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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

CINDY PARK et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A., et al., Defendants and Respondents.	B276456 (Los Angeles County Super. Ct. No. LC103339)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rick Brown, Judge. Affirmed.

Stephen R. Golden & Associates and Stephen R. Golden for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendants and Respondents Bank of America, N.A., and ReconTrust Company, N.A.

Yu | Mohandesi, Jordan S. Yu, Pavel Ekmekchyan and Allan P. Bareng for Defendant and Respondent Bank of New York Mellon.

Plaintiffs and appellants Cindy Park and Richard Weatherman (Appellants) appeal from a judgment against them following a successful demurrer and a motion for judgment on the pleadings that the trial court granted without leave to amend. Appellants borrowed $252,000 in 2005. The loan was secured by a trust deed on their home. Defendant and respondent Bank of America, N.A. (B of A) was the servicer for the loan. Defendant and respondent Bank of New York Mellon (Mellon), as the trustee of a loan trust, was the successor in interest to the original lender, America's Wholesale Lender (AWL).[1] The trust deed identified Mortgage Electronic Registration Systems (MERS) as AWL's nominee and the beneficiary of the trust deed.

Appellants' first amended complaint (FAC) challenged the Banks' rights to pursue a nonjudicial foreclosure to remedy Appellants' default on the loan. Appellants' primary allegation was that AWL did not actually exist at the time the loan was made. Based upon this allegation, Appellants claimed that the loan transaction "never occurred" and that MERS's subsequent assignment of rights under the trust deed to Mellon was therefore void. On appeal, Appellants make that same claim and also argue that they should have been permitted to amend their FAC to identify additional reasons why MERS's assignment was void.

We reject Appellants' arguments. Appellants' claim that AWL did not exist at the time of the loan is contradicted by judicially noticeable public records (to which Appellants did not

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[1] We refer to B of A and Mellon collectively as the "Banks." As discussed further below, AWL was a "doing business as" name (dba) used by Countrywide Home Loans (Countrywide). B of A is the successor in interest to Countrywide.

object below) showing that AWL was a registered dba for Countrywide prior to 2005. Appellants' other arguments concerning MERS's assignment of the trust deed are not based upon any specific facts and amount to an impermissible preemptive attack on the Banks' right to foreclose. The statutory scheme governing nonjudicial foreclosure specifies the requirements for executing against real property that is subject to a trust deed, and borrowers may not use a preemptive judicial action to require creditors to provide additional proof of their right to foreclose. We therefore affirm the judgment.

BACKGROUND

1. *The Loan Transaction*[2]

Appellants obtained a $252,000 loan on May 11, 2005, evidenced by a promissory note (Note) and secured by a deed of trust (Trust Deed) on their condominium (the Property). The Trust Deed identified AWL as the lender and stated that "Lender is a corporation organized and existing under the laws of New York." The trustee was CTC Real Estate Service.

The Trust Deed identified MERS as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this security instrument."[3] Under the heading of "TRANSFER OF

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[2] Consistent with the standard of review, for purposes of this appeal we accept the facts as alleged in the FAC and as set forth in the exhibits attached to the FAC, except for those facts that are contradicted by judicially noticeable evidence.

[3] "MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the

RIGHTS IN THE PROPERTY," the Trust Deed again stated that "[t]he beneficiary of this security instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." The Trust Deed also stated that Appellants understood and agreed that "MERS holds only legal title to the interests granted by [Appellants] 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." The Trust Deed further stated that the "Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to [Appellants]."

An "Assignment of Deed of Trust" by MERS to Mellon was recorded on August 17, 2011 (Assignment). The Assignment granted to Mellon "all beneficial interest" in the Trust Deed "together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued or to accrue under said [Trust Deed]." The

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member originates or owns; MERS acts solely as the lender's 'nominee,' having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 931, fn. 7 (*Yvanova*).)

Assignment was executed by Swarupa Slee, identified as an "Assistant Secretary" of MERS.

On November 14, 2011, a substitution of trustee executed by Mellon was recorded. The substitution identified the new trustee as Recontrust Company, N.A. (Recon). On February 17, 2012, Recon recorded a notice of default concerning the Property (Default Notice). According to the Default Notice, Appellants were in arrears on their loan in the amount of $21,062.02 as of November 14, 2011. The Default Notice included a declaration dated September 19, 2011, stating that the signor had "tried with due diligence to contact the borrower in accordance with California Civil Code Section 2923.5."

There were several other subsequent changes in the trustee. On May 21, 2014, Peak Foreclosure Services, Inc., the trustee at the time, recorded a "Notice of Trustee's Sale," scheduling the sale for June 16, 2015. However, no trustee sale has occurred.

2. *Proceedings Below*

Appellants filed their initial complaint on September 4, 2015, and filed their FAC on November 13, 2015. The FAC included causes of action for fraud, quiet title, "cancellation of instrument," unlawful and unfair business practices under Business and Professions Code section 17200, and for alleged violation of various Civil Code provisions requiring nonjudicial foreclosures to be commenced only by those with authority to do so and to be supported by an accurate declaration.

