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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARTY ZACHARY et al., Plaintiffs and Appellants, v. U.S. BANK, NATIONAL ASSOCIATION, as Trustee, etc., et al, Defendants and Respondents.	2d Civ. No. B284004 (Super. Ct. No. 16CVP0321) (San Luis Obispo County)

Plaintiffs Marty Zachary, Christina Zachary and Mike Maunu brought this action for wrongful foreclosure against defendants U.S. Bank, National Association, as Trustee for GSAA Home Equity Trust 2006-1, Asset-Backed Certificates Series 2006-1 (U.S. Bank); Specialized Loan Servicing LLC (SLS); Quality Loan Service Corporation (Quality) and Duke Partners II, LLC (Duke). The First Amended Complaint (FAC) alleges

causes of action for wrongful foreclosure, violation of Civil Code section 2924.17[1] and cancellation of instruments.

The trial court sustained defendants' demurrers to the FAC without leave to amend. Plaintiffs, who are appearing in propria persona, contend this was error. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In August 2005, the Zacharys borrowed $332,500 from SCME Mortgage Bankers, Inc. (SCME) to purchase a second home in Paso Robles. The loan was secured by a deed of trust which identified Stewart Title of San Diego as trustee and Mortgage Electronic Registration System (MERS) as the nominee of SCME. The deed of trust states that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." It further states: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Plaintiffs allege that SCME's corporate status was suspended by the California Secretary of State on April 19, 2013. On December 10, 2015, MERS assigned the deed of trust to U.S. Bank. Subsequently, Wells Fargo Bank, as the servicing agent for U.S. Bank, substituted Quality as the trustee. Following this substitution, Quality recorded a notice of default and then a

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[1] All statutory references are to the Civil Code unless otherwise specified.

notice of trustee's sale. At some point, SLS became the loan servicer.

On November 22, 2016, plaintiffs filed a complaint seeking to enjoin the trustee's sale. Quality proceeded with the sale on November 28, 2016. Duke purchased the property at that sale. Before the sale occurred, Maunu, who is or was a tenant on the property, allegedly informed Duke of the litigation.

Shortly after the sale, plaintiffs filed the FAC. They allege claims for wrongful foreclosure, violation of section 2924.17 and cancellation of instruments against U.S. Bank and Quality. The FAC also alleges a claim for violation of section 2924.17 against SLS and a claim for cancellation of instruments against Duke.

U.S. Bank, Quality and SLS demurred to the FAC. Duke filed a separate demurrer. As the trial court explained, "[p]laintiffs' wrongful foreclosure claim is based on allegations that because SCME was a suspended corporation[,] MERS had no authority to act as its nominee such that MERS' assignment to U.S. Bank was void *ab initio*. Plaintiffs therefore allege U.S. Bank had no authority to authorize Quality to proceed with the nonjudicial foreclosure. As it relates to Duke, the third cause of action alleges the trustee's deed upon sale must be cancelled because the sale is void for the reasons stated above. Plaintiffs also allege that Duke is not a bona fide purchaser as it was aware of this action at the time of the trustee's sale. As to tender[,] [p]laintiffs allege they are excused because the trustee's sale is void."

The trial court rejected each of these contentions and sustained both demurrers without leave to amend. It also denied plaintiffs' motion to file a second amended complaint (SAC). The court ruled that because the demurrers had been sustained without leave to amend, there was no pleading on file to be

amended. It also noted that "[p]laintiffs were unable to convince the Court at the hearings on the demurrers that the complaint could be amended to state a viable cause of action." Plaintiffs appeal.

DISCUSSION

Appealability

Plaintiffs' appeal is from the "[j]udgment of dismissal after an order sustaining a demurrer." The only formal judgment of dismissal in the record is the one in Duke's favor. The trial court, however, did sign an April 4, 2017 order sustaining the demurrer of U.S. Bank, Quality and SLS without leave to amend, and directing that the claims against them be "dismissed with prejudice."

Typically, an order sustaining a demurrer without leave to amend is interlocutory and not appealable. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776.) An exception exists when the trial court has issued a written, signed order dismissing an action. (Code Civ. Proc., § 581d.) In that situation, the order constitutes a judgment and is "effective for all purposes." (*Ibid.*; *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1233-1234.) We conclude the court's order dismissing the claims against U.S. Bank, Quality and SLS is an appealable judgment. (Code Civ. Proc., § 581d.) We also conclude the appeal was timely filed.[2]

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[2] Although the trial court's order was issued more than 60 days before the notice of appeal was filed, the record reflects that no notice of entry of the order was filed and served. Accordingly, plaintiffs had 180 days in which to file their notice of appeal. (Cal. Rules of Court, rule 8.104(a)(1)(C).) The notice was filed within that time period.

