Filed 10/28/16 Torossian v. Wells Fargo Bank 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RAFFI TOROSSIAN, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., et al., Defendants and Respondents.	B266235 (Los Angeles County Super. Ct. No. BC524487)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Rodriquez Law Group and Patricia Rodriguez for Plaintiff and Appellant.

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

Plaintiff and appellant Raffi Torossian (Torossian) appeals the trial court's order dismissing his action after it sustained the demurrer of defendants and respondents Wells Fargo Bank, N.A. (Wells), Mortgage Electronic Registration Systems, Inc. (MERS), and US Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee (successor by merger to LaSalle Bank National Association) as Trustee for Morgan Stanley Mortgage Loan Trust 2007-8XS (US Bank) (collectively, Defendants) to Torossian's second amended complaint without leave to amend.

We conclude Torossian failed to state a cause of action for wrongful foreclosure or for violation of Civil Code section 2924, subdivision (a)(6),[1] and that the trial court did not abuse its discretion in denying leave to amend. Therefore, the order of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Pleadings; the relevant allegations in the first amended complaint*.

Torossian commenced this action on October 15, 2013, and filed the first amended complaint on February 28, 2014. Although he subsequently filed a second amended complaint, the only two causes of action that are the subject of this appeal were eliminated when the trial court sustained a demurrer to those portions of the first amended complaint without leave to amend. Therefore, our focus is on the relevant causes of action in the first amended complaint. In that pleading, Torossian alleged as follows:

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[1] All unspecified statutory references are to the Civil Code.

On January 9, 2007, Torossian executed a series of documents including a promissory note in the amount of $650,000 for the purchase of certain real property in Pasadena. The original lender was Mylor Financial, Inc. (Mylor) (not a party to this appeal), and Wells was the servicer of the loan. "[T]here was a failed attempt" to transfer the note into the Morgan Stanley Mortgage Loan Trust 2007-8XS (Trust), which had a closing date of May 31, 2007. An assignment of deed of trust was recorded on August 31, 2009, *after* the closing date of the Trust. Further, the assignment was purportedly done directly from MERS to LaSalle Bank, N.A. (LaSalle), bypassing the process required by the Pooling and Servicing Agreement (PSA) to ensure a complete chain of endorsements. Thus, the note and deed of trust were not properly assigned to any of the Defendants.

The first cause of action, wrongful foreclosure, pled that there were no documents to show the deed of trust was duly assigned to the Trust prior to the Trust's closing date. Further, even if the deed of trust had been transferred to the Trust by its closing date, the transfer was void because the note was not transferred in accordance with the requirements of the PSA, which requires a complete and unbroken chain of transfers and assignments. "The gravamen of Plaintiff's complaint is that Defendants are attempting to foreclose without any legal authority or standing to do so." The complaint sought "an Order enjoining the Defendants from carrying out a foreclosure sale of the SUBJECT PROPERTY."

The second cause of action, which incorporated the above allegations, alleged a violation of section 2924, subdivision (a)(6). The statute provides in relevant part: "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." (*Ibid.*)[2]

2. *Demurrer to first amended complaint.*

Defendants demurred. With respect to the cause of action for wrongful foreclosure, they contended California law precluded Torossian from bringing a judicial action to determine whether Defendants were authorized to proceed with foreclosure. Further, any alleged defect in the securitization of the loan, such as a delayed transfer into a securitized pool, had no effect on Torossian or on Defendants' ability to foreclose. Also, Torossian was not a party to the PSA and lacked standing to enforce its provisions. In addition, Torossian had failed to allege tender or to indicate why it would be inequitable to require tender, "especially considering that he [did] not dispute his default on the Loan."

As for the statutory claim, Defendants asserted that Torossian had failed to allege specific facts to show a violation of section 2924, subdivision (a)(6) had occurred.

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[2] The first amended complaint's third through fifth causes of action are not relevant to this appeal and require no discussion.

3. *Trial court's ruling on demurrer to first amended complaint.*

On December 15, 2014, the matter came on for hearing. The trial court sustained Defendants' demurrer to the causes of action for wrongful foreclosure, violation of section 2924, subdivision (a)(6), and equitable estoppel, *without leave to amend*, and to the causes of action for violation of the federal Truth In Lending Act (TILA) (15 U.S.C. § 1641(g)) and unfair business practices (Bus. & Prof. Code, § 17200 et seq.), *with leave to amend*.[3]

4. *Subsequent proceedings.*

In January 2015, Torossian filed a second amended complaint, which alleged the only two remaining causes of action: violation of TILA and unfair business practices.

