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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BRIAN ZULLI,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Defendant and Respondent.

2d Civil No. B237041
(Super. Ct. No. 56-2010-00383828-CU-
OR-SIM)
(Ventura County)

Brian Zulli appeals the order dismissing his complaint against Mortgage Electronic Registration Systems, Inc. (MERS), following the sustaining of a demurrer without leave to amend. Appellant contends he sufficiently pled causes of action against MERS arising from the nonjudicial foreclosure on his now-deceased mother's residence. We affirm.

FACTS AND PROCEDURAL HISTORY

In February 2006, Sylvia Zulli obtained a \$1,250,000 loan from Quick Loan Funding, Inc. (Quick Loan) for the purchase of a residential property in Moorpark (the property). In exchange for the loan, Sylvia¹ executed a promissory note that was

¹ As is customary in cases involving family members with the same last name, we refer to appellant's mother by her first name. We do so merely for ease of reference and intend no disrespect.

secured by a deed of trust naming MERS as the beneficiary. The deed of trust provides the MERS, "acting solely as a nominee for" Quick Loan and any of Quick Loan's successors in interest, had the right to foreclose and sell the property in the event of Sylvia's breach of her obligation to repay the loan.²

Under an assignment of deed of trust dated January 20, 2009, all beneficial interest under the deed of trust was conveyed to Wells Fargo Bank (Wells Fargo).³ The assignment expressly provided that the assigned interest under the deed of trust included "the Promissory Notes secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust." That same date, Wells Fargo, through its attorney in fact Litton Loan Servicing (Litton), substituted the Wolf Law Firm as trustee under the deed of trust.

After Sylvia failed to make several monthly payments on the loan, the Wolf Law Firm caused a notice of default to be recorded. A notice of trustee's sale was recorded on July 28, 2009. Prior to the trustee's sale, Sylvia filed a complaint against MERS, Quick Loan, Wells Fargo, the Wolf Law Firm and others alleging, among other things, that the assignment of deed of trust and substitution of trustee executed prior to the foreclosure were invalid. After Sylvia died in May 2010, the court granted appellant's motion under Code of Civil Procedure section 377.31 to continue the action as Sylvia's personal representative and successor in interest. In the meantime, the court sustained MERS' demurrer to the second amended complaint without leave to amend.

After judgment in Sylvia's case was entered in favor MERS, appellant filed the instant action. The original three and one-half page complaint filed against MERS, Wells Fargo, and Litton, which was entitled as an action for "quiet title," was dismissed

² In March 2007, Sylvia obtained a second loan in the amount of \$489,700 and executed another promissory note secured by a deed of trust naming MERS as the beneficiary.

³ The interest was more specifically assigned to Wells Fargo in its capacity "as Trustee for Asset-Backed Pass-Through Certificates Series 2006-SHLI under the Pooling and Servicing Agreement dated as of October 1, 2006."

with leave to amend following the sustaining of a demurrer based on uncertainty and failure to state a cause of action. Appellant then filed a 90-page first amended complaint alleging a total of 24 causes of action against 20 different defendants. The 17 causes of action against MERS include claims for wrongful foreclosure, fraud, unjust enrichment, unfair business practices, and slander of title.

MERS demurred to the first amended complaint. In addition to challenging the individual causes of action on various grounds, MERS generally demurred on the ground that its authority to serve and act as beneficiary under the deed of trust was authorized as a matter of law. The court sustained the demurrer in its entirety without leave to amend and dismissed the first amended complaint as to MERS with prejudice.

DISCUSSION

Appellant contends the court erred in sustaining MERS' demurrer to his first amended complaint without leave to amend and entering a judgment of dismissal in its favor. He asserts that he should have been allowed to proceed against MERS based on his allegations that the assignment of deed of trust and substitution of trustee executed prior to the foreclosure were ineffective and/or fraudulent. We disagree.

"We review an order sustaining a demurrer de novo, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. [Citation.] We accept as true properly pleaded allegations of fact, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters subject to judicial notice. [Citation.] 'The burden is on appellant to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any legal theory.' [Citation.]" (*Shuster v. BAC Homes Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 509 (*Shuster*)).

We agree with the trial court's conclusion that appellant's first amended complaint failed to include facts sufficient to state a cause of action against MERS, and that the defect could not be cured by granting leave to amend. In arguing to the contrary, appellant merely offers his allegations that (1) the individual who executed the

assignment of deed of trust in favor of Wells Fargo was not a MERS employee or authorized to act on its behalf; and (2) the individual who executed the substitution of trustee in favor of the Wolf Law Firm on behalf of Wells Fargo was not a Wells Fargo employee.⁴

Appellant, however, fails to challenge or even cite two recent cases that are essentially fatal to his claim. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 269-271; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507.) In both cases, the court held that allegations MERS had invalidly assigned a deed of trust and note were insufficient to overcome the sustaining of a demurrer absent a showing of prejudice. Both courts reasoned: "[I]f MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. 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. Plaintiff effectively concedes she was in default, and she does not allege that the transfer to HSBC interfered in any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note." (*Fontenot, supra*, at p. 272; *Herrera, supra*, at pp. 1507-1508, quoting *Fontenot*.) In *Herrera*, the court employed the same reasoning with regard to an allegedly invalid substitution of trustee. (*Herrera, supra*, at p. 1508.)

Here, appellant fails to show how he has suffered any prejudice as the result of the purported errors of which he complains. It is undisputed that Sylvia was in default

⁴ The additional arguments appellant made in opposing the demurrer in the trial court are not raised in the opening brief and are thus forfeited. (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 455; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

when the foreclosure took place, and there is no allegation that the assignment of deed of trust or substitution of trustee prevented her from making payments on the loan. As we recently recognized, the sustaining of a demurrer is also proper (subject to certain exceptions inapplicable here) against a plaintiff seeking to set aside a foreclosure who fails to allege tender of the amounts due and owing under the loan upon which he or she defaulted. (*Shuster, supra*, 211 Cal.App.4th at p. 512.) Because no such allegation was made here, judgment in favor of MERS was proper.⁵

The judgment is affirmed. MERS shall recover its costs on appeal.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

⁵ To the extent appellant contends that MERS committed fraud, the record reflects that he failed to plead the claim with the requisite specificity and he offers nothing new on appeal. Accordingly, he has failed to meet his burden of proving the trial court erred in sustaining the demurrer as to the fraud cause of action. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America* (2011) 197 Cal.App.4th 424, 431; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

Barbara A. Lane, Judge
Superior Court County of Ventura

Brian Zulli, in pro. per., for Plaintiff and Appellant.

Houser & Allison, Eric. D. Houser, Brian J. Wagner, for Defendant and
Respondent.