Standard of Review

The judgment on an order sustaining a demurrer is reviewed de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) ""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.] . . . 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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) This burden may be met for the first time in the reviewing court. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1041-1042; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

Maunu's Lack of Standing

The trial court sustained the demurrers as to Maunu because he lacks standing to bring claims for wrongful foreclosure, violation of section 2924.17 and cancellation of instruments. It is well established that "'only parties with an interest in the secured loan or in the real property security itself have standing to challenge or attempt to set aside a nonjudicial foreclosure sale.'" (*Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1103.) Since Maunu is not a party to the loan or deed of trust, the court properly dismissed his claims in the FAC.

Alleged Wrongful Foreclosure

In *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), our Supreme Court held that, where an assignment of a deed of trust is void, as opposed to being merely voidable, "[a] foreclosed-upon [home loan] borrower" (*id.* at p. 937) "has standing to claim a nonjudicial foreclosure was wrongful." (*Id.* at p. 942.) Relying upon *Yvanova*, the Zacharys contend MERS's assignment of the deed of trust is void and, as a result, they have standing to challenge the foreclosure.

As *Yvanova* explained, "A void contract is without legal effect. [Citation.] 'It binds no one and is a mere nullity.' [Citation.] 'Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it . . . .'" (*Yvanova*, *supra*, 62 Cal.4th at p. 929.) In contrast, a voidable transaction "'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.' [Citation.] It may be declared void but is not void in itself." (*Id.* at p. 930.)

The pivotal allegation in the FAC is that SCME was a suspended corporation when MERS assigned the deed of trust to U.S. Bank. This is a factual allegation we must accept as true. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We need not accept as true, however, the contentions and legal conclusions that the Zacharys claim flow from SCME's suspended status -- specifically, their contention that the assignment of the deed of trust to U.S. Bank is void because the suspension rendered SCME incapable of contracting and/or terminated its agency relationship with MERS.

It is undisputed that MERS assigned the deed of trust to U.S. Bank in its capacity as SCME's nominee. Contracts that a suspended corporation enters into are not void but merely voidable, "at the request of any party to the contract other than the [suspended corporation]." (Rev. & Tax. Code, § 23304.1, subd. (a); *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 668-669.) As nonparties to the assignment, the Zacharys could not have voided it. (Rev. & Tax. Code, § 23304.1, subd. (a).) Only U.S. Bank could have done so, and the FAC does not allege any effort by U.S. Bank to void the assignment. (See *Yvanova*, *supra*, 62 Cal.4th at p. 930; *Myrick v. O'Neill* (1939) 33 Cal.App.2d 644, 648 ["'[A] voidable contract is one which may be rendered null at the option of one of the parties, *but is not void until so rendered*"].)

The Zacharys' assertion that SCME's suspended status terminated its agency relationship with MERS also fails. Section 2355 provides that an agency is terminated by (a) the expiration of its term, (b) the extinction of its subject, (c) the death of the agent, (d) the agent's renunciation of the agency, or (e) the incapacity of the agent to act as such. (*Id.*, subds. (a)-(e).) None of these events is alleged here, and the Zacharys do not claim that any could be alleged.

Section 2356, subdivision (a) states that unless the power of an agent is coupled with an interest in the subject of the agency (in which case the agency is irrevocable), the agency can be terminated by revocation by the principal, the death of the principal, or the incapacity of the principal to contract. (*Id.*, subd. (a)(1)-(3).) Here, there is no allegation that SCME ever revoked MERS's agency. (*Id.*, subd. (a)(1).) There also are no alleged facts showing that SCME was dissolved before the assignment was made. (*Id.*, subd. (a)(2).) The FAC instead

alleges that the corporation was merely suspended at the time of the assignment. A suspension does not, however, render the corporation incapable of contracting. (*Id*., subd. (a)(3).) On the contrary, by providing in Revenue and Taxation Code section 23304.1, subdivision (a) that the contracts of a suspended corporation are not void but voidable, the Legislature implicitly recognized that a suspended corporation may enter into contracts. (See also *id*., § 23303.)

In *Siliga v. Mortgage Elec. Registration Sys., Inc.* (2013) 219 Cal.App.4th 75 (*Siliga*), disapproved on other grounds by *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13, the plaintiffs claimed that any authority given to MERS by the original lender lapsed when that lender "went out of business" by filing bankruptcy. (*Id.* at pp. 83-84.) The court disagreed, concluding that the plaintiffs had failed to allege facts showing that the lender had actually gone out of business, been dissolved or suffered an incapacity to contract. (*Id.* at p. 84.) Absent such allegations, there was no lapse in MERS's authority. (*Ibid.*)

The same is true here. Although the FAC alleges that SCME was suspended at the time MERS assigned the deed of trust to U.S. Bank, there are no facts showing it was out of business, dissolved or without the ability to contract at the time of the assignment. (See *Siliga*, *supra*, 219 Cal.App.4th at p. 84.)

