GIGI E. RUEGSEGGER, Plaintiff and Appellant,
v.
CITIMORTGAGE, INC., et al., Defendants and Respondents.

No. G052454.

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

Filed February 16, 2017.

Appeal from a judgment of the Superior Court of Orange County, Super. Ct. No. 30-2011-00442197, Deborah C. Servino, Judge. Affirmed.

Alan S. Yockelson and David N. Lake for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Bradford E. Klein, for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

OPINION

O'LEARY, P. J.

Gigi E. Ruegsegger (Gigi)[1] appeals from a judgment after the trial court granted Homeward Residential, Inc. (Homeward)[2] and Mortgage Electronic Registration Systems, Inc.'s (MERS) motion for judgment on the pleadings. Gigi argues the trial court erred by granting the motion because she had standing and suffered prejudice as a result of fraudulent mortgage practices. Because we conclude Gigi did not have standing, we need not address the prejudice contention. We affirm the judgment.

FACTS

On review of a motion for judgment on the pleadings, courts treat all properly pleaded material facts in the complaint as true. (*Hopp v. City of Los Angeles*(2010)

183 Cal.App.4th 713, 717.) Gigi's third amended complaint (TAC) alleged the following:

In October 1998, Gigi and her husband, Robert Ruegsegger (Robert), purchased property at 22442 Cassia Lane, Lake Forest, California 92630 (Property). They resided in the home with their two children.

In October 2006, Robert refinanced the mortgage on the Property through the original lender, MortgageIT, Inc. (MortgageIT). Robert, as the sole borrower, executed a promissory note (Note) in the amount of $630,000; Gigi did not sign the Note.[3] The Note was secured by a deed of trust (DOT), which Gigi signed. The DOT identified MortgageIT as the lender and MERS as beneficiary and nominee for the lender and its successors and assigns. Although the DOT identified Robert and Gigi as the borrowers, paragraph 13 of the DOT provided in relevant part as follows: "[A]ny [b]orrower who co-signs this [s]ecurity [i]nstrument but does not execute the [n]ote (a `co-signer'): . . . is not personally obligated to pay the sums secured by this [s]ecurity [i]instrument. . . ." In February 2007, servicing of the loan was transferred to CitiMortgage, Inc. (Citi), and Gigi and Robert made payments accordingly.

In September 2008, Gigi and Robert were in the process of obtaining a divorce.[4] On or around September 14, 2008, Robert conveyed his interest in the Property to Gigi by way of a quitclaim deed, which was recorded on September 23, 2008. As part of the divorce settlement, Gigi "never agreed to and did not assume any of the obligations under the [Note]."

Around the same time, Gigi contacted Citi to determine whether she could modify the loan because she was having financial problems, and Citi agreed. Pursuant to Citi's recommendation, Gigi first skipped payments and then made 10 modified payments totaling $27,472 while Citi was simultaneously pursuing foreclosure.

In September 2010, MERS executed an assignment of deed of trust (ADOT 1) in favor of Citi, which was recorded on October 5, 2010. The same day, Citi recorded a substitution of trustee (SOT), naming CR Title Services (CR Title) as trustee. CR recorded a Notice of Default and Election to Sell Deed of Trust (NOD) on October 5, 2010; the trustee's sale was scheduled for January 27, 2011. The NOD lists MERS, not Citi, as the beneficiary.

In December 2010, Homeward began to service the loan. On January 6, 2011, a Notice of Trustee Sale (NOTS) was recorded against the DOT.

On January 27, 2011, Citi executed an assignment of deed of trust (ADOT 2) in favor of MTGLQ, Investors, L.P., which was recorded on February 8, 2011. Gigi alleged the ADOT 1 and ADOT 2 were "robosigned" and fraudulently executed by malfeasant financial officers.

In January 2011, Gigi filed the instant action. On March 31, 2011, a third assignment (ADOT 3) was recorded showing an assignment of the DOT from MTGLQ to Resi Whole Loan IV, LLC (Resi), and its successors and assigns.[5]

Following a couple of successful demurrers, Gigi filed her TAC, the operative complaint, in January 2012 against Citi, CR Title, MERS, Homeward, and MTGLQ for the following causes of action: first—fraud; second—negligent misrepresentation; third—statutory unfair business practices (MERS & Homeward); fourth—declaratory relief (MERS & Homeward); fifth—to void or cancel assignment of deed of trust (MERS); and sixth—quiet title.

CR Title recorded a Notice of Rescission (NOR) on January 7, 2013, rescinding the NOD. No new notice of default has been recorded, and no sale of the Property is currently scheduled, a point Gigi concedes on appeal.

Homeward and MERS filed a motion for judgment on the pleadings. Gigi opposed the motion. Rejecting Gigi's assertion *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*), controlled, the trial court granted the motion, relying on a number of cases, including *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*). The court ruled Gigi did not have standing to assert defects in securitization, assignments, and substitutions, and she did not allege she was prejudiced by any defect in the assignments.

The trial court entered judgment on April 13, 2015, and the clerk mailed notice of entry of the judgment on June 22, 2015. Gigi timely appealed.

