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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FRANCISCA AMADOR, Plaintiff and Appellant, v. BACK HOME LOAN SERVICING L.P., f/k/a/ COUNTRYWIDE HOME LOAN SERVICING, L.P. et al., Defendants and Respondents.	B257383 (Los Angeles County Super. Ct. No. BC482843)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Steven J. Kleifield, Judge. Affirmed.

Rodriguez Law Group, Patricia Rodriguez for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Kerry W. Franich for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Francisca Amador (plaintiff) executed a note and deed of trust in favor of the original lender to fund the purchase of a home. The deed of trust was subsequently assigned to a securitized investment trust. When plaintiff defaulted on the loan and foreclosure proceedings were instituted, plaintiff sued defendants and appellants[1] for, inter alia, wrongful foreclosure.

Plaintiff appeals from a judgment entered following the sustaining of a demurrer without leave to amend. She contends that the trial court erred when it sustained the demurrer to her wrongful foreclosure cause of action because she had alleged sufficient facts to state such a claim under the decision in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*). She further contends that the trial court erred when it sustained the demurrer to her cause of action for violation of the Truth in Lending Act[2] because she alleged facts that showed she did not receive notice of the assignment of her deed of trust as required under that Act. And, plaintiff contends that the trial court abused its discretion when it denied her leave to amend.

We conclude that because the weight of California and federal authority holds that borrowers such as plaintiff lack standing to bring wrongful foreclosure claims based on allegedly void assignments of their notes and deeds of trust, the trial court did not err in sustaining the demurrer to plaintiff's wrongful foreclosure claim. We further hold that because the assignment of plaintiff's deed of trust was not a transfer within the meaning of 15 U.S.C. section 1641(g), the trial court did not err in sustaining the demurrer to the Truth in Lending Act cause of action. And, because plaintiff did not provide the reporter's transcript of the hearing on the demurrer or an agreed or settled statement, she

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[1] Defendants are BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loan Servicing, L.P.; Recontrust Company, N.A.; The Bank of New York Mellon (BONY) f/k/a The Bank of New York as Trustee for Certificate Holders of CWABS, Incorporated Trust 2005-7; and Mortgage Electronic Registration Systems, Inc. (MERS).

[2] 15 U.S.C. section 1641(g).

has failed to demonstrate that the trial court abused its discretion by denying leave to amend.

FACTUAL BACKGROUND[3]

On or about June 13, 2005, plaintiff executed a note and deed of trust in connection with the purchase of a home. The original lender was America's Wholesale Lender; the original trustee under the deed of trust was defendant Recontrust Company, N.A.; and the original nominal beneficiary under the deed of trust was defendant MERS (Mortgage Electronic Registration Systems, Inc.).

Plaintiff's loan thereafter "was attempted to be securitized, however, the note was not properly transferred to defendant [BONY], acting as the trustee for the Securitized Trust." The deed of trust executed by plaintiff in favor of the original lender "was not properly assigned and transferred to defendants operating the pooled mortgage funds or trusts in accordance with [the pooling and servicing agreement] of the entities making and receiving the purported assignments to the trust. The pooling and servicing agreement required that each note and deed of trust "had to be endorsed and assigned, respectively, to the [securitized trust], with executions by multiple intervening parties before it reached the [securitized trust]." The closing date for the trust was June 28, 2005, but neither the note nor the deed of trust was assigned to the securitized trust by the closing date. Under the pooling and servicing agreement, any assignments of a deed of trust beyond the specified closing date for the trust were void.

The pooling and servicing agreement for the securitized trust specified the rights and obligations of each party to the securitization transaction. It required strict compliance with its procedures and timelines.

Even if the deed of trust had been transferred directly to the trust by the closing date, the transaction would still have been void because the note would not have been

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[3] We state the facts as alleged in the operative complaint.

transferred according to the pooling and servicing agreement as that agreement required a complete unbroken chain of transfers and assignments to and from each intervening party. Documents filed with the Securities and Exchange Commission by the securitization participants claimed that the note and deed of trust in issue were sold, transferred, and securitized by defendants with other loans and mortgages.

As of the date of the filing of the complaint, the deed of trust had not been legally assigned to any other party or entity. No documents or records can be produced to demonstrate that prior to the closing date of the securitized trust, the deed of trust was duly assigned, transferred, and delivered to the securitized trust. The purported assignments and transfers of plaintiff's debt or obligation did not comply with New York law, as well as other laws and statutes, and therefore were not valid and enforceable.

