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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEPHEN FORDE,

Plaintiff and Appellant,

v.

HSBC BANK USA, N.A. et al.,

Defendants and Respondents.

B291582

(Los Angeles County
Super. Ct. No. YC070999)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Michael P. Vicencia, Judge. Affirmed.

Henry J. Josefsberg for Plaintiff and Appellant.

Wright Finlay & Zak, Jonathan D. Fink and Kaelee M.
Gifford for Defendant and Respondent Servis One, Inc.

Reed Smith, Raffi Kassabian and Zachary Frampton for
Defendants and Respondents HSBC Bank USA, N.A. and
Nationstar Mortgage LLC.

INTRODUCTION

In this wrongful foreclosure action Stephen Forde appeals from the judgment entered after the trial court sustained demurrers to his first amended complaint without leave to amend and dissolved a preliminary injunction that stayed foreclosure. Forde contends the trial court erred in sustaining the demurrers without leave to amend and in dissolving the injunction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Forde Acquires an Interest in Maple 1 and Maple 2, Then Sues His Alleged Co-owners*

In 2005 Randy and Reyna Taylor and Steve Hawrylack purchased real property known as Maple 1 with a \$1 million loan evidenced by a promissory note secured by a deed of trust on the property. In 2006 the Taylors and Hawrylack purchased another property, Maple 2, with a loan of \$958,750 evidenced by a promissory note secured by a deed of trust on that property. Both deeds of trust identified the Taylors and Hawrylack as the borrowers on the loans. In March 2011 Forde “acquired . . . an undivided one-third interest” in Maple 1, Maple 2, and two other real properties—“Verdugo” and the “Jackson duplex”—owned and managed by the Taylors and Hawrylack.¹

In April 2011 Forde sued the Taylors and Hawrylack (*Forde v. Hawrylack et al.* (Super. Ct. Los Angeles County, 2011, No. YC064625) (the 2011 action), alleging they had mismanaged

¹ Forde purported to acquire his interests in Maple 1 and Maple 2 through a series of quitclaim deeds.

the four properties, resulting in significant arrearages in property taxes and payments on the promissory notes. In July 2011 the trial court in that case appointed Forde as manager of the properties, authorizing him to collect rents and income from the properties for “payment of the respective past due property taxes, and/or payments on the respective notes secured by First Deeds of Trust and/or maintenance of the Subject Properties.”

In October 2011 the trial court in that action also authorized Forde to “communicate with Bank of America regarding the loans secured by” the deeds of trust on the four properties (Bank of America serviced the loans at that time) and to “negotiate forbearance and workout agreements for past due amounts of loan payments and/or property taxes.” The court ordered that Forde could “not negotiate the alteration of [the] underlying interest rate, due date, or normal monthly payment loan schedule set forth at loan origination,” which were to “remain unchanged” upon eliminating the arrearages. The court’s October 2011 order stated it would “remain in effect as long as [Forde] shall serve as the property manager” of the properties.

In September 2012 the parties settled the 2011 action. The settlement agreement provided that Forde would continue to manage the four properties “with the same authority and powers given to him” by the court in its July 2011 order.

B. *The Taylors and Hawrylack Sue Forde*

In October 2015 the Taylors and Hawrylack filed an action against Forde for, among other things, partition of the Maple 1 and Maple 2 properties (*Taylor et al. v. Forde* (Super. Ct. Los Angeles County, 2015, No. BC597720) (the partition action). The

Taylors and Hawrylack alleged Forde, while managing Maple 1 and Maple 2 pursuant to the September 2012 settlement agreement, had “personally pocketed the rents,” “not paid the mortgages,” and not “properly maintained the properties.” The Taylors and Hawrylack sought to have the properties sold and to recover from Forde their portion of the rents they claimed he had improperly retained.

