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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DAVID FEE, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	2d Civil No. B263042 (Super. Ct. No. 1415765) (Santa Barbara County)

David Fee filed this action to prevent a nonjudicial foreclosure. He appeals from the judgment after orders (1) sustaining without leave to amend a demurrer to claims based on fraud, negligence, negligent infliction of emotional distress (NIED), and intentional infliction of emotional distress (IIED); and (2) granting summary judgment against him on his cause of action for declaratory relief. We affirm.

BACKGROUND

Fee borrowed $2.25 million in 2006 from Washington Mutual Bank, formerly known as Washington Mutual Bank, FA

(WaMu), to refinance a residence in Montecito. Fee signed a deed of trust in favor of WaMu to secure the loan. The deed of trust names California Reconveyance Company (CRC) as trustee and grants the property to CRC "in trust, with power of sale."

In 2008, JPMorgan Chase Bank, N.A. (Chase) purchased WaMu's assets from WaMu's receiver, the Federal Deposit Insurance Corporation (FDIC). Chase sent Fee a letter informing him that it owns the loan and that its subsidiary (Chase Home Finance, LLC) will service the loan.

Fee stopped making payments on the loan in 2010. At Chase's direction, CRC recorded a notice of trustee's sale. (Civ. Code, § 2924, subd. (a)(1) & (3).)[1] Two weeks later, it recorded the assignment of the deed of trust from the FDIC to Chase, "memorializ[ing] the transfer that occurred . . . on September 25, 2008."

Fee filed this action one week before the scheduled sale. He requests an order enjoining the sale, damages, and a declaration that he owns the property free of any other claims and that Chase has no right to the property or standing to foreclose. Fee alleges Chase is not authorized to foreclose because it is not the beneficial owner of the loan and the deed of trust. He also alleges Chase was negligent and engaged in fraud when it communicated with him about loan modification.

After two rounds of demurrer and amendment, the trial court sustained a demurrer without leave to amend as to all causes of action except the cause of action for declaratory relief.

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

That cause of action, it concluded, was authorized by the newly enacted Homeowner's Bill of Rights.[2]

Chase moved for summary judgment. It presented evidence establishing its right to foreclose. The trial court reviewed the evidence and concluded there is no triable issue of fact.

DISCUSSION

Summary Judgment

Chase is entitled to judgment as a matter of law on Fee's cause of action for declaratory relief because there is no actual controversy regarding Chase's right to foreclose. (Code Civ. Proc., § 1060.) Chase proved beyond dispute that it has the right to foreclose, even though it had no burden to do so. The law does "not . . . place a burden on the foreclosing entity to demonstrate in court, prior to foreclosing, that it has a right to foreclose." (*Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157 (*Lucioni*).)

We review an order granting summary judgment de novo to determine whether all the evidence submitted shows there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) If a defendant demonstrates that one or more elements cannot be established or there is a complete defense, the burden shifts to the plaintiff to demonstrate a triable issue of material fact exists. (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 581.)

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[2] Sections 2920.5, 2923.4-2923.7, 2923.9-2924.12, 2924.15, and 2924.17-2924.20, effective January 1, 2013.

In nonjudicial foreclosure proceedings, an assignee of the original beneficiary of the deed of trust may direct the trustee to sell the property. (§ 2924, subd. (a)(6); *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 923 (*Yvanova*).) After the sale, the borrower may bring an action for wrongful foreclosure against the foreclosing party on the ground it lacked authority to foreclose because the assignment was void. (*Ibid.*; *Lucioni*, *supra*, 3 Cal.App.5th at p. 160.) The borrower may do so even if it is in default. (*Yvanova*, at p. 924.)

Here, Chase established that it is the assignee of the original beneficiary with the right to foreclose. Fee does not dispute that the loan was originally a WaMu asset. Chase submitted the 2008 purchase agreement with the FDIC in which it acquired all of WaMu's assets. Chase's representative, who is familiar with its loan files and WaMu's business records, declares that Fee's loan is a Chase asset and has not been securitized or sold to a third party since Chase purchased it from the FDIC. CRC was authorized to record the notice of sale for Chase because CRC is named as trustee with power of sale on the deed of trust. (§ 2924, subd. (a)(1).)

Fee contends there is a triable issue of fact whether Chase acquired his loan in the purchase agreement with the FDIC because the purchase agreement did not include a schedule of assets. But the agreement included all WaMu assets: "[A]ll right, title, and interest of the [receiver] in and to all of the assets . . . of [WaMu] whether or not reflected on the books of [WaMu] as of" the date WaMu closed. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 764-765.)

