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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HENRY BUSHKIN, Plaintiff and Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, et al., Defendants and Respondents.	B233529 (Los Angeles County Super. Ct. No. BC419511)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed.

Law Offices of Henry I. Bushkin and Henry I. Bushkin, in pro. per., for Plaintiff and Appellant.

Wolfe & Wyman and Kelly Andrew Beall for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Henry Bushkin appeals from a judgment entered after the trial court granted the motion for summary judgment brought by respondents Deutsche Bank National Trust Company (Deutsche Bank) and BAC Home Loans Servicing LP as successor in interest to Home Loan Services, Inc. (HLS). Bushkin contends that the trial court erred in dismissing his causes of action arising out of the foreclosure of his residence.

We affirm because Bushkin failed to present evidence of prejudicial irregularities in the foreclosure proceedings and because he was unable to tender the amounts due under his loan.

FACTUAL AND PROCEDURAL BACKGROUND

Following the foreclosure and sale of his home, Bushkin filed a complaint against respondents as well as several other defendants who have since been dismissed. Successive demurrers served to whittle down Bushkin's claims from six to three in the operative fourth amended complaint. Bushkin's first cause of action seeks to set aside the trustee's sale of the property, the second claim seeks to cancel the trustee's deed upon sale because the trustee's sale was void, and the third seeks to quiet title to the property. The causes of action are all based on Deutsche Bank's alleged lack of standing to foreclose on the property and an allegedly deficient notice of default provided to Bushkin, which irregularities Bushkin alleges rendered the sale void.

Respondents moved for summary judgment, or in the alternative, for summary adjudication.

I. *Evidence in Support of Summary Judgment*

Respondents produced the following evidence in support of their motion for summary judgment:

Bushkin executed and delivered a promissory note dated November 18, 2004, to First Franklin Financial Corporation (FFFC) in the principal amount of $875,000, with respect to property at 9743 Elderidge Drive in Beverly Hills, California (the property). The note required Bushkin to send monthly mortgage payments to 150 Allegheny Center Mall, Pittsburgh, PA 15212. On November 18, 2004, Bushkin also signed a confirmation of this mailing address for his payments; the confirmation notice further provided a contact phone number of 800-346-6437 for the payee First Franklin Loan Services.

As security for the note, Bushkin executed and delivered to FFFC a deed of trust, also dated November 18, 2004. The deed of trust was recorded against the property on December 1, 2004.

According to the declaration of Michael Brandi, one of the custodians of records for HLS, dba First Franklin Loan Services, as well as HLS's successor in interest BAC Home Loans Servicing LP, FFFC assigned, sold, and transferred its interests in the loan to Deutsche Bank. No date is provided for the transfer and no supporting documents are attached as exhibits.

Brandi states in his declaration that HLS was the loan servicer for Bushkin's loan from the inception of the loan until October 16, 2010, after which date BAC Home Loans Servicing became the servicer of the loan. Bushkin testified at his deposition that he believed HLS was the servicer of his loan as of 2008. The address for BAC Home Loans Servicing remained the same as that used by HLS – 150 Alleghany Center Mall, Pittsburgh, PA 15212, the address to which Bushkin was originally directed to make his payments. As servicer, the responsibilities of

HLS and subsequently BAC Home Loans Servicing included collection of mortgage payments and the potential foreclosure of the subject property, in addition to other services. As the servicer, neither HLS nor BAC Homes Loans Servicing claimed any interest in Bushkin's property.

Bushkin defaulted in his monthly mortgage payments, failing to make monthly mortgage payments for March and April 2008. In May 2008, HLS referred the matter to its foreclosure trustee, First American Loanstar Mortgage Services, LLC (Loanstar), to initiate a nonjudicial foreclosure on behalf of Deutsche Bank.