In November 2015 the trial court granted a motion by the Taylors and Hawrylack to appoint a receiver, Kevin Singer, to take possession of Maple 2. The court ordered the receiver to “manage, control, care for, preserve, [and] maintain” the property; “collect the rents, issues, and profits therefrom[] to pay any loans, taxes or assessments falling due during the period of receivership”; “execute and prepare all documents and to perform all acts, either in the name of the plaintiffs, defendant or in the receiver’s own name, which are necessary or incidental to preserving, protecting, managing and/or controlling” the property; and “institute ancillary proceedings . . . as are necessary to preserve and protect” the property.

C. *Forde Files This Action*

In December 2015 Forde filed this wrongful foreclosure action against HSBC Bank USA, N.A., which held the note secured by the deed of trust on Maple 2, and Clear Recon Corp., which in August 2015 had recorded a notice of default and foreclosure under the deed of trust. Forde alleged the notice misstated the amount of the default on the Maple 2 note (\$233,895.30) because the notice did not account for loan payments (totaling \$26,157.04) Forde claimed that he submitted between December 2014 and June 2015 but that the loan’s

servicer, Nationstar Mortgage (Nationstar), had improperly refused to accept. Forde sought a preliminary injunction staying the foreclosure, which the court issued in January 2016.

HSBC demurred to the complaint on the ground Forde had failed to join indispensable parties, and the trial court sustained the demurrer, expressing skepticism about Forde's "standing to pursue this action." Forde filed a first amended complaint, adding as defendants Nationstar, the Taylors, Hawrylack, and Servis One, Inc. dba BSI Financial Services (BSI), the subservicer of the Maple 1 loan.² Forde asserted causes of action for (1) wrongful foreclosure against HSBC, Nationstar, and Clear Recon, based on his previous allegations about the Maple 2 loan; (2) an accounting against HSBC, Nationstar, and BSI, based on allegations of irregularities in the servicing of the Maple 1 and Maple 2 loans; (3) declaratory relief against all defendants, including a declaration that the notice of default on the Maple 2 loan was invalid and declarations of the amounts due to cure any delinquent payments on the Maple 1 and Maple 2 loans; and (4) a "Temporary Restraining Order / Permanent and Preliminary Injunction" against HSBC, Nationstar, Clear Recon, and BSI, which included requests to enjoin foreclosure on Maple 2 and to enjoin BSI from "acting upon its erroneous accounting" for the Maple 1 loan.

² Federal regulations define a "master servicer" . . . as 'the owner of the right to perform servicing, which may actually perform the servicing itself or may do so through a subservicer.' [Citation.] A subservicer does not own the right to perform the servicing, but does so on behalf of the master servicer." (*Guillaume v. Federal Nat. Mortg. Assn.* (S.D.Fla. 2013) 928 F.Supp.2d 1337, 1340, fn. 3.) Forde alleged Bank of America was the master servicer of the Maple 1 loan.

HSBC, Nationstar, and BSI demurred to the first amended complaint, which the trial court heard on May 31, 2018. At the same time the court ruled on several matters in related cases, including the partition action. In that action the court ruled the Taylors and Hawrylack had a right to partition Maple 1 and Maple 2 and appointed Singer “receiver of both properties,” with authority to operate, manage, and control them and partition them by sale. Turning to the matters pending in this action, the court sustained the demurrers by HSBC, Nationstar, and BSI without leave to amend. The court ruled Forde lacked standing to seek relief against these three defendants because he was “not a party to the loan[s]” and received his claimed interest in Maple 1 and Maple 2 “after the loan[s] [were] made and subject to [the] deed[s] of trust.” The court also concluded its ruling in the partition action “largely mooted” Forde’s claims in this action. Finally, the court ruled the preliminary injunction was “dissolved by operation of law” because the court had sustained the demurrer by HSBC and Nationstar without leave to amend. Forde timely appealed.³

DISCUSSION

A. *Standards of Review*

“““On appeal from an order of dismissal after an order sustaining a demurrer, our 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.] In reviewing the complaint, “we must assume the truth of all facts

³ Before appealing, Forde voluntarily dismissed the Taylors and Hawrylack from this action.

properly pleaded by the plaintiffs, [including those in exhibits attached to or referred to in the complaint,] as well as those that are judicially noticeable.” [Citation.] We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling.” (*Ward v. Tilly’s, Inc.* (2019) 31 Cal.App.5th 1167, 1174; accord, *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1172-1173.)