On April 30, 2015, the trial court sustained Defendants' demurrer to the second amended complaint without leave to amend and dismissed the action.

Torossian filed a timely notice of appeal from the order of dismissal.[4]

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[3] On appeal, Torossian solely asserts error with respect to the first two causes of action in the first amended complaint -- wrongful foreclosure and violation of section 2924, subdivision (a)(6).

[4] The order of dismissal is appealable. (Code Civ. Proc., § 581d.)

CONTENTIONS

Torossian contends: the trial court erred in sustaining the demurrer to his wrongful foreclosure claim as well as his claim for violation of section 2924, subdivision (a)(6); the trial court improperly accepted the truth, validity, and/or legal effect of Defendants' foreclosure documents on judicial notice; and the trial court abused its discretion in denying leave to amend.

DISCUSSION

1. *Standard of appellate review*.

Our review of the trial court's order sustaining the demurrer without leave to amend is governed by well settled principles. " '[O]ur standard of review is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." [Citation.]' [Citation.] ' " '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.]" ' [Citation.] 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]' [Citation.]" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433 (*Walgreen*).)

2. *Torossian cannot maintain this preemptive action to challenge the anticipated foreclosure; the alleged assignment of his deed of trust to a securitized trust occurring after the securitized trust's closing date is merely voidable and not void, and therefore the power to ratify or avoid the transaction lies solely with the parties to the assignment.*

a. *No preemptive action to challenge authority of foreclosing party.*

Although Torossian styled his cause of action as one for "wrongful foreclosure," the complaint reflects he was actually seeking to *enjoin* Defendants "from carrying out a foreclosure sale" of his property. However, California's nonjudicial foreclosure statutes, which provide a comprehensive framework for the regulation of nonjudicial foreclosures, do not authorize a judicial action to determine whether the person initiating the foreclosure process is authorized to do so, and there are no grounds for implying such an action. (*Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1154-1155 (*Gomes*).) Further, recognition of such a right would "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Id*. at p. 1155; accord, *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513 (*Jenkins*).)

Jenkins is illustrative. There, the plaintiff alleged the trustee of a securitized investment trust had no authority to initiate foreclosure because "the promissory note was not transferred into the investment trust with a complete and unbroken chain of endorsements and transfers . . . ." (*Jenkins*, *supra*, 216 Cal.App.4th at p. 510.) The trial court sustained the

defendants' demurrers without leave to amend. The appellate court affirmed, citing *Gomes* for the proposition that California's comprehensive nonjudicial foreclosure scheme does not provide for a preemptive action to challenge the authority of the party initiating foreclosure. (*Id.* at p. 513.) The *Jenkins* court explained: "[W]e agree with the *Gomes* court that the [statutory nonjudicial foreclosure] provisions do not contain express authority for such a preemptive action. Also, even if the statutes are interpreted broadly, it cannot be said the provisions imply the authority for such a preemptive action exists, because doing so would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature. [Citations.] 'The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the note holder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.' (*Gomes*, *supra*, 192 Cal.App.4th at p. 1155.)" (*Jenkins*, *supra*, at p. 513.)[5]

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[5] *Jenkins* also held a homeowner/borrower lacked standing to allege an improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note) because she was an unrelated third party to the alleged securitization and thus had no right to enforce the investment trust's pooling and servicing agreement. (*Jenkins*, *supra*, 216 Cal.App.4th at pp. 514-515.) As discussed below, the Supreme Court in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*) later disapproved *Jenkins* to the extent that *Jenkins* precluded a borrower from challenging an assignment that is *absolutely void*. (*Yvanova*, *supra*, at p. 939, fn. 13.)

Notwithstanding the prohibition on preemptive preforeclosure actions, Torossian contends he is entitled to bring a preforeclosure action because neither the note nor the deed of trust were assigned to the Trust by the requisite closing date of the Trust, rendering the purported assignment *void* as a matter of New York trust law. However, the weight of authority holds that an untimely assignment to a securitized trust, made after the securitized trust's closing date, is not void but merely voidable. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259; *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89 (*Rajamin*); compare *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1097 (*Glaski*).) Likewise, any failure to comply with the terms of the PSA renders Defendants' acquisition of Torossian's loan merely voidable by the trust beneficiary, rather than void. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815; *Rajamin*, *supra*, 757 F.3d at pp. 88-89.)

> "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.)