Defendants foreclosed on plaintiff's real property by means of fraud and deceit and lacked a proper legal basis for asserting their contractual options. Defendants knew or should have known that the loan was illegal and based on fraud, but furthered the harm to plaintiff by causing a forfeiture of plaintiff's real property. Because they violated California law and public policy with respect to the loan, defendants were without a legal right to foreclose on the property.

PROCEDURAL BACKGROUND

MERS assigned the deed of trust to BONY in September 2011. Recontrust recorded a notice of default in October 2011. Because plaintiff failed to cure the default, Recontrust recorded a notice of trustee's sale in January 2012.[4]

In April 2012, plaintiff filed her original complaint against defendants. Defendants filed a demurrer to which plaintiff responded by filing a first amended complaint. Defendants then demurred to the first amended complaint and the trial court sustained the demurrer with leave to amend.

[4] According to defendants, the foreclosure sale was completed on December 31, 2014, i.e., well after the April 22, 2014, judgment of dismissal.

Pursuant to the trial court's order granting her leave to amend, plaintiff filed the operative second amended complaint asserting causes of action for declaratory relief, violation of the Truth in Lending Act, violation of Business and Professions Code section 17200 et seq., intentional infliction of emotional distress, and wrongful foreclosure. Defendants demurred to the second amended complaint, and the trial court sustained the demurrer without leave to amend. The trial court subsequently entered judgment in favor of defendants in April 2014. Plaintiff filed a timely notice of appeal.

DISCUSSION

A. Standard of Review

On review of a trial court's order sustaining a demurrer, we examine the complaint de novo to determine if it states a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) As the Supreme Court has observed, "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. '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. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. Wrongful Foreclosure

Relying on *Glaski, supra,* 218 Cal.App.4th 1079, plaintiff contends that she alleged facts sufficient to state a cause of action for wrongful foreclosure. According to plaintiff, *Glaski* held that "a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust . . . occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not part[y] to, or a third party beneficiary of, the assignment agreement." Because case authority both prior to and following the decision in *Glaski* establishes that borrowers such as plaintiff lack standing to challenge the validity of an assignment of their deeds of trust, as they are not parties to such assignment agreements, we conclude that the trial court did not err in sustaining the demurrer to the wrongful foreclosure cause of action.

In *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*), as in this case, the plaintiff borrower alleged that her loan was pooled with other loans in a securitized investment trust without proper compliance with the pooling and servicing agreement. In upholding the trial court's order sustaining a demurrer to a declaratory relief cause of action based on those allegations, the court in *Jenkins* held, inter alia, that the plaintiff lacked standing to challenge the alleged violations of the assignment and pooling and servicing agreements because the plaintiff was not a party to those agreements. The court in *Jenkins* explained: "[E]ven if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to [the plaintiff's] 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 [the] plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.' (*Herrera* [*Federal National Mortgage Association* (2012)] 205 Cal.App.4th [1495,] 1507.) 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 the investment trust's pooling and servicing agreement, relating to such transactions*. (See *In re Correia* (Bankr. 1st Cir. 2011) 452 B.R. 319, 324-325 [debtors lacked standing to raise violations of pooling and service agreement].) [¶] Furthermore, even if any subsequent transfers of the promissory note were invalid, [the plaintiff] is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees. [The plaintiff], however, may not assume the theoretical claims of hypothetical transferors and transferees for the purposes of showing a 'controversy of concrete actuality.' (See *Jessin* [*v. County of Shasta* (1989)] 274 Cal.App.2d [737,] 743 (*Jessin*).)" (*Id.* at pp. 514-515, italics added.)

Notwithstanding the holding in *Jenkins, supra,* 216 Cal.App.4th 497 concerning the standing of borrowers to assert the rights of third parties to assignment and pooling and servicing agreements, the court in *Glaski, supra*, 218 Cal.App.4th 1079—without discussing the holding in *Jenkins*—held that the borrower in that case did have standing to assert a postforeclosure cause of action for wrongful foreclosure based on the alleged failure of the assignor of the deed of trust to effect the assignment prior to the closing date of the securitized trust. "We conclude that [the plaintiff borrower's] factual allegations regarding postclosing date attempts to transfer his deed of trust into the [securitized trust] are sufficient to state a basis for concluding the attempted transfers were void. As a result, [the plaintiff] has a stated cognizable claim for wrongful foreclosure under the theory that the entity invoking the power of sale . . . was not the holder of the [plaintiff's] deed of trust." (*Id*. at p. 1097.)