A notice of default and election to sell on behalf of Deutsche Bank was recorded on May 15, 2008, and Loanstar mailed copies to Bushkin at the property on May 21, 2008 and June 10, 2008. The notice advised Bushkin that he was in default because he had failed to make his mortgage payments. The notice further advised Bushkin that Loanstar was the "Agent for the current beneficiary" under the Deed of Trust dated November 18, 2004, and that he could avoid foreclosure by paying the past due payments plus permitted costs and expenses totaling $25,224.24. The notice provided: "To find out the amount you must pay or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact HOME LOAN SERVICES, INC., FKA NATIONAL CITY, c/o First American Loanstar Trustee Services, P.O. BOX 961253, FORT WORTH, TX 76161, 817-699-6035."

Along with the notice of default, Loanstar sent Bushkin a letter dated May 21, 2008, stating that the current creditor was Deutsche Bank, that the loan was serviced by HLS, and that Loanstar "has been authorized by the Servicer/Creditor to initiate foreclosure proceedings." The letter furthered advised that the amount of the debt as of that date was $895,547.01.

Loanstar's records show that Bushkin never contacted Loanstar by telephone or email requesting a reinstatement amount or payoff amount on his loan. It is Loanstar's practice, once it receives a borrower's request for a reinstatement or payoff amount on a loan, to obtain the information from the servicer for that borrower's loan, and then to send it by letter to the borrower. In addition, all borrowers who contact Loanstar by telephone are given the telephone number and contact name (if available) at the specific loan servicer for their loan. Had Loanstar received an email or telephone call from Bushkin making such a request, it would have provided him with sufficient information in a written letter to identify the reinstatement and payoff amounts owed on his loan, the name of the owner of his loan, and the mailing address for the payoff funds.

Bushkin subsequently failed to make monthly mortgage payments for May, June, July and August 2008. In August 2008, Bushkin contacted HLS and advised that he would like to enter into a modification of his loan in an effort to avoid foreclosure. In September 2008, HLS sent Bushkin a Payment Plan agreement which required him to make three payments of $8,000 each to HLS under a trial payment plan before a permanent modification of his loan could be made. The Payment Plan expressly provided that the loan would not be brought current by making the payments under the trial payment plan.

In December 2008, Bushkin telephoned HLS after the company sent him a draft loan modification agreement. Between May 2008 and February 2009, Bushkin spoke with HLS on numerous occasions concerning the loan modification and the foreclosure sale. HLS never received an executed loan modification agreement from Bushkin.

HLS did not receive any payments from Bushkin after November 2008. Between May 15, 2008 and February 17, 2009, Bushkin never paid or offered to pay the sum of $25,224.24 plus the monthly mortgage payments accruing after

February 1, 2008, in order to reinstate his loan. Nor did Bushkin ever offer to pay $981,698.95, the total amount owed by Bushkin on the loan, including unpaid principal, accrued interest, corporate advances and foreclosure costs.

At the foreclosure sale conducted on February 17, 2009 after numerous postponements, Deutsche Bank acquired the property from Loanstar based on Deutsche Bank's credit bid of $732,900. There was no equity in the property at the time of the foreclosure sale. Loanstar issued a Trustee's Deed Upon Sale to Deutsche Bank as the successful bidder. In the Trustee's Deed Upon Sale, a Loanstar representative declared under penalty of perjury that "[t]he grantee herein [Deutsche Bank] was the foreclosing beneficiary."

According to Brandi, at all times during the servicing of the loan and the foreclosure sale, HLS had possession of the original promissory note signed by Bushkin.

II. *Evidence in Opposition to Summary Judgment*

In opposition to the motion for summary judgment, Bushkin submitted his own declaration as well as a short declaration by his former mortgage broker, Mel Markman. He did not offer any documentary evidence.

Bushkin declared that in conversations with representatives of HLS, he inquired as to the identity of the owner of his loan, but never received an answer. Markman declared that he attempted to contact HLS on Bushkin's behalf to discuss the modification agreement[1] but was never successful in speaking with anyone.

