Filed 12/4/17 Traister v. Ocwen Loan Servicing CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RICHARD TRAISTER, Plaintiff and Appellant, v. OCWEN LOAN SERVICING, LLC, et al., Defendants and Respondents.	B269662 (Los Angeles County Super. Ct. No. BC570040)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed as to defendants and respondents Ocwen Loan Servicing, LLC, Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc. Dismissed as to defendant and respondent Greenpoint Mortgage Funding, Inc.

Rodriguez Law Group and Patricia Rodriguez for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Jennifer A. Brady for Defendants and Respondents Ocwen Loan Servicing,

LLC, Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc.

In this preforeclosure action, plaintiff and appellant Richard Traister appeals from the judgment entered after the trial court sustained without leave to amend the demurrer of defendants and respondents Ocwen Loan Servicing, LLC; Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2007-4 Asset-Backed Certificates Series 2007-4; and Mortgage Electronic Registration Systems, Inc. (collectively, defendants).[1] Traister contends, among other things, that he had standing to bring this action based on alleged defects in the chain of title. We follow other courts of appeal which have rejected similar claims and affirm the judgment.

BACKGROUND

According to the complaint and judicially noticeable documents that defendants submitted in support of their demurrer, Traister, in 2006, executed a promissory note in favor of Greenpoint Mortgage Funding, Inc., the original lender. The note was secured by a deed of trust on residential real property (the Property). Mortgage Electronic Registration Systems, Inc. (MERS) was named as the beneficiary under the deed of trust. MERS assigned the deed of trust to Bank of America, N.A. and Bank of America assigned it to a securitized trust, Deutsche Bank National Trust Company as Trustee for the holders of the

---

[1] We address Traister's appeal as to Greenpoint Mortgage Funding, Inc., in Discussion, section I, *post*.

GSAA Home Equity Trust 2007-4 Asset Backed Certificates Series 2007-4, which was formed under New York law. Ocwen serviced the loan. In April 2014, a notice of default was recorded against the Property, but the Property has not yet been foreclosed on.

Traister filed this lawsuit in January 2015. He thereafter filed, as a matter of right, his first amended complaint. The first amended complaint alleged causes of action for wrongful foreclosure; violation of Civil Code section 2924, subdivision (a)(6);[2] violation of Business and Professions Code sections 17200 and 17500; breach of the covenant of good faith and fair dealing; and violation of section 2924.11, subdivision (b) (alleged against Ocwen only). Traister based his causes of action on the allegation that there was no evidence the deed of trust was delivered to Deutsche Bank Trust before the trust's May 31, 2007 closing date.

Defendants demurred to the first amended complaint on the grounds that Traister had no standing to challenge the assignments or securitization; MERS was authorized to act under the deed of trust; and Traister's wrongful foreclosure cause of action was premature. Defendants argued that the Business and Professions Code causes of action were premised on flawed theories and the complaint failed to allege the requisite facts. Also, Traister could not allege a cause of action for breach of the implied covenant of good faith and fair dealing because defendants did not negotiate the loan. Finally, Traister's allegation that defendants violated section 2924.11, subdivision

---

[2] All further undesignated statutory references are to the Civil Code.

(b) was contradicted by the denial letter attached to the complaint.

The trial court sustained defendants' demurrer without leave to amend and entered judgment. This appeal followed.

DISCUSSION

I. The appeal as to Greenpoint Mortgage Funding

Greenpoint, the original lender, separately demurred. Its demurrer was also sustained without leave to amend. The trial court entered judgment dismissing the action as to Greenpoint on September 17, 2015, and notice of entry of judgment was served on September 29, 2015 and filed on October 2, 2015. More than 60 days after notice of entry of judgment, the notice of appeal was filed on January 14, 2016. Any appeal as to Greenpoint is therefore untimely.[3] (Cal. Rules of Court, rule 8.104(a)(1).)

II. Standard of review

When reviewing a judgment entered following the sustaining of a demurrer without leave to amend, our de novo review requires us to assume the truth of the factual allegations of the complaint, giving the complaint a reasonable interpretation and reading the complaint as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

---

[3] It is unclear whether Traister intended to appeal the judgment entered in Greenpoint's favor, because the notice of appeal states it is from the judgment entered on November 16, 2015, which is when judgment was entered in favor of Ocwen Loan Servicing, LLC; Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2007-4 Asset-Backed Certificates Series 2007-4; and MERS. Greenpoint has not filed a respondent's brief on appeal.

