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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THOMAS SCHULTHEIS et al., Plaintiffs and Appellants, v. OCWEN LOAN SERVICING LLC et al., Defendants and Respondents.	2d Civil No.B282124 (Super. Ct. No. 16CV00160) (Santa Barbara County)

Nearly a decade ago, appellants Thomas and Toni Schultheis defaulted on an $8 million home loan secured by a deed of trust. They avoided foreclosure by declaring bankruptcy. They obtained a bankruptcy discharge in 2014 by promising to make partial loan payments and sell their house by 2016.

Appellants did not sell their house. Instead, they brought this lawsuit claiming that their loan and trust deed were improperly transferred among financial institutions. Respondents are the current lien holder and loan servicer, and the former trust deed beneficiary and foreclosure trustee.

The trial court sustained respondents' demurrers to the third amended complaint without leave to amend. We conclude that appellants' claims were litigated or could have been litigated during the bankruptcy proceeding, so that appellants are barred from litigating them here. Further, appellants' latest pleading fails to state a cause of action, and they have not demonstrated how they could amend to state a claim. We affirm the trial court's judgment dismissing appellants' lawsuit.

FACTS AND PROCEDURAL HISTORY[1]

Appellants live in a house on Via Bendita, at Hope Ranch in Santa Barbara (the Property). In January 2006, Thomas Schultheis obtained a loan for $8 million (the Loan) from American Brokers Conduit (ABC) secured by a deed of trust (DOT) on the Property. The beneficiary of the DOT is respondent Mortgage Electronic Registration Systems, Inc. (MERS). MERS held legal title to the interest granted by the DOT, as nominee of the lender and the lender's successors and assigns.

In 2009, MERS assigned the DOT to American Home Mortgage Servicing, Inc. (AHMSI).[2] AHMSI, in turn, promptly assigned the DOT to LaSalle Bank as trustee for the Zuni Mortgage Loan Trust 2006-OA1 (the Securitized Trust). Bank of America, as successor by merger with LaSalle Bank, assigned the DOT to respondent U.S. Bank. Respondent Ocwen Loan

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[1] The facts are derived from the third amended complaint (TAC), the exhibits attached to the pleading, and documents subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*); *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.)

[2] MERS had legal title and could transfer or assign the loan. (*Yvanova, supra,* 62 Cal.4th at p. 931, fn. 7.)

Servicing LLC collects loan payments for U.S. Bank. Respondent T.D. Service Financial Corporation is a foreclosure trustee.

Schultheis defaulted on the Loan. In 2009, foreclosure proceedings began with the recording of a Notice of Default and Election to Sell (NOD), showing a delinquency of $278,323. The NOD was rescinded in 2014.

In 2009, while foreclosure proceedings were pending, appellants filed for bankruptcy. Their sworn bankruptcy schedules list the Property, valued at $25 million, and a secured lien held by AHMSI for $9.45 million. AHMSI filed a claim in appellants' bankruptcy proceeding on behalf of U.S. Bank as trustee of the Securitized Trust.

In 2010, appellants moved for an order disallowing AHMSI's claim. Appellants argued that AHMSI lacks standing to assert a claim on behalf of the trustee of the Securitized Trust because (a) transfers of the Loan and the DOT were invalid and (b) AHMSI does not have possession of the original promissory note or any right to enforce the Loan or the DOT. Appellants asserted that the proper claimant might be ABC, U.S. Bank, Bank of America or Wells Fargo Bank, but none of those entities filed a bankruptcy claim. The bankruptcy court overruled appellants' objection to AHMSI's claim.

In 2013, appellants filed a Plan of Reorganization (Plan). It lists a first trust deed in favor of Bank of America/Ocwen with an "allowed claim" of nearly $10.5 million. Appellants promised to make "payments of $12,500 per month until the property is sold" within two years. These payments are less than half of the required monthly mortgage payment of nearly $27,000. The bankruptcy court approved the Plan in January 2014. Appellants

received a discharge and the bankruptcy case was closed in September 2014.

Appellants filed this lawsuit against respondents in 2016, alleging state and federal claims. The case was removed to federal court then remanded to state court after the federal claims were dismissed. After a series of demurrers, the trial court sustained without leave to amend respondents' demurrers to the TAC, and dismissed the action.

DISCUSSION

Appeal lies from the judgment of dismissal. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review the pleading de novo to determine if a cause of action has been stated and assume the truth of properly pleaded material facts. (*Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The contents of exhibits attached to the complaint take precedence over conflicting facts alleged in the pleading. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56; *Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406.)