Subsequent to the decision in *Glaski, supra,* 218 Cal.App.4th 1079, the holding in *Jenkins, supra*, 216 Cal.App.4th 497 rejecting the standing of borrowers to enforce the

rights of third parties in assignment and pooling and servicing agreements was followed in the recent case of *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736 (*Kan*), which was critical of *Glaski's* holding on the standing issue because it deviated from the weight of California and federal authority**.** [5] In *Kan*, the court observed in dicta that "[a]lthough not necessary to our decision, we note that many courts have criticized *Glaski*'s finding that the plaintiff had standing to challenge alleged violations of the securitization process. [The plaintiff borrower] points out that *Glaski* was followed in two unpublished federal district court cases: *Engler v. ReconTrust Co*. (C.D.Cal., Dec. 20, 2013, No. CV12-1165 CBM (SPx)) 2013 U.S.Dist. Lexis 179950) and *Kling v. Bank of America, N.A.* (C.D.Cal., Sept. 4, 2013, No. CV 13-2648 DSF (CWx)) 2013 U.S.Dist. Lexis 184981. [Footnote omitted.] The vast majority of [federal] courts analyzing the case, however, have found it unpersuasive. (See, e.g., *Miller v. JPMorgan 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 [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.)

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[5] Four other Court of Appeal decisions that rejected the holding in *Glaski, supra,* 218 Cal.App.4th 1079 and held that borrowers did not have standing to challenge allegedly void assignments of their notes and deeds of trust are currently pending review in the Supreme Court on that standing issue. (*Yvanova v. New Century Mortgage Corp.*, S218973; *Keshtgar v. V.S. Bank N.A.*, S220012; *Mendoza v. JP Morgan Chase Bank, N.A.*, S220675, and *Boyce v. T.D. Service Co.*, S226267.)

The issue of whether the reasoning in *Glaski, supra*, 218 Cal.App.4th 1079 is meritorious in light of the overwhelming number of authorities rejecting that reasoning is currently pending before the Supreme Court, which presumably will resolve the conflict when it issues its opinion on that matter. In the interim, we follow the weight of the authorities that hold that a borrower such as plaintiff lacks standing to assert a claim based on alleged violations of the securitized trust's pooling and service agreement that allegedly rendered the assignment of her deed of trust void. Those authorities provide that the only parties aggrieved by such alleged violations are the signatories to the assignment and pooling and servicing agreements. Because plaintiff's obligations under the note and deed of trust were not changed by the allegedly void assignment of her deed of trust, she cannot demonstrate that she was prejudiced by the assignment. Under the authorities, she therefore lacks standing to assert a wrongful foreclosure claim based on the allegedly void assignment of her deed of trust.

C. Violation of Truth in Lending Act

Plaintiff contends that when MERS assigned her deed of trust to BONY in September 2011, she did not receive from BONY the notice of the assignment as required under section 1641(g) of the Truth in Lending Act. (15 U.S.C. § 1641(g).)[6] Therefore, plaintiff asserts that her allegations concerning the failure to give the required notice gave rise to a statutory private right of action against BONY under 15 U.S.C. section 1641(g).

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[6] 15 U.S.C. 1641(g) provides: "(g) Notice of new creditor. [¶] (1) In general. In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including-- [¶] (A) the identity, address, telephone number of the new creditor; [¶] (B) the date of transfer; [¶] (C) how to reach an agent or party having authority to act on behalf of the new creditor; [¶] (D) the location of the place where transfer of ownership of the debt is recorded; and [¶] (E) any other relevant information regarding the new creditor. [¶] (2) Definition. As used in this subsection, the term 'mortgage loan' means any consumer credit transaction that is secured by the principal dwelling of a consumer."

The assignment of plaintiff's deed of trust was made by MERS. The deed of trust provided that MERS was the nominal beneficiary of the deed of trust and that MERS held "only legal title to interests granted by borrowers in this Security Instrument . . . ." Therefore, MERS acted as the nominee of the beneficiary of plaintiff's deed of trust, but the lender retained the promissory note. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151 (*Gomes*).)[7]