“When 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. . . . 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. . . . The plaintiff has the burden of proving that an amendment would cure the defect.’” (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 155; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) And “[o]rdinarily, an order granting or denying a preliminary injunction or granting or denying a motion to dissolve an injunction is reviewed under the abuse of discretion standard.” (*Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1462.)

B. *The Trial Court Did Not Err in Sustaining the Demurrer by HSBC and Nationstar Without Leave To Amend*

The trial court correctly ruled Forde lacked standing to assert a cause of action against HSBC and Nationstar for wrongful foreclosure. “Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff.” (*Mendoza v. JPMorgan Chase*

Bank, N.A. (2016) 6 Cal.App.5th 802, 810.) “To have standing, a party must be beneficially interested in the controversy; that is, he or she must have ‘some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.’” (*Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 315; see *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814 [plaintiff “must be able to demonstrate that . . . she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical”]; *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031 [“lack of standing may be raised by demurrer”].) Forde offers three bases for his standing to assert a cause of action for wrongful foreclosure against HSBC and Nationstar; none has merit.

First, Forde contends he has standing because, although the Maple 2 deed of trust did not identify him as a borrower, he was “an assignee to the [borrowers’] obligations and rights” under the deed of trust. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 929 (*Yvanova*) [“[a] beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure”]; *Munger v. Moore* (1970) 11 Cal.App.3d 1, 8 [the beneficiary or trustee may be liable to borrower’s successor in interest].) Forde concedes the deed of trust required the lender’s approval for any such assignment to be valid.⁴ And

⁴ The deed of trust provided that “any Successor in Interest of Borrower who assumes Borrower’s obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower’s rights and benefits under this Security Instrument.”

he correctly concedes that, because the deed of trust comes within the statute of frauds (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552 (*Secrest*), the statute of frauds also applies to the lender's approval of an assignment of the borrower's rights under the deed of trust (see *id.* at p. 553 "[a]n agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds"). But having thus acknowledged the statute of frauds as a hurdle to his assignment contention, Forde fails to clear it.

"A contract coming within the statute of frauds is invalid unless it is memorialized by a writing subscribed by the party to be charged or by the party's agent." (*Secrest, supra*, 167 Cal.App.4th at p. 552; see Civ. Code, § 1624, subd. (a).) That writing need only be a "note or memorandum," but it must "identif[y] the subject of the parties' agreement, show[] that they made a contract, and state[] the essential contract terms with reasonable certainty." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766; see *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1503 (*Rossberg*) [where the plaintiff alleges an agreement subject to the statute of frauds, failure to allege a writing that satisfies the statute "is a legal issue properly decided on demurrer"].)

Forde has alleged no such writing memorializing lender approval of the alleged assignment to him of the borrowers' rights under the Maple 2 deed of trust. He points to a writing he faxed to a Bank of America representative in July 2011, but that writing memorialized only Forde's understanding of an oral agreement he, as the court-appointed manager of the four properties at issue in the 2011 action, had reached with the bank representative concerning arrangements for paying tax and loan

arrearages for those properties. Nothing in Forde's allegations or in his briefs on appeal suggests the writing reflected Bank of America's (or any other entity's) approval of an assignment of the borrowers' rights and obligations under the Maple 2 deed of trust. Moreover, Forde alleges he received only the representative's subsequent oral assent to the terms contained in the writing he faxed. He does not allege any representative of Bank of America (or any other entity) signed that writing. (See *Rossberg, supra*, 219 Cal.App.4th at p. 1503 ["[t]he statute of frauds requires a signed writing"].)

