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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

SEAN PARK et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	B264026 (Los Angeles County Super. Ct. No. SC121710)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lawrence H. Cho, Judge. Reversed and remanded with directions.

George H. Bye; and Stephen F. Lopez for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Edward D. Vogel and Karin Dougan Vogel for Defendants and Respondents.

INTRODUCTION

Sean and Michelle Park filed this action for wrongful initiation of foreclosure, fraud, negligence, unfair competition, and other causes of action against Wells Fargo Bank, N.A. also known as Wachovia Mortgage, FSB, formerly known as World Savings Bank FSB (Wells Fargo), Wells Fargo Bank Home Mortgage, Golden West Savings Association Service, Co. (Golden West), Bank of New York Mellon (BNYM) as trustee of World Savings Mortgage Pass-Through Certificates Series 31 Trust, and Cal-Western Reconveyance Corporation (Cal-Western), for their alleged involvement in the foreclosure on the Parks' property. The Parks appeal from a judgment of dismissal following the trial court's order sustaining the demurrer of Wells Fargo, BNYM, and Golden West to the Parks' first amended complaint without leave to amend.

We conclude the Parks have shown there is a reasonable probability they can amend their complaint to cure the defects in the first amended complaint and to state causes of action for wrongful foreclosure, cancellation of instruments, and quiet title against Wells Fargo, and we direct the trial court to allow the Parks to file a motion for leave to amend to allege these causes of action. We conclude, however, the Parks have not made such a showing for their causes of action against BNYM and Golden West. Therefore, we reverse the judgment in favor of Wells Fargo and affirm the judgment in favor of BNYM and Golden West.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Loan, Requests for Modification, and Foreclosure*

In October 2007 the Parks refinanced the property at issue in this case with an $887,520 loan from World Savings Bank evidenced by a promissory note secured by a deed of trust encumbering their property. The deed of trust identified World Savings Bank, FSB, its successors and/or assignees as lender/beneficiary and Golden West as trustee. Pursuant to the deed of trust, the Parks "irrevocably grant[ed] and convey[ed] the Property to the Trustee, in trust for Lender, with a power of sale" if the Parks defaulted. The Parks also agreed the "Lender may at any time appoint a successor trustee."

The promissory note, titled "Adjustable Rate Mortgage Note," stated, "My initial monthly payment amount was selected by me from a range of initial payment amounts approved by Lender and may not be sufficient to pay the entire amount of interest accruing on the unpaid Principal balance." The note also provided, under "Deferred Interest; Additions to My Unpaid Principal," that "[f]rom time to time, my monthly payments may be insufficient to pay the total amount of monthly interest that is due. If this occurs, the amount of interest that is not paid each month, called 'Deferred Interest,' will be added to my Principal and will accrue interest at the same rate as the Principal."

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[1] Because the Parks appeal from a judgment after an order sustaining a demurrer, we "accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

Notwithstanding these express disclaimers, the Parks alleged World Savings failed to disclose negative amortization would occur and misrepresented the Parks could refinance in six months without a prepayment penalty.

The Parks suffered a significant loss of income following the collapse of the real estate market. In March 2009 they approached Wachovia, World Savings Bank's successor-by-merger,[2] to inquire about a loan modification. Tiffany Duke, a supervisor from Wachovia's Loss Mitigation department, directed the Parks to stop making payments on their loan in order to qualify for a loan modification. Although initially hesitant to follow Duke's instructions, the Parks stopped making loan payments in approximately June 2009. On or about May 1, 2010, the bank denied the Parks a loan modification without explanation.

Wells Fargo, through its attorney-in-fact Cal-Western Reconveyance Corporation, executed a substitution of trustee with an "[e]ffective [d]ate" of July 22, 2010, which purported to substitute Cal-Western as the new trustee under the deed of trust. On July 23, 2010 Cal-Western issued a notice of default stating the Parks owed payments since July 2009 and attaching a declaration from Wells Fargo authorizing the notice of default. In October 2010 Cal-Western issued the first notice of trustee's sale, but postponed the sale shortly thereafter. In April 2012

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[2] The Parks alleged that, "[a]s of December 31, 2007, World [S]avings Bank, FSB became known as Wachovia Mortgage, FSB" and that Wachovia merged with Wells Fargo "[o]n or about December 31, 2008." In their first amended complaint, the Parks at times collectively referred to World Savings, Wachovia, and Wells Fargo as the "Wells Fargo Defendants."

Cal-Western issued a second notice of trustee's sale, but that sale was also postponed. On November 19, 2013 Cal-Western recorded a third notice of trustee's sale. As of the filing of the first amended complaint, the loan modification process was still "continuing" while Wells Fargo simultaneously—and improperly—pursued foreclosure, a practice known as "dual-tracking."

The Parks also alleged their loan was securitized, or at least there was an attempt at securitization, prior to Wells Fargo's merger with Wachovia. As a result, according to the Parks, Wells Fargo did not have "any legal or corporate authority to collect on their loan, [or] service the loan," and similarly had no right to accept the Parks' loan payments or initiate foreclosure.

