JIMMY BOYLE, Plaintiff and Appellant,
v.
VESUVIO HOLDINGS, LLC, et al., Defendants and Respondents.
Nos. B256055, B259976.
Court of Appeals of California, Second District, Division Three.
Filed October 14, 2016.
CONSOLIDATED APPEALS from a judgment of the Superior Court of Los Angeles County, Superior Court No. BC503500. Holly E. Kendig, Judge. Reversed.
Law Offices of Bruce J. Guttman and Bruce J. Guttman for Plaintiff and Appellant.
No appearances for Defendants and Respondents Vesuvio Holdings, LLC and Luxury Portfolio, LLC.
Chuck & Tsoong, Stephen C. Chuck and Victoria J. Tsoong for Defendants and Respondents Deutsche Bank National Trust Company, as Trustee, etc. and CIT Bank, N.A.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

INTRODUCTION

After the nonjudicial foreclosure of his home, plaintiff Jimmy Boyle sued the trustee of his deed of trust, along with the trustee of the securitized trust holding his loan documents, its agent, the loan servicer, and the two purchasers of his property at the foreclosure sale.[1] The complaint alleges wrongful foreclosure and slander of title, and plaintiff seeks to clear the cloud on his title. All of plaintiff's claims are premised on his allegations that the assignment of his loan documents to the securitized trust was void *ab initio,* with the result that the foreclosing defendants had no right to sell his property. The trial court sustained the demurrers of all defendants to the operative complaint on the ground that the proximate cause of plaintiff's damages was his own default on the loan obligations. The court denied leave to amend and dismissed the action. On appeal, plaintiff contends that he has stated or could amend to state his causes of action. For the reasons set forth herein, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The general allegations in the operative complaint*

a. *Plaintiff's Loan*

Viewing the first amended and operative complaint according to the usual rules of appellate review (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*)),[2] although not a model of clarity, it alleges that plaintiff executed a trust deed securing a $460,000 promissory note. The trust deed identified the lender and beneficiary as IndyMac Bank, F.S.B. (IndyMac), and the trustee as Charles A. Brown.

b. *transfer of IndyMac to OneWest*

IndyMac later ceased doing business and the Federal Deposit Insurance Corporation (FDIC) took it into receivership. On March 19, 2009, the FDIC completed a sale of IndyMac to defendant OneWest (the transfer). Plaintiff alleges that, as of that March 2009 date, OneWest assumed the operations of IndyMac, including all servicing rights concerning plaintiff's loan, with the result that the FDIC ceased to act as IndyMac's receiver and lost its authority to act on IndyMac's behalf.

c. *assignment of plaintiff's loan and trust deed to the securitized trust*

On March 23, 2012, the FDIC as receiver for IndyMac — despite the alleged transfer of IndyMac to OneWest three years earlier — purported to assign plaintiff's trust deed and note to a mortgage-backed security (the assignment).[3] Executed under the signature of "JC San Pedro, Attorney in Fact," the assignment was made by the FDIC to defendant Deutsche Bank, as trustee of the INDX Mortgage Trust 2007-AR21IP, Mortgage Pass-Through Certificates, Series 2007-AR21IP under the Pooling and Servicing Agreement dated October 1, 2007 (the INDX securitized trust).

The complaint alleges that the assignment of plaintiff's trust deed to the INDX securitized trust was void *ab initio* for three reasons: (1) the purported assignment occurred in 2012, years after the INDX securitized trust's November 2007 closing date (the date by which all loans and mortgages or deeds of trust had to be transferred to the investment pool); (2) the FDIC, having already transferred all of IndyMac's assets to OneWest in 2009, no longer had authority to execute the assignment to the INDX securitized trust in 2012; and (3) the signature on the

assignment was a forgery and JC San Pedro was not an employee or agent of the FDIC. For these three reasons, plaintiff alleges, the assignment was a nullity and so the INDX securitized trust was not the true owner or holder of plaintiff's note and trust deed, was not owed any money under his loan documents, and thus had no power to authorize initiation of the foreclosure sale.

d. ***substitution of trustee under plaintiff's trust deed***

On March 23, 2012, the same day as the assignment, Deutsche Bank, as trustee of the INDX securitized trust, executed a document purporting to substitute defendant Meridian[4] in place of Charles A. Brown, as trustee under plaintiff's trust deed (the substitution).
Plaintiff alleges that the substitution was void for three reasons: (1) the assignment being void *ab initio*, as alleged *infra*, Deutsche Bank, as trustee of the INDX securitized trust, lacked the power to execute the substitution; (2) the signature on the substitution was forged or was made by an individual who did not have authority to act on behalf of Deutsche Bank; and (3) the substitution violated paragraph 24 of plaintiff's trust deed, which empowered lenders only to make trustee substitutions.

e. ***the foreclosure***

On April 18, 2012, Meridian, on behalf of the INDX securitized trust, gave notice of default and election to sell plaintiff's property under the power of sale provision in plaintiff's trust deed. On July 21, 2012, Meridian recorded a notice of trustee's sale to be held on August 13, 2012. Plaintiff alleges that the notices of default and of trustee's sale were ineffective because, the assignment and substitution being void, Meridian never became the duly appointed trustee under the trust deed or the authorized agent of the true lender or beneficiary.
On December 10, 2012, IndyMac Mortgage Services, a division of OneWest, invited plaintiff to apply for a loan modification through the Home Affordable Modification Program (HAMP). Plaintiff's loan modification application was denied by letter sent on February 11, 2013. Meridian sold the property at the foreclosure sale three days later on February 14, 2013, to defendants Vesuvio and Luxury.