Therefore, Torossian cannot bring a preforeclosure action to challenge the allegedly delayed assignment of his note and deed of trust to the Trust, or to challenge Defendants' alleged failure to

comply with the terms of the PSA. California's nonjudicial foreclosure scheme does not authorize such a preemptive lawsuit.

b. *Torossian's reliance on* Yvanova *is misplaced.*

At the time the trial court ruled on the demurrer, it did not have the benefit of *Yvanova*, which was decided during the pendency of this appeal. Before addressing Torossian's attempt to rely on *Yvanova*, we summarize the Supreme Court's holding therein.

Yvanova arose out of the allegedly wrongful foreclosure of the plaintiff's home by the lienholder. The Supreme Court granted review to consider an extremely narrow question: "whether the 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, italics added.) As to that limited issue, the Supreme 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 was not merely voidable but *void*." (*Id.* at pp. 942-943, italics added.) The court's holding was explicitly narrow, declining to reach, among other questions, whether a homeowner had standing to preemptively challenge the assignment of the beneficial interest, *prior to foreclosure*. The court explained the narrow reach of its holding as follows: "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the

assignment is void or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (*Id.* at p. 924.)

Yvanova agreed with *Glaski*, *supra*, 218 Cal.App.4th 1079, to the extent *Glaski* 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." (*Yvanova*, *supra*, 62 Cal.4th at p. 939.) *Yvanova* rejected *Jenkins* insofar as that decision "spoke too broadly in holding a borrower lacks standing to challenge an assignment of the note and deed of trust to which the borrower was neither a party nor a third party beneficiary. *Jenkins*'s rule may hold as to claimed defects that would make the assignment merely voidable, but not as to alleged defects rendering the assignment *absolutely void*." (*Yvanova*, *supra*, at p. 939, italics added.)

Unlike *Yvanova*, which was an action for wrongful foreclosure, Torossian's action is a *preforeclosure* lawsuit. Although Torossian seeks to construe *Yvanova* as giving him standing to sue, *Yvanova* clearly stated that it did "not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Yvanova*, *supra*, 62 Cal.4th at p. 924.)

In this regard, *Yvanova* further stated: "*Jenkins* held California law did not permit a 'preemptive judicial action[ ] to challenge the right, power, and authority of a foreclosing "beneficiary" or beneficiary's "agent" to initiate and pursue foreclosure.' (*Jenkins*, *supra*, 216 Cal.App.4th at p. 511.) Relying

primarily on *Gomes*[, *supra*,] 192 Cal.App.4th 1149, *Jenkins* reasoned that such preemptive suits are inconsistent with California's comprehensive statutory scheme for nonjudicial foreclosure; allowing such lawsuits ' "would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." ' (*Jenkins*, at p. 513, quoting *Gomes*, at p. 1155.) [¶] *This aspect of Jenkins, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review*, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*. As framed by the proceedings below, the concrete question in the present case is whether plaintiff should be permitted to amend her complaint to seek redress, in a wrongful foreclosure count, for the trustee's sale that has already taken place. We do not address the distinct question of whether, or under what circumstances, 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 pp. 933-934, certain italics added.)

Saterbak, *supra*, 245 Cal.App.4th 808, illuminates the narrow nature of *Yvanova*'s holding. In *Saterbak*, as here, the plaintiff brought a preforeclosure lawsuit challenging the defendant's ability to foreclose; the plaintiff pled, inter alia, that the deed of trust was not timely assigned to a real estate mortgage investment conduit (REMIC) trust because MERS did not assign the deed of trust to the REMIC trust until years after

the REMIC trust's closing date, allegedly rendering the assignment "void." (*Id.* at p. 814.)[6]

Saterbak held the plaintiff lacked standing to challenge the assignment, explaining: "The California Supreme Court recently held that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment renders the assignment void. (*Yvanova*, *supra*, 62 Cal.4th at pp. 942-943.) However, *Yvanova*'s ruling is expressly limited to the post-foreclosure context. (*Id.* at pp. 934-935 ('narrow question' under review was whether a borrower seeking remedies for *wrongful foreclosure* has standing, not whether a borrower could *preempt* a nonjudicial foreclosure).) *Because Saterbak brings a preforeclosure suit challenging* [*d*]*efendant's ability to foreclose, Yvanova does not alter her standing obligations*." (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815, certain italics added.)