B. *The Parks File This Action To Prevent Foreclosure*

On November 27, 2013 the Parks filed this action. Their original complaint alleged 12 causes of action: (1) wrongful initiation of foreclosure, (2) fraud in the inducement, (3) fraud, (4) breach of the implied covenant of good faith and fair dealing, (5) negligence, (6) quasi-contract, (7) violation of California Business and Professions Code section 17200 et seq., (8) accounting, (9) breach of contract, (10) breach of the implied covenant of good faith and fair dealing, (11) negligence, and (12) intentional infliction of emotional distress. The Parks also filed an ex parte application for a temporary restraining order to stay the impending foreclosure sale. On December 11, 2013 the trial court granted the temporary restraining order and set a hearing on the Parks' application for preliminary injunction.

The defendants filed a motion to strike and demurred to all causes of action, asserting a number of arguments, including federal preemption, statute of limitations, statute of frauds, lack of duty of care, failure to allege tender, and lack of standing to challenge the alleged securitization of the loan. The defendants also opposed the Parks' request for a preliminary injunction.

On February 11, 2014 the trial court denied the request for a preliminary injunction seeking to enjoin the foreclosure sale and dissolved the temporary restraining order. The court found a money judgment would give the Parks adequate relief in the event the foreclosure was wrongful, given that "[t]he documents submitted to the Court indicate that the 4 unit rental property is an investment for the Plaintiffs." The court did not reach the issue of likelihood of success on the merits. In lieu of filing an opposition to the still-pending demurrer, the Parks on March 13, 2014 filed the operative first amended complaint, adding a thirteenth cause of action to quiet title. One week later, on March 20, 2014, the foreclosure sale occurred, at which Wells Fargo, as the purported beneficiary, purchased the property from trustee Cal-Western.

On April 7, 2014 the defendants demurred to the first amended complaint, making largely the same arguments they made in their initial demurrer. The defendants also filed a request for judicial notice[3] and a motion to expunge the Parks' lis

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[3] The defendants asked the court to take judicial notice of the following documents: the substitution of trustee, civil case queries of the Parks' other lawsuits against lenders, the criminal indictment of and judgment against Michael Park, the trustee's deed upon sale, the lis pendens, the trial court's February 11, 2014 tentative ruling denying the Parks' request for a

pendens. The hearing on the demurrer was initially set for December 5, 2014, but the court continued the hearing to January 23, 2015 pursuant to a notice from the court clerk dated November 24, 2014. The Parks suggest their attorney believed the continuance extended the deadline to file an opposition to the demurrer, and therefore did not file opposition papers until mid-January.

C. *The Trial Court Denies the Parks' Ex Parte Application To Specially Set the Parks' Motion To File a Second Amended Complaint*

On December 12, 2014, after the court had continued the hearing on the demurrer to the first amended complaint to January 23, 2015, the Parks filed an ex parte application to specially set the hearing on their motion to file a second amended complaint so that the court would hear the demurrer and motion for leave on the same day, and for permission to file such a motion. The trial court denied the Parks' application in a minute order that indicates the court had heard oral argument but that does not elaborate on the court's reasoning.

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preliminary injunction, and the January 14, 2014 declaration of Michael Dolan, a manager at Wells Fargo, filed in opposition to the request for preliminary injunction. The trial court granted the request for judicial notice "in full" as to the case queries, criminal judgment, and the court's tentative ruling. The court also granted the request to take judicial notice with respect to the "recordation and existence only" of the substitution of trustee, the trustee's deed upon sale, and the lis pendens. The court took judicial notice of the declaration of Mr. Dolan as to "filing and existence only." The Parks do not argue the trial court erred in taking judicial notice of these documents.

D. *The Trial Court Sustains the Defendants' Demurrer to the First Amended Complaint Without Leave To Amend*

At the hearing on the defendants' demurrer, the trial court on its own motion struck the Parks' opposition papers as untimely and sustained the demurrer without leave to amend. The court nevertheless heard argument, considered the Parks' opposition papers, and sustained the demurrer without leave to amend on the merits. The Parks timely appealed from the judgment of dismissal.[4]

DISCUSSION

A. *Standard of Review*

"We apply the following well-established law in reviewing a trial court's order sustaining a demurrer without leave to amend: 'We independently review the ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action.'" (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 833.) "We must assume the truth of all properly pleaded facts as well as those that are judicially noticeable." (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809.) "'[F]acts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.'" (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767.)

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[4] Wells Fargo Bank Home Mortgage and Cal-Western are not parties to this appeal.

