Filed 7/30/15 Carr v. Canterbury Lots 68 CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| MARTHA CARR,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CANTERBURY LOTS 68, LLC, et al.,<br><br>Defendants and Respondents. | B256053<br><br>(Los Angeles County<br>Super. Ct. No. BC523351) |

APPEAL from orders of the Superior Court of Los Angeles County, Barbara Scheper, Judge. Affirmed.

Law Offices of Bruce J. Guttman and Bruce J. Guttman, for Plaintiff and Appellant.

Wood, Smith, Henning & Berman, Raymond Babaian, Christopher D. Perez, Andrew J. Mallon and Fred R. Vasquez, for Defendant and Respondent Canterbury Lots 68, LLC.

Bryan Cave, Christopher L. Dueringer and Nicole N. King, for Defendant and Respondent JPMorgan Chase Bank, N.A.

Plaintiff and appellant Martha Carr (Carr) appeals orders of dismissal in favor of defendants and respondents JPMorgan Chase Bank, N.A. (Chase) and Canterbury Lots 68, LLC (Canterbury) following the sustaining, without leave to amend, of their demurrers to Carr's first amended complaint.

In this wrongful foreclosure action, the essential issue presented is whether Carr stated a cause of action against Chase or against Canterbury, which subsequently purchased the subject real property at a trustee's sale.

For the reasons discussed, Carr failed to state a cause of action against either defendant. Further, she has not shown she is capable of amending the pleading to state a cause of action. Therefore, the orders of dismissal are affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Facts.*

On February 12, 2007, Carr obtained a $416,250 loan from Washington Mutual Bank (WaMu), secured by a deed of trust on the real property located at 23208 Redbud Ridge Circle in Santa Clarita. The deed of trust listed WaMu as the lender and beneficiary and California Reconveyance Company (CRC) as the trustee.

On April 26, 2007, WaMu filed a preliminary prospectus with the Securities and Exchange Commission to register the WaMu Trust as a vehicle through which to sell mortgage backed securities. The pool of mortgages, of which Carr's loan was a part, was governed by the Pooling and Servicing Agreement (PSA or pooling agreement) covering the WaMu Trust. Under the terms of the PSA, the WaMu Trust's closing date was May 10, 2007.

"[I]n September 2008, WaMu financially collapsed and the United States Office of Thrift Supervision (OTS) seized the defunct bank and placed it into the receivership of the Federal Deposit Insurance Corporation (FDIC). The FDIC succeeded to 'all rights,

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[1] "Inasmuch as this appeal follows the sustaining of a demurrer, we draw our facts from those pleaded in the complaint [citations] and those of which we may take judicial notice [citation]." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 516, fn. 1.)

titles, powers, and privileges' of the bank. (12 U.S.C. § 1821(d)(2)(A)(i).) Soon thereafter, the FDIC, by way of a purchase and assumption agreement executed on September 25, 2008, transferred certain assets and liabilities of WaMu, including the defunct bank's loan portfolio, to Chase." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 504 (*Jenkins*).)[2]

On June 6, 2012, Chase, as "successor in interest to[,] by purchase from the FDIC as Servicer of WASHINGTON MUTUAL BANK, FA," executed an assignment of the deed of trust to "Citibank, N.A., as trustee for WaMu Series 2007-HE3 Trust, ITS SUCCESSORS OR ASSIGNS, (ASSIGNEE)" (Citi or the Citi trustee). The assignment from Chase to Citi, as trustee for the WaMu Trust, was recorded the following day.

On June 7, 2012, CRC recorded a notice of default and election to sell under deed of trust. The notice of default showed Carr was $106,201.12 in arrears. A notice of trustee's sale was recorded on September 10, 2012. Canterbury purchased the property at a public auction on April 8, 2013. The trustee's deed indicated that the amount of the unpaid debt, together with costs, was $565,695.61.

2. *Pleadings.*

Carr commenced this action on October 3, 2013. The operative first amended complaint, filed January 27, 2014, named Canterbury, Chase, and others not parties to this appeal.