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[1] In his opening brief, Bushkin contends that while he was working on the payment plan that required him to pay $8,000 per month for a three-month period commencing September 2008, HLS sent him a modification agreement that contained additional terms never discussed with him. However, Bushkin cites only to his complaint as support for

While Bushkin stated in his declaration that "I have maintained throughout the course of this litigation that Deutsche Bank . . . never owned my promissory Note nor did they ever receive an assignment of the security interest in my property," he did not submit any actual evidence to support this position. He relies on respondents' answer to the fourth amended complaint in which they admit that the loan was sold to Goldman Sachs Mortgage Company and subsequently securitized by GS Mortgage Securities Corporation, but no evidence is submitted demonstrating the time period during which Goldman Sachs owned the loan. In particular, Bushkin did not submit evidence tending to show that Deutsche Bank was *not* the owner of the loan either when the notice of default was recorded in May 2008 or when the foreclosure sale took place in February 2009.

III. *The Trial Court's Ruling*

The court granted respondents' request for judicial notice of Bushkin's original complaint, first amended complaint, and notice of related cases filed with the court, but stated that it "will not take judicial notice of the truth of the matters asserted within the complaint and notice of related cases."

After conducting a hearing on respondents' motion for summary judgment, the trial court adopted its tentative ruling and granted the motion for summary judgment. The court found that respondents presented evidence that the interests in Bushkin's loan were assigned to Deutsche Bank, which became the owner of his loan. The court reasoned that all three causes of action should be dismissed because Bushkin failed to show there was a triable issue as to whether he was misled or prejudiced by the fact that the notice of default contained the name and

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these factual allegations, and fails to cite to any evidence in the record. Therefore, we disregard these unsupported facts.

contact information for the loan servicer, HLS, instead of the beneficiary, Deutsche Bank, as required by Civil Code section 2924c, subdivision (b)(1). Respondents proffered evidence that Bushkin "was in constant communication with HLS, concerning modification of his loan and postponement of the foreclosure sale, *after* receiving the foreclosure notices in 2008" and thus "the evidence suggests that [Bushkin] was not misled and had sufficient information to contact Loanstar or HLS to determine the amount to pay Deutsche Bank or to arrange payment to stop the foreclosure, as both entities were acting on the behalf of Deutsche Bank." In addition, the court found that the causes of action all failed for the separate reason that Bushkin failed to tender the full amount of indebtedness to Deutsche Bank. Bushkin did not dispute that he never offered to pay the outstanding debt, and he submitted no evidence to support his contention that tender should be excused. The court also concluded that the first cause of action to set aside the trustee's sale failed because Bushkin did not prove that he suffered any damages, given that there was no equity in the property at the time of the sale.

After the court entered judgment dismissing Bushkin's claims, Bushkin timely appealed.

DISCUSSION

I. *Standard of Review*

"[I]n moving for summary judgment, a 'defendant . . . has met' his 'burden of showing that a cause of action has no merit if' he 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to

show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (o)(2).)" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"We review an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. [Citations.] In undertaking our independent review, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 101 (*Lona*).)

II. *Deutsche Bank's Standing to Foreclose*

Bushkin disputes that Deutsche Bank was the owner of his loan at the time the notice of default was recorded, and thus he contends Deutsche Bank lacked standing to foreclose on the loan. For the reasons that follow, we conclude that Bushkin failed to raise a triable issue with respect to Deutsche Bank's standing to foreclose.

Civil Code sections 2924 through 2924k "set forth 'a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.'

[Citation.]" (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 (*Debrunner*).) "'The comprehensive statutory framework established [in sections 2924 to 2924k] to govern nonjudicial foreclosure sales is intended to be exhaustive.' [Citations.] 'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.' [Citations.]" (*Id*. at pp. 440-441.)

"A nonjudicial foreclosure sale is accompanied by a common law presumption that it 'was conducted regularly and fairly.' [Citations.] This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity. . . . It is the burden of the party challenging the trustee's sale to prove such irregularity and thereby overcome the presumption of the sale's regularity." (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1258; see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 (*Fontenot*) ["[A] nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut this presumption."]; *Lona*, *supra*, 202 Cal.App.4th at p. 105.) A nonjudicial trustee's sale may be set aside based on irregularities only if they are prejudicial to the party challenging the sale. (*Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097-1098 (*Lo*).)