2. ***The operative complaint***

Plaintiff asserts causes of action for:

a. ***wrongful foreclosure against Deutsche Bank and OneWest***

Plaintiff does not seek preemptively to forestall foreclosure; he alleges that the sale was wrongful on two grounds. First, plaintiff alleges that Deutsche Bank, as trustee of the INDX securitized trust, had no authority to foreclose because the assignment to it was void ab initio. Second, plaintiff alleges wrongful foreclosure in violation of the California Homeowner Bill of Rights (HBOR)[5] by (1) engaging in dual tracking, i.e., conducting a trustee's sale while plaintiff's loan modification application was pending (Civ. Code, § 2923.6);[6] (2) failing to provide plaintiff with a "single point of contact" (§ 2923.7); and (3) foreclosing without authority to do so (§ 2924). Plaintiff alleges he was damaged, among other reasons, because defendants deprived him of critical information about irregularities in the chain of title to prevent him from taking action to enjoin the sale of his home (§ 2923.5).

b. ***slander of title against all defendants***

Plaintiff alleges, because the assignment was void *ab initio*, Deutsche Bank, as trustee of the INDX securitized trust, had no authority to execute the substitution of Meridian as trustee under plaintiff's trust deed, or to authorize initiation of the foreclosure sale. Plaintiff alleges that Vesuvio and Luxury had "at least constructive knowledge" that the assignment was invalid because public records establish that (1) the FDIC, having already transferred IndyMac to OneWest in 2009, could not later transfer his note and trust deed in 2012 to the INDX securitized trust; and (2) JC San Pedro, who was not an employee of the FDIC, had no authority to act on the FDIC's behalf. Plaintiff alleges that the recording of the trust deed upon sale slandered his title, caused him damage, and prejudiced him, by forcing him to expend time and money to investigate the questionable documents, and by depriving him of the right to deal with the parties holding actual interest in his loan documents in an effort to prevent foreclosure. Plaintiff further alleges that Deutsche Bank and OneWest acted maliciously and with reckless disregard of plaintiff's rights because their handling of plaintiff's loan was part of a large-scale operation of backdating, manufacturing, and falsifying loan documents to carry out mass foreclosures, and so they knew or had reason to know of the irregularities but failed to stop or correct the improprieties.

c. ***quieting title and removing the cloud on title against Luxury and Vesuvio***[7]

These causes of action are dependent on the success of the first two. Plaintiff seeks a judicial determination that title to the property remains vested in him alone because the foreclosure sale and the trustee's deed upon sale were inoperative

based on the void assignment and ineffective substitution. And, he seeks an order declaring the deeds into Vesuvio and Luxury to be invalid.

3. ***The demurrer of Deutsche Bank and OneWest to the operative complaint***

Deutsche Bank and OneWest together generally demurred to the complaint. They asserted that the HBOR does not apply retroactively to the foreclosure of plaintiff's property and in any event, the HBOR allegations were preempted by the federal Home Owners' Loan Act (12 U.S.C. § 1461 et seq.) (HOLA). Additionally, they argued that under California's nonjudicial foreclosure statutes, plaintiff had no right to a judicial determination whether the party initiating the trustee sale was authorized. They also argued that the slander of title cause of action failed because the proximate cause of harm to plaintiff was his own default on the loan, and because the foreclosing defendants enjoyed a privilege for all documents recorded in a nonjudicial foreclosure. (§§ 2924 & 47.)

4. ***The demurrer of Vesuvio and Luxury to the operative complaint***

Vesuvio and Luxury together generally demurred to the causes of action to quiet title, remove the cloud on title, and slander of title. They asked the trial court to take judicial notice of the notices of default and of trustee's sale attached to the complaint. They relied on the rebuttable presumption of a valid sale which arises from the recording of a trustee's deed that recites the satisfaction of all notice requirements and procedures required by law (§ 2924). Plaintiff failed to allege facts showing that Vesuvio and Luxury were not bona fide purchasers for value to overcome the presumption of validity of the foreclosure sale, they argued, as plaintiff failed to show that they had notice of the FDIC's lack of authority to execute the assignment. Also, noting a properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender, they argued that plaintiff had no standing to challenge the authority of the foreclosing parties to conduct the sale.