These causes of action were all based on allegations that: (1) the loan transaction was invalid, and (2) the Assignment was void. Citing information obtained from the New York State Department of State Divisions of Corporations, the FAC alleged

that AWL "did not come into its corporate existence until December 16, 2008." The FAC claimed that, because AWL did not yet exist at the time of the loan, no valid contract covered the loan transaction and the Assignment of the Trust Deed to Mellon was void. The FAC also alleged that, "by its own admission," MERS had no employees and the Assignment executed by Slee on behalf of MERS was therefore unauthorized and invalid. The FAC contained no further allegations concerning this purported admission by MERS or why MERS allegedly had no employees.

B of A and Recon filed a demurrer to the FAC. Mellon answered and filed a motion for judgment on the pleadings.

The Banks supported their demurrer and motion with requests for judicial notice. Those requests attached a copy of a "Fictitious Business Name Statement" that was recorded on July 11, 2002 (dba Statement). The dba Statement identified "America's Wholesale Lender" as the fictitious business name of Countrywide, a New York corporation. The dba Statement stated that it was valid for five years from the date of filing.

The trial court sustained the demurrer and granted the motion for judgment on the pleadings, both without leave to amend. Judgment was entered on May 19, 2016.

DISCUSSION

1. *Standard of Review*

An order sustaining a demurrer is reviewed de novo to determine whether the complaint states a cause of action as a matter of law. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) On appeal, we " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We may also disregard allegations that are

inconsistent with facts that are subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).)

When a trial court sustains a demurrer without leave to amend, the court's decision not to permit further amendment is reviewed for abuse of discretion. (Code Civ. Proc., § 472c, subd. (a); *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947.) If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment. (*Ellenberger*, at p. 947.)

A trial court's ruling granting judgment on the pleadings is "equivalent to a demurrer and is governed by the same standard of review." (*Mack v. State Bar* (2001) 92 Cal.App.4th 957, 961.)

2. *Appellants' FAC Failed to State a Claim*

Each of the causes of action in the FAC depends upon the factual allegation that AWL did not exist in 2005 when Appellants obtained their loan.[4] But that factual allegation was

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[4] Appellants' only brief on appeal does not address the additional allegation in the FAC that MERS had no employees. Nor did Appellant's opposition to Mellon's motion for judgment on the pleadings. It is unclear whether Appellants based this allegation on the alleged nonexistence of AWL in 2005 or on some other factual basis not addressed in the FAC. In either case, by failing to address the allegation, Appellants have forfeited any argument that the allegation can support a claim. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700.) Moreover, even if the argument were not forfeited, it would simply be another component of Appellants' claim that Mellon never received a valid assignment of rights in the Trust Deed. As discussed below, that claim

directly contradicted by the evidence the Banks submitted to the trial court through their request for judicial notice. According to a Fictitious Business Statement recorded in Los Angeles County in 2002, AWL was a registered dba of Countrywide when Appellants obtained their loan in 2005. Thus, Appellants are wrong in claiming that AWL did not exist in 2005. AWL was simply another name for Countrywide. " 'The designation "d/b/a" means "doing business as" but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business.' " (*Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1200, quoting *Duval v. Midwest Auto City, Inc.* (D.Neb. 1977) 425 F.Supp. 1381, 1387, affd. (8th Cir. 1978) 578 F.2d 721.)

As stated above, in ruling on a demurrer or a motion for judgment on the pleadings a court may disregard allegations that are contrary to a fact of which judicial notice may be taken. (Code Civ. Proc., § 430.30, subd. (a).) Appellants' allegation that AWL did not exist in 2005 is directly contrary to the judicially noticeable fact that AWL was a registered dba for Countrywide in 2005. (Evid. Code, § 452, subd. (h); *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ["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

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amounts to an impermissible preemptive action challenging the Banks' right to foreclose.

from the documents"], disapproved on other grounds in *Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.)[5]

Appellants cite Business and Professions Code section 17910.5 for the requirement that any person using the word "corporation," "Inc.," or other corporate designation in a dba must actually be organized as a corporation in California "or some other jurisdiction." But the Fictitious Business Name Statement that the Banks submitted below states that Countrywide was in fact a New York corporation, and Appellants do not dispute that fact. Appellants do not present any other factual theory in support of their allegation that the loan documents falsely identified the status of the lender.