DISCUSSION

"`A motion for judgment on the pleadings, like a general demurrer, challenges the sufficiency of the plaintiff's cause of action and raises the legal issue, regardless of the existence of triable issues of fact, of whether the complaint states a cause of action. [Citation.]' [Citation.] The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer. [Citation.] `We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' [Citation.] `"We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action

under any legal theory. [Citation.]'" [Citation.] We review the disposition, not the court's reasons for that disposition. [Citation.]" (*Ellerbee v. County of Los Angeles*(2010) 187 Cal.App.4th 1206, 1213-1214.)

I. Standing

"`Standing is a threshold issue, because without it no justiciable controversy exists.' [Citation.] `Standing goes to the existence of a cause of action. . . .' [Citation.] Pursuant to Code of Civil Procedure section 367, `[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.'" (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813 (*Saterbak*).)

Numerous California courts have rejected the argument that a *borrower* may preempt a nonjudicial foreclosure by challenging a debt assignment. They have done so based on the reasoning **"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.'"** (*Saterbak, supra*, 245 Cal.App.4th at p. 814; *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 745; *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1493; *Jenkins, supra*, 216 Cal.App.4th at pp. 511-513, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13 (*Yvanova*); *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156 (*Gomes*).)

In *Yvanova, supra*, 62 Cal.4th at page 924, the court stated as follows: "Our ruling in this case is a narrow one. 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."** Our Supreme court noted this holding was in agreement with *Glaski, supra*, 218 Cal.App.4th at page 1079 [borrower under deed of trust standing to challenge foreclosure because assignment void]. (*Yvanova, supra*, 62 Cal.4th at pp. 939-940.)

Later, the *Yvanova* court added, the following: "This aspect of *Jenkins*, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*. . . . We do not address the

distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward." (*Yvanova, supra*, 62 Cal.4th at p. 934.)

The California Supreme Court's decision in *Yvanova* does not impact the trial court's analysis in this case, where Gigi is challenging the assignment of deeds to prevent a nonjudicial foreclosure that has not yet occurred. Indeed, Gigi admits as much in her reply brief when she states ***Yvanova*" only leaves open the question of whether a pre-foreclosure action is permissible." The *Jenkins* court's holding on this point remains good law.** Gigi brought this action before a non-judicial foreclosure had occurred and her attempts to characterize her action as one to remedy prior *attempts* and further *attempts* to foreclose are unavailing. Thus, Gigi lacked standing to challenge the assignment of the deeds of trust because a foreclosure had not yet occurred. We reach our conclusion without deciding whether Gigi was a "borrower" when she signed the DOT but not the Note.

Gigi relies on the California Homeowner Bill of Rights (HBOR) to support her claim she has standing. She also asserts the HBOR overrules *Jenkins, supra*, 216 Cal.App.4th 497. The HBOR went into effect on January 1, 2013. (Civ. Code, § 2923.4.) All the documents in question were executed before the HBOR's effective date. Gigi cites to no authority supporting the proposition the California Legislature intended for the HBOR to apply retroactively. (*Saterbak, supra*, 245 Cal.App.4th at p. 818 [HBOR not retroactive].) **Additionally, *Jenkins* was decided in May 2013, *after* the HBOR went into effect. The HBOR could not overrule a case that had not been decided yet.**

Acknowledging numerous cases have stated *Glaski, supra*, 218 Cal.App.4th 1079,represents the minority view, Gigi asserts *Glaski* actually represents the majority view, citing to a number of federal Courts of Appeal and District Court decisions. **Many courts have criticized the *Glaski* court's holding the plaintiff had standing to challenge alleged violations in the securitization process**. (*Kan, supra*, 230 Cal.App.4th at p. 744.) We need not weigh in on the correctness of *Glaski, supra*,218 Cal.App.4th 1079. It is inapposite because it has no relevance to this preforeclosure action. (*Kan, supra*, 230 Cal.App.4th at p. 745.)

Gigi relies on *Gomes, supra*, 192 Cal.App.4th at pages 1154-1156 [**PLAINTIFF MUST STATE "*SPECIFIC FACTUAL BASIS* FOR ALLEGING THAT THE FORECLOSURE WAS NOT INITIATED BY THE CORRECT PARTY"**], to support her claim the trial court erred. Even assuming Gigi stated sufficient facts in her third, fourth, and fifth causes of action against MERS and Homeward, Gigi still

fails to state a claim because she lacks standing to challenge the alleged flaws in the assignments.

Because we conclude Gigi lacked standing to pursue her claims, we need not decide the additional question of whether she demonstrated prejudice. Gigi does not assert, and we do not find, she can cure her lack of standing, and any further amendment would be fruitless. (*Willemsen v. Mitrosilis* (2014) 230 Cal.App.4th 622, 634.)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

FYBEL, J. and IKOLA, J., concurs.

[1] We refer to the parties by their first names for ease of reference and intend no disrespect.

[2] Homeward formerly operated as American Home Mortgage Servicing, Inc. (AHMS). We will refer to its collectively as Homeward.

[3] The Note we have in the record does not include Robert's signature.

[4] The divorce became final on November 26, 2008.

[5] Gigi does not mention ADOT 3 in the TAC, and challenges only ADOT 1 and ADOT 2.