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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAVID RAJAMIN, Plaintiff and Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Defendant and Respodent.	B237560 (Los Angeles County Super. Ct. No. BC450584)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

Law Offices of Henry I. Bushkin and Henry I. Bushkin for Plaintiff and Appellant.

Litchfield Cavo, Edward D. Vaisbort and Edward C. Hsu for Defendant and Respondent.

David Rajamin appeals from the court's judgment dismissing his complaint for declaratory relief in a foreclosure action. We affirm.

FACTS AND PROCEEDINGS

Appellant David Rajamin owned a single family home in Hacienda Heights. In 2006, he refinanced his home with a $405,000 subprime loan from First Franklin Financial Corp. To secure his repayment of the loan, he signed a promissory note and deed of trust. On May 11, 2006, the Los Angeles County Recorder's Office recorded appellant's deed of trust naming First Franklin's nominee, Mortgage Electronic Registration Systems, Inc. (MERS), as the deed of trust's beneficiary. "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. . . . 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." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151 (*Gomes*).) Appellant's loan was thereafter bundled with more than 10,000 other mortgage loans originated by First Franklin into a trust entitled First Franklin Mortgage Loan Trust 2006-FF11 (the mortgage trust).

Appellant eventually defaulted on his loan. In July 2009, notice of appellant's default was recorded with Los Angeles County, thereby triggering the beginning of the nonjudicial foreclosure of appellant's house. In August 2009, MERS assigned by recorded instrument its beneficial interest in appellant's deed of trust to respondent Deutsche Bank National Trust Company as trustee for the mortgage trust. Appellant alleges the assignment to respondent was a sham because it conflicted with an August 2006 "Pooling and Service Agreement" that transferred the rights to appellant's promissory note and deed of trust to an entity not involved in these proceedings. The Pooling and Service Agreement is not in the record and appellant does not identify the

entity who received the rights to his note and deed of trust. Whether or not a sham, Los Angeles County recorded the assignment to respondent, and respondent (and its successor[1]) pressed forward with the nonjudicial foreclosure proceedings.

Following the assignment of the deed of trust to respondent Deutsche Bank, appellant filed in December 2010 his complaint seeking a judgment declaring the actual, lawful owner of appellant's promissory note and loan.[2] Respondent demurred to the complaint. Respondent argued appellant's request for a declaratory judgment was, at bottom, a "produce the note" attack against the nonjudicial foreclosure of appellant's home. Respondent asserted case law and the statutory scheme governing nonjudicial foreclosure did not require a foreclosing party to produce the underlying promissory note. Agreeing with respondent, the trial court sustained the demurrer without leave to amend. The court entered judgment for respondent, appellant's home was sold in a trustee's sale, and this appeal followed.

STANDARD OF REVIEW

"A demurrer must assume the truth of a complaint's properly pleaded allegations." (*Century-National Ins. Co. v. Garcia* (2011) 51 Cal.4th 564, 566 fn. 1) "We treat [a] 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,

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1 In September 2009, NDEx West, L.L.C., replaced respondent Deutsche Bank in the nonjudicial foreclosure proceedings, but we do not understand appellant to allege that this substitution affected his cause of action here.

2 Appellant also alleged causes of action for unjust enrichment and money had and received, but later voluntarily dismissed them.

we decide whether there is a reasonable possibility that the defect can be cured by amendment . . . ." (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318.)

DISCUSSION

Appellant contends the trial court erred in finding he did not state a cognizable claim for declaratory judgment. The gist of appellant's claim for relief is respondent did not own or possess appellant's promissory note. According to appellant, the 2006 Pooling and Servicing Agreement, which is not part of the record but which we surmise might have pertained to placement of appellant's note and deed of trust in the mortgage trust created by appellant's lender First Franklin, governed the rights to his note and deed of trust. Appellant reasons First Franklin's nominee MERS thus lacked authority to transfer any interest in the note or deed of trust, making MERS's 2009 assignment of the deed of trust to respondent a sham.

Appellant's theory is not legally cognizable because a party foreclosing on a deed of trust need not own or possess the underlying note. A homeowner who gives a deed of trust to secure his repayment of a home loan does not have standing to challenge the foreclosing party's authority to act on behalf of the deed of trust's beneficiary. (*Gomes, supra,* 192 Cal.App.4th at pp. 1154-1155 [rejected attempt to require proof of note's ownership]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*) [citing *Gomes* for proposition that foreclosure statutory scheme "does not include a requirement that an agent demonstrate authorization by its principal" to initiate foreclosure]; accord *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 [rejecting contention that "no foreclosure of a deed of trust is valid unless the beneficiary is in possession of the underlying promissory note."].) The statutory scheme governing nonjudicial foreclosure "permits a notice of default to be filed by the 'trustee, mortgagee, or beneficiary, or any of their authorized agents.' The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid." (*Debrunner* at p. 440.)

Here, appellant did not dispute the validity of his promissory note and the debt it represented. In fact, appellant asserted First Franklin Financial Corp. (or perhaps the mortgage trust) continued to own the debt. Appellant's counsel told the court, "The note is clearly an obligation of my client." Later during the same hearing, counsel said "We don't dispute that there's a debt, but we dispute that they [respondent] own the debt." Commenting on what it perceived to be the untenability of appellant's legal argument, the court noted First Franklin had not intervened in the proceedings to claim that appellant owed his debt to First Franklin. The court reasoned that if respondent Deutsche Bank were acting beyond its authority in regard to the note and deed of trust, then the dispute was between Deutsche Bank and First Franklin, and did not involve appellant. The court observed "If First Franklin owns the note, then they are the party which ought to be suing Deutsche Bank for fraud. . . . But it doesn't involve you – or your client."