"When the trial court sustains a demurrer 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.'" (*Tenet Healthsystem*, *supra*, 245 Cal.App.4th at p. 833.) "'[S]uch a showing can be made for the first time to the reviewing court . . . .'" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153-1154; see *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044 [a "plaintiff may request leave to amend for first time on appeal," and "having requested an opportunity to amend in the trial court is not a condition precedent to our now granting such relief"]; accord, *Eckler v. Neutrogena Corp.* (2015) 238 Cal.App.4th 433, 438; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226.) "In considering whether there is a reasonable probability a defect in the complaint could be cured by amendment, courts may consider counsel's statements at oral argument." (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 870.) "Whether a plaintiff will be able to prove its allegations is not relevant." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1057; see *Mendoza*, *supra*, 6 Cal.App.5th at p. 809 ["[w]e are not concerned with plaintiff's ability to prove the allegations or with any possible difficulties in making such proof"].)

B. *The Parks Have Shown a Reasonable Possibility They Can Amend To Allege Standing To Challenge the Foreclosure Sale*

In their first amended complaint, the Parks alleged that, at some unidentified point in time, World Savings sold their loan to an unknown entity. The Parks further alleged that someone, either World Savings or some other entity, attempted to securitize their loan,[5] by way of an assignment to the World Savings Real Estate Mortgage Investment Conduit 2007 Trust Series 31.[6] The Parks alleged New York and Delaware law govern the Trust, and BNYM serves as the trustee. The Parks alleged, however, the securitization attempt failed because their loan was not transferred prior to the November 28, 2007 closing date prescribed by the Trust's pooling and service agreement (PSA).

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[5] "A securitized investment trust is created by pooling the loans into a trust and selling to investors the right to receive the mortgage interest and principal payments. [Citation.] Terms of the trusts and the rights and obligations of the parties are set forth in a pooling and service agreement." (*Yhudai v. Impac Funding Corporation* (2016) 1 Cal.App.5th 1252, 1254, fn. 2.)

[6] The Parks attached to their first amended complaint an affidavit by William McCaffrey, an "experienced Securitization Analyst," who, using software that enables him to locate notes held by any "named Trust-Entity," claims he discovered the Parks' loan was securitized and held in the Trust. The defendants assert they possess evidence establishing the loan was never securitized and in fact is owned by Wells Fargo. That factual question cannot be resolved on demurrer.

The trial court, in sustaining the demurrer, ruled the Parks lacked standing to challenge the failed securitization attempt. The Parks argued in their opening brief that the foreclosure sale was wrongful and void based on these, and other similar, contentions.[7]

In their reply brief, the Parks describe an alternative version of the facts surrounding their loan's history, which presents a new theory of why the foreclosure was void. The Parks argue they can allege that, rather than failing to properly assign their loan into the Trust, Wachovia or World Savings in fact *successfully* assigned the loan, but did so *prior to* the merger with Wells Fargo, which the Parks allege was "completed" on or about December 31, 2008. Thus, the theory goes, the Trust, as the current beneficiary, not Wells Fargo, had authority to substitute a new trustee and initiate foreclosure. Accordingly, in July 2010 Wells Fargo did not have authority to substitute Cal-Western as trustee because World Savings or Wachovia had already assigned away that right. The Parks contend the original trustee named in their deed of trust, Golden West, remains the "true" trustee, and in March 2014 Wells Fargo lacked authority to foreclose through Cal-Western.

The Parks' two alleged factual scenarios fall on opposite sides of the void versus voidable distinction the California Supreme Court recently discussed in *Yvanova v. New Century*

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[7] The Parks also allege Wells Fargo's substitution of trustee and the other foreclosure documents were "robo-signe[d]" and/or suffered from other procedural and statutory irregularities, which rendered the documents "ineffective."

Mortgage Corp. (2016) 62 Cal.4th 919.[8] Specifically, the Supreme Court in *Yvanova* addressed a borrower's standing to bring a wrongful foreclosure cause of action based on an allegedly defective assignment of the borrower's loan to the foreclosing party. (See *id.* at p. 923.) The Supreme Court in *Yvanova* changed the legal landscape just enough to provide borrowers a narrow foothold on which to allege standing to challenge a foreclosure as void, and the Parks' new theory does just that.

The Supreme Court explained the distinction between void and voidable assignments for purposes of standing, as follows: "When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Yvanova*, *supra*, 62 Cal.4th at p. 936.) By contrast, "[b]orrowers who challenge the foreclosing party's authority on the grounds of a void assignment 'are not attempting to enforce the terms of the instruments of assignment; to the contrary, they urge that the assignments are void ab initio.'" (*Id.* at p. 936.)

The Supreme Court also explained that "only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial

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[8] The Supreme Court decided *Yvanova* after the trial court in this case sustained the defendants' demurrer.

foreclosure. [Citations.] If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." (*Yvanova*, *supra*, 62 Cal.4th at p. 935.) The Supreme Court held "a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Id*. at p. 939; see *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 ["*Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment *void*, rather than *voidable*"].)