Fee's experts speculated that WaMu may have transferred or securitized the loan before Chase purchased

WaMu's assets. For evidentiary support, Fee relies on a 2011 form letter in which Chase states that the loan "was sold into a public security managed by [Chase] and may include a number of investors." But the letter continues, "The address of your investor is:" and provides Chase's own address. It does not contradict Chase's evidence that it is the beneficial owner of the loan.

Fee points out that the original note was lost. There is no requirement that the foreclosing party possess the original note. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440.) That it was lost is not evidence that it was sold or securitized before the FDIC seized WaMu's assets.

Chase's copy of the note is endorsed "in blank" by a WaMu representative. This does not, as Fee contends, demonstrate that WaMu assigned or securitized it before the FDIC seized its assets.

Fee points out that Chase did not record an assignment of the deed of trust until five years after the purchase agreement and after Chase initiated foreclosure proceedings. But there is no requirement that an assignment of a deed of trust be recorded. (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 336.) The requirement that an assignment of the beneficial interest in a debt secured by real property must be recorded in order for the assignee to exercise the power of sale applies only to a mortgage and not to a deed of trust. (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122.) There is no triable issue of fact concerning Chase's authority to foreclose. Fee's speculation to the contrary is insufficient. (*Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 913 (*Gillies*).)

Moreover, a borrower such as Fee may not bring a presale action to enjoin the sale based on lack of authority to foreclose. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*), overruled on other grounds by *Yvanova*, *supra*, 62 Cal.4th at p. 199; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*).) This is because preemptive action would introduce judicial intervention into a comprehensive nonjudicial statutory scheme. (*Jenkins*, at p. 513; *Gomes*, at p. 1155.)

The Homeowner's Bill of Rights does not alter the rule. (*Lucioni*, *supra*, 3 Cal.App.5th 150.) The trial court allowed Fee to pursue his preemptive declaratory relief action because it believed the newly enacted Homeowner's Bill of Rights (effective January 1, 2013) superseded *Jenkins* and *Gomes* and authorized preemptive action to challenge the right to foreclose. But our colleagues in Division Five subsequently reached a contrary conclusion with which we agree. (*Ibid.*)

The Homeowner's Bill of Rights requires a mortgage servicer, before filing a notice of default or notice of sale, to "ensure that it has reviewed competent and reliable evidence to substantiate . . . the right to foreclose" and to notify the borrower of the right to "[a] copy of any assignment . . . required to demonstrate the right of the mortgage servicer to foreclose." (§§ 2924.17, subds. (a) & (b), 2923.55, subd. (b)(1)(B)(iii).)[3] It authorizes a presale action by the borrower to enjoin material

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[3] Sections 2924, subdivision (a)(6), 2924.17, and 2923.55 became effective January 1, 2013, just before CRC signed the notice of default (January 31, 2013) and recorded it (February 4, 2013).

violations of nine provisions, including section 2924.17 (duty to investigate the right to foreclose). The *Lucioni* court concluded it does "not create a right to litigate, preforeclosure, whether the foreclosing party's conclusion that it had the right to foreclose was *correct*." (*Lucioni*, *supra*, 3 Cal.App.5th at p. 163.) If the foreclosing party's conclusion is incorrect, it will be exposed to damages in a postsale action. (*Yvanova*, *supra*, 62 Cal.4th at p. 923.) And if it repeatedly or intentionally fails to investigate its right to foreclose, it will be exposed to penalties or punitive damages. (§ 2924.17, subd. (c); *Lucioni*, at p. 164.)

Yvanova does not authorize Fee's presale action. Fee argues, "*Yvanova* confirmed 'black letter' law mandating relief from 'wrongful foreclosure' before the sale." But *Yvanova* was a postsale case and the court wrote: "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." (*Yvanova*, *supra*, 62 Cal.4th at p. 924.) The "aspect of *Jenkins*, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure [was] not within the scope of [its] review." (*Id.* at p. 934.)

Fee contends Chase must prove validity of the assignment before the sale because a party claiming under an assignment bears the burden to prove its validity. (*Yvanova*, *supra*, 62 Cal.4th at p. 938; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292.) But this rule applies to assignees who file suit to enforce their assigned rights; not to assignees who initiate nonjudicial foreclosure. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814.)

Fee urges that presale protection is needed when foreclosure is based on a void or missing assignment. There is no

void or missing assignment here. This case does not present the concerns raised in *Yvanova* about foreclosure by a stranger to the debt because the undisputed evidence shows Chase owns the loan. (See *Yvanova*, *supra*, 62 Cal.4th at pp. 938-939.) Chase established its right to proceed and was entitled to judgment on the declaratory relief action as a matter of law.