Forde also argues his part performance in paying tax arrearages on the Verdugo property, as provided for in the writing he faxed to the Bank of America representative, took the lender's approval of the assignment out of the statute of frauds. (See *Secrest, supra*, 167 Cal.App.4th at p. 555 ["Part performance allows enforcement of a contract lacking a requisite writing in situations in which invoking the statute of frauds would cause unconscionable injury."].) But ""the payment of money is not 'sufficient part performance to take an oral agreement out of the statute of frauds.'"" (*Smyth v. Berman* (2019) 31 Cal.App.5th 183, 198; accord, *Secrest*, at p. 555.) Moreover, to constitute part performance, "the relevant acts either must "unequivocally refer[]" to the contract [citation], or "clearly relate" to its terms." (*Secrest*, at p. 555.) Payment of tax arrearages on the Verdugo property does not refer or relate to an agreement by the lender to approve an assignment of the borrowers' rights and obligations under the Maple 2 deed of trust. Thus, Forde's allegations do not establish a valid assignment to him of the borrowers' rights under the Maple 2 deed of trust.

Second, Forde suggests his ownership interest in Maple 2 gave him standing to assert a cause of action for wrongful foreclosure. But he cites no authority for that suggestion, and the law is to the contrary. (See *Yvanova, supra*, 62 Cal.4th at p. 929 [“[a] beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the *borrower* for wrongful foreclosure,” *italics added*]; *Munger v. Moore, supra*, 11 Cal.App.3d at pp. 7-8 [liability for wrongful foreclosure inures to the benefit of the trustor under the deed of trust or his or her successor in interest]; 4 Witkin, Summary of Cal. Law (11th ed. 2017) Security Transactions in Real Property, § 183 [same]; *Shetty v. ARLP Securitization Trust Series 2014-2* (C.D.Cal., Oct. 28, 2016, No. CV16-05467-BRO) 2016 WL 10999324 at p. 6 (*Shetty*) [because “only a *borrower* (or his assignee) may bring a claim as to the underlying mortgage,” the plaintiff, who alleged only an ownership interest in the encumbered property, “lacks standing to pursue any claims arising from the underlying mortgage”].)

Third, Forde argues he has standing to assert his cause of action for wrongful foreclosure because he was the manager of Maple 2. Again, however, he cites no authority suggesting a property manager has standing to bring a wrongful foreclosure action. What’s more, at the time he filed this action in December 2015, Forde was no longer the manager of Maple 2, because in November 2015 the trial court appointed Singer the receiver and manager of Maple 2. Therefore, Forde has not alleged he had, or how he could have, standing to bring his cause of action for wrongful foreclosure, and the trial court properly sustained the demurrer to that cause of action without leave to amend.

Forde's other causes of action against HSBC and Nationstar fail for related reasons. An accounting and injunctive relief are not independent causes of action, but types of remedies dependent on the validity of the underlying claims. (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1485; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82 (*Batt*), disapproved on another ground in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626; *Duggal v. G.E. Capital Communications Servs.* (2000) 81 Cal.App.4th 81, 95; *Janis v. Cal. State Lottery Com.* (1998) 68 Cal.App.4th 824, 833-834.) Similarly, Forde's cause of action for declaratory relief against HSBC and Nationstar, in which he seeks declarations of the invalidity of the notice of default and foreclosure and of the amount due to cure any default on the loan secured by the Maple 2 deed of trust, is wholly derivative of his cause of action for wrongful foreclosure. Because the trial court properly sustained the demurrer to the cause of action for wrongful foreclosure, it properly sustained the demurrer to these remaining, purported causes of action against HSBC and Nationstar. (See *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800 (*Ball*) [where a demurrer is properly sustained as to a statutory claim, "a demurrer is also properly sustained as to a claim for declaratory relief which is 'wholly derivative' of the statutory claim"]; *Shetty, supra*, 2016 WL 10999324, at p. 6 [property owner who was not a borrower (or his assignee) under the deed of trust "lack[ed] standing to pursue any claims arising from" the deed of trust, including a claim for declaratory relief].)