While *Yvanova* did not decide whether assignments into a securitized trust after its closing date are void or voidable, several post-*Yvanova* Court of Appeal decisions have concluded that such untimely assignments are merely *voidable* under New York law[9] and therefore do not give borrowers standing to

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[9] It is unclear what law governs the Trust and PSA. The Parks allege the Trust is regulated by New York and Delaware law. The Parks also cite to *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1097, for the proposition that a late transfer into a trust "formed under New York law" is "void under New York trust law." For their part, the defendants rely on *Saterbak*, *supra*, 245 Cal.App.4th at p. 815, which also involved a trust governed by New York law, to argue the late transfer here, as in *Saterbak*, "would merely make the assignment voidable." Meanwhile, the PSA attached to the Parks' original complaint indicates California law governs. The PSA, however, is not part of the exhibits to the first amended complaint in the record. In

challenge such a defect. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43 ["an assignment to a securitized trust made after the trust's closing date is merely voidable"]; *Yhudai*, *supra,* 1 Cal.App.5th at p. 1259 ["a postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law"]; *Saterbak*, *supra*, 245 Cal.App.4th at p. 815, citing *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89.)[10]

We agree with these authorities that a post-closing assignment, even in contravention of a trust's PSA, is not void, but merely voidable, at the election of the parties to the assignment governed by New York law. Thus, because the Parks' original wrongful foreclosure cause of action was based on an assignment that was at best voidable, the Parks lacked standing

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any event, neither party argues that New York law does not govern the Trust or that California law would produce a different result.

[10] The Parks cite *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 for the proposition that such post-closing transfers "are void under New York trust law." Numerous courts, however, have rejected *Glaski*, noting a New York appellate court has since overruled the New York trial court opinion on which *Glaski* relied. (See *Yhudai*, *supra*, at p. 1259 ["the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected"]; accord *Saterbak*, *supra*, 245 Cal.App.4th at p. 815, fn. 5; *Kalnoki*, *supra*, 8 Cal.App.5th at p. 43; see *Wells Fargo Bank, N.A., v. Erobobo* (N.Y.App.Div. 2015) 9 N.Y.S.3d 312 [127 A.D.3d 1176, 1178].)

to bring that cause of action.[11] The allegation the Parks propose to make in their amended complaint, however, describes a substitution of trustee and foreclosure sale that were void. The Parks state they can allege "World Savings and/or Wachovia" had already successfully transferred its/their interest in the Parks' loan to the Trust prior to the 2008 Wells Fargo merger, so that Wells Fargo did not have any beneficial interest in, or ownership of, the loan after that. Such an allegation would render Wells Fargo's substitution of Cal-Western as trustee, the resulting foreclosure documentation, and the trustee's sale, all void, not merely voidable.

The court in *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552 addressed similar allegations that the wrong entity foreclosed. The borrower there alleged that, before JPMorgan Chase Bank purportedly assigned her loan to Bank of America (the foreclosing entity), Chase had already assigned the loan to Deutsche Bank, and therefore the assignment to Bank of America, and its foreclosure sale, was void. (*Sciarratta*, at pp. 563, 568.) Following *Yvanova*, the court in *Sciarratta* held the second assignment was void, not voidable, and therefore the borrower had standing to assert a cause of action for wrongful

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[11] Similarly, the Parks' allegation that the substitution of trustee and foreclosure documents were "robo-signed" renders those documents voidable, at best, not void. (See *Mendoza*, *supra,* 6 Cal.App.5th at p. 820 [agreeing with "the prevailing view that plaintiff homeowners lack standing to challenge the validity of robo-signatures"]; *Pratap v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 63 F.Supp.3d 1101, 1109-1110 [finding the borrower's allegations of robo-signing did not render the substitution of trustee void, but rather "voidable," and in any event, were insufficient to state a claim].)

foreclosure against Bank of America. (See *Sciarratta*, at pp. 564-565 ["Chase, having assigned 'all beneficial interest' in Sciarratta's notes and deed of trust to Deutsche Bank in April 2009, could not assign again the same interests to Bank of America in November 2009" because "once a claim has been assigned, unless a contrary intention is shown, the assignment ""vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto"""].)

As noted, because this is an appeal from an order sustaining a demurrer, we assume the truth of the Parks' proposed factual amendments. (See *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407, 413 ["[a]ppellate courts treat the demurrer as admitting all material facts properly pleaded"].) Assuming the truth of the Parks' proposed amendment that, because of the prior assignment, only the Trust, and not Wells Fargo or its agent Cal-Western, had the authority to foreclose, the Parks can allege standing to claim the sale was wrongful under *Yvanova*.

C. *The Parks Have Shown a Reasonable Possibility They Can Amend To State Causes of Action Against Wells Fargo Based on an Unauthorized Foreclosure Sale*

In their reply brief and at oral argument, the Parks concede they seek leave to amend to allege three (and only three) causes of action: wrongful foreclosure, cancellation of instruments, and quiet title. The Parks have met their burden of showing there is

a reasonable possibility they can amend their complaint to state these causes of action.[12]

1. *The Parks May Be Able To Amend Their Complaint To Assert a Cause of Action for Wrongful Foreclosure*

"A wrongful foreclosure is . . . an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper."