In view of the above, we conclude there is no merit to Torossian's theory that *Yvanova* enables him to allege standing to bring this *preforeclosure* lawsuit alleging a belated assignment to the Trust and noncompliance with the PSA. The alleged defects of which Torossian complains would render the assignment merely voidable, not void (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815), and as explained, *Yvanova* did not disapprove *Jenkins* to the extent *Jenkins* held that a lawsuit may not be brought to preempt a nonjudicial foreclosure. (*Yvanova*, *supra*, 62 Cal.4th at p. 934; *Jenkins*, *supra*, 216 Cal.App.4th at p. 13.)

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6 The *Saterbak* court found the assignment under its consideration, an assignment to a securitized trust made after the trust's closing date, was merely voidable, not void. (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 814-815.)

Accordingly, the trial court properly sustained Defendants' demurrer to Torossian's preforeclosure "wrongful foreclosure" claim without leave to amend.

c. *Other issues not reached*.

Torossian contends the trial court improperly accepted the truth, validity, and/or legal effect of Defendants' foreclosure documents on judicial notice. He argues the trial court misconstrued the legal effect of simply recording the allegedly invalid documents. He reasons that if, as he alleged in his pleadings, the notice of default, deed of trust and other documents were *void*, Defendants' mere recording of these documents did not validate their contents. However, as already discussed, the defects alleged by Torossian, i.e., a belated assignment to the Trust and noncompliance with the PSA, would make the assignment merely voidable, rather than void. Under these circumstances, because Torossian cannot maintain a preforeclosure challenge to Defendants' authority to proceed with foreclosure, it is unnecessary to discuss whether the trial court erred in accepting the truth of the matters judicially noticed.

Similarly, Torossian's inability to maintain a preemptive lawsuit challenging the assignment to the Trust renders it unnecessary to address whether Torossian was required to allege tender of the loan balance in order to proceed with his preforeclosure challenge.

3. *No private right of action for violation of section 2924, subdivision (a)(6).*

Torossian contends he alleged a prima facie violation of section 2924, subdivision (a)(6), part of the California Homeowners Bill of Rights (HBOR), based on allegations that Defendants recorded a notice of default and notice of trustee's

sale against his home, although the Defendants were neither original beneficiaries under the deed of trust nor legitimate transferees by way of a proper assignment.

To reiterate, the statute provides in relevant part: "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).) However, this provision does not contain language authorizing a preforeclosure action for damages or injunctive relief.

We are also guided by section 2924.12, which specifies at subdivision (a)(1): "If a trustee's deed upon sale *has not been recorded*, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17." (Italics added.)[7] The

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[7] On the other hand, if a "trustee's deed upon sale *has been recorded* [which is not the case here], a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for *actual economic damages* pursuant to Section 3281, resulting from a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 . . . ." (§ 2924.12, subd. (b), italics added.) Subdivision (b) of section 2924.12 enumerates the same statutory provisions as subdivision (a).

phrase *expressio unius est exclusio alterius*, a familiar canon of statutory interpretation, expresses the principle that when a statute contains a specific list of matters, by negative implication the Legislature did not intend to extend that list beyond the specified matters. (*Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1208.) Because section 2924, subdivision (a)(6) is not one of the provisions enumerated in section 2924.12, it evinces the Legislature's intent not to authorize a statutory remedy for violation thereof. Other courts have reached the same conclusion. (See *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 158-159; *Penermon v. Wells Fargo Bank, N.A.* (N.D.Cal.2014) 47 F.Supp.3d 982, 997 [concluding it was not authorized to provide damages for a violation of § 2924 as that section was excluded from § 2924.12; *Hernandez v. Select Portfolio, Inc.* (C.D.Cal. 2015) 2015 WL 3914741, *8 ["Because the California legislature clearly provided money damages as a remedy for certain HBOR violations, but not for others, the court is constrained to conclude that it did not intend to permit the recovery of money damages for a § 2924(a)(6) violation"].)

In view of the specific provisions made actionable by section 2924.12, we conclude Torossian cannot state a cause of action under section 2924, subdivision (a)(6) for injunctive relief or for damages.

4. *No abuse of discretion in denial of leave to amend.*

The burden of proving that a pleading defect can be cured by amendment " 'is squarely on the plaintiff.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

Here, Torossian has not shown that he is capable of amending his cause of action for "wrongful foreclosure" to state a viable preemptive challenge to Defendants' authority to proceed

with foreclosure. Further, he has not show that he can state a cause of action under section 2924, subdivision (a)(6) for injunctive relief or for damages. Accordingly, we perceive no abuse of discretion in the trial court's denial of leave to amend.

DISPOSITION

The order of dismissal is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, 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.