Carr asserted causes of action against Chase for declaratory relief, cancellation of instruments, slander of title, removal of cloud on title, wrongful foreclosure, and unfair

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[2] The FDIC/Chase purchase and assumption agreement (P&A Agreement) is before this court by way of Chase's unopposed request for judicial notice, which this court granted. (See, e.g., *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752-755 [in ruling on demurrer, trial court properly took judicial notice of various documents and facts therein, including the federal government's appointment of FDIC as WaMu's receiver and the P&A Agreement, which provides that the FDIC transferred to Chase assets of WaMu, but not certain liabilities, as of September 25, 2008]; contra, *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 887 [P&A agreement not subject to permissive judicial notice].)

business practices (Bus. & Prof. Code, § 17200 et seq.). As against Canterbury, Carr set forth causes of action for declaratory relief, cancellation of instruments, quiet title, and removal of cloud on title.

The gravamen of the operative pleading is that Chase's assignment of the deed of trust to Citi (as trustee of the WaMu Trust), recorded on June 7, 2012, was of no force and effect because it occurred after the May 10, 2007 closing date of the WaMu Trust. Carr also pled that the Citi trustee never acquired the right to payment under the promissory note because the note was not specifically included in the assignment of the deed of trust; therefore, the note became separated from the deed of trust, rendering the loan unsecured.

Carr further alleged she was injured by the separation of the note and deed of trust "in that she was forced to choose between making payments to the entity that held the Note or the entity that held the Deed of Trust. If Plaintiff made payments to the entity that purported to hold title to the Deed of Trust, she ran the risk that her payments would not be credited by the entity that owned the Note as payments on the debt evidenced by the Note, and, or ran the risk of being required to make double payments."[3]

3. *Demurrers by Chase and Canterbury*.

Both Canterbury and Chase demurred to the first amended complaint.

Chase contended, inter alia: Carr's failure to allege tender barred her claims; she lacked standing to challenge the securitization of her loan; and the language of the assignment from Chase to Citi expressly provided that the transfer of the deed of trust was "together with all right, title, and interest secured thereby," so that Carr could not allege the deed and note were separated.

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[3] We note Carr was deeply in arrears prior to the June 6, 2012 assignment by Chase to the Citi trustee. The June 6, 2012 notice of default showed she was $106,201.12 in arrears as of that date. Therefore, Carr cannot properly plead the alleged separation of the note and deed of trust as a consequence of the June 6, 2012 assignment of the deed of trust confused her and led her to cease making payments.

Similarly, Canterbury argued Carr failed to allege a valid tender, she lacked standing to bring claims based on a violation of the PSA agreement, and the trustee's sale is conclusively presumed to have been valid.

4. *Trial court's ruling.*

After hearing the matters, the trial court sustained the demurrers of Chase and Canterbury without leave to amend and entered orders of dismissal in their favor.

The trial court ruled, inter alia, that Carr lacked standing to allege the assignment by Chase to Citi, trustee for the WaMu Trust, was void on the ground the assignment occurred after the closing date specified in the pooling agreement governing the trust. The trial court also rejected Carr's argument that the deed of trust was assigned to the WaMu Trust without the note, citing the language of the assignment that the transfer of the deed of trust was " ' together with all right, title, and interest secured thereby . . . .' " The trial court further found that Carr had failed to allege facts to bring herself within an exception to the requirement that she tender payment of the debt.

Carr filed a timely notice of appeal from the orders of dismissal.

## CONTENTIONS

Carr contends she is entitled to relief on one or more of the following three theories: (1) the beneficial interest in the deed of trust never vested in Chase and hence Chase could not have assigned it to the Citi trustee; (2) alternatively, the assignment of the deed of trust to the Citi trustee without the note rendered the debt unsecured and the deed of trust a nullity; and (3) the assignment to the Citi trustee was void because it post-dated the closing date designated by the pooling agreement governing the WaMu Trust.

Carr further contends: she had standing to sue Chase, and she stated viable causes of action against Chase for declaratory relief, cancellation of instruments, removal of cloud on title, slander of title, wrongful foreclosure, and unfair business practices. With respect to Canterbury, Carr asserts: it cannot be determined from the face of the pleading whether Canterbury is a bona fide purchaser (BFP), and she stated causes of action against Canterbury for declaratory relief, cancellation of instruments, quiet title, and

removal of cloud on title. Carr further contends that no tender of payment was necessary where, as here, void instruments are alleged, and at a minimum, the trial court should have granted her leave to amend.

