JOHN MEDINA, Plaintiff and Appellant,
v.
OCWEN LOAN SERVICING, LLC, et al., Defendants and Respondents.

No. A150662.

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

Filed November 5, 2018.

Appeal from the Alameda County, Superior Court No. RG16-814191.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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POLLAK, J.

Plaintiff John Medina appeals from a judgment entered in favor of defendants Ocwen Loan Servicing, LLC (Ocwen), Mortgage Electronic Registration Systems, Inc. (MERS), and Wells Fargo Bank (Wells Fargo), as trustee for a mortgage-backed securities trust, after the entry of an order sustaining without leave to amend their demurrer to Medina's first amended complaint. Medina seeks to prohibit foreclosure of his home although no foreclosure has yet occurred. Wells Fargo is the current beneficiary of the deed of trust (DoT) on Medina's home, which it acquired by a 2016 assignment from MERS. Medina contends that the assignment is invalid because MERS lost its power to assign the DoT in 2006 when it assigned the DoT from the original lender to a new beneficiary that was not a MERS member. Medina also alleges that a transfer of the loan to the mortgage-backed securities trust was void ab initio because the transfer did not comply with requirements in the trust's pooling and servicing agreement. We shall affirm the judgment.

Factual and Procedural Background

Medina's pleadings allege as follows.[1] In May 2006, upon obtaining a home loan, Medina executed the DoT, which identifies the lender as Paul Financial, LLC, and the beneficiary as MERS, "acting solely as nominee for Lender and Lender's successors and assigns." Paul Financial was a "table lender" for Greenwich Capital Financial Products, Inc. (GC Financial), which funded the loan. Paul Financial was the loan's original servicer; the current servicer is defendant Ocwen.

Later in 2006, Paul Financial sold the loan to GC Financial, which sponsored a mortgage-backed securities transaction that created the Harborview Mortgage Loan Trust 2006-10, Mortgage Loan Passthrough Certificates, Series 2006-10 (Harborview trust or the trust). The trust is governed by New York law and by a pooling and service agreement (PSA). GC Financial bundled Medina's loan with other mortgages and sold them to Greenwich Capital Acceptance, Inc. (GC Acceptance) as "depositor," or trustee, for the trust. GC Acceptance in turn sold the loans to Wells Fargo as trustee for the trust. Neither GC Financial nor GC Acceptance is a member of MERS. Also, the PSA provides that to include a loan in the trust, the depositor must convey to the trust all rights to and interest in the note and DoT by no later than 90 days after the trust's closing date of November 13, 2006. The depositor did not do so as to Medina's loan.

Some nine years after the securitization, in December 2015, defendant Ocwen sent Medina a letter headed "Urgent Delinquency Notice/To Avoid Foreclosure Respond by 01/15/2016." It stated that Medina's account was past due, and that Ocwen could foreclose if Medina did not contact them. In response, Medina applied for a loan modification, which Ocwen denied in February 2016.

A month later, Ocwen recorded an assignment of the DoT to Wells Fargo. The assignment states that MERS, "solely as nominee for Paul Financial LLC, its successors and/or assigns," transfers to Wells Fargo, as trustee of the Harborview trust, all of MERS's interest under the DoT.

Medina does not allege that any defendant has served or sought to record a notice of default or of sale pursuant to Civil Code section 2924. Nonetheless, in May 2016, Medina filed a complaint asserting five causes of action, seeking: (1) declaratory relief that defendants have no right to collect mortgage payments or pursue foreclosure, (2) damages for wrongful foreclosure, (3) quiet title, (4) injunctive relief to stop deceptive practices

that violate the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and (5) restitution of mortgage payments to avoid unjust enrichment.

In October 2016, the trial court sustained a demurrer to all counts with leave to amend. It ruled that Medina's claims all failed because he did not allege that defendants had yet initiated a foreclosure, and that even if foreclosure proceedings had begun, his allegations would not state a cause of action for wrongful foreclosure. The court rejected Medina's theories that MERS lacked standing to assign the DoT to Wells Fargo and that failure to comply with the closing date set forth in the trust's PSA voided the transfer of the loan. The court sustained the demurrer with leave to amend "to allege th[at] foreclosure proceedings have been initiated and to allege facts showing that . . . [they] should be enjoined because the March 2016 assignment [of the DoT] is void."