We may also consider matters subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*).) When a demurrer 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." (*Blank*, at p. 318; see also Code Civ. Proc., § 452; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

III. *Yvanova* and Traister's wrongful foreclosure cause of action

Whether Traister can proceed with his wrongful foreclosure cause of action depends on his standing to sue. We therefore begin with *Yvanova*, *supra*, 62 Cal.4th 919.

In *Yvanova*, the plaintiff-borrower sued to quiet title based on an allegedly void assignment of a note and deed of trust. In assessing the plaintiff's standing to allege wrongful foreclosure, *Yvanova* resolved an issue that had divided courts of appeal: whether a "borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." (*Yvanova*, *supra*, 62 Cal.4th at p. 923.) *Yvanova* explained that a void transaction is "without legal effect." (*Id.* at p. 929.) "A voidable transaction, in contrast, 'is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' " (*Id.* at p. 930.) The court concluded that a borrower has standing "to claim a nonjudicial foreclosure was wrongful because an

assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust was *not merely voidable but void*, depriving the foreclosing party of any legitimate authority to order a trustee's sale." (*Id.* at pp. 942-943, italics added.)

Yvanova, however, explicitly did not address the situation before us. That is, whether "a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward." (*Yvanova*, *supra*, 62 Cal.4th at p. 934; *id.* at p. 924.) The court also did not address whether allegations that a plaintiff's "note and deed of trust were purportedly transferred into the trust after the trust's closing date were sufficient to plead a void assignment and hence to establish standing." (*Id.* at p. 931; *ibid.* [court expressed "no opinion" whether a "postclosing date transfer into a New York securitized trust is void or merely voidable . . ."].)

Instead, *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808 (*Saterbak*), addressed issues *Yvanova* left open; for example, whether a borrower-plaintiff may bring a *preforeclosure* action to enjoin a sale based on a foreclosing entity's alleged lack of authority to foreclose. The plaintiff in *Saterbak*, like Traister, alleged that an assignment of the deed of trust was void because it was not transferred into a securitized trust before the trust's closing date. (*Saterbak*, at pp. 812, 814.) *Saterbak* noted that California's nonjudicial foreclosure law does not provide for filing a preemptive lawsuit to determine the foreclosing entity's authority to initiate foreclosure. (*Id.* at p. 814, citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156.) Allowing preemptive lawsuits would result in the impermissible interjection of courts into the

nonjudicial scheme that our Legislature enacted. (*Saterbak*, at p. 814, citing *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513, disapproved on another point by *Yvanova*, at p. 939, fn. 13.) Moreover, *Saterbak* noted that *Yvanova* held that a borrower has standing only where the defect in the assignment renders the assignment void rather than voidable. (*Saterbak*, at p. 815.) Although *Yvanova* declined to opine on whether, under New York law, an untimely assignment to a securitized trust is voidable, not void, *Saterbak* concluded that "such an assignment is merely voidable." (*Saterbak*, at p. 815; accord, *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"]; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259 ["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"]; *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736; *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88, 89.) Hence, a borrower has no standing under California's nonjudicial foreclosure scheme to bring a preemptive challenge to the foreclosing entity's authority to initiate foreclosure based on an allegedly untimely assignment to a securitized trust.

We agree with *Saterbak* and therefore conclude that Traister cannot maintain his cause of action for wrongful foreclosure. We add one additional reason why a cause of action has not been stated: the first element of the cause of action is " '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.' " (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) Because this action is a preforeclosure action, the first element of the cause of action is not satisfied.

IV. Cause of action under section 2924, subdivision (a)(6)

Traister's second cause of action asserts a claim for violation of section 2924, subdivision (a)(6). That section is part of the Homeowner's Bill of Rights (HBOR), which was enacted in 2013 to provide borrowers with loss mitigation options as part of the nonjudicial foreclosure process. (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157-158 (*Lucioni*); *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) That section provides: "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest." (§ 2924, subd. (a)(6).)