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[12] The Parks also argue the trial court abused its discretion in striking their opposition to the demurrer as untimely and denying their ex parte application to specially set their motion for leave to file a second amended complaint. Because the Parks have shown they are entitled to leave to amend, we do not reach these issues. We note, however, the Parks were not prejudiced by the trial court's statement it was striking their opposition because the trial court in the alternative decided the demurrer on the merits. The trial court's denial of the Parks' ex parte application was more problematic. The Parks filed their application on December 12, 2014, at which time the Parks still had sufficient time to have their motion for leave heard within the statutory notice period of 16 court days. (See Code Civ. Proc., § 1005, subd. (b).) Although it is unclear why the Parks were unable to reserve a hearing for their motion for leave to amend on regular statutory notice, the court, by denying the Parks' ex parte application and proceeding with the hearing on the demurrer, effectively deprived the Parks of their statutory right to a hearing on their motion. (See *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 742 ["courts have required an opportunity for oral argument in critical pretrial matters as to which there are genuine disputes of law or fact"].) Again, however, the Parks did not suffer prejudice because they were able to make their arguments in opposition to the demurrer and on appeal.

(*Sciarratta*, *supra*, 247 Cal.App.4th at p. 561.) "'The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering."'" (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1184-1185.) "[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case." (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 409.)

Regarding the first element, the Supreme Court in *Yvanova* confirmed that a "foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action. [Citations.] . . . [O]nly the original beneficiary, its assignee or an agent of one of these has the authority to instruct the trustee to initiate and complete a nonjudicial foreclosure sale." (*Yvanova*, *supra*, 62 Cal.4th at p. 929; see *Sciarratta*, *supra*, 247 Cal.App.4th at p. 565.) As the defendants correctly argue, however, under *Yvanova* "the wrongful foreclosure plaintiff . . . must do more than assert a lack of authority to foreclose; the plaintiff must allege facts 'show[ing] the defendant who invoked the power of sale was not the true beneficiary.'" (*Yvanova*, at p. 930.)

There is a reasonable possibility the Parks can amend their complaint to sufficiently allege a foreclosure initiated without authority. The Parks state they can allege their loan was successfully securitized and assigned to an investment trust, the World Savings Real Estate Investment Conduit Trust Series 31, prior to Wells Fargo's merger-by-acquisition with Wachovia, which, according to the Parks, was completed in December 2008. Thus, when Wells Fargo acquired Wachovia's assets, the Parks' loan already belonged to the Trust, for which BNYM purportedly serves as trustee. Accordingly, when Wells Fargo foreclosed, it did so wrongfully—as a stranger to the loan without any authority or right to foreclose.

With respect to the second element, prejudice, the Supreme Court in *Yvanova* held that a borrower whose property is foreclosed on by the wrong entity suffers prejudice, or injury, regardless of whether the borrower was in default. (See *Yvanova*, *supra*, 62 Cal.4th at pp. 937-938 ["[t]he borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing"].) While the Supreme Court limited its prejudice discussion to the issue of standing (see *ibid.*), it rejected the argument a borrower in default is not harmed by an unauthorized foreclosure because the actual beneficiary could foreclose anyway. The Supreme Court explained, "It is no mere 'procedural nicety,' from a contractual point of view, to insist that only those with authority to foreclose be permitted to do so." (*Id.* at p. 938.) Thus, one who loses property in an unauthorized foreclosure, and endures some measure of economic harm as a result, also suffers prejudice for purpose of a wrongful foreclosure cause of action, regardless of the loan's default status or the

borrower's arrearage. As the court in *Sciarratta*, following *Yvanova*, similarly concluded, "A homeowner experiences prejudice or harm when an entity with no interest in the debt forecloses. When a non-debtholder forecloses, a homeowner is harmed because he or she has lost her home to an entity with no legal right to take it." (*Sciarratta*, *supra*, 247 Cal.App.4th at pp. 565-566.) The Parks' proposed allegations that an entity with no authority or interest foreclosed on their property and caused them to incur resulting economic damages sufficiently alleges prejudice for the second element of a wrongful foreclosure action.

The third element of a wrongful foreclosure cause of action is tender, which the trial court ruled the Parks had not alleged. The Parks argue they are excused from alleging tender because they can allege the sale is void. The Parks are correct.

The requirement of alleging tender, or an excuse from having to allege tender, depends on whether the borrower is challenging the foreclosure as void or voidable. (See *Kalnoki*, *supra*, 8 Cal.App.5th at p. 48 ["[t]ender rule only applies to cases where the foreclosure sale is voidable"]; *Sciarratta*, *supra,* 247 Cal.App.4th at p. 568 ["[b]ecause [the borrower] properly alleged the foreclosure was void and not merely voidable, tender was not required"]; *Chavez*, *supra*, 219 Cal.App.4th at p. 1063 [borrower "sufficiently alleged an exception to the tender rule that the foreclosure sale was void because Defendants lacked a contractual basis to exercise the power of sale"]; *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1100 ["[t]ender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclosure on the property"]; cf. *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878 ["in the context of

overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust"].)