1. The Trial Court Properly Considered Public Documents

At respondents' request, the trial court took judicial notice of the recorded rescission of the NOD, and bankruptcy court orders and filings. Appellants did not oppose respondents' request for judicial notice. We must take notice of the documents. (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1.)

The DOT, the assignments of the DOT, and the NOD are exhibits to the TAC. Appellants argue that the trial court improperly accepted the validity and legal effect of these

documents, which they contend "were void" and not validated by respondents' "mere recording" of them. However, appellants waived any challenge to the authenticity of the documents. (Evid. Code, § 353, subd. (a) [a judgment cannot be reversed unless the record contains an objection]; *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, fn. 4.)

Appellants are mistaken, in any event. The trial court may take judicial notice of the "existence and facial contents" of the recorded DOT and assignments. (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1.) "[C]ourts may—and, indeed, must—disregard allegations that are contrary to judicially noticed facts and documents." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1338.) "'[U]nder the doctrine of truthful pleading, the courts "will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed."'" (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; *Rubio v. U.S. Bank N.A.* (N.D. Cal. Apr. 1, 2014) 2014 U.S.Dist.Lexis 45677, *13-14 [court can fully consider facts contained in publicly recorded documents incorporated into the complaint].)

There is no basis to conclude that the recorded documents are void. The TAC alleges that appellants obtained the $8 million Loan secured by the DOT. In bankruptcy, they acknowledged the Loan and their responsibility for its repayment. Appellants' 2014 Plan admits the assignment of the Loan and the DOT, because they promised to make "protection payments" to Bank of America and Ocwen. With this history, appellants cannot succeed with bare assertions that the assignments are void.

2. Res Judicata

In the trial court, respondents asserted that this lawsuit is barred by principles of res judicata. They continue to urge the point on appeal. Appellants do not address the issue.

As noted above, we must take judicial notice of appellants' request that the bankruptcy court disallow AHMSI's claim; they contended that the Loan was not validly transferred to the Securitized Trust or properly assigned to the banks. The bankruptcy court overruled the objection, and its allowance of AHMSI's claim "'is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of res judicata.'" (*Siegel v. Federal Home Loan Mortg. Corp.* (9th Cir. 1998) 143 F.3d 525, 529.)

AHMSI is not a party to this lawsuit; however, respondents are in privity with AHMSI, for purposes of applying collateral estoppel. Privity exists if there are successive relationships to the same property rights, or if a party has a substantially similar interest with a party to former litigation. (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 718.) Bank of America is the "successor by merger" of AHMSI's assignee, LaSalle Bank; U.S. Bank acquired its interest in the DOT from Bank of America. Appellants' challenge to these transfers was or could have been litigated during bankruptcy, so they cannot litigate it now. (*Siegel v. Federal Home Loan Mortg. Corp., supra,* 143 F.3d at pp. 528-529 [barring claims that could have been asserted in bankruptcy].)

Appellants' Plan contradicts their claims in this lawsuit. "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect." (*Trulis v. Barton* (9th

Cir. 1995) 107 F.3d 685, 691, italics omitted.) In their Plan, appellants agreed to repay the "[s]ecured claim of Bank of America/Ocwen Loan Servicing, LLC." Appellants cannot contradict their Plan by claiming in their TAC that Bank of America never had a valid interest in the Loan or DOT.[3]

Litigants who halt a foreclosure through bankruptcy, and argue the invalidity of loan assignments to the bankruptcy court, cannot relitigate the same issue after losing in federal court. As this Court wrote in *Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 914, principles of res judicata prevent litigants from vindicating the same primary right in multiple forums by requesting different relief, or arguing a different legal theory. Piecemeal litigation causes vexation and expense to the parties and wastes judicial resources.

3. Wrongful Foreclosure

If we assume that appellants are not precluded by principles of res judicata, we still conclude that their wrongful foreclosure claim was properly dismissed.

A claim for wrongful foreclosure requires (1) an illegal, fraudulent or oppressive sale of real property by the trustee, (2) prejudice or harm to the person attacking the sale, and (3) the trustor has tendered the secured indebtedness or is excused from making a tender. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.)