Traister alleges that, under section 2924, subdivision (a)(6), defendants did not have "standing to properly record a notice of default because the Note and Deed of Trust became unenforceable by Defendants during the botched securitization . . . ." This allegation is materially no different than the one in *Lucioni*, *supra*, 3 Cal.App.5th 150. The *Lucioni* plaintiff sought to enjoin the defendants from foreclosing on his property based on

the plaintiff's claim that the defendants were not properly assigned an interest in the deed of trust. (*Id.* at pp. 157-158.) *Lucioni* found that the Legislature did not intend to confer a private right of action for injunctive relief under section 2924, subdivision (a)(6), for several reasons. (*Id.* at pp. 158-161.) First, the HBOR authorizes a private right of action to enjoin a nonjudicial trustee's sale where a lender violates specified statutory provisions: sections 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17. (§ 2924.12, subd. (a)(1); *Lucioni*, at p. 158.) A homeowner also may bring an action for injunctive relief for a material violation of section 2923.5 or 2924.18. (§ 2924.19, subd. (a)(1); *Lucioni*, at p. 158.) However, section 2924, subdivision (a)(6) is not identified in sections 2924.12, subdivision (a)(1) and 2924.19, subdivision (a)(1). (*Lucioni*, at p. 158.) In the *Lucioni* court's view, under the HBOR, "a foreclosure may be enjoined due to a material violation of the statutory provisions that the Legislature has chosen to list, but not due to a violation of unlisted provisions. 'Generally, the expression of some things in a statute implies the exclusion of others not expressed.' [Citations.] As the Legislature chose to provide for injunctive relief for some HBOR violations, but not for a violation of section 2924(a)(6), we do not find such relief impliedly available. Under the HBOR, then, a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the necessary authority to foreclose." (*Lucioni*, at pp. 158-159.)

We will follow *Lucioni* and conclude that Traister may not state a cause of action for wrongful initiation of foreclosure proceedings under section 2924, subdivision (a)(6). The trial

court therefore did not err in sustaining defendants' demurrer. (See *Lucioni*, *supra*, 3 Cal.App.4th at p. 161.)

V. The remaining causes of action

Defendants' demurrer was also sustained without leave to amend to Traister's causes of action for violation of Business and Professions Code sections 17200 and 17500; violation of the covenant of good faith and fair dealing; and violation of section 2924.11, subdivision (b). On appeal, Traister has failed to address those causes of action. Any issue is therefore forfeited and we need not address whether the demurrer was properly sustained without leave to amend as to them. (See generally *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).)

VI. Judicial notice

Traister also contends that the trial court erred in taking judicial notice of various documents by misconstruing "the legal effect of simply recording the allegedly invalid foreclosure documents," because if they were void then the mere recording of them did not "validate their contents."[4]

---

[4] Defendants requested judicial notice of the deed of trust, recorded December 12, 2006; an assignment of the deed of trust recorded October 13, 2011; an assignment of the deed of trust recorded April 6, 2012; a substitution of Quality Loan Service as

We review orders granting or denying requests for judicial notice for abuse of discretion. (*Yvanova*, *supra*, 62 Cal.4th at p. 924 & fn. 1; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-266.) We see no such abuse. On this record, which does not contain the minute order from or a reporter's transcript of the demurrer proceedings, it is not clear that the court ruled on the request for judicial notice. Thus, the record does not show that the court improperly noticed the truth of any facts in the recorded documents. In any event, any error did not impact the outcome. As we have explained, Traister's causes of action were defective for reasons unrelated to any facts stated in the recorded assignments.

VII. Denial of leave to amend

Finally, Traister contends that the trial court abused its discretion in denying leave to amend the complaint. We disagree.

Where, as here, a trial court sustains a demurrer without leave to amend, "we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Traister argues that he should be given leave to amend to "further clarify his arguments." He fails, however, to specify what would be those clarifications. Given the fatal defects we have identified, what Traister could do

---

trustee, recorded April 24, 2014; and the notice of default, recorded April 29, 2014.

to cure them is not apparent. We therefore find that the court did not abuse its discretion by denying leave to amend.

DISPOSITION

Any appeal taken against Greenpoint is dismissed. The judgment as to defendants is affirmed. Defendants and respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

---

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