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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JEFFREY MCDONALD,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICES, LLC,

Defendant and Respondent.

B252155

(Los Angeles County
Super. Ct. No. BC490166)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Susan Bryant-Deason, Judge. Affirmed.

Bergman & Gutierrez, Penelope P. Bergman, Deborah P. Gutierrez and
Amanda L. Gray for Plaintiff and Appellant.

Akerman, Justin D. Balser and Preston K. Ascherin for Defendant and
Respondent.

Jeffrey McDonald appeals from a judgment dismissing his first amended complaint against Aurora Loan Services, LLC (Aurora) after the court sustained a demurrer without leave to amend. McDonald contends he has adequately pled causes of action for cancellation of a trust deed assignment, violation of Civil Code section 2924.17, unfair competition (Bus. & Prof. Code, § 17200 et seq.), and declaratory relief, all arising from the recordation of a false and unauthorized assignment of a deed of trust. We conclude that he has shown no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

In September 2005, McDonald executed a \$552,000 promissory note in favor of MILA, Inc. (MILA). The note was secured by a deed of trust against real property owned by McDonald in the City of Los Angeles. The deed of trust was recorded on September 23, 2005. The deed of trust identified McDonald as “Borrower” and MILA as “Lender.” The deed of trust stated that Mortgage Electronic Registration Systems, Inc. (MERS), “is acting solely as a nominee for Lender and Lender’s successors and assigns,” and 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.” It stated further, “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.”

MERS executed a substitution of trustee on June 3, 2009, naming Quality Loan Servicing Corporation (QLS) as the new trustee, and QLS recorded the document on July 17, 2009. QLS recorded a notice of default and election to sell under the deed of

trust on June 5, 2009. The notice of default stated that QLS was acting as agent for the beneficiary.

Stacy Sandoz, as vice-president of MERS, executed an assignment of the deed of trust on July 15, 2011. The assignment stated that MERS, “as nominee for MILA, Inc., . . . its successors and/or assigns” (capitalization omitted), assigned to Aurora “all beneficial interest under” the deed of trust. Aurora recorded the assignment on July 22, 2011.

2. Trial Court Proceedings

McDonald filed a complaint against Aurora in August 2012 alleging claims for (1) cancellation of the notice of default, substitution of trustee, and trust deed assignment; (2) unfair competition; and (3) declaratory relief. The trial court sustained a demurrer to the complaint with leave to amend.

McDonald filed the operative first amended complaint against Aurora in April 2013. He asserts four causes of action: (1) cancellation of the trust deed assignment; (2) violation of Civil Code section 2924.17; (3) unfair competition; and (4) declaratory relief. He alleges that the trust deed assignment was invalid because MERS’s own Milestones report, attached to the complaint, shows that Aurora never acquired any interest in the deed of trust; Aurora’s counsel informed McDonald on November 17, 2011 that a company other than Aurora owned the debt; Sandoz prepared and executed the trust deed assignment at the direction of Aurora and not at the direction of MERS; and since Sandoz was not vice president of MERS, she had no authority to execute the assignment of behalf of MERS and no personal knowledge of the relevant facts in the assignment.

Aurora filed a general demurrer to each of the causes of action in the first amended complaint. The trial court filed an order sustaining the demurrer without leave to amend on September 5, 2013. The court concluded that McDonald failed to allege that he tendered the debt or was excused from doing so, MERS was an express beneficiary under the deed of trust with the power to initiate a foreclosure, and McDonald’s allegations that the trust deed assignment was invalid were conclusory.

The court filed a signed order dismissing the complaint on October 4, 2013.¹ McDonald timely appealed.

CONTENTIONS

McDonald contends the trial court erred because he has adequately pled causes of action for cancellation of the trust deed assignment, violation of Civil Code section 2924.17, unfair competition, and declaratory relief.

DISCUSSION

1. Standard of Review

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable probability that the defect can be cured by amendment. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1082.) The plaintiff has the burden to show how the complaint could be amended to cure any defect. (*Ibid.*) The plaintiff can make that showing for the first time on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

¹ A signed order of dismissal is an appealable judgment. (Code Civ. Proc., § 581d.)

2. *The Trial Court Properly Sustained the Demurrer to the First Cause of Action for Cancellation of the Trust Deed Assignment*

The first cause of action in the pleading is for cancellation of instrument, the trust deed assignment, under Civil Code section 3412. Civil Code section 3412 provides:

“A written instrument, in respect to which there is 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.”

McDonald contends he has adequately pled that the trust deed assignment was invalid for four reasons: (1) Sandoz was acting on behalf of Aurora rather than MERS, so Aurora unlawfully assigned the trust deed to itself; (2) the trust deed assignment violated the statute of frauds because MERS, purportedly acting on behalf of MILA or its successors or assigns, failed to disclose the name of its principal; (3) MERS had no authority to assign the deed of trust because any authority given to MERS by MILA lapsed when MILA went out of business; and (4) the statement in the assignment that the deed of trust was assigned to Aurora was false because the note and the deed of trust are inseparable and the note was never assigned to Aurora.

“MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as ‘nominee’ for the lender, and granted the authority to exercise legal rights of the lender.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*).)

“MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. [Citations.]

As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans. [Citation.]” (*Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040.)

A borrower has no standing to challenge a completed foreclosure sale based on a claim that the foreclosing party had no authority to foreclose unless the borrower suffered prejudice as a result. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507-1508 (*Herrera*); *Fontenot, supra*, 198 Cal.App.4th at p. 272; but see *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094-1095 [stating that a borrower has standing to challenge a trust deed assignment if the assignment is void].)² An assignment of a deed of trust does not change the borrower's obligations under the note and ordinarily does not prevent the borrower from making the payments due, and therefore does not prejudice the borrower. (*Herrera, supra*, at p. 1508; *Fontenot, supra*, at p. 272.) A plaintiff must allege specific facts showing prejudice even if the trust deed assignment is void. (*Herrera, supra*, at p. 1507.)