## DISCUSSION

1. *Standard of appellate review.*

"In determining whether a plaintiff has properly stated a claim for relief, "our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] *We also consider matters which may be judicially noticed*." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] 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.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, italics added (*Zelig*).) Our review is de novo. (*Ibid*.)

2. *No merit to Carr's claim that Chase was legally a stranger to the transaction without the authority to validly assign the deed of trust to the Citi trustee.*

Carr contends Chase merely was a servicer of the loan, without a beneficial interest in the deed of trust and without the authority to assign it to Citi, and therefore the claim of any party that derives from the void assignment must fail.[4]

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[4] Chase contends that Carr waived this argument by not raising it below. As a general rule a party is not permitted to change its position on appeal and raise new issues not presented in the trial court. (*B&P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959.) However, a litigant may raise for the first time on appeal a pure question of law presented by undisputed facts, and because a demurrer raises only questions of law, an "appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse

Carr's argument is as follows. The lender identified in the deed of trust recorded on February 23, 2007 is "Washington Mutual Bank." The next recorded document was the "Corrective CORPORATE ASSIGNMENT OF DEED OF TRUST" recorded June 7, 2012, whereby "JPMorgan Chase Bank, National Association, successor in interest to[,] by purchase from the FDIC *as Servicer* of WASHINGTON MUTUAL BANK, FA," assigned the deed of trust to "Citibank, N.A., as trustee for WaMu Series 2007-HE3 Trust, ITS SUCCESSORS OR ASSIGNS, (ASSIGNEE)." (Italics added.) According to Carr, this assignment clearly states that the entity that purported to be making the assignment to Citi was doing so in its capacity as a loan servicer, not in its capacity as a successor lender or beneficiary, and there is no evidence that the Chase servicer "ever obtained, or was even authorized to obtain, a beneficial interest in the Deed of Trust."

As indicated, during the pendency of the appeal, we granted Chase's unopposed request for judicial notice of the P&A Agreement, whereby Chase acquired WaMu's assets from the FDIC. In her reply brief, Carr does not dispute Chase's assertion that pursuant to the P&A Agreement, Chase acquired from the FDIC certain WaMu assets, including a beneficial interest in Carr's loan. Carr's reply merely argues that this evidence submitted by Chase, "while perhaps relevant to a factual inquiry, would not have been an appropriate submission in support of a demurrer. At a later stage of the proceeding, it might have been appropriate. [Carr] should have been permitted to survive demurrer, at least, however, on her theory that [Chase] had no right to transfer the Deed of Trust to the Citi Trustee, since [Chase] was neither the original Beneficiary under the Deed of Trust, nor an assignee/transferee of the Deed of Trust."

Carr's argument lacks merit. As discussed at footnote 2, above, the P&A Agreement is subject to judicial notice (*Scott, supra*, 214 Cal.App.4th at pp. 752-755), and matters that are judicially noticeable may be considered on demurrer (*Zelig, supra*, 27 Cal.4th at p. 1126). Carr has not shown that notwithstanding the P&A Agreement, she

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the ruling on new grounds." (*Ibid*.) Therefore, we address this argument by Carr on the merits.

is capable of truthfully alleging facts sufficient to show that Chase did not acquire a beneficial interest in her loan from the FDIC. Accordingly, we reject Carr's theory that she can state a cause of action on the theory that the beneficial interest in the deed of trust never vested in Chase.

3. *No merit to Carr's claim that the deed of trust became separated from the note, making the note unsecured and the deed of trust a nullity.*

Next, Carr contends the deed of trust was void for the alternative reason that when Chase assigned the deed of trust to Citi on June 6, 2012, the assignment did not include an assignment of the *note* secured by the deed of trust.

