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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DAVID B. FEE, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	2d Civil No. B236531 (Super. Ct. No. 1379769) (Santa Barbara County)

After defaulting on a $1.53 million residential loan, David B. Fee ("Fee") sued to halt the foreclosure of his home on the ground that none of the entities that initiated foreclosure proceedings—namely, JP Morgan Chase Bank, N.A. ("Chase"), U.S. Bank, N.A. ("U.S. Bank"), and California Reconveyance Company ("CRC") (collectively "defendants")—had standing to do so. Fee's First Amended Complaint alleged wrongful foreclosure and restitution. The trial court granted defendants' motion for judgment on the pleadings without leave to amend. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2007, Fee borrowed $1.53 million from Washington Mutual Bank ("WaMu") to refinance an existing loan on his residence on San Antonio Creek Road in Santa Barbara. Fee signed a promissory note to WaMu, which was secured by a deed of trust that listed WaMu as "lender" and CRC as "trustee." Fee alleges that WaMu then

"securitized" his promissory note—that is, WaMu placed his note and some 2,000 other notes into a trust, and then sold shares in the trust to investors seeking a portion of the expected income stream on those notes. This transfer, Fee alleges, was defective because the promissory notes were never formally assigned to the trust. In September 2008, Chase acquired WaMu's assets from the FDIC, including Fee's loan and deed of trust.

Fee stopped making payments on his loan in July 2009. By November 23, 2010, he was $153,278.89 behind in his payments. On that date, Chase assigned the promissory note and deed of trust to U.S. Bank, and CRC—as trustee on Fee's deed of trust—filed a Notice of Default, and thereby initiated forfeiture proceedings. When Fee did not cure the defect, CRC recorded a Notice of Trustee's Sale on February 24, 2011.

Eight days before the scheduled foreclosure sale in March 2011, Fee sued WaMu, Chase, and CRC for wrongful foreclosure and restitution, and sought to enjoin the upcoming sale. The trial court temporarily stayed the sale. A few days later, Fee filed a First Amended Complaint that added U.S. Bank as a defendant and alleged: (i) wrongful foreclosure, on the ground that none of the foreclosing parties was the "holder in due course" of his promissory note; and (ii) restitution, on the ground that his loan had already been paid off by the securitization or by credit default insurance, such that any recovery in foreclosure was duplicative and hence unjust. The court dissolved the temporary injunction in May 2011, but no sale has taken place.

Chase, CRC and U.S. Bank moved for judgment on the pleadings, which the court heard and granted without leave to amend. The court ruled that Fee could not state a claim for wrongful foreclosure. The court reasoned that the "chain of title" "clearly established" U.S. Bank as beneficiary and CRC as trustee on the deed of trust; that any "trustee, mortgagee, or beneficiary or any of their authorized agents" is empowered, under Civil Code[1] section 2924, subdivision (a)(1), to initiate nonjudicial foreclosure proceedings; and that this power is not conditioned on the foreclosing entity also having title to (or possession of) the promissory note. Thus, the court concluded, the

[1] All statutory references are to this code unless otherwise stated.

alleged securitization of the note had no effect on CRC's right, as trustee, to foreclose under the deed of trust. The court also ruled that restitution was a remedy, not a separate cause of action.

DISCUSSION

In reviewing a motion for judgment on the pleadings, "[w]e treat the pleadings as admitting all of the material facts properly pleaded, but not any contentions, deductions or conclusions of fact or law contained therein. We may also consider matters subject to judicial notice. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any theory. [Citation.]"[2] (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We review the trial court's denial of leave to amend for an abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.)

I. *Judgment on the Pleadings*

A. *Wrongful foreclosure*

Fee's wrongful foreclosure claim explicitly rests on the premise, grounded in Commercial Code section 3301, that only the holder in due course of the promissory note may initiate nonjudicial foreclosure proceedings under the related deed of trust. We have rejected this precise argument. (E.g., *Debrunner v. Deutsche Bank Nat'l Trust Co.* (2012) 204 Cal.App.4th 443, 440-441.) In *DeBrunner*, we noted that section 2924, subdivision (a)(1), confers the power to initiate nonjudicial foreclosure proceedings on "the trustee, mortgagee, or beneficiary or any of their authorized agents"; we refused to engraft onto the comprehensive procedures governing nonjudicial foreclosures (see §§ 2924-2924k), an additional Commercial Code section 3301-based requirement that the

[2] Fee now argues it was improper to rely on judicially noticed documents, citing *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366 and other cases. Fee forfeited this argument by failing to object to the trial court's judicial notice of these documents. (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 406, fn .3.) Judicial notice was appropriate in any event because the trial court used these documents to establish undisputed facts—namely, the chain of title to the deed of trust—and not to validate the foreclosure or otherwise refute Fee's allegations regarding standing, which is ostensibly what *Herrera* prohibits.

initiating entity also be the holder in due course of the accompanying promissory note. (*Debrunner*, *supra*, at pp. 440-441; see also *Herrera v. Federal Nat'l Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1505-1507.) Because Fee does not dispute—and, in fact, affirmatively alleges—that CRC is the trustee on the deed of trust, CRC had standing under section 2924, subdivision (a)(1), to initiate the foreclosure, and Fee's standing-based wrongful foreclosure claim fails as a matter of law.

