary of the Deed of Trust, was authorized to substitute Quality as trustee. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 39 **["`[b]y statute the Legislature has permitted the beneficiary of a deed of trust to substitute, at any time, a new trustee for the existing trustee'"**].)

The Bakers point to no evidence AHM's assets passed to a bankruptcy trustee before the Assignment or any other evidence submitted in opposition to the summary judgment motion that would create a triable issue of material fact. Instead, they appear to rely solely on the allegations of their SAC. **A plaintiff cannot "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**. . . ." (§ 437c, subd. (p)(2); *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.)

The Bakers contend the rules applicable to adhesion contracts give them standing to enforce "clear language" in the Deed of Trust entitling only the

"lender" to declare a default and initiate foreclosure.[6] The *Saterbak* court also rejected this very same argument, noting that **the BORROWER HAD, IN THE DEED OF TRUST, EXPRESSLY GRANTED MERS LEGAL TITLE AND THE AUTHORITY TO EXERCISE ALL OF THE LENDER'S RIGHTS**. (*Saterbak, supra,* 245 Cal.App.4th at p. 816.) *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.' [Citations.] . . . [¶] [The 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 [the plaintiff's] standing obligations under California law; they merely give [the plaintiff] the power to argue any defense the borrower may have to avoid foreclosure. .** . . . [¶] . . . [¶] . . . As a rule, **`CONTRACTS OF ADHESION ARE GENERALLY ENFORCEABLE ACCORDING TO THEIR TERMS, [BUT] A PROVISION CONTAINED IN SUCH A CONTRACT CANNOT BE ENFORCED IF IT DOES NOT FALL WITHIN THE REASONABLE EXPECTATIONS OF THE WEAKER OR "ADHERING" PARTY.'** (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1446. . . .) . . . **`[B]ecause a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor' [citation], together with the [deed of trust] securing it. [The plaintiff] `irrevocably grant[ed] and convey[ed]' the . . . property to the Lender; recognized that MERS (as nominee) had the right `to exercise any or all' of the interests of the Lender; and agreed that the Note, together with the [deed of trust] could be sold one or more times without notice to her. There is no reasonable expectation from this language that the parties intended to allow [the plaintiff] to challenge future assignments made to unrelated third parties."** (*Saterbak,* at pp. 816-817, italics omitted.)

The Bakers also argue vaguely that "[e]ven if U.S. Bank was the Lender, . . . it did not execute the Substitution of Trustee. Instead, [Citi] executed the Substitution of Trustee without any proof that they had any authority to execute said substitution." Citi presented evidence it was the loan servicer. And **NOTHING IN THE LANGUAGE OF THE DEED OF TRUST PROHIBITS THE LENDER FROM ACTING THROUGH AN AGENT WHEN APPOINTING A SUCCESSOR TRUSTEE**. Nor do the Bakers point to any authority requiring U.S. Bank to provide them with

affirmative evidence of Citi's authority. The authority supports the contrary position. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC, supra,* 8 Cal.App.5th at p. 40 **["[N]OWHERE IN THE NONJUDICIAL FORECLOSURE STATUTES OR THE DEED OF TRUST DOES IT REQUIRE A BENEFICIARY TO PROVIDE COPIES OF ANY POWER OF ATTORNEY TO THE BORROWER**"].)

The Bakers did not meet their burden of showing there was a triable issue of fact to support their claim the Assignment was void. The trial court did not err in granting respondents' motion for summary judgment.

IV. DISPOSITION

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

SIMONS, Acting P. J. and NEEDHAM, J., concurs.

[1] Undesignated statutory references are to the Civil Code. Quality, as successor trustee, filed a declaration of nonmonetary status. (§ 2924*l,* subds. (a), (b).) It appears no objections were filed and, thus, Quality did not participate further in the litigation and is not a party to the appeal. (§ 2924*l,* subd. (d).) Hereafter, we refer to Citi and U.S. Bank collectively as respondents.

[2] U.S. Bank N.A. in its capacity as trustee to the Series 2006-A6 Trust is hereafter referred to as U.S. Bank.

[3] The Bakers dismissed their wrongful foreclosure cause of action prior to the summary judgment ruling. By failing to address their breach of contract and unlawful competition causes of action in their opening brief, the Bakers have forfeited any argument the trial court's ruling was in error with respect to these causes of action. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [arguments not raised in opening brief need not be considered].) For the same reason, we do not address another argument the Bakers raise only in their reply brief—that a triable issue of material fact exists as to whether the Note was assigned to U.S. Bank with the Deed of Trust. (*Ibid.*)

[4] In relevant part, Oakes states: "I am one of the custodians of record for [Citi], which maintains a computer database (the `Loan Records') of acts, transactions, payments, communications, escrow account activity, disbursements, events, chain of title activity, and analyses with respect to mortgage loan which [Citi] owns, funds, and/or services, including those related to the [Bakers'] loan. . . . These records and the entries in these records are made and kept within the ordinary course of business and are made at or near the time of the act, events or conditions of record by a means which insures their reliability and [are] made by persons whose responsibility is to record such acts, events or conditions. I have personally reviewed the Loan Records pertaining to the Loan which is

the subject of this action. . . . [¶] . . . [¶] A review of [Citi's] books and records show that an Assignment of the [Deed of Trust], from [MERS] as nominee for [AHM] to [U.S. Bank] was executed by Stephanie M. Goeckner, an Assistant Secretary for MERS. A true and correct copy of the Assignment is attached hereto as Exhibit 3. The Assignment was executed April 3, 2013 and recorded on April 16, 2013. [¶] . . . [¶] [Citi]'s books and record[s] show that on February 27, 2014, a Substitution of Trustee . . . executed by [Citi] as attorney-in-fact for U.S. Bank was recorded in Alameda County replacing Alliance Title Company with Quality Loan Service Corporation as Trustee on the Baker [Deed of Trust]. A true and correct copy of the [Substitution of Trustee] is attached hereto as Exhibit 5."

[5] "`**Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority.'"** (*Gomes, supra,* 192 Cal.App.4th at p. 1155, fn. 6; accord, Cal. Rules of Court, rule 8.1115; *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990, fn. 4.)

[6] The Bakers also present a conclusory argument that HBOR gives them standing to maintain their preforeclosure action. The argument has been forfeited by the Bakers' failure to support their argument with reasoned analysis or citation to any HBOR authority. (See *Guthrey v. State of California, supra,* 63 Cal.App.4th at pp. 1115-1116.) In any event, **the provision on which they presumably rely (§ 2924, subd. (a)(6)) does not authorize a private right of action**. (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 158; see § 2924.12.)