Similarly, a borrower maintaining an action prior to a foreclosure sale has no standing to challenge a trust deed assignment unless the borrower suffered prejudice as a result of the assignment. (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 85.) A trust deed assignment does not change the borrower's obligations under the note, and there ordinarily is no reason to believe that the original lender, or its successor, would refrain from foreclosure if the loan is in default. (*Ibid.*) A borrower must allege specific facts showing prejudice. (See *Herrera, supra*, 205 Cal.App.4th at p. 1507; *Siliga, supra*, at p. 85.)

McDonald fails to allege any facts showing that he suffered prejudice as a result of the trust deed assignment. Importantly, he does not dispute that he defaulted under

² The California Supreme Court granted review in *Yvanova v. New Century Mortg. Corp.*, S218973, on August 27, 2014, limiting the argument to the following issue: “In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?”

the note and that a proper party may initiate a nonjudicial foreclosure. McDonald also alleges no facts suggesting that the trust deed assignment prevented him from making payments or caused him prejudice in any way. That is, he fails to explain how he was aggrieved if Aurora instead of the original lender directed the trustee to foreclose. We therefore conclude that he has no standing to challenge the trust deed assignment by seeking its cancellation. In light of our conclusion, we need not address the particular grounds asserted for invalidating the assignment.³

3. *The Trial Court Properly Sustained the Demurrer to the Second Cause of Action for Violation of Civil Code Section 2924.17*

Civil Code section 2924.17 establishes requirements for declarations and other documents recorded or filed in connection with nonjudicial or judicial foreclosure proceedings, including trust deed assignments. Subdivision (a) states that such documents “shall be accurate and complete and supported by competent and reliable evidence.” Subdivision (b) states, “Before recording or filing any of the documents described in subdivision (a), 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.” The statute was enacted in 2012 as part of the California Homeowner Bill of Rights (Stats. 2012, ch. 86, § 20) and became effective on January 1, 2013. (Cal. Const., art. IV, § 8, subd. (c)(1).)

A statute operates prospectively only unless the Legislature clearly intended it to operate retrospectively. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1209.) “[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.” (*Id.* at p. 1209.) A retroactive

³ Aurora cites *Keshtgar v. U.S. Bank, N.A.* (2014) 226 Cal.App.4th 1201, review granted Oct. 1, 2014, S220012, in support of its argument that McDonald has no standing to dispute the validity of the trust deed assignment. Since the California Supreme Court granted review in *Keshtgar*, the opinion is no longer considered published and is not citable authority. (Cal. Rules of Court, rules 8.1105(e), 8.1115(a).)

or retrospective statute is one that affects rights, obligations, acts, transactions, and conditions performed or existing prior to the statute's adoption. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839.) “ “[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.” [Citation.]’ ” (*Ibid.*)

Civil Code section 2924.17 contains no express retroactivity provision, and McDonald fails to cite or discuss its legislative history. Absent a showing to the contrary, we conclude that the statute operates prospectively only and does not apply retroactively to acts or transactions performed prior to its effective date. The trust deed assignment was recorded on July 22, 2011, before the effective date of the statute, and therefore is not governed by the statute. The trial court properly sustained the demurrer to the second cause of action.

4. *The Trial Court Properly Sustained the Demurrer to the Third Cause of Action for Unfair Competition*

A private person has standing to sue for relief under the unfair competition law only if he or she “has suffered injury in fact and has lost money or property as a result of the unfair competition.” (Bus. & Prof. Code, § 17204.) To satisfy these standing requirements, a plaintiff must “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.)

McDonald does not dispute that he defaulted on his loan and acknowledges that the notice of default was recorded before the trust deed assignment. Accordingly, any economic injury resulting from the impending foreclosure was caused by McDonald's default on his loan, not by the trust deed assignment. (*Jenkins v. JPMorgan Chase, N.A.* (2013) 216 Cal.App.4th 497, 523 [“As Jenkins's home was subject to nonjudicial foreclosure because of Jenkins's default on her loan, which occurred before Defendants'

alleged wrongful acts, Jenkins cannot assert the impending foreclosure of her home (i.e., her alleged economic injury) was caused by Defendants' wrongful actions"].) Because McDonald has no standing to sue under the unfair competition law, the trial court properly sustained the demurrer to the third cause of action.

5. *The Trial Court Properly Sustained the Demurrer to the Fourth Cause of Action for Declaratory Relief*

McDonald alleges in his declaratory relief cause of action that the parties dispute the validity of the trust deed assignment. He seeks a judgment declaring whether the trust deed assignment was valid and, if it was invalid, whether Aurora acquired an interest in the property by any other means. McDonald argues that if he prevails on his claim for cancellation of the trust deed assignment, declaratory relief will be necessary to determine whether Aurora has any interest in the deed of trust or the property. McDonald's declaratory relief cause of action fails because there is no actual controversy relating to the legal rights of these parties. Even if MILA or MERS lacked authority to assign the deed of trust to Aurora, the "true victim" is not McDonald because the assignment merely replaced one creditor with another. (*Fontenot, supra*, 198 Cal.App.4th at p. 272.) In any event, the declaratory relief cause of action also fails because it is duplicative of his cause of action for cancellation of the trust deed assignment. (*California Ins. Guarantee Assn v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623-1624.) The trial court did not err in sustaining the demurrer to this cause of action.

DISPOSITION

The judgment is affirmed. Aurora is entitled to costs on appeal.

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LAVIN, J.*

WE CONCUR:

KITCHING, Acting P. J.

ALDRICH, J.

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