5. ***The ruling***

The trial court sustained the demurrers without leave to amend. Relying on *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*), disapproved on other grounds (standing) in the recent case of *Yvanova, supra*, 62 Cal.4th at page 939, the court ruled that plaintiff failed to establish he was damaged or prejudiced by the foreclosure. The court reasoned that plaintiff never claimed he was not in default or that the "true lender" would have refrained from

foreclosing under the circumstances. Plaintiff's claim is only that the *wrong entity conducted the trustee's sale*, the trial court observed. Even assuming Deutsche Bank did not have the authority to foreclose, the court explained that the "true victim" of the wrongful sale was not plaintiff/borrower, but the original lender, i.e., OneWest as IndyMac's successor. The court denied leave to amend. Plaintiff filed his timely appeals from the dismissal of his lawsuit.

CONTENTIONS

Plaintiff contends that he has stated, or could amend to state, a cause of action for damages from wrongful foreclosure. Assuming he has alleged wrongful foreclosure, plaintiff contends he can allege one or more of the remaining causes of action.

DISCUSSION

In determining whether plaintiff has stated a cause of action, "`our standard of review is clear: "`. . .' When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." [Citations.]' [Citation.] Our review is de novo. [Citation.]" (*Rosolowski v. Guthy-Renker LLC* (2014) 230 Cal.App.4th 1403, 1410, quoting from *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

1. *wrongful foreclosure*

The elements of a tort cause of action for wrongful foreclosure are: "`(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.' [Citation.]" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) However, **tender is not required when, as here, the challenge to the foreclosure sale is that it was void *ab initio***. (*Glaski, supra*, 218 Cal.App.4th at p. 1100.)

a. ***Plaintiff has successfully alleged wrongful foreclosure based on a void assignment that deprived defendants of authority to foreclose.***

"A foreclosure initiated by one with no authority to do so is wrongful for purposes of . . . an action" for wrongful foreclosure. (*Yvanova, supra,* 62 Cal.4th at p. 929.) **"[O]nly the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt. . . ."** (*Id.* at p. 928.)
A borrower may premise a wrongful foreclosure cause of action on allegations that the foreclosing entity lacked authority because the assignment through which it purportedly became holder, trustee, or beneficiary under the trust deed, was void. (*Glaski, supra,* 218 Cal.App.4th at pp. 1094-1095.) "A void contract is without legal effect. [Citation.] `It binds no one and is a mere nullity.' [Citation.]" (*Yvanova, supra,* 62 Cal.4th at p. 929.) By comparison, **if the transaction is merely voidable, a cause of action is not stated** (see *Glaski,* at pp. 1094-1095), **because a voidable transaction "`is one where one or more parties have the power, . . . by ratification of the contract to extinguish the power of avoidance.'** [Citation.]" (*Yvanova,* at p. 930.)
As noted, plaintiff's operative complaint alleges that Deutsche Bank and OneWest had no authority to foreclose because the assignment of his promissory note and trust deed to the INDX securitized trust was void *ab initio* for three reasons: (1) the assignment was executed more than four years after the securitized trust's 2007 closing date; (2) the FDIC, having already transferred IndyMac to OneWest, no longer had plaintiff's loan documents to transfer to the securitized trust; and (3) the signature on the assignment was forged and was given by individuals without authority to sign.
Turning to the first basis for voidness, the court in *Glaski, supra,* 218 Cal.App.4th 1079, held that the homeowner stated a cause of action for wrongful foreclosure on the basis that the post-closing date transfer of his note and mortgage to the trustee of a New York securitized trust was void. (*Id.* at pp. 1083-1087, 1094-1095.) However, **this portion of *Glaski* has been rejected as inconsistent with New York authority establishing that an assignment to a securitized trust made after the trust's closing date was *voidable* under New York law**. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 & fn. 5; *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-90 [**under "weight of New York authority," "an unauthorized act by the trustee is not void but merely voidable by the beneficiary"**].) The record here shows that the INDX securitized trust was formed under the laws of New York and so the post-closing date assignment is not void but merely voidable. Therefore, **PLAINTIFF CANNOT STATE A CAUSE OF ACTION FOR WRONGFUL FORECLOSURE BASED ON THE DATE OF THE ASSIGNMENT.**

Plaintiff's second alleged reason that the assignment was void does state a basis for wrongful foreclosure, namely that the FDIC had nothing to assign to Deutsche Bank, as trustee of the INDX securitized trust, having already transferred all of IndyMac to OneWest nearly four years earlier. **Where the assignor holds no interest to assign, the assignment is void, not voidable.** (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 564 (*Sciarratta*).) The allegations in *Sciarratta* were that Chase assigned "all beneficial interest" in the plaintiff's notes and trust deed to Deutsche Bank in April 2009, and then assigned the same interests to Bank of America in November 2009. (*Id.* at pp. 562-563.) These allegations stated a void assignment. (*Id.* at p. 564.) We accept as true the allegations that the FDIC transferred all of IndyMac to OneWest in 2009, including all beneficial interest in plaintiff's loan documents and, notwithstanding that *OneWest* held plaintiff's note and trust deed by then, the *FDIC in 2012 assigned* the same loan documents to the INDX securitized trust, the beneficiary who conducted the foreclosure sale. On that basis, plaintiff has stated a void assignment.