Moreover, even if SCME were considered dissolved or defunct, it would not render the assignment void. In *Ghuman v. Wells Fargo Bank, N.A.* (E.D. Cal. 2013) 989 F.Supp.2d 994, MERS assigned the deed of trust to Deutsche Bank after the original lender had become defunct. (*Id.* at p. 1002.) Noting that a nominee of a lender has broad powers to act, with or without the lender's consent, the court concluded that MERS's power as nominee under the deed of trust "was not impaired in any way by

the Lender becoming defunct," and that "there is no basis upon which the subsequent assignment of the Deed of Trust to Deutsche Bank can be found invalid." (*Id.* at p. 1003.) The court explained: "No stated requirement in California's non-judicial foreclosure scheme requires a beneficial interest in the Note to foreclose. . . . Rather, the statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate a non-judicial foreclosure. . . . In other words, MERS has broad power to act as nominee of a lender. Plaintiffs have provided no authority and the Court's research reveals no authority to suggest this power is affected when a lender becomes defunct." (*Id.* at p. 1002; see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271 ["[T]he allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender"], disapproved on other grounds by *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13; *L'Amoreaux v. Wells Fargo Bank, N.A.* (5th Cir. 2014) 755 F.3d 748, 750 [rejecting argument that MERS lacked authority to assign the deed of trust where, at the time of the assignment, the original lender no longer existed]; *Handfield v. Wells Fargo Bank, N.A.* (N.D. Ga. 2013) 2013 U.S. Dist. LEXIS 55594, *16 ["This Court is unaware of any legal authority that would invalidate the assignment from MERS to Wells Fargo, simply because Utah Financial, the original lender, was defunct"]; *Camat v. Fannie Mae* (D. Hawaii 2012) 2012 U.S. Dist. LEXIS 87667, *21 ["dissolution [of the original lender] would not prevent MERS from transferring any interest in the mortgage"].)

Based on these authorities, we conclude plaintiffs have not alleged facts showing the assignment of the deed of trust is void. Since the assignment is, at best, voidable, the Zacharys lack

standing to challenge the assignment. (*Yvanova*, *supra*, 62 Cal.4th at p. 923; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810 ["A borrower has standing if the alleged assignment is void, but not if the assignment is merely voidable"].) Accordingly, the trial court properly dismissed the claim for wrongful foreclosure.

Alleged Violation of Section 2924.17

Section 2924.17 provides that before recording a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee, "a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." (*Id.*, subd. (b).) A "'mortgage servicer'" is defined as "a person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner's authorized agent." (§ 2920.5, subd. (a).) The definition does "not include a trustee, or a trustee's authorized agent, acting under a power of sale pursuant to a deed of trust." (*Ibid.*)

The FAC does not allege facts showing that either U.S. Bank or Quality qualify as the "mortgage servicer." Quality, as the trustee, is not a "mortgage servicer," and there are no allegations demonstrating that U.S. Bank acted as such. Although the Zacharys generally allege that SLS was "a loan servicer," they do not allege any wrongful conduct by SLS. Their claim is based on the allegation that "[t]here is no competent or reliable evidence of a valid non-judicial foreclosure against the

property because 1) U.S. Bank never received a valid assignment of the debt in any manner, and 2) Quality is not a valid substitute trustee of the deed of trust." We agree with the trial court that this claim "fail[s] based on the failure to state a valid cause of action for wrongful foreclosure."

Cancellation of Instruments

The FAC seeks cancellation of the trustee's deed upon sale. Once again, it alleges the instrument is void because MERS's assignment of the deed of trust is invalid and Quality did not have the power to sell the property.

Section 3412 provides that "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a *person against whom it is void or voidable*, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Italics added; see *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818-819 (*Saterbak*).)

As previously noted, the FAC alleges facts showing that the assignment of the deed of trust is, at best, voidable. But section 3412 requires that "the challenged instrument be void or voidable against the party seeking to cancel it." (*Johnson v. PNC Mortg.* (N.D. Cal. 2015) 80 F.Supp.3d 980, 990, italics omitted.) Here, the Zacharys fail to allege facts showing that MERS's assignment of the deed of trust to U.S. Bank is void or voidable against them. (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 818-819.) Furthermore, "[a] valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117; see *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878.) The Zacharys' failure to allege tender also defeats their claim for cancellation of instruments.

Denial of Leave to Amend

Plaintiffs contend the trial court abused its discretion by denying them leave to amend the FAC. They maintain the allegations in the proposed SAC state viable claims for relief on behalf of all three plaintiffs.

The proposed SAC reiterates the Zacharys' claims for wrongful foreclosure, cancellation of instruments and violation of section 2924.17. These causes of actions are based on the same allegations set forth in the FAC, i.e., that U.S. Bank never received a valid assignment of the debt in any manner and that Quality is not a valid substitute trustee. For the reasons discussed above, these claims fail as a matter of law.