To the extent the Parks' wrongful foreclosure cause of action is based on a late assignment to the Trust or on procedural irregularities in the foreclosure process, as it was in their first amended complaint, the Parks have only alleged a voidable assignment or sale, which requires allegations of tender. To the extent the Parks' wrongful foreclosure cause of action relies on the allegation the foreclosing party had no beneficial interest in the loan, as they propose to amend their complaint to allege, the Parks can allege a void sale, which does not require allegations of tender. Indeed, it would make little sense to require the Parks tender an amount due on the loan to a defendant with (allegedly) no right to such funds.

2. *The Parks May Be Able To Amend Their Complaint To Assert a Cause of Action for Cancellation of Instruments*

The Parks seek cancellation of the foreclosure documents (notice of default, notice(s) of trustee's sale, and the trustee's deed upon sale) and the substitution of trustee. They represent they can allege these documents are void because they were executed by "[defendants] and/or its agents," who purportedly lacked any interest in, or authority over, the Parks' loan.

Civil Code section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." To state a cause of action under section 3412, the Parks must allege the challenged

instruments (1) would cause "serious injury" if left untouched and (2) are void or voidable against the party seeking cancellation. (See *Saterbak*, *supra*, 245 Cal.App.4th at p. 818.) For cancellation, the "plaintiff must allege, inter alia, facts showing actual invalidity of the apparently valid instrument or piece of evidence." (*Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 638, disapproved on other grounds, *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 35-36.)

The defendants argue the Parks' cancellation cause of action suffers from the same defects as the wrongful foreclosure cause of action.[13] The defendants' argument here, however, fails for the same reason it did for the wrongful foreclosure cause of action. The Parks may be able to amend to seek cancellation of the substitution of trustee and foreclosure documents because the Parks state they can allege the documents were all issued by, or at the direction of, Wells Fargo, a purported stranger to their loan.

3. *The Parks May Be Able To Amend Their Complaint To Assert a Cause of Action for Quiet Title*

To state a quiet title cause of action, the plaintiff must allege (1) a description of the subject property, (2) the title of the plaintiff as to which a determination is sought and the basis of the title, (3) the adverse claims to title of the plaintiff against

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[13] The tender rule generally applies to a cause of action for cancellation of instruments. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 819.) As discussed, however, "[t]he tender rule is not absolute; tender is not required to cancel a written instrument that is *void* and not merely voidable." (*Ibid.*)

which a determination is sought, (4) the date as of which the determination is sought, and (5) a prayer for the determination of title of the plaintiff against the adverse claims. (Code Civ. Proc., § 761.020.) An action to quiet title differs from a cancellation action in that cancellation is "aimed at a particular instrument or piece of evidence." (*Reiner v. Danial* (1989) 211 Cal.App.3d 682, 689.)

In their demurrer, the defendants argued the Parks had not stated a cause of action for quiet title because they failed to allege they tendered the amount due on the loan. The trial court agreed, stating, "Without tender of the defaulted amount due any challenges to the bases of the foreclosure . . . fail." As discussed, however, the trial court made this determination without the benefit of *Yvanova* and *Sciarratta*. Failure to allege tender is not fatal to the Parks' challenge to the foreclosure sale and Wells Fargo's claim to the property. (See *Sciarratta*, *supra*, 247 Cal.App.4th at p. 568.)

C. *The Federal Home Owners' Loan Act Does Not Preempt the Parks' Causes of Action*

In addition to finding the Parks (under pre-*Yvanova* law) lacked standing to challenge the securitization, the trial court ruled that state law causes of action, like those asserted by the Parks, are preempted by the Home Owners' Loan Act (HOLA) because they "challenge the securitization process rather than failure to follow California foreclosure process." We independently review the question of federal preemption. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023-1024.)

"Whether federal law preempts state law is fundamentally a question whether Congress has intended such a result." (*Peatros v. Bank of America NT & SA* (2000) 22 Cal.4th 147, 157; accord, *Quinn v. U.S. Bank NA* (2011) 196 Cal.App.4th 168, 176; *Harris*, *supra*, 185 Cal.App.4th at p. 1024.) "Federal regulations have no less pre-emptive effect than federal statutes." (*Fidelity Federal Savings & Loan Association v. de la Cuesta* (1982) 458 U.S. 141, 153; accord, *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950; see *Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1391, fn. 3 ["'[f]ederal regulations have the same preemptive effect as the statutes under which they are promulgated"'].)