Medina then filed the operative amended complaint. He did not add an allegation that defendants had initiated a foreclosure, but added new passages summarizing his theories. He alleged that "Wells Fargo is not a successor or assign of Paul Financial because MERS sold Plaintiff's mortgage loan . . . in 2006 [to GC Financial], a non-MERS member," and that MERS's March 2016 assignment of the DoT to Wells Fargo was void because "[o]nce a mortgage is sold, MERS must establish an agency relationship with its new principal, the new beneficiary," but MERS had not done so after assigning Medina's loan to GC Financial.

After granting defendants' request for judicial notice of the existence and legal effect of three recorded documents—the 2006 DoT, the 2016 assignment of the DoT to Wells Fargo, and a 2006 grant deed—the court sustained their demurrer to the amended complaint without leave to amend. Medina timely filed a notice of appeal.

Discussion

1. Standard of Review

"`On review of an order sustaining a demurrer without leave to amend, 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." [Citation.]' [Citation.] `"`We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact

or law. [Citation.] . . .' [Citation] '" [Citation.] `We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory.'" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) We interpret the complaint reasonably, "reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also consider documents attached to the complaint as exhibits: "If recitals in those documents are inconsistent with the allegations of the complaint, the recitals take precedence, and we disregard allegations inconsistent with the unambiguous text of the documents." (*Williams v. Housing Auth. of Los Angeles* (2004) 121 Cal.App.4th 708, 714, fn. 6). Finally, if the trial court sustained a demurrer without leave to amend, as here, we must decide whether there is a reasonable chance that the plaintiff could cure the defect with an amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

2. Request for Judicial Notice

Medina contends that the court erred in granting defendants' request for judicial notice of the three documents because photocopies rather than certified copies were submitted in support of the application. While the best practice is to submit certified copies of recorded documents, we need not linger over the issue here because Medina himself submitted copies of two of the documents—the 2006 DoT and 2016 assignment—as exhibits to his amended complaint. The third document—a grant deed from Medina to himself and Esther Becerra—is irrelevant to the issues on appeal. Any error as to judicial notice was thus harmless.

3. Wrongful Foreclosure

Medina's only reasoned argument on the merits is that the trial court erred in holding that he cannot assert a cause of action for wrongful foreclosure. Medina insists that MERS lacked authority to assign the DoT to Wells Fargo, and that the assignment of the loan to the trust was void because not recorded by the date required by the PSA. These arguments fail for independently sufficient reasons.

First, as the trial court explained, **California authority holds that a homeowner cannot preemptively assert causes of action for wrongful foreclosure before a trustee has conducted a foreclosure sale or at least begun foreclosure proceedings by filing a notice of default**. (*Kan v. Guild*

Mortgage Co. (2014) 230 Cal.App.4th 736, 741-744, and authorities cited; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511-513, disapproved on other ground in *Yvanova v. New Century Mortgage Co.* (2016) 62 Cal.4th 919, 933-939 & fn. 13 (*Yvanova*).[2])

The operative amended complaint does not allege that foreclosure proceedings have been formally initiated but Medina asserts that "the unregulated banks may fail to record any such notice, and begin [the] foreclosure process in a manner . . . contrary to law," and the amended complaint alleges that Ocwen "commenced foreclosure activity" by "purporting to assign [the DoT] to . . . Wells Fargo." But while Ocwen's intent in recording the 2016 assignment may have been to facilitate a future foreclosure, **the foreclosure process can be initiated only by recording and serving the notices required by Civil Code section 2924**. The conduct Medina alleges simply does not constitute a foreclosure.

In addition to being premature, Medina's arguments fail on their merits. He contends that the 2016 assignment of the DoT to Wells Fargo was invalid because MERS lost its authority to assign the DoT after the initial, 2006 assignment from original lender Paul Financial to GC Financial, because GC Financial is not a member of the MERS registry and has no independent agency relationship with MERS. However, **the DoT defines MERS as "a nominee for Lender *and Lender's successors and assigns*" and states that "[t]he beneficiary of this Security Instrument is MERS (solely as nominee for Lender *and Lender's successors and assigns*)." (Italics added.) The DoT states that Medina "understands and agrees that MERS holds only legal title to the interests granted by [him] 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. . . ." (Italics added.) GC Financial, GC Acceptance, and Wells Fargo are "successors and assigns" of the original lender Paul Financial, so that MERS was authorized as their nominee to exercise the Lender's powers under the DoT**. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, disapproved on other ground in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13; *Avila v. Wells Fargo Bank, N.A.* (N.D. Cal. Dec. 23, 2016) 2016 U.S.Dist. Lexis 178229, at pp. *8-*9.)