Bushkin argues that respondents bore the burden on their motion for summary judgment to establish that Deutsche Bank owned the note and had standing to foreclose. This argument ignores the presumption of regularity discussed above. In *Fontenot*, the First District dealt with the same argument that the defendant bore the burden of proving there had been a proper assignment of the promissory note executed by the plaintiff. (*Fontenot*, *supra*, 198 Cal.App.4th at pp. 269-270.) The court held that "[g]iven the presumption of regularity, if plaintiff contended the sale was invalid because [the purported assignee] had no

authority to conduct the sale, the burden rested with plaintiff affirmatively to plead facts demonstrating the impropriety." (*Id.* at p. 270.) As in *Fontenot*, we conclude that Deutsche Bank is presumed to be a proper party to foreclose on Bushkin's loan absent substantial evidence to the contrary.

We now examine the evidence proffered by the parties with respect to the assignment of the interest in Bushkin's loan. In moving for summary judgment, respondents introduced evidence that FFFC assigned, sold, and transferred its interests in the loan to Deutsche Bank and that Deutsche Bank became the owner of Bushkin's loan. However, respondents did not specifically identify *when* the assignment of interest in Bushkin's loan was made. For his part, Bushkin alleges in his opening brief that "[s]ometime around 2008, defendants realized that they had failed to make any assignments of the individual mortgages, including plaintiff's note and deed of trust, when they were in the process of packaging, securitizing and selling the mortgages for profit. In an effort to correct these mistakes, and to enable them to foreclose, defendants backtracked to fraudulently create a purported assignment of the Note and Deed of Trust," appearing to give Deutsche Bank the requisite standing to foreclose.[2] He thus appears to contend that at the time the notice of default was recorded, there had been no assignment to Deutsche Bank of the interest in his loan, and therefore Deutsche Bank had no standing to foreclose on his loan. For support for this theory, Bushkin cites to the

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[2] In his opening brief, Bushkin further suggests, without any citation to evidence, that the backdating of the assignment was done to ensure that Deutsche Bank would gain certain tax advantages and to comply with the terms of the Pooling and Servicing Agreement, the securitization agreement governing Bushkin's loan after it was packaged along with other loans for sale to investors. We do not credit Bushkin's unsupported argument. Thus, we need not address respondents' contention that Bushkin lacks standing to complain that Deutsche Bank breached the Pooling and Servicing Agreement because he is not a party to that agreement.

unpublished federal district court opinion in *Ohlendorf v. Am. Home Mortg.* (E.D. Cal. March 31, 2010) 2010 U.S. Dist. LEXIS 31098, in which the court held that the plaintiff stated a viable claim for wrongful foreclosure where he asserted that the defendants were not the proper parties to foreclose because the assignments of interest in the plaintiff's loan were recorded after the new beneficiary had already issued the Notice of Default, and were backdated to be effective before the Notice of Default was issued. Recently, in *Makreas v. First Nat. Bank of Northern California* (N.D. Cal. 2012) __ F.Supp.2d __ (*Makreas*), another district court found that the plaintiff had stated a claim for wrongful foreclosure where he alleged that "an assignment or substitution of trustee was backdated to cover up the fact that it was assigned after the notice of default," and thus "the party who noticed the default did not, at the time of the notice, have the authority to record the notice of default."

Bushkin, however, fails to put forth actual evidence to satisfy this theory. In asserting that the assignment of interest in his loan to Deutsche Bank was fraudulently backdated, he cites only to his fourth amended complaint for support. His unverified complaint is not evidence. (*Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, 212, fn. 1.) Because he has not put forth any evidence from which it could be concluded that no assignment had occurred at the time the notice of default was issued, Bushkin has failed to raise a triable issue as to whether Deutsche Bank lacked standing to foreclose on his loan.