Forde has not shown a reasonable possibility he can cure these defects by amendment. Therefore, the trial court did not

abuse its discretion in sustaining the demurrer without leave to amend. (See *Monsanto Co. v. Office of Environmental Health Hazard Assessment* (2018) 22 Cal.App.5th 534, 561 [“demurrer sustained without leave to amend is affirmed where there is no reasonable possibility that the defect can be cured by amendment”]; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992 [if “there is a reasonable possibility that the defect can be cured by amendment . . . the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm”].)

C. *The Trial Court Did Not Err in Sustaining the Demurrer by BSI Without Leave To Amend*

Against BSI Forde asserted causes of action for an accounting, declaratory relief, and injunctive relief. As noted, the first and third of these are not independent causes of action, but remedies dependent on underlying claims. (*Batt, supra*, 155 Cal.App.4th at p. 82.) Only the cause of action for declaratory relief may stand alone. (See *Ball, supra*, 164 Cal.App.4th at p. 800 [“Code of Civil Procedure section 1060 permits an original action, and authorizes a claim for declaratory relief to be filed ‘alone’”].) Forde, however, lacks standing to assert that cause of action against BSI.

To state a claim for declaratory relief under Code of Civil Procedure section 1060 (section 1060),⁵ a plaintiff must allege

⁵ Section 1060 provides, in relevant part: “Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the

“two essential elements: ‘(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party.’” (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546 (*Lee*); see *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410 (*Brownfield*) [the “proper subjects” are set forth in section 1060 and other statutes].) Although section 1060 ““appears to allow for an extremely broad scope of an action for declaratory relief” [citation], “an actual controversy that is currently active is required for such relief to be issued, and both standing and ripeness are appropriate criteria in that determination. [Citation.]” [Citation.] “One cannot analyze requested declaratory relief without evaluating the nature of the rights and duties that the plaintiff is asserting, which must follow some recognized or cognizable legal theories that are related to subjects and requests for relief that are properly before the court.”” (*Lee*, at p. 546.) We review de novo whether there is an “actual controversy” within the meaning of section 1060. (*Id.* at pp. 546-547.)

In his cause of action for declaratory relief against BSI, Forde seeks a declaration of the amount due to cure any default on the note secured by the deed of trust on the Maple 1 property. But Forde’s allegations do not show he has any direct interest in any actual, active controversy concerning delinquent payments

natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract.”

on the note secured by that deed of trust. He purports to assert rights as an assignee of the borrowers under the Maple 1 deed of trust, but as discussed in connection with his claim to be an assignee of the borrowers under the Maple 2 deed of trust, he has not alleged he acquired any such rights. (See *D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1491 [plaintiff who was not a party to the contract that was the subject of declaratory relief action lacked standing]; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 55 [same].) Forde has not articulated how any other purported interest he may have in the Maple 1 property “translates into ‘a legally cognizable theory of declaratory relief.’”⁶ (*D. Cummins*, at p. 1491.) Nor has he alleged there is any active controversy between him and BSI concerning delinquent payments: He does not allege BSI has taken any action adverse to him as a result of supposedly delinquent payments. (See *Brownfield, supra*, 208 Cal.App.3d at p. 410 [“[t]he ‘actual controversy’ requirement concerns the existence of *present* controversy relating to the legal rights and duties of the respective parties pursuant to contract . . . , statute or order”].)

Therefore, the trial court did not err in sustaining BSI’s demurrer to all Forde’s causes of action. And because Forde has not shown a reasonable possibility of curing the defects in his causes of action by amendment, the court did not abuse its discretion in denying Forde leave to amend.

⁶ Forde denies he is a third party beneficiary of the Maple 1 deed of trust.

D. *The Trial Court Did Not Abuse Its Discretion in
Dissolving the Preliminary Injunction*

Forde contends the trial court erred in dissolving the preliminary injunction because it should not have sustained the demurrers without leave to amend. Because the trial court properly sustained the demurrers without leave to amend, it did not abuse its discretion in dissolving the preliminary injunction. (See *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 734 [plaintiff was not entitled to injunctive relief where the court properly sustained a demurrer to all causes of action without leave to amend].)

DISPOSITION

The judgment is affirmed. Respondents' request for judicial notice is granted. Respondents are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.