Fee's allegation that WaMu securitized, or tried to securitize, his promissory note does not alter this analysis. If, as Fee alleges, the transfer of the note to the investors' trust was defective, then title to the note remained with WaMu, and thereafter passed from WaMu to Chase to U.S. Bank; this would, under Fee's own theory, make U.S. Bank the holder in due course of the note and thus confer standing to foreclose. Alternatively, if, as Fee also alleges, the securitization was valid, this claim fails given the holding of numerous courts that a lender's securitization of a note's income stream (or, for that matter, the sale of the note itself) to investors does not extinguish the lender's right—or that of its assignees—to initiate foreclosure proceedings under the deed of trust. (E.g., *Hoverman v. CitiMortgage, Inc.* (D. Utah. 2011) 2011 U.S. Dist. LEXIS 86968, at pp. 21-22; *Upperman v. Deutsche Bank Nat'l Trust Co.* (E.D. Va. 2010) 2010 U.S. Dist. LEXIS 38827, at pp. 5-6.) Either way, therefore, the securitization never deprived U.S. Bank of its right to direct CRC, as trustee, to initiate foreclosure proceedings.

Fee's further allegation that the foreclosure is wrongful because the assignments of the deed of trust were never recorded, in violation of section 2932.5, is foreclosed as a matter of law by *Calvo v. HSBC Bank USA, Inc.* (2011) 199 Cal.App.4th 118, 121-122.

2. *Restitution*

Although the viability of restitution and/or unjust enrichment as an independent cause of action is not yet settled (compare *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 [such an action does not exist] with *Elder v. Pacific Bell Tel. Co.* (2012) 205 Cal.App.4th 841, 857 [such an action

exists]), we need not weigh in on that dispute because Fee cannot state a claim for unjust enrichment in any event. To state such a claim, Fee must allege the "'. . . receipt of a benefit and unjust retention of that benefit [by defendants] at the expense of another . . .'" and, in particular, at *his* expense. (*Elder*, *supra*, at p. 857.) This Fee cannot do. Fee does not dispute that he never repaid the promissory note, so even if (as Fee alleges) the note will be paid off twice—once when the note was securitized or indemnified by default insurance, and again upon foreclosure—the alleged double payment on the note does not come at *Fee's* expense (as he will only pay it off once through the foreclosure proceeds).

II. *Denial of Leave to Amend*

Fee asserts the trial court abused its discretion by granting judgment on the pleadings without leave to amend. We disagree. "The burden is on the plaintiff . . . to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; see *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1541.) The plaintiff also must show there is a reasonable possibility that defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 71-72.)

Fee proffers three amendments to his complaint that he asserts necessitate further litigation—that is, claims for declaratory relief, for unfair business practices, and for a violation of the federal Truth-in-Lending Act ("TILA"; 15 U.S.C. § 1601 et seq.) The first two are grounded in the same facts and same legal theories as his wrongful foreclosure claim, which we hold lacks any legal basis. Fee's proposed TILA claim, in which he would assert that U.S. Bank did not notify him in November 2010 that it assigned his note (*id.* at § 1641(g)), fails as a matter of law for two reasons. First, Fee cannot allege he was actually damaged by the absence of notice because he was already in default by the time of the assignment, such that any confusion on his part (as to the true holder of the note) did not result in any payments to the wrong entity or in any finance charges. (*Diaz v. BSI Fin. Servs.* (C.D. Cal. 2012) 2012 U.S. Dist. Lexis 78798, at pp. 9-12.) Second, Fee's claim is barred by TILA's one-year statute of limitations (15

U.S.C. § 1640(e)), because it rests on different facts and entails a different type of injury than the claims alleged in his latest complaint, and would therefore not relate back to the date of that complaint (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409). Because Fee has not identified any other factual or legal basis to support his action, the trial court did not abuse its discretion by denying leave to amend. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

DISPOSITION

The judgment of dismissal is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P.J.

YEGAN, J.

* Assigned by the Chairperson of the Judicial Council.

Denise de Bellefeuille, Judge

Superior Court County of Santa Barbara

Law Offices of Patricia Rodriguez and Patricia Rodriguez, for Plaintiff and Appellant.

Alvarado Smith, Theodore E. Bacon and Rick D. Navarrette, for Defendants and Respondents.