Appellants do not allege that a foreclosure sale has taken place. Nor do they allege that they tendered their debt. Instead,

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[3] The TAC alleges that "Bank of America did not have any interest in the Plaintiffs' Loan to transfer in the first place as Bank of America never acquired any valid interest in the Plaintiffs' Loan."

they are trying to preempt a possible future foreclosure. A borrower cannot halt a *threatened* foreclosure by questioning the foreclosing party's right to proceed; a preemptive wrongful foreclosure claim would impermissibly interject courts into the nonjudicial foreclosure scheme. (*Saterbak v. JPMorgan Chase Bank* (2016) 245 Cal.App.4th 808, 814-815; *Lucioni v. Bank of America* (2016) 3 Cal.App.5th 150, 160.) Appellants have not stated a claim for wrongful foreclosure.

4. Covenant of Good Faith and Fair Dealing

Appellants allege that respondents breached the implied covenant of good faith and fair dealing by attempting to collect on appellants' debt without having any lawful interest in the Loan, and by foreclosing without having any interest in the DOT. Appellants allege injury because the Property has diminished in value due to respondents' conduct.

Appellants cannot claim injury from a foreclosure. The NOD was rescinded in 2014, and no right to sell the Property pursuant to the DOT is being exercised.

There are multiple problems with appellants' claim that respondents have no right to collect payments on the Loan. First, appellants' bankruptcy Plan gives Ocwen the right to collect Loan payments. They are collaterally estopped from claiming in the TAC that Ocwen has no right to collect payments. Second, the TAC alleges, fundamentally, that respondents are strangers with no right to enforce the Loan. A plaintiff who denies a contractual relationship with the defendant cannot claim that the defendant breached a covenant of good faith because the existence of a contract is a prerequisite to such a claim. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) As

appellants deny having a contract with respondents here, they cannot claim a breach of the implied covenant.

5. Unfair Competition Law (UCL) Claim

The UCL proscribes unlawful, unfair or fraudulent business practices. A plaintiff must allege in detail that he or she has suffered an economic injury (a loss of money or property) caused by the unfair practices. (Bus. & Prof. Code, §§ 17200, 17204; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Appellants allege that respondents violated the UCL by recording "false" documents and enforcing the Loan and DOT without having any right to do so. As shown in the preceding sections, appellants conceded their indebtedness and promised to pay loan servicer Ocwen in the bankruptcy Plan. By their actions, appellants gave up the right to challenge the validity of the Loan, the DOT, and the assignments.

There is no basis to conclude, in any event, that the assignments are void. A borrower may challenge a loan transfer that is "void, and not merely voidable at the behest of the parties to the assignment." (*Yvanova*, *supra*, 62 Cal.4th at p. 923.) As a rule, contracts are "void" if they violate the law or public policy and cannot be ratified (*id.* at p. 929; *Colby v. Title Ins. & Trust Co.* (1911) 160 Cal. 632, 644-646); or if the object is unlawful, impossible or unascertainable (Civ. Code, § 1598); or if there is fraud in the inception, so that the promisor does not know what he is signing (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921); or if the contract is made with the intent to defraud subsequent purchasers (Civ. Code, § 1227).

An allegedly untimely transfer of a loan into a securitized trust is merely voidable, not void *ab initio*. (*Mendoza v. JPMorgan Chase Bank* (2016) 6 Cal.App.5th 802, 811-818; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 42-43; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1257-1260.) Here, the transfer of appellants' loan to the Securitized Trust is voidable. Appellants lack standing, as borrowers, to pursue a theory that the transfer to the Securitized Trust and assignment of their loan documents is unfair, unlawful or fraudulent. (See *Mendoza* at pp. 815-818.)

Apart from failing to allege an unfair, unlawful or fraudulent act, appellants have not alleged actual injury. The Property was not foreclosed, despite appellants' default. They are in possession and, it seems, ignoring the terms of the Plan, in which they promised to sell the Property by 2016. We direct appellants to this Court's observations in *Gillies v. JPMorgan Chase Bank*, *supra*, 7 Cal.App.5th at p. 909: "A person who borrows money from a bank to purchase or refinance a home has a reasonable expectation that the bank will fund the loan. The bank has a reasonable expectation that monthly mortgage payments will be made. Here, appellant's reasonable expectations were met. The bank's were not. Nonpayment of the mortgage for approximately eight years while the borrower remains in possession is an egregious abuse."

6. Leave to Amend

A plaintiff may request an amendment on appeal. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.) The burden of demonstrating a reasonable possibility that defects can be cured "is squarely on

the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.)

Appellants believe that the TAC is sufficient, but "could further clarify their arguments" in a fifth pleading. Their brief does not spell out how an amendment could cure a defect or change the legal effect of their pleading. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1467-1468; *People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.) The trial court did not abuse its discretion by sustaining respondents' demurrers without leave to amend.

DISPOSITION

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

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

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