Plaintiff's third alleged reason the assignment was void is that the signature thereon was a forgery**. "It has been uniformly established that a forged document is void *ab initio* and constitutes a nullity; as such it cannot provide the basis for a superior title as against the original grantor."** (*Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 43, and cases cited therein [**trust deed obtained by means of forgery is void**].) Assuming this forgery allegation is true, as we must on review of a demurrer, plaintiff has alleged a void, not a merely voidable, assignment on this ground also. (See *Halajian v. Deutsche Bank Nat. Trust Co.* (E.D.Cal. Feb. 14, 2013, No. 1:12-CV-00814 AWI GSA) 2013 WL 593671, at p. *7 [dismissal for failure to state a claim improper in absence of judicially noticeable documents showing that signor was in fact authorized to sign on behalf of Mortgage Electronic Registration Systems, Inc.].)

Therefore, plaintiff has alleged a wrongful foreclosure cause of action based on the theories that Deutsche Bank, as trustee of the INDX securitized trust, lacked authority to foreclose on plaintiff's property because the assignment through which it purportedly became beneficiary under the trust deed was void for two reasons: the FDIC had nothing to transfer to Deutsche Bank, as trustee of the INDX securitized trust, and the signature on the assignment was a forgery.

Deutsche Bank and OneWest argue, citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, that plaintiff lacked standing to challenge Deutsche Bank's authority to hold the trustee's sale. *Gomes* held that the nonjudicial foreclosure scheme, is "`a comprehensive framework for the regulation of a nonjudicial foreclosure sale'" that did not allow for a lawsuit attacking the note holder's authority to initiate the foreclosure process. (*Ibid.*) However, our Supreme

Court recently concluded that "a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Yvanova, supra*, 62 Cal.4th at p. 939; accord, *Sciarratta, supra*, 247 Cal.App.4th at p. 555.)[8] Plaintiff has standing.

b. *Plaintiff has stated, and should be afforded the opportunity to amend to state, a cause of action for wrongful foreclosure based on violations of the HBOR.*

In addition to the void assignment, plaintiff alleges that the foreclosure was wrongful because the trustee's sale was conducted in violation of various provisions of the HBOR. The HBOR is a series of statutes designed to "`address more pointedly the foreclosure crisis in our state'" and to place specific limitations on the nonjudicial foreclosures of owner-occupied residential real property. (*Monterossa v. Superior Court, supra*, 237 Cal.App.4th at pp. 749, 752.) Among other things, the **HBOR requires servicers to provide borrowers with a "single point of contact" to enhance communication (§ 2923.7), and prohibits dual tracking, which occurs when a servicer continues with a foreclosure while the borrower's application for a loan modification is under review, or within 30 days of the application's denial.** (§ 2923.6; *Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal.App.4th 49, 86, fn. 14.)[9]
The complaint alleges that Deutsche Bank and Meridian engaged in unlawful dual tracking by holding the foreclosure sale just three days after OneWest denied plaintiff's HAMP application, and that OneWest failed to provide him with a single point of contact. Deutsche Bank and OneWest demurred on the ground that plaintiff did not state a cause of action because his factual allegations concerning his HAMP efforts and OneWest's conduct were insufficient. Although plaintiff has stated a violation of the single point of contact requirement, ***he omitted to allege that his HAMP application was "complete."*** (See § 2923.6, subd. (c).) We agree with plaintiff that, to the extent he failed to include other sufficient information concerning his HAMP application, this represents a deficiency of facts over which he has control and so he should be given leave to amend. As he alleges the sale was void *ab initio*, plaintiff is not otherwise required to allege that he tendered the loan balance before filing suit, defendants' contention to the contrary notwithstanding. (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1273-1274; *Glaski, supra*, 218 Cal.App.4th at p. 1100.)
Defendants contend that sections 2923.6 and 2923.7 became effective January 1, 2013 and do not apply retroactively. However, according to the complaint, the violations also occurred in February 2013, *after* the HBOR took effect. In sum, plaintiff should be allowed to amend to allege, if possible, facts concerning the

completion of his HAMP application under section 2923.6. In all other respects, plaintiff has stated a cause of action for wrongful foreclosure in violation of these two provisions of the HBOR.
However, plaintiff alleges a third violation of the HBOR, namely that the sale was conducted by an entity that was neither the holder of the beneficial interest, the original or substituted trustee under the trust deed, nor the designated agent of the beneficiary, in violation of section 2924, subdivision (a)(6). **PLAINTIFF CANNOT STATE A CAUSE OF ACTION FOR MONEY DAMAGES FOR VIOLATION OF THIS PROVISION OF THE HBOR**. (*Hernandez v. Select Portfolio, Inc.* (C.D.Cal. June 25, 2015, No. CV15-01896 MMM (AJWx) 2015 WL 3914741, at p. *8 ["Section 2924.12 sets forth a statutory scheme for redressing violations of the HBOR; despite the fact that it references various other HBOR statutes, § 2924.12 does not mention § 2924(a)"].)