Contrary to Bushkin's contention, *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868 (*Dimock*), does not buttress his position. In *Dimock*, it was undisputed that the beneficiary of the loan recorded a substitution of trustee which substituted a new trustee of record, but the prior trustee conducted a sale of the property. (*Id.* at p. 872.) The court held that "[b]ecause the respondent beneficiary . . . recorded a substitution of trustee, thereafter only the substituted trustee had the

power to sell the trustor's property at a foreclosure sale. Thus a later sale by the prior trustee was void." (*Id.* at p. 871.) Whereas the undisputed facts in *Dimock* compelled the court's conclusion that the sale was void, in the instant case Bushkin offers no evidence with respect to Deutsche Bank's status as the owner of the loan at the time the notice of default was recorded and as of the foreclosure sale.

III. *Alleged Defects in Notice of Default*

Bushkin alleges another alleged irregularity in the foreclosure process, namely that the notice of default was defective. Civil Code section 2924c, subdivision (b)(1) provides form language that must be included in a notice of default, including the following: "To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

_____

(Name of beneficiary or mortgagee)

_____

(Mailing Address)

_____

(Telephone)"

Bushkin contends that respondents violated this section because the notice of default did not provide the name and contact information of the beneficiary or mortgagee, and instead only provided the information for the loan servicer.

Courts have rejected similar arguments. In *Debrunner*, the plaintiff contended that the notice of default was defective because it failed to identify Deutsche Bank as the beneficiary, and instead listed and provided contact information for Saxon Mortgage Services, Inc. the loan servicer. The plaintiff contended that the failure to strictly comply with Civil Code section 2924c,

subdivision (b)(1) rendered the foreclosure proceeding invalid, even if no prejudice was shown. (*Debrunner, supra,* 204 Cal.App.4th at p. 440.)

The appellate court disagreed. The court noted that the Fair Debt Collection Practices notice attached to the notice of default identified Deutsche Bank as the creditor. Further, the court noted that the notice identified Saxon, the servicer of the loan, and listed Saxon's address and telephone number. Finally, the court found that a showing of prejudice is required in order to find a foreclosure proceeding invalid for procedural irregularities, and here, "no conceivable prejudice is either shown or asserted" as a result of the failure to identify the beneficiary on the notice of default. (*Debrunner, supra*, 204 Cal.App.4th at p. 443.) Thus, the court concluded that there was no basis for invalidating the foreclosure proceeding based on the requirements of Civil Code section 2924c, subdivision (b)(1). (*Debrunner, supra*, 204 Cal.App.4th at p. 444.)

In *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, Division One of this appellate district reached a similar result in a case where the plaintiff "Aceves [took] issue with the notice of default, pointing out that it mistakenly identified Option One, the mortgagee, as the beneficiary under the deed of trust when U.S. Bank was actually the beneficiary." (*Aceves, supra*, 192 Cal.App.4th at p. 232.) The court found that "[a]lthough this contention is factually correct, it is of no legal consequence. Aceves did not suffer any prejudice as a result of the error. Nor could she. The notice instructed Aceves to contact Quality Loan Service, the trustee, *not* Option One, if she wanted '[t]o find out the amount you must pay, or arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason.' The notice also included the address and telephone number for Quality Loan Service, not Option One. Absent prejudice, the error does not warrant relief. [Citation.]" (*Ibid*.)

Bushkin has similarly failed to submit any evidence that he was prejudiced by the failure of the notice of deficiency to identify the purported beneficiary, Deutsche Bank, and provide its contact information. The notice advised Bushkin that Loanstar was the "Agent for the current beneficiary" and that he could avoid foreclosure by paying the past due payments plus permitted costs and expenses totaling $25,224.24. The notice further provided contact information for HLS, care of Loanstar, in the event that Bushkin wished to find out the amount he needed to pay to stop foreclosure or to arrange for payment to stop the foreclosure. Thus, Bushkin had the contact information for Loanstar, Deutsche Bank's agent, but Bushkin never contacted it by telephone or email. If he had, Loanstar's customary practice would have been to obtain the loan information he requested from the servicer and provide it to him along with the name of the owner of his loan and the mailing address for sending payoff funds.