Congress enacted HOLA to charter savings associations under federal law in order to create a national system of centrally regulated savings and loan associations in "'response to the inadequacies of the existing state system.'" (*Silvas v. E*Trade Mortg. Corp.* (9th Cir. 2008) 514 F.3d 1001, 1004; accord, *Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 614.) Through HOLA, Congress gave the Office of Thrift Supervision (OTS) plenary power to regulate federal savings associations. (*Silvas*, at p. 1005.) Pursuant to that authority, the OTS in 1996 issued 12 Code of Federal Regulations section 560.2, and, in doing so, announced its intention to "occupy the entire field of lending regulation for federal savings associations."[14] (61 Fed.Reg. 50954 (Sept. 30, 1996); see *Akopyan*

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[14] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 1376) repealed section 560.2 (76 Fed.Reg. 48952 (Aug. 9, 2011)), and OTS's supervisory authority over federal savings associations was transferred to the Office of the Comptroller of the Currency,

v. Wells Fargo Home Mortgage, Inc. (2013) 215 Cal.App.4th 120, 138-139.) Section 560.2 is a preemption regulation whereby the OTS sought "to give federal savings associations maximum flexibility to exercise their lending powers . . . without regard to state laws purporting to regulate or otherwise affect their credit activities." (12 C.F.R. § 560.2(a).) To that end, paragraph (b) of section 560.2 provides examples of the types of preempted state laws that "purport[] to impose requirements regarding" certain lending activities. (12 C.F.R. § 560.2(b).)

Paragraph (c) of 12 Code of Federal Regulations section 560.2 saves certain state laws from preemption, such as "[c]ontract and commercial law" and "[r]eal property law" insofar as such laws "only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a)." (12 C.F.R. § 560.2(c).) As the OTS stated in promulgating section 560.2, "OTS wants to make clear that it does not intend to preempt basic state laws such as . . . state laws governing real property [and] contracts." (61 Fed.Reg. 50951, 50966.)

As the Ninth Circuit noted in *Silvas*, *supra*, 514 F.3d 1001, OTS outlined how to evaluate whether section 560.2 preempts a state law: "'[T]he first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by

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effectively eliminating HOLA preemption. (*Meyer v. One West Bank, F.S.B.* (C.D.Cal. 2015) 91 F.Supp.3d 1177, 1180-1181.) This amendment to HOLA was prospective, however, and loans originating prior to Dodd-Frank's effective date of July 21, 2011, like the Parks' loan, are subject to HOLA preemption law then in place. (*Ibid.*)

paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.'" (*Silvas*, at p. 1005, quoting 61.Fed.Reg. 50951, 50966-50967.)

We look to the challenged conduct on which a cause of action is based to determine if, as applied, it falls within paragraph (b).[15] (*Silvas*, *supra*, 514 F.3d at p. 1006.) Although the Parks initially alleged wrongful conduct relating to their loan's origination, modification, and the failed securitization attempt, their theory on appeal is now limited to the defendants' ability to foreclose pursuant to the deed of trust under California's nonjudicial foreclosure scheme. HOLA does not preempt such a claim. As the court held in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, the omission of "foreclosure" from the types of activities enumerated in (b)(10) of 12 Code of Federal Regulations section 560.2 demonstrates OTS's intent to exclude it from federal preemption. (*Mabry*, at p. 231.) This is because "the *process of foreclosure* has traditionally been a matter of state real property law," and "[g]iven the traditional state control over mortgage foreclosure laws, it is logical to conclude

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[15] The defendants argued in their demurrer that the Parks' claim that "Wells Fargo somehow does not own the loan and/or cannot proceed with foreclosure" fell within paragraph (b)(10) of 12 Code of Federal Regulations section 560.2, "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages."

that if the Office of Thrift Supervision wanted to include foreclosure as within the preempted category . . . it would have been explicit. Nothing prevented the office from simply adding the words 'foreclosure of' to section 560.2(b)(10)." (*Mabry*, at pp. 230-231; see *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 202 [California's foreclosure statute is "part of the process of foreclosure and therefore is not subject to federal preemption"].)

Thus, a claim challenging an entity's authority to invoke the power of sale pursuant to a deed of trust is not preempted by HOLA. Nor is a claim alleging an illegal, unauthorized foreclosure sale of property, based on a loan the lender no longer has, the kind of lending power for which OTS intended to give lenders "maximum flexibility." (See *Quintero v. Wells Fargo Bank, N.A.* (N.D.Cal. Jan. 17, 2014, No. C-13-04937 JSC) 2014 WL 202755, at p. 4 [foreclosure statute not preempted by HOLA because "simply putting any restriction on how and when an entity may foreclose" is not "imposing a requirement on" the activities listed in paragraph (b)(10) of section 560.2]; 12 C.F.R. § 560.2.) The unremarkable proposition that a stranger to a loan cannot foreclose on property to which the stranger has no relationship is within the realm of basic real property and contract law relegated to the states in paragraph (c) of section 560.2. Nor does this general principle impose additional requirements, or have more than an incidental effect, on Wells Fargo's normal lending operations. (See *Harris*, *supra*, 185 Cal.App.4th at p. 1026 [the plaintiffs' claim that the bank "failed to credit their payments to their account . . . is a matter of ordinary contract law and has no effect on [the bank's] lending activities"]; *Osorio v. Wells Fargo Bank* (N.D.Cal. May 24, 2012,