c. *HOLA preemption does not apply.*

Defendants argue that HOLA, which afforded federally chartered savings banks field preemption of all state laws governing real estate, preempts plaintiff's claims based on the HBOR. The contention fails.
The supremacy clause of the United States Constitution requires courts to follow federal law when, in enacting a federal statute, Congress intended to set aside the state law. (*Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376, 382-383.) One of the four types of federal preemption, field preemption or "`"Congress' intent to preempt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress `left no room' for supplementary state regulation." [Citation.]' [Citations.]" (*Id.* at p. 383.)
HOLA granted savings banks express statutory field preemption of state foreclosure laws. (12 U.S.C. §§ 1463(a) & 1464(a); 12 C.F.R. § 560.2(a); *Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 738 [**HOLA was "intended to preempt all state laws purporting to regulate any aspect of the lending operations of a federally chartered savings association."**].) **HOLA** was strictly limited to federal savings institutions, however, and **was not intended to affect the operations *of national banks*, which are governed by different laws**. (*Penermon v. Wells Fargo Bank, N.A.* (N.D.Cal. 2014) 47 F.Supp.3d 982, 993-994.) Deutsche Bank and OneWest argue that HOLA preempts plaintiff's HBOR claims because his loan originated with IndyMac, a federal savings bank, and was transferred to OneWest, who at some indefinite point was also a thrift.
But HOLA's "preemptive force does not hinge on genesis of the loan; rather, the nature of the bank *at issue* is the defining criterion." (*Avnieli v. Residential Credit*

Solutions, Inc. (C.D.Cal. Oct. 9, 2015, No. 2:15-CV-02877) 2015 WL 5923532, at p. *3, italics added [**HOLA PREEMPTION DOES NOT APPLY WHERE FORECLOSING PARTY IS A NATIONAL BANK AS SUCCESSOR IN INTEREST TO A SAVINGS BANK LENDER**].) Stated differently, **when the party accused of violating the HBOR is a national bank, the field preemption of HOLA does not apply, notwithstanding the originator of the loan may have been a savings bank.** (*Ibid.*, see *Saving HBOR, supra,* 48 U.S.F. L.Rev. at pp. 206, 211-216; accord, *Valtierra v. Wells Fargo Bank, N.A.* (E.D.Cal. Feb. 10, 2011, No. CIV-F-10-0849 AWI GSA) 2011 WL 590596, at p. *4 [HOLA does not apply where the allegedly wrongful act committed by national bank]; *Ramirez v. Wells Fargo Bank, N.A.* (N.D.Cal. Apr. 27, 2011, No. C10-05874 WHA) 2011 WL 1585075, at p. *7 [same].)

We recognize federal cases, some cited by defendants, that have held that HOLA preemption protects a national bank if the loan originator was a federal thrift. None is persuasive. (See generally *Saving HBOR, supra,* 48 U.S.F. L.Rev. 189; *Gerber v. Wells Fargo Bank, N.A.* (D.Ariz. Feb. 9, 2012, No. CV 11-01083-PHX-NVW) 2012 WL 413997, at p. *3; but see *Griffin v. Green Tree Servicing, LLC* (2015) 166 F.Supp.3d 1030, and cases cited therein; *Leghorn v. Wells Fargo Bank, N.A.* (N.D.Cal. 2013) 950 F.Supp.2d 1093, 1108.) As one federal district court succinctly stated, "Wells Fargo argues that HOLA preemption `sticks' to any loan originating with a federal savings bank. [¶] **The plain language of [12 C.F.R.] § 560.2 demonstrates that this argument is without merit. . . .** . [¶] . . . . [P]reemption is not some sort of asset that can be bargained, sold, or transferred. HOLA preemption was created . . . for the benefit of *federal savings associations*, and [12 C.F.R.] § 560.2 plainly seeks to avoid burdening the operations of *federal savings associations.* Wells Fargo is not a federal savings association. . . . HOLA preemption does not apply to Wells Fargo." (*Gerber, supra,* 2012 WL 413997, at pp. *3-4.)[10] Thus, **HOLA's field preemption applies only if, *at the time the cause of action arose*, the defendant financial institution was a federal savings association.**

Alternatively, defendants' preemption argument fails because the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) (Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 1376 (H.R. 4173)), which took effect on July 21, 2011, significantly diminished preemption for savings banks as of that date. (2 Dunaway, The Law of Distressed Real Estate (2016) § 17A:2; see *Saving HBOR, supra,* 48 U.S.F. L.Rev. at p. 200.) Thus, ***even if the holder of the note at the time the cause of action arose were a savings bank, after July 21, 2011, it is not entitled to field preemption under HOLA***.[11]