The Zacharys' only new cause of action is an alleged violation of section 2924.12 by U.S. Bank, Quality and SLS. Subdivision (b) of that section states: "After a trustee's deed upon sale has been recorded, 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 2923.5, 2923.7, 2924.11, or 2924.17 by that mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale."

While section 2924.12 may allow a borrower to recover damages after a foreclosure sale has been completed, there must still be a material violation of the underlying statute -- in this case, section 2924.17. As previously discussed, the Zacharys have failed to state a claim for relief under that section. Moreover, the claim for violation of section 2924.12 is predicated upon the allegation that the assignment of the deed of trust to U.S. Bank

is void and Quality is not a valid substitute trustee. We have already explained why this allegation is subject to demurrer.

The proposed SAC also clarifies that Maunu entered into a contract with the Zacharys to lease the property. In his capacity as a lessee, Maunu alleges new causes of action against Duke for intentional interference with contract, civil harassment, breach of the covenant of quiet enjoyment, nuisance, violation of Business and Professions Code section 17200 et seq., and negligence. These six claims, which are based upon Duke's alleged wrongful eviction of Maunu, seek damages as well as "injunctive relief to enjoin the eviction proceedings."

Duke did not oppose plaintiffs' motion to file the proposed SAC, and its respondent's brief does not address the new causes of action alleged by Maunu. Because these causes of action arise from the alleged wrongful eviction proceedings, as opposed to the alleged invalid assignment of the deed of trust, we asked Duke to submit a supplemental letter brief addressing whether Maunu has stated a claim for relief. Duke complied and Maunu filed a response.

In its supplemental brief, Duke maintains that Maunu has not stated a viable cause of action. Each of Maunu's new claims is dependent upon the allegation that he "is a tenant in the subject property under a valid lease dated 7/27/16." As Duke points out, however, the alleged lease is void under section 1214, which states that "[e]very conveyance of real property . . . , other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action."

Maunu's alleged lease was for a term of more than one year and thus falls within the ambit of section 1214. (*Goldstein v. Ray* (1981) 118 Cal.App.3d 571, 575.) Maunu does not allege that the lease was recorded, and he concedes he did not provide a copy of the lease to Duke until after the trustee's deed upon sale had been recorded. As a result, the lease is void as against Duke, which qualifies as a good faith subsequent purchaser for value. (*Id.* at pp. 575-576.) Without a valid lease, Maunu cannot maintain claims against Duke for alleged wrongful eviction.

In addition, Duke has provided court documents showing that Maunu's proposed SAC is barred by issue preclusion (i.e., collateral estoppel), which "'operates (in the second of two actions which do not involve identical causes of action) to obviate the need to relitigate issues already adjudicated in the first action. [Citation.]'"[3] (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.) Specifically, the issues raised in the proposed SAC were adjudicated in a prior unlawful detainer (UD) proceeding brought by Duke. Maunu filed a prejudgment claim of right to possession in that proceeding. He alleged that he was a legitimate tenant under the lease, and that he should have been given a 90-day notice before eviction.

Following trial, the UD court found that Maunu failed to show by a preponderance of the evidence that he is a two-year lessee and determined that Maunu "is merely an occupant of the premises at best and is therefore subject to eviction as are 'all other occupants of the premises' under the pleadings." It further found that Maunu presented no viable defense to section 1214's

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[3] On June 18, 2018, Duke requested that we take judicial notice of the court documents. We grant the request. (Evid. Code, § 452, subd. (d).)

requirement that multi-year leases be recorded prior to a trustee's sale in order for the lease to be valid as against the purchaser. Accordingly, the UD court entered judgment awarding Duke possession of the property. It also ordered Maunu to pay Duke $5,955 in holdover damages and costs.

We reject Maunu's attempts to relitigate these issues here. Given that Duke is legally entitled to possession of the property, Maunu has failed to demonstrate that he has any claims against Duke for wrongful eviction. The trial court did not abuse its discretion by denying leave to amend.

DISPOSITION

The judgments are affirmed. Defendants/respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Roger T. Picquet, Judge
Donald G. Umhofer, Judge
Superior Court County of San Luis Obispo

Marty Zachary, Christina Zachary and Mike Maunu, in pro. per., for Plaintiffs and Appellants.

McCarthy & Holthus and Matthew B. Learned, for Defendants and Respondents U.S. National Association, as Trustee for GSAA Home Equity Trust 2006-1, Asset-Backed Certificates Series 2026-1, Specialized Loan Servicing LLC, and Quality Loan Service Corporation.

Dinsmore & Sandelmann, Frank Sandelmann and Lewis Stevenson; Wedgewood and Julie A. Choi, for Defendant and Respondent Duke Partners II, LLC.