The argument does not detain us. As the trial court found, the language of the instrument assigning the deed of trust from Chase to Citi is dispositive. The June 6, 2012 assignment of the deed of trust (exh. C to the first amended complaint) stated the deed of trust was transferred "*together with all right, title and interest secured thereby . . .* " (Italics added.) Therefore, Chase's assignment to Citi of the deed of trust included a transfer of the obligation secured thereby, i.e., the note.

Given the express language of the Chase/Citi assignment, Carr cannot properly allege the deed of trust was transferred without the note. (*Duncan v. The McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 360, disapproved on another point in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1176, 1182 [if facts appearing in exhibit attached to complaint contradict those expressly pleaded, facts appearing in exhibit are given precedence].)

Moreover, as explained in *Debrunner v. Deutsche Bank Nat. Trust Co*. (2012) 204 Cal.App.4th 433 (*Debrunner*), Civil Code sections 2924 to 2924k establish a comprehensive and exhaustive statutory framework to govern nonjudicial foreclosure sales, and therefore California courts " 'have refused to read any additional requirements into the non-judicial foreclosure statute.' [Citations.]" (*Debrunner*, *supra*, at pp. 440-441.) Because the statutes " 'do[ ] not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale,' " (*id.* at p. 441) the

separation of the note and deed of trust does not prevent a party from conducting a nonjudicial foreclosure sale. Indeed, the statutory scheme authorizes the " 'trustee, mortgagee, or beneficiary, or any of their authorized agents' " to initiate nonjudicial foreclosure proceedings, regardless of whether the foreclosing party holds a beneficial interest in both the note and deed of trust. (*Id*. at pp. 440-441, citing Civ. Code, § 2924, subd. (a)(1).) Accordingly, there is no legal basis for Carr's contention that the alleged separation of the note and deed of trust was a bar to foreclosure on the subject real property.

4. *Carr lacks standing to challenge the alleged improper assignment of the note and deed of trust after the closing date of the mortgage investment pool*.

a. *Carr's theory of defective securitization*.[5]

Carr alleges that on June 6, 2012, Chase purported to assign her deed of trust to the WaMu Trust, a pool of mortgage backed securities, but the closing date for the WaMu Trust was May 10, 2007, as specified in the pooling agreement covering the WaMu Trust. Carr contends that because the assignment occurred after the WaMu Trust's closing date, the assignment was void, and no act or transaction based thereon can be treated as valid.[6]

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[5] "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. [Citation.] Hence, the securities issued by the trust are 'mortgage-backed.' " (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1082, fn. 1 (*Glaski*).)

[6] As Division Two of this District recently observed, this "argument is not a novel one. The wave of real estate loan defaults over the past decade has given rise to a number of creative theories developed by individuals hoping to avoid foreclosure. The argument that a defendant lacks standing to foreclose because of an improper securitization process has recently become particularly popular." (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 741 (*Kan*).)

b. *The* Glaski *decision.*

The above argument by Carr is based on *Glaski*, *supra*, 218 Cal.App.4th 1079. There, the plaintiff alleged that his loan was transferred to a securitized trust after the trust's closing date, so as to render the transfer ineffective. The plaintiff asserted the late transfer violated the trust's pooling and servicing agreement and was void because, if effectuated, it would have caused the trust to lose tax advantages accruing to real estate mortgage investment conduit (REMIC) trusts; federal tax code provisions require that mortgages be transferred to such trusts within a certain time frame, usually 90 days after a trust is created, in order to enjoy tax advantages. (*Id*. at pp. 1093-1095.)

The *Glaski* court held that a plaintiff may properly allege a valid cause of action for wrongful foreclosure by stating facts showing the defendant who invoked the power of sale was not the true holder of the deed of trust, and that the plaintiff's allegations detailing the faulty postclosing date transfer of his deed of trust to the REMIC trust met this pleading standard. (*Glaski*, *supra*, 218 Cal.App.4th at pp. 1094-1097.)