For the foregoing reasons, HOLA field preemption is inapplicable here because Deutsche Bank is not a thrift but a national bank organized under different laws

and subject to supervision by a different governmental entity than savings banks. (*Griffin v. Green Tree Servicing, LLC, supra,* 166 F.Supp.3d 1030.) As for OneWest, there is no allegation in the four corners of the complaint — and defendants provided no judicially noticeable documents showing — that OneWest was a federally chartered savings bank *at the time the causes of action arose.* And, assuming OneWest could invoke HOLA protection, the alleged unlawful conduct occurred after Dodd-Frank took effect and so field preemption would not apply, irrespective of the species of bank. Defendants' demurrer has not demonstrated that HOLA prevented plaintiff from stating a cause of action for wrongful foreclosure.

d. *Plaintiff has adequately alleged prejudice and damages.*

As noted, the trial court relied on *Fontenot, supra,* 198 Cal.App.4th 256, to rule that plaintiff was not damaged or prejudiced by the foreclosure, *even if the wrong entity foreclosed,* because plaintiff does not deny he was in default on his loan. Thus, the court reasoned, plaintiff's own default was the proximate cause of the foreclosure sale.

However, when issuing its ruling, the trial court did not have the benefit of *Yvanova*'s conclusion that *foreclosure by the wrong entity is the harm.* **"It is no mere `procedural nicety,' from *A CONTRACTUAL POINT OF VIEW*, to insist that only those with authority to foreclose on a borrower be permitted to do so."** (*Yvanova, supra,* 62 Cal.4th at p. 938.) "The borrower owes money not to the world at large but to a particular person or institution, and **only the person or institution entitled to payment may enforce the debt by foreclosing on the security.**" (*Ibid.*)

Accordingly, **a homeowner alleging wrongful foreclosure** on the ground the foreclosing beneficiary's interest was void **need not allege prejudice or harm beyond the alleged wrongful foreclosure itself**. (*Sciarratta, supra,* 247 Cal.App.4th at p. 565.) Following *Yvanova*'s lead, *Sciarratta* explained **"When a non-debtholder forecloses, a homeowner is harmed because he or she has lost her home to an entity with no legal right to take it. If not for the void assignment, the incorrect entity would not have pursued a wrongful foreclosure. Therefore, the void assignment is the cause in fact of the homeowner's injury and all he or she is required to allege on the element of prejudice. *The critical issue is not the plaintiff's ability to pay, but rather whether the defendant's conduct resulted in the plaintiff's harm; i.e., a foreclosure that was wrongful because it was initiated by a person or entity having no legal right to do so; i.e. holding void title."*** (*Sciarratta,* at pp. 565-566, italics added.) *Sciarratta* quoted from *Yvanova* that, "the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void

assignment. Thus, `[t]he identified harm—the foreclosure—can be traced directly to [the foreclosing entity's] exercise of the authority purportedly delegated by the assignment.'" (*Yvanova, supra,* 62 Cal.4th at p. 937; *Sciarratta,* at p. 566.) *Sciarratta* also distinguished *Fontenot* for incorrectly and exclusively focusing on the homeowner plaintiff's ability to have avoided *any* foreclosure. (*Sciarratta, supra,* 247 Cal.App.4th at p. 566.) As *Sciarratta* explained, *Fontenot*'s interpretation of prejudice narrowly, to mean that the wrongful foreclosure plaintiffs must demonstrate that they could have avoided foreclosure, contravened the policies underlying *Yvanova*'s standing rule that only the entity "`entitled to payment may enforce the debt by foreclosing on the security.'" (*Sciarratta,* at p. 567, quoting from *Yvanova, supra,* 62 Cal.4th at p. 938.) Stated otherwise**, the proximate cause of the homeowner's damage in a cause of action alleging the foreclosing entity had no legal right to sell is the defendant's wrongful foreclosure itself, not the borrower plaintiff's default on the loan.** Here, plaintiff has adequately alleged just the sort of wrongful foreclosure at issue in *Sciarratta* and thus has sufficiently alleged proximate harm and prejudice.

To summarize, the trial court abused its discretion in denying plaintiff leave to amend his wrongful foreclosure cause of action to add facts concerning the completion of his HAMP application. In all other respects, the trial court erred in sustaining the demurrer to the cause of action for wrongful foreclosure.

2. *The complaint states a cause of action for damages for slander of title.*

"The elements of a cause of action for slander of title are (1) a publication, which is (2) *without privilege* or justification, (3) false, and (4) causes pecuniary loss. [Citation.]" (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 472.)

Plaintiff's operative complaint states publications that are false (the first and third elements). It alleges, as the result of the void assignment and substitution, that neither Deutsche Bank nor its agent, Meridian, had authority to foreclose, and so the recorded notices of default and of trustee sale, along with the trustee deeds upon sale, were false.

Citing sections 2924 and 47, defendants argue that all of the recorded documents are privileged publications,[12] and raise the defense that the publications were true at the time they were recorded.