A debtor suffering foreclosure cannot delay or prevent the foreclosure by arguing the party initiating the foreclosure does not own the debt. *Gomes, supra,* 192 Cal.App.4th 1149, is illustrative. There, a homeowner borrowed money from lender KB Home Mortgage Company. (*Id*. at p. 1151.) The homeowner signed a promissory note secured by a deed of trust. The deed of trust identified MERS as the nominee acting for lender KB. The homeowner defaulted on the note. MERS began foreclosure proceedings. The homeowner filed a complaint for declaratory judgment against MERS, challenging MERS's initiation of foreclosure proceedings because allegedly the promissory note's owner, KB, had not authorized MERS to do so. (*Id.* at p. 1152.) Affirming the trial court's dismissal of the complaint, the *Gomes* court noted that California's statutory nonjudicial foreclosure scheme is comprehensive and displaced common law causes of action. (*Id.* at p. 1154.) It explained that "Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute." (*Id.* at p. 1154.) The *Gomes* court therefore rejected the homeowner's attempt to add to foreclosure proceedings a requirement that the foreclosing party prove it owned the note or that the note's owner had authorized foreclosure. "By asserting a right to bring a court action to

determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, Gomes is attempting to interject the courts into this comprehensive nonjudicial scheme. . . . Gomes has identified no legal authority for such a lawsuit. . . . [¶] . . . [N]owhere does the statute [establishing the nonjudicial foreclosure process] provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action." (*Gomes* at pp. 1154-1155.)

Fontenot, supra, 198 Cal.App.4th 256, decided after *Gomes*, is to the same effect. Prefacing its discussion of *Gomes*, *Fontenot* commented upon the public's emerging understanding of MERS's role in the business of foreclosing on mortgages. *Fontenot* noted: "Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender. This aspect of the system has come under attack in a number of state and federal decisions across the country, under a variety of legal theories. The decisions have generally, although by no means universally, found that the use of MERS does not invalidate a foreclosure sale that is otherwise substantively and procedurally proper. [¶] Our Courts of Appeal have only recently addressed MERS's role, but both published decisions have come down on the side of MERS." (*Id.* at p. 267.) *Fontenot* then turned to one of those decisions: *Gomes*. "In *Gomes v. Countrywide Home Loans, Inc.* [*supra*], 192 Cal.App.4th 1149, the plaintiff sought to prevent foreclosure on his home. He sued MERS, among others, alleging he was unaware of the identity of the owner of his promissory note, but believed the owner had not authorized MERS to proceed with the foreclosure. The plaintiff sought to enjoin foreclosure in the absence of proof that MERS was authorized by the note's owner to proceed. [Citation.] The court rejected the claim . . . ." (*Fontenot, supra,* at p. 268.) After reviewing the case law, *Fontenot* held the same result should apply to the facts before it as occurred in *Gomes*. In *Fontenot*, the homeowner claimed MERS lacked authority to assign the note. The *Fontenot* court found "the claim fails because MERS

did not bear the burden of proving a valid assignment. The nonjudicial foreclosure statutes are a comprehensive scheme . . . ." (*Id.* at p. 270.) The principle for which *Gomes* and *Fontenot* stand applies here: A foreclosing party such as respondent need not possess or own the note underlying a deed of trust, and a property owner such as appellant cannot resist foreclosure under a deed of trust by demanding the foreclosing party "produce the note."[3]

Appellant contends the court violated legal principles governing respondent's demurrer by requiring appellant to *produce evidence* that respondent did not own (or act on the authority of the owner of) the promissory note. Appellant cites the court's question, "What evidence do you have that they don't own the note?" during the hearing on the demurrer. We do not understand the court's question to have put appellant to the task of producing evidence. Rather, the court's question was rhetorical, posed in response to appellant's description of appellant's claim. Appellant told the court, "Your honor, we're not asking them to produce the note. We're not asking them to produce the deed of trust. We're asking them to show this court how they own the note. Simply that. If they could show this court that they own this note, then they could do whatever they want with regard to this. [¶] The Court: What evidence do you have that they don't own the note?" Appellant did not answer the court's question, nor did the court press appellant for answer. Instead, appellant responded to the courts' query by referring to the then-ongoing investigation by California officials into alleged mishandling of documents by lending banks in the banks' drive to securitize mortgages for resale to investors in the years leading up to 2008's housing-bubble collapse and financial crisis.

Appellant also contends the court erred by taking judicial notice of not just the existence, but also the *content*, of the publicly-recorded document reflecting MERS's purported 2009 assignment to respondent Deutche Bank. We understand appellant's contention to be that the purported assignment lacked legal effect because it contradicted the placement of the note and deed of trust into the mortgage trust created by the 2006

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3 Appellant does not dispute that he failed to make certain payments due under the note or that he is excused from making those payments.

Pooling and Service Agreement. "Courts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged. [Citations.] The official act of recordation and the common use of a notary public in the execution of such documents assures their reliability, and the maintenance of the documents in the recorder's office makes their existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute. [¶] In addition, courts have taken judicial notice not only of the existence and recordation of recorded documents but also of a variety of matters that can be deduced from the documents . . . [such as] the parties, dates, and legal consequences of a series of recorded documents relating to a real estate transaction." (*Fontenot, supra,* 198 Cal.App.4th at pp. 264-265.) We conclude the trial court correctly took judicial notice of the assignment as it is the fact of the assignment itself that transferred a security interest in the property. (See e.g. *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316 ["operative facts" such as words forming agreement become true by virtue of being said]; *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 858.)

DISPOSITION

The judgment is affirmed. Each side to bear its own costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.