Appellants apparently derived their theory that AWL did not exist in 2005 from a trademark infringement lawsuit that B of A filed in 2012 against a New York corporation that called itself "America's Wholesale Lender, Inc." Appellants attached the complaint from that lawsuit to their FAC. The basis for B of A's

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[5] The record does not show any ruling by the trial court on the Banks' request for judicial notice. However, there is also no record of any objection to the request (there is no reporter's transcript in the appellate record) and Appellants do not argue on appeal that the Fictitious Business Statement was an improper subject for judicial notice. We therefore presume that the trial court considered the Fictitious Business Statement in making its rulings. " 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [court presumed that the trial court took judicial notice of changes in counsel in denying a motion for discretionary dismissal for lack of prosecution], quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238–2239.)

claim in that case is consistent with the fact that AWL was actually a dba for Countrywide in 2005. B of A claimed that Countrywide "has used the 'America's Wholesale Lender' fictitious business name and AMERICA'S WHOLESALE LENDER® mark in connection with its mortgage banking business for over eighteen years in California and throughout the United States." B of A alleged that the defendant was a "sham corporation" that was registered in New York on December 16, 2008, and had infringed Countrywide's mark and engaged in deceptive and fraudulent business practices using that mark. The fact that some *other* entity created in 2008 used Countrywide's dba to engage in fraudulent transactions obviously does not mean that Countrywide's use of its *own* dba on loan documents in 2005 was somehow fraudulent or misleading. Appellants' fraud theory is therefore specious and cannot support any claim.

3. *Appellants' Other Arguments Questioning the Validity of the Trust Deed Assignment Do Not Provide Any Basis to Permit an Amended Complaint*

Appellants identify a jumble of additional alleged issues concerning the validity of MERS's assignment to Mellon, including: (1) there are "publicly known and acknowledged facts" concerning loan fraud allegedly committed by Countrywide; (2) there is "no evidence" that the Note was physically transferred to Mellon along with the assignment of the Trust Deed; (3) MERS could not transfer any interest in the Trust Deed if an interest in the Note was not also transferred; and (4) there were various problems with the transfer to Mellon stemming from the nature of the loan trust for which it was the trustee.

None of these purported issues provides a ground to permit further amendment of the complaint.

A borrower is not permitted to pursue a pre-foreclosure judicial action based upon general allegations questioning the authority of the defendant to proceed with a nonjudicial foreclosure. Such an action does not seek a remedy for misconduct, but rather seeks to impose an additional, non-statutory requirement on the defendant to demonstrate that it is authorized to proceed with the foreclosure. "[S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, fn. 5 (*Gomes*); accord, *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814–815 (*Saterbak*); *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82–83 (*Siliga*), disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513 (*Jenkins*), disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13.)[6]

Appellants assert only general allegations questioning the validity of the Assignment and the authority of the Banks to proceed with a nonjudicial foreclosure. They do not identify any specific misconduct in the Banks' acquisition of their interest in the Trust Deed or concerning the foreclosure process that might support an amended complaint. Their claims therefore amount

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[6] The court in *Yvanova* noted, but declined to consider the holdings in *Jenkins* and *Gomes* that preemptive lawsuits challenging a nonjudicial foreclosure are impermissible. (*Yvanova, supra,* 62 Cal.4th at pp. 933–934.)

only to an impermissible preemptive action challenging the authority of the Banks to proceed with a nonjudicial foreclosure.

There are additional reasons why Appellants' arguments do not identify any viable claim. First, Appellants' vague claims about a history of fraudulent conduct by Countrywide do not allege any fraud concerning *Appellants'* loan. (*See Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 807 (*Mendoza*) ["Plaintiff's description of foreclosure abuse generally, as extracted from the popular media, is fully developed, but her allegations of the specific flaws in the securitization of her specific loan are quite sparse"].) Second, Appellants' claim that there is "no evidence" Mellon had physical custody of the Note is irrelevant, as physical possession of a promissory note is not a requirement for foreclosure. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511–512; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440–441.) Third, Appellants' argument that Mellon could not foreclose if it did not have an interest in the Note ignores that, under the Assignment, MERS assigned "all beneficial interest" in the Trust Deed "together with the note(s) and obligations therein described." Here, as in *Siliga,* Appellants "fail to allege facts supporting the conclusion that MERS lacked authority to assign the note." (*Siliga, supra,* 219 Cal.App.4th at p. 84.)

Finally, although Appellants' arguments as to why Mellon allegedly had no valid interest in the Trust Deed as trustee of the loan trust are far from clear, they do not appear to identify any claim that Appellants would have standing to assert. The weight of authority (including a prior decision from this Division) holds that the assignment of a loan to an investment trust in violation of the terms of the trust merely "renders the assignment

voidable, not void." (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259; accord, *Mendoza, supra,* 6 Cal.App.5th at pp. 810–820; *Saterbak, supra,* 245 Cal.App.4th at p. 815.) While a borrower may challenge a lender's *void* assignment of a loan, the borrower does not have standing to challenge an assignment that is merely *voidable* because the assignment may be ratified by the assignee. (*Yvanova, supra,* 62 Cal.4th at pp. 936, 942–943.)

Appellants' FAC did not state a claim, and Appellants have not identified any possible amendment that would amount to a viable claim. The trial court therefore properly exercised its discretion to sustain the demurrer and grant the motion for judgment on the pleadings without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.