No. C 12-02645 RS) 2012 WL 1909335, at p. 2 ("[t]here is no federal or nationally-uniform standard for creating and enforcing security interests in real property"].) HOLA does not preempt the Parks' state law causes of action for wrongful foreclosure, cancellation of instruments, and quiet title based on Wells Fargo's purported lack of authority to foreclose under the deed of trust.[16]

D. *The Parks Have Not Stated, nor Have They Shown They Can Amend To State, Causes of Action Against BNYM and Golden West*

The Parks' appellate briefs are silent about the specific involvement of BNYM and Golden West, if any, in the allegedly unauthorized foreclosure sale Wells Fargo initiated and conducted. Indeed, the Parks sued BYNM in its capacity as trustee of the Trust, the very entity the Parks now claim is the

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[16] Because we conclude HOLA does not preempt the Parks' foreclosure-based causes of action, we do not reach their additional argument that Wells Fargo is not regulated by, or subject to, HOLA because Wells Fargo is a bank, not a federal savings association. (Compare *Gerber v. Wells Fargo Bank, N.A.* (D. Ariz. Feb. 9, 2012, No. CV 11-01083-PHX-NVW) 2012 WL 413997, at p. 4 ["HOLA preemption was created by the OTS for the benefit of *federal savings associations*, and § 560.2 plainly seeks to avoid burdening the operations of *federal savings associations*," and "Wells Fargo is not a federal savings association"] with *Griffin v. Green Tree Servicing, LLC* (C.D.Cal. 2015) 166 F.Supp.3d 1030, 1044 ["claims based on BofA's post-merger conduct pertain only to the conduct of a national bank," but "[c]laims based on pre-merger conduct, by contrast, concern the conduct of Countrywide Bank, FSB, which was a federal savings entity governed by HOLA and § 560.2"].)

loan's true beneficiary. Similarly, according to the Parks' reply brief, "only the true trustee of the deed of trust can hold the sale for the beneficiary" and the Parks alleged the "true trustee" is Golden West, the original trustee named in the deed of trust. The Parks cannot logically claim that only BNYM and Golden West had the authority to foreclose and then sue BNYM and Golden West for not having the authority to foreclose. Moreover, the Parks do not now claim BNYM or Golden West directed or permitted Wells Fargo to foreclose—nor could they and still claim the foreclosure was wrongful because it was unauthorized.[17] Because the Parks have not proposed any amendment that would support viable causes of action against these defendants, nor can we conceive of any, the trial court did not err in sustaining the demurrer by BNYM and Golden West without leave to amend. (See *Mendoza*, *supra,* 6 Cal.App.5th at p. 809.)

E. *On Remand, the Parks May File a Motion for Leave To Amend To Add Their Proposed Causes of Action for Wrongful Foreclosure, Cancellation, and Quiet Title*

As noted, the Parks raised for the first time in their reply brief on appeal the possibility of amending their complaint to

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[17] The Parks alleged in their first amended complaint that, "[a]t all times relevant herein, the Wells Fargo Defendants were acting as purported agent[s] for BNYM as Trustee of the Trust" and that BNYM, like Wells Fargo, lacked "legal authority" to foreclose, given the failed attempt at securitization. As discussed, the Parks have abandoned their securitization theory and propose to amend their complaint to allege the Trust is the actual owner of their loan and did not authorize the foreclosure.

state new causes of action for wrongful foreclosure, cancellation, and quiet title based on a successful assignment of their loan to the Trust. Wells Fargo contended at oral argument (which was entirely proper because it had no prior opportunity to respond to the Parks' reply brief) the Parks are not entitled to leave to amend because their proposed allegations are inconsistent with their prior allegation that the assignment to the Trust was unsuccessful.

The parties have not properly litigated this issue, either on appeal or, where it is more appropriate in the first instance, in the trial court. Therefore, on remand, the trial court should allow the Parks to file a motion for leave to amend pursuant to California Rules of Court, rule 3.1324, to assert causes of action for wrongful foreclosure, cancellation, and quiet title. Under rule 3.1324 the Parks must provide a copy of the proposed amendment or amended pleading and identify the proposed changes, and include a separate declaration specifying the effect of the amendment, why the amendment is necessary and proper, when the Parks discovered the facts giving rise to the amendment, and why the Parks did not request the amendment earlier. (See Cal. Rules of Court, rule 3.1324(b).) The court can rule on the propriety of amending the complaint to allege the Parks' three proposed causes of action after the parties have had an opportunity to present evidence and argument on these requirements.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate the order sustaining Wells

Fargo's demurrer to the first amended complaint without leave to amend, and to enter a new order (1) allowing the Parks to file a motion for leave to amend their complaint pursuant to California Rules of Court, rule 3.1324, to add causes of action against Wells Fargo for wrongful foreclosure, cancellation, and quiet title based on the proposed allegations described in the Parks' reply brief, and (2) sustaining the demurrer by BNYM and Golden West without leave to amend. The court is also to enter a new judgment in favor of BNYM and Golden West only. The Parks' motion to augment is denied as moot. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

MENETREZ, J.*

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