Moreover, Bushkin received a letter along with the notice of deficiency disclosing that the current creditor was Deutsche Bank, that the loan was serviced by Home Loan Services, Inc., and that Loanstar "has been authorized by the Servicer/Creditor to initiate foreclosure proceedings." Any confusion Bushkin may have had as to the identity of the beneficiary of the loan or the roles of HLS and Loanstar in the process was dispelled by the letter.

Although Bushkin contends in his brief that he "intended to pay any sums necessary to avoid foreclosure, [but] he had no entity to contact for accurate information to cure any purported default," he cites only to the fourth amended complaint as support for this statement. As discussed above, statements in the complaint do not constitute admissible evidence. Moreover, the undisputed evidence showed that he frequently communicated with HLS with respect to a proposed modification agreement, in an attempt to cease his default. Although Bushkin contends that HLS representatives never answered his questions about the

identity of the owner of his loan, he does not dispute that he knew the mailing address for sending payments and he could have inquired about the payoff amount in his frequent communications with HLS. Bushkin has not shown that he suffered harm from the defective notice of default, and thus, to the extent his claims are based on that irregularity, they cannot stand.

IV. *Lack of Tender*

Respondents also moved for summary judgment based on Bushkin's inability to tender the amount due under his loan. We conclude that summary judgment was appropriate on this separate ground as well.

Setting aside a nonjudicial foreclosure sale for irregularities in sale notice or procedure is an equitable remedy (*Lo, supra*, 88 Cal.App.4th at p. 1098), and such an action generally "should be accompanied by an offer to pay the full amount of the debt for which the property was security." (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578.) "The rationale behind the [tender] rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs." (*FPCI RE–HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.)

Bushkin does not argue that he could have tendered the full amount due under the loan. Rather, he contends that he should be excused from tendering, because it would be inequitable to require him to "tender the full amount of the indebtedness to an entity that is allegedly not the beneficiary to the deed of trust." (See *Lona, supra*, 202 Cal.App.4th at p. 112 ["if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt"]; *Dimock, supra*, 81 Cal.App.4th at p. 878 [where transfer of deed was void because trustee lacked power to transfer it, tender was not

required]; *Makreas, supra*, __ F.Supp.2d __ ["where . . . a plaintiff alleges that the entity lacked authority to foreclose on the property, the foreclosure sale would be void" and thus tender is not required].)

In order to withstand summary judgment based on his failure to tender the amount due under the loan, Bushkin must do more than allege, without any supporting evidence, that Deutsche Bank was not the beneficiary of the loan during the critical time period. As discussed above, given the presumption of regularity, Bushkin bears the burden to show that Deutsche Bank did not have authority to conduct the sale. (*Fontenot, supra*, 198 Cal.App.4th at p. 270.) He has failed to present any such evidence. Bushkin has also failed to demonstrate that any other exception to the tender rule is applicable in his case, and accordingly his inability to tender the amount due is fatal to all his claims.[3]

V. *Propriety of Taking Judicial Notice*

Bushkin also contends that the trial court erred in taking judicial notice of the facts stated in unspecified "recorded documents." He cites the well-established principle that although a court may judicially notice recorded deeds of trust or assignments of such deeds, this "does not mean it may take judicial notice of factual matters stated therein." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117; see *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375; *Fontenot, supra*, 198 Cal.App.4th at pp. 264-267.)

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[3] Because we affirm the grant of summary judgment on other grounds, we need not address respondents' additional arguments that summary judgment was appropriate because Bushkin had actual knowledge of the sale and because he failed to proffer evidence of any damages.

As respondents point out, however, the trial court did not purport to take judicial notice of any recorded deeds or assignments, but rather took judicial notice only of Bushkin's original and first amended complaints as well as his notice of related cases. Moreover, the court specifically stated that it was not taking judicial notice of the truth of the matters asserted within those pleadings. Hence, Bushkin's argument is not well-taken.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.