Demurrer

We review de novo the order sustaining Chase's demurrer without leave to amend, accepting the truth of material facts properly pleaded but not contentions, deductions or conclusions of fact or law. (*Yvanova*, *supra*, 62 Cal.4th at p. 924.) Fee bears the burden of showing that the facts pleaded establish every element of each cause of action. (*Gillies*, *supra*, 7 Cal.App.5th at p. 912.) Fee must prove there is a reasonable possibility that he can amend his complaint to overcome any legal deficiencies. (*Ibid*.) We conclude there is no reasonable possibility that amendment would cure the complaint's legal defects.

Fraud

Fee does not state a cause of action for fraud based on wrongful foreclosure and there is no reasonable possibility he could amend to do so. To state a cause of action for fraud, a plaintiff must allege with particularity a false representation of material fact, knowledge it is false, intent to induce another to rely on it, actual reliance, and resulting damages. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) In an action against a corporation, a plaintiff must also allege the name of the person who made the representation, his or her authority to speak, to whom he or she spoke, what was said and

when it was said. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157 (*Tarmann*).)

Less specificity is required when the corporate defendant must necessarily possess full information concerning the facts. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 217.) But that exception does not apply because Fee is in the best position to know which representations he relied upon to his detriment.

Fee's allegations and proposed amendments do not meet the *Tarmann* requirements. In his third amended complaint, Fee alleged that unnamed Chase representatives made false statements about its authority to foreclose and the loan modification process in order to induce him to default and that he would have cured his default if they had not done so. On appeal, he contends he can state fraud more particularly by alleging that the identity of "agents listed on letters demanding payment or on recorded instruments . . . will be obtained by discovery"; and that these individuals "extort[ed] payments on the Note by threatening wrongful foreclosure without standing," by "mail and phone," "between the date the relevant parties acquired the loan and the present." These general allegations of fraud do not state a cause of action.

Negligence and NIED

Fee alleges that Chase breached duties to investigate and disclose information about the loan, made false statements about the loan modification process, and commenced foreclosure without authority.

As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role

as a lender. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 [no duty of care to borrower in preparing appraisal of security for loan to protect lender].) The Homeowner's Bill of Rights may have modified this rule, but Fee does not state a cause of action under any of its provisions. Loan servicing, modification, and foreclosure are within the scope of conventional lending activities. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67-68 (*Lueras*).)

This case is unlike *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 901, in which the ongoing relationship between a construction lender and a borrower throughout construction gave rise to a duty of care. As that court observed, "we deal with a construction loan, not a residential home loan where, save for possible loan servicing issues, the relationship ends when the loan is funded." (*Ibid.*) Fee alleges no ongoing relationship or active participation in a construction enterprise. (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 864.)

The claim for negligent infliction of emotional distress fails for the same reason. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It allows for recovery of emotional distress damages without physical injury in a negligence cause of action under limited circumstances. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928; see also *Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 126 [claim for negligent infliction of emotional distress requires proof of duty, breach, causation and damages].)

Fee's reliance on *Biakanja v. Irving* (1958) 49 Cal.2d 647 is unavailing. That case concerned the issue of duties owed

by a negligent actor to third parties not in privity with the actor. Fee is not a third party to the loan agreement. He is in privity of contract. His remedy lies in breach of contract, not negligence. (*Lueras*, *supra*, 221 Cal.App.4th at p. 68.)

Fee also relies on federal district court cases for the rule that mortgage lenders have a duty of care toward their borrowers. But federal district court cases do not control.

Fee's contention that Chase owed him a fiduciary duty likewise fails. No fiduciary duty exists between a borrower and a lender in an arm's length transaction. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206.)

IIED

Fee does not state a cause of action for intentional infliction of emotional distress because he does not allege extreme and outrageous conduct. Fee alleges that Chase's "aforementioned acts" caused him to suffer mental anguish and distress. He contends Chase extorted payments by threatening wrongful foreclosure and it committed grand larceny by stealing the property. These contentions are not supported by pleaded facts. "It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid." (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334 [borrower had no cause of action for negligence against lender based on federal statutory duty].)

Leave to Amend

The trial court identified all of these defects and allowed Fee two opportunities to amend. He has not established that he could cure the defects if given further opportunity to do so.

DISPOSITION

The judgment is affirmed. Chase is awarded its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

Holman & Martin, Andrew R. Martin and Adam Holman, for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr., for Defendants and Respondents.