However, **the privilege enjoyed by trustees and beneficiaries for statutory notices in connection with nonjudicial foreclosures is a qualified one**. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 339-341, citing § 47, subd. (c)(1) [qualified common interests privilege].) **A PLAINTIFF MAY OVERCOME THE QUALIFIED PRIVILEGE BY ALLEGING MALICE, NOT MERE**

NEGLIGENCE. (*Kachlon*, at p. 344.) Malice in this context "is defined as actual malice, meaning `**"that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."'** [Citations.]" (*Id.* at p. 336.) **"[P]leading that defendants published [the document] with knowledge of its falsity does adequately allege actual malice."** (*Boyich v. Howell* (1963) 221 Cal.App.2d 801, 803.) Plaintiff alleges that defendants falsified the signatures on the assignment and substitution and so they knew of the irregularities in the sale but failed to stop the sale or correct the problems. He also alleges that the acts were done willfully, deliberately, intentionally, maliciously, and in conscious disregard of plaintiff's rights, with the design and intent wrongfully and unlawfully to slander plaintiff's title and divest him of title and possession of his home. Thus, plaintiff sufficiently alleges malice to overcome the privilege.

As for damages, the trial court sustained the demurrers to plaintiff's complaint on the same ground as in the wrongful foreclosure cause of action, namely that the proximate cause of plaintiff's damage was his default on his loan obligation, not the recording of the foreclosure documents and trust deeds upon sale.

Slander of title requires proximately-caused pecuniary loss, such as impaired value or marketability, or expenses of legal proceedings to remove the cloud on the title caused by the recorded falsehoods. (*M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 199-200, disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11.) **"[N]o other pecuniary damages need be shown."** (*Sumner Hill Homeowners Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1034-1035.) The complaint alleges that plaintiff's title was slandered because an entity without the legal right to do so foreclosed on his property and recorded false notices and trustee's deeds. The complaint alleges that plaintiff was forced to expend time and money to retain professionals to investigate the questionable foreclosure documents, and includes as damages the expenses incurred by plaintiff in the form of attorney fees and other costs to clear title and remove the doubt on his property rights cast by the recording of false documents. Plaintiff has sufficiently alleged proximately-caused damages. As plaintiff has stated a cause of action for slander of title, the trial court abused its discretion in sustaining the demurrers to this cause of action.

3. *The complaint states causes of action to quiet title and to remove the cloud on title.*

To plead a cause of action to quiet title, the complaint must include: (1) a legal description and street address of the property, (2) the title and the basis for

title sought by plaintiff, (3) the adverse claims to plaintiff's title, (4) the date as of which determination is sought, and (5) a prayer for the determination of plaintiff's title as against the adverse claims. (Code Civ. Proc., § 761.020.) In his cause of action to quiet title, plaintiff alleges his ownership of the property. He alleges that the adverse claims of Vesuvio and Luxury were based on the invalid foreclosure, as evidenced by the recorded false documents, with the result that the foreclosure sale did not transfer title. That is, plaintiff alleges that the recorded trustee's deeds upon sale into Vesuvio and Luxury are inconsistent with his rights. Plaintiff seeks a declaration that, as of March 6, 2013, title to the property was vested in him only. The complaint adequately states causes of action both to quiet title and to remove the cloud on his title.

In their demurrer, Vesuvio and Luxury urged the trial court to take judicial notice of the recorded notices of default and trustee's sale, and the trust deeds upon sale. Those documents recite that all requirements and procedures required by law were satisfied, and hence give rise to the presumption that the sale was valid. They argued, citing section 2924, subdivision (c), that they are thus bona fide purchasers for value. The argument is unavailing.

The relevant provisions of section 2924 "establish presumptions about the adequacy of *notices* related to a foreclosure sale: **`A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.'"** (*Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 713-714, quoting from § 2924, subd. (c).) **"`The statutory presumption [created by section 2924] only applies to the propriety of the required *notices,* [and] it does not apply to other requirements of the foreclosure process.**' (4 Miller & Starr, *supra,* § 10:211, p. 680.)" (*Bank of America v. La Jolla Group II, supra,* at p. 714, italics added.)

Plaintiff does not allege that the foreclosure sale was improperly noticed. He attacks the validity of the sale on the ground that the foreclosing defendants had no right to exercise the power of sale in the first place. Plaintiff also alleges that Vesuvio and Luxury had "at least constructive knowledge" that the assignment was void because public records establish that (a) the FDIC did not have his note to assign in 2012 to the INDX securitized trust, having already transferred all of IndyMac to One West in 2009; and (b) JC San Pedro had no authority to act on the FDIC's behalf. Put otherwise, the gravamen of plaintiff's entire action is that the recorded documents are void on their face and rendered the entire foreclosure sale

invalid. **"No statute creates a presumption—conclusive or otherwise—for any purchaser—bona fide or otherwise—that any recitals in a trustee's deed render effective a sale that had no contractual basis."** (*Bank of America v. La Jolla Group II, supra*, 129 Cal.App.4th at p. 714 [holding trustee's deed not protected by § 2924 presumption where borrower cured the default before the sale and deprived the beneficiary of right to sell].) The dismissal of the causes of action to quiet title and to remove the cloud on plaintiff's title was error.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings in accordance with the views expressed in this opinion. Plaintiff shall recover his costs on appeal.
EDMON, P. J. and LAVIN, J., concurs.