The *Glaski* court further found that a borrower has standing to contest a defective assignment to a REMIC trust, explicitly rejecting the view that the borrower's status as a nonparty or non-third party beneficiary to an assignment agreement prevents the borrower from challenging the transfer. (*Glaski*, *supra*, 218 Cal.App.4th at pp. 1094-1095.) Analyzing New York law, under which the investment trust was formed, the court held that a postclosing date assignment into such a trust is void. (*Id*. at p. 1096.) *Glaski* acknowledged that other courts, analyzing the same law, have held that postclosing transfers are merely voidable, not void. (*Id*. at pp. 1096-1097, citing *Calderon v. Bank of America, N.A.* (W.D.Tex.2013) 941 F.Supp.2d 753, 767; *Bank of America National Association v. Bassman FBT, L.L.C.* (2012) 2012 ILApp(2d) 110729, 366 Ill.Dec. 936, 981 N.E.2d 1, 8.) Differing with these opinions, the *Glaski* court stated: "In this case, however, we believe applying the statute to void the attempted transfer is justified because it protects the beneficiaries of the [investment trust] from the potential adverse tax consequence of the trust losing its status as a REMIC trust under the Internal Revenue

Code." (*Id*. at p. 1097.) *Glaski* held the status of the assignment as void (rather than voidable) gave the plaintiff standing to challenge it.[7] (*Id*. at pp. 1097-1098.) *Glaski* therefore reversed the trial court's order sustaining the demurrer to the wrongful foreclosure claim. (*Id*. at p. 1100.)

c. *Overwhelming criticism of Glaski; borrower lacks standing to sue for alleged defects in loan securitization process.*

In *Jenkins, supra*, 216 Cal.App.4th 497, which preceded *Glaski*, the court addressed similar "attempts to construct a dispute between [the plaintiff] and Defendants with regard to the alleged improper transfer of the promissory note during the securitization process." (*Id*. at p. 514.) The *Jenkins* court held "even if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note . . . ) occurred, the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. 'Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.' [Citation.] As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [the plaintiff] lacks standing to enforce any agreements, including

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[7] Our Supreme Court has granted review in four wrongful foreclosure cases that declined to follow *Glaski* on this point. (*Yvanova v. New Century Mortgage Corp*. (2014) 226 Cal.App.4th 495, review granted Aug. 27, 2014, S218973; *Keshtgar v. U.S. Bank, N.A.* (2014) 226 Cal.App.4th 1201, review granted Oct. 1, 2014, S220012; *Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, review granted Nov. 12, 2014, S220675; *Boyce v. T.D. Service Co.* (2015) 235 Cal.App.4th 429, review granted July 15, 2015, S226267; see *Yvanova v. New Century Mortgage Corp*. (2014) 331 P.3d 1275 ["The petition for review is granted. Briefing and argument is limited to the following issue . . . In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?"].)

the investment trust's pooling and servicing agreement, relating to such transactions." (*Id*. at pp. 514-515.)

In the wake of *Glaski*, "[t]he vast majority of courts analyzing [the decision] . . . have found it unpersuasive. (See, e.g., *Miller v. JP Morgan Chase Bank N.A.* (N.D.Cal., Aug. 8, 2014, No. 5:13–CV–03192–EJD) 2014 U.S. Dist.Lexis 110038, pp. *11-*12 ['Courts in this District have expressly rejected *Glaski* . . . .']; *Tavares v. Nationstar Mortgage LLC* (S.D.Cal., July 14, 2014, No. 14cv216–WQH-NLS) 2014 U.S.Dist. Lexis 95537, p.*9 [finding *Glaski*'s reasoning unpersuasive]; *Zapata v. Wells Fargo Bank, N.A.* (N.D.Cal., Dec. 10, 2013, No. C 13–04288 WHA) 2013 U.S.Dist. Lexis 173187, p.*5 ['Every court in this district that has evaluated *Glaski* has found it is unpersuasive and not binding authority']; *Davies v. Deutsche Bank National Trust Co*. (*In re Davies*) (9th Cir., Mar. 24, 2014, No. 12-60003) 565 Fed.Appx. 630 [2014 U.S.App. Lexis 5416, pp. *4-*5] [following *Jenkins* instead of *Glaski*]; *Rajamin v. Deutsche Bank National Trust Co*. (2d Cir. 2014) 757 F.3d 79 [(*Rajamin*)] [disagreeing with *Glaski*'s interpretation of New York law; finding improper transfer into investment trust is voidable, not void].)" (*Kan, supra*, 230 Cal.App.4th at p. 744.)