In *Terry v. Mortgage Electronic Registration Systems*, 2013 U.S. Dist. LEXIS 61234, ∗7-9 (D. Md. April 30, 2 013), the court explained: "'Regulation Z, which implements this section, provides that a person is covered by § 1641(g) if he or she "becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment or other transfer."' *Connell v. CitiMortgage, Inc.*, Civil Action No. 11-0443-WS-C, 2012 U.S. Dist. LEXIS 162363, 2012 WL 5511087, at *6 (S.D. Ala. Nov. 13, 2012) (quoting 12 C.F.R. § 226.39(a)(1)). The result of these provisions is that a creditor is not the 'new owner . . . of the debt' under section 1641(g) unless the creditor acquires legal title to, or otherwise assumes, the debt underlying the mortgage. [¶] In this case, [the assignee] did not acquire legal title to, or otherwise assume, the Note by executing the Assignment Deed. . . . Therefore, MERS never held legal title to the underlying debt; when it assigned its beneficial interest' back to [the assignee], it could not have transferred legal title to the debt. *Cf.*

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[7] The court in *Gomes, supra*, 192 Cal.App.4th at page 1151 explained: "'MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.' (*Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529, 530 [704 N.W.2d 784, 785].) 'A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.' (*Jackson v. Mortgage Electronic Registration Systems, Inc*. (Minn. 2009) 770 N.W.2d 487, 491.)"

Deutsche Bank Nat'l Trust Co. v. Brock, No. 55, Sept. Term 2012, 430 Md. 714, 63 A.3d 40, 2013 Md. LEXIS 147, 2013 WL 1164508, at *6 (Md. Mar. 22, 2013) (citations and internal quotation marks omitted) (publication forthcoming) ('A deed of trust securing a negotiable promissory note cannot be transferred like a mortgage; rather, the corresponding note may be transferred, and carries with it the security provided by the deed of trust.'); Black's Law Dictionary 885 (9th ed. 2009) (defining 'beneficial interest' as '[a] right or expectancy in something . . . as opposed to legal title to that thing'). [¶] Furthermore, even if the Assignment Deed transferred legal title back to [the assignee] in some specialized sense, it is implausible to infer that this action constituted a transfer or assignment of the underlying debt obligation. For 'the mere designation of MERS in the trust deed as the beneficiary of the security instrument, and as Lender's nominee, does not alter the fact that the holder of the note (the lender) would still be entitled to repayment of the loan and is the proper party in whose name foreclosure is initiated after the borrowers' default.' *Showell v. BAC Home Loans Servicing, LP*, No. 4:11-CV-00489-CWD, 2012 U.S. Dist. LEXIS 134020, 2012 WL 4105472, at *6 (D. Idaho Sep. 17, 2012) (citation omitted); *cf. Sheppard v. BAC Home Loans Servicing, LP*, No. 3:11-cv-00062, 2012 U.S. Dist. LEXIS 7654, 2012 WL 204288, at *4 (W.D. Va. Jan. 24, 2012) (MERS, as beneficiary under the deed of trust, could not claim superior title to noteholder as [MERS] 'had no beneficial interest in the note that the deed of trust secured'). The conclusion that a nominal beneficiary's assignment of its beneficial interest in a deed of trust to the holder of underlying debt fails to implicate section 1641(g) is consistent with the decisions of other district courts. [Citations.]"

Based on these authorities, it does not appear that the assignment by MERS of its interest under the deed of trust transferred the underlying loan obligation or debt. Although the assignment provided that it transferred all of MERS "beneficial interest under [the deed of trust] together with the note[s] and obligations therein described . . . ," MERS could only transfer its rights in that deed. As MERS did not hold title to the loan or underlying debt obligation, it had no legal ability to transfer that title. Because section 1641(g) requires notice only where the loan or debt obligation is transferred, BONY was

under no obligation based on the assignment of the deed of trust from MERS to give plaintiff notice of the assignment. Plaintiff therefore failed to state a claim under section 1641(g).

D. Leave to Amend

Plaintiff contends that the trial court abused its discretion when it denied her leave to amend her second amended complaint. But plaintiff has not provided a reporter's transcript of the hearing on the demurrer or an agreed or settled statement. (Cal. Rules of Court, rule 8.130(h).) Without a reporter's transcript or an agreed or settled statement, the record is silent as to the reasons the trial court denied leave to amend. As a result, we cannot, for example, determine whether plaintiff offered proposed amendments and, if so, the trial court's response to those proposals. Because a judgment or order of the trial court is presumed correct on appeal, we must affirm a judgment or order unless the appellant affirmatively demonstrates an abuse of discretion. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200-1201; *People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, 80.) Because there is no record of the hearing on the demurrer, plaintiff has failed to satisfy her burden on appeal of demonstrating an abuse of discretion.

DISPOSITION

The judgment of the trial court following the sustaining of defendants' demurrer without leave to amend is affirmed. No costs are awarded on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

KIRSCHNER, J.*

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