[1] Defendants and respondents are: (1) Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Trust 2007-AR21IP, Mortgage Pass-Through Certificates, Series 2007-AR21IP under the Pooling and Servicing Agreement dated October 1, 2007 (Deutsche Bank); (2) CIT Bank, N.A., formerly known as OneWest Bank N.A., formerly known as OneWest Bank, FSB, through its division IndyMac Mortgage Services (OneWest); (3) Meridian Foreclosure Services, formerly known as MTDS Inc. (Meridian); (4) Vesuvio Holdings, LLC (Vesuvio); and (5) Luxury Portfolio LLC (Luxury).
Respondents Vesuvio and Luxury, the purchasers at the foreclosure sale, did not file briefs on appeal. Plaintiff has abandoned his appeal of the judgment in favor of the mortgage servicer, Meridian, and so it is not a party herein.

[2] "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. [Citation.]" (*Yvanova, supra*, 62 Cal.4th at p. 924.)

[3] "Mortgage-backed securities are created through a complex process known as `securitization.' (See Levitin & Twomey, *Mortgage Servicing* (2011) 28 Yale J. on Reg. 1, 13 [`a mortgage securitization transaction is extremely complex . . .'].) **In simplified terms, `securitization' is the process where (1) many loans are bundled together and transferred to a passive entity, such as a trust, and (2) the trust holds the loans and issues investment securities that are repaid from the mortgage payments made on the loans.** (Oppenheim & Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-backed Securitization Process Is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense* (2012) 41 Stetson L.Rev. 745, 753-754.) . . . Hence, the securities issued by the trust are `mortgage-backed.' For purposes of this opinion, we will refer to such a trust as a `securitized trust.'" (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1082, fn. 1 (*Glaski*).)

[4] See footnote 1, *ante.*

[5] "Although the Legislature did not give the legislation a title, the Governor in his signing statement, and courts and commentators, have referred to the legislation as the `California Homeowner Bill of Rights.' [Citations.]" (*Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 749, fn. 1, citing Koo, *Saving the California Homeowner Bill of Rights from Federal Banking Preemption* (2013) 48 U.S.F. L.Rev. 189 (hereafter *Saving HBOR*).)

[6] All further statutory references are to the Civil Code, unless otherwise noted.

[7] Although the complaint also named Deutsche Bank as a defendant in the quiet title cause of action, plaintiff asserts in his appellate brief that "for purposes of this appeal, he is alleging [the quiet title cause of action] against Vesuvio and Luxury only."

[8] The respondent's brief of Deutsche Bank and OneWest was filed before *Yvanova* was filed and so these defendants did not discuss that case.

[9] Section 2923.7 reads in relevant part, "Upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." (*Id.*, subd. (a).)

Section 2923.6 reads in relevant part, "A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: [¶] (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired." (*Id.*, subd. (c)(1).) **"If the borrower's application for a first lien loan modification is denied, the borrower shall have *at least 30 days* from the date of the written denial to appeal the denial and to provide evidence that the mortgage servicer's determination was in error."** (*Id.*, subd. (d), italics added.) "If the borrower's application for a first lien loan modification is denied, the mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or, if a notice of default has already been recorded, record a notice of sale or conduct a trustee's sale until the later of: [¶] (1) Thirty-one days after the borrower is notified in writing of the denial." (*Id.*, subd. (e).)

[10] For the same reason cited by *Gerber*, we reject *Haggarty v. Wells Fargo Bank, N.A.* (N.D.Cal. Feb 2, 2011, No. C10-02416 CRB) 2011 WL 445183, at page *4, a case cited by defendants here.

[11] Implicitly acknowledging the field preemption in HOLA was eliminated by Dodd-Frank, defendants cite *Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, and *Settle v. World Savings Bank, F.S.B.* (C.D.Cal. Jan. 11, 2012, No. ED CV 11-00800 MMM) 2012 WL 1026103, to argue that "claims related to contracts *formed prior to the enactment of Dodd-Frank* are subject to the preemption analysis in effect at that time." As explained, HOLA preemption does not "stick" to a loan originating with a savings bank. We look *not* at who originally held the contract, but who held the contract at the time of the alleged wrongful conduct. (*Avnieli v. Residential Credit Solutions, Inc., supra,* 2015 WL 5923532, at p. *3.) The cause of action in

both *Silvas* and *Settle* arose before Dodd-Frank took effect. (*Silvas*, at p. 1003; *Settle*, at p. *1.) Plaintiff's cause of action, by contrast, arose after.

[12] Section 2924 reads in part, "All of the following shall constitute privileged communications pursuant to Section 47: [¶] (1) The mailing, publication, and delivery of notices as required by this section. [¶] (2) Performance of the procedures set forth in this article. [¶] (3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure." (*Id.*, subd. (d).)