Medina's second theory is that the transfer of his loan to the Harborview trust, and the assignment of the DoT to Wells Fargo as trustee of that trust, were void because the relevant assignments were not timely recorded in compliance with the trust's PSA. Although *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 previously provided support for this theory, subsequent decisions have made clear that the failure to timely record the assignments did not render them void.[3] Noting that **the New York trial court order on which *Glaski* based its interpretation of New York law had later been reversed on appeal** (see *Wells Fargo Bank v. Erobobo* (N.Y.App. Div. 2015) 127 A.D.3d 1176, 1178), and that **the Second Circuit Court of Appeals had held that a post-closing transfer is not void under New York law, but only voidable** (*Rajamin v. Deutsche Bank National Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-90), **the Second, Third, and Fourth Appellate Districts have all held that such an untimely assignment is merely voidable.** (*Yhudai v. Impac Funding Corp.* (2016) 1 Cal.App.5th 1252, 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*. . . . [Citation] . . . **[A] postclosing assignment of a loan to an investment trust that violates the terms of the trust [is] voidable, not void, under New York law."];** accord, *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 812-817 [**rejecting "the discredited *Glaski* interpretation of New York law, an interpretation expressly rejected by the appellate courts in New York"];** *Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 815 & fn. 5 [similar].)

4. *Other Causes of Action and Leave to Amend*

Medina's brief on appeal focuses almost exclusively on his claim that the trial court erred in holding that he cannot pursue a cause of action for wrongful foreclosure on the facts pled in his original complaint. Although that pleading and his amended complaint also include counts for declaratory relief, to quiet title, for injunctive relief under the UCL, and for restitution to avoid unjust enrichment, his lone brief presents no reasoned argument that any of those counts states a cause of action, or could be amended to state a cause of action. The claims for declaratory relief, to quiet title, and for restitution fail because they depend on the alleged invalidity of the 2016 assignment, and the UCL cause of action fails because the conduct he has alleged was not fraudulent or likely to deceive.

Although Medina asserts that the trial court abused its discretion by failing to give him leave to amend further, he does not identify any additional facts he can allege to cure the fatal defects described above. The trial court thus properly sustained the demurrer without leave to amend as to all causes of action.

Disposition

The judgment is affirmed. Defendants shall recover their costs incurred on appeal.

Siggins, P.J. and Ross, J.[*], concurs.

[1] Medina's brief recites, nearly verbatim, the "Material Facts . . ." section not of the operative amended complaint, but of his original complaint. Some facts alleged in the original complaint, and recited in Medina's brief, were omitted from the amended complaint. For simplicity's sake, we set forth all the allegations in the original complaint recited in Medina's brief, whether or not those allegations appear in the amended complaint.

[2] The Supreme Court held in *Yvanova* that a borrower has standing to allege that a *completed foreclosure sale* was wrongful because an assignment of the note and DoT to the foreclosing entity was void (*Yvanova, supra,* 62 Cal.4th at p. 939), but ***Yvanova* distinguished pre-foreclosure cases like this one and expressly declined to assess the validity of decisions holding such suits impermissible (*id.* at p. 924 ["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."]; accord, *id.* at pp. 933-934). As the Fourth Appellate District has since held, *Yvanova* thus did not alter the rule barring preforeclosure actions. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815**; cf. *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 281 [noting in dicta a "distinct possibility" that Supreme Court may eventually allow preforeclosure suits based on allegations that an assignment was void].)

[3] In *Yvanova,* the Supreme Court endorsed *Glaski*'s holding that a homeowner has standing to challenge a void assignment of their loan (*Yvanova, supra,* 62 Cal.4th at p. 929), **but the court expressly did not decide whether failure to comply with the closing date of a PSA governed by New York law makes an assignment void or merely voidable** (*id.* at p. 931).

[*] Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.