Apart from *Jenkins*, we are guided in particular by the Second Circuit's decision in *Rajamin*, *supra*, 757 F.3d 79, a case that arose from the Southern District of New York. In rejecting *Glaski*'s interpretation of New York law and its conclusion that a borrower has standing to challenge a mortgage assignment as void, *Rajamin* explained, "[W]e conclude that as unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable; and that under New York law such acts are voidable only at the instance of a trust beneficiary or a person acting in his behalf. Plaintiffs here are not beneficiaries of the securitization trusts; the beneficiaries are the certificateholders. Plaintiffs are not even incidental beneficiaries of the securitization trusts, for their interests are adverse to those of the certificateholders. Plaintiffs do not contend that they did not receive the proceeds of their loan transactions; and their role

thereafter was simply to make payments of the principal and interest due. The law of trusts provides no basis for plaintiffs' claims." (*Rajamin*, *supra*, 757 F.3d at p. 90.)[8]

Guided by the above, we decline to follow *Glaski* and conclude Carr lacks standing to challenge the alleged improper assignment of the deed of trust to the WaMu Trust after its closing date. Unless or until our Supreme Court holds otherwise, we agree with the courts that have concluded a borrower lacks standing to object to such irregularity in a loan's securitization.

5. *Carr's causes of action against Chase*.

Based on the three theories discussed above – Chase never obtained a beneficial interest in Carr's deed of trust, the deed of trust became separated from the note, and the assignment to the WaMu Trust was void because it occurred after the trust's closing date – Carr contends she stated viable causes of action against Chase for declaratory relief, cancellation of instruments, removal of cloud on title, slander of title, wrongful foreclosure, and unfair business practices.

These various causes of action by Carr are all predicated on the three theories which we have discussed above and rejected. It therefore follows that these causes of action are not viable.[9]

Further, Carr, as the plaintiff and appellant, has the burden to demonstrate a reasonable possibility that she is capable of amending her pleading to state a cause of action. (*Zelig*, *supra*, 27 Cal.4th at p. 1126.) Carr has not met her burden. Therefore,

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[8] As an Illinois court observed, "We simply do not see how the New York legislature could have intended to allow a debtor in a commercial transaction to invoke the provisions of a trust to which it is a stranger in order to frustrate the collection of the debt." (*Bank of America Nat. Ass'n v. Bassman FBT, L.L.C.* (2012) 2012 IL.App(2d) 110729, 981 N.E.2d 1, 13.)

[9] "Although it is technically improper to sustain a demurrer to a declaratory relief cause of action, the error is harmless if the substantive claim is legally untenable. [Citation.] The object of the declaratory relief action is served by our opinion that plaintiff cannot recover on the legal theory [she] asserts. [Citation.]" (*Teresi v. State of California* (1986) 180 Cal.App.3d 239, 245, fn. 4.)

Carr cannot show the trial court abused its discretion in denying her leave to file a second amended complaint.

6. *Carr's causes of action against Canterbury*.

As against Canterbury, Carr asserted causes of action for declaratory relief, cancellation of instruments, quiet title, and removal of cloud on title. Carr contends it cannot be determined from the face of the pleadings whether Canterbury is a BFP; a purchaser acquires property subject to prior interests of which he has actual or constructive notice, and because the assignment of the deed of trust was a recorded document, "Canterbury thus had knowledge of the defects discernable from the Assignment, such as the fact that it did not include the note, that its date long post-dated the closing date of the PSA." Thus, Carr's claims against Canterbury are predicated on the three alleged defects discussed above.

Our determination that Carr failed to state a cause of action based on an alleged defect in the assignment or in the securitization process disposes of Carr's claims against Canterbury, the subsequent purchaser of the property.[10]

[10] Having rejected Carr's challenges to the enforceability of the deed of trust or the validity of the assignment to the Citi trustee, it is unnecessary to address Carr's contention that she was not required to tender payment, or any other issues.

## DISPOSITION

The orders of dismissal in favor of Chase and Canterbury are affirmed. Respondents shall recover their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

KITCHING, J.

EGERTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.