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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

RUPERT MACONICK, Plaintiff and Appellant, v. CHASE HOME FINANCE LLC et al., Defendants and Respondents.	B239093 (Los Angeles County Super. Ct. No. SC 112271)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Richard A. Stone, Judge. Affirmed.

Stephen F. Lopez and Alan L. Geraci for Plaintiff and Appellant.

AlvaradoSmith, Thomas Van, John M. Sorich, S. Christopher Yoo and Jacob M. Clark for Defendants and Respondents.

SUMMARY

A plaintiff who borrowed $2.2 million from a now-failed bank, and executed a deed of trust on his residence securing payment of the loan, seeks to quiet title to the property against the defendant bank that purchased the failed bank's assets, contending that the defendant did not in fact acquire the note and deed of trust and, as a consequence, title to the property is vested in plaintiff alone. Because plaintiff has not paid the debt secured by the deed of trust and does not allege an unconditional offer to do so, he cannot state a quiet title action against defendants.

FACTS

In 2007, plaintiff Rupert Maconick borrowed more than $2.2 million from Washington Mutual Bank and executed a deed of trust securing the promissory note, with Washington Mutual as the beneficiary and defendant California Reconveyance Company (CRC) as trustee. Defendant JPMorgan Chase Bank, N.A., purchased the assets of Washington Mutual from the Federal Deposit Insurance Corporation (FDIC) in September 2008. Nonjudicial foreclosure proceedings on plaintiff's residence began in January 2011, but the notice of default and notice of trustee's sale were rescinded by notice recorded on April 29, 2011, and plaintiff asserts without contradiction that he is current on the note.

Meanwhile, shortly before the rescission notice was filed, plaintiff sued JPMorgan Chase and CRC for predatory lending practices. The complaint included a cause of action to quiet title to the property.

Plaintiff's complaint was verified. He alleged the location and legal description of the property. He alleged that neither the defendants "nor any agent for them has ownership or possession of the original promissory note, the basis for any of these defendants to bring a foreclosure sale based upon breach of the promissory note for which the deed of trust, with the power of sale, is security." In addition to the predatory lending allegations, plaintiff alleged the foreclosure sale (which had not yet been rescinded when the complaint was filed) would adversely affect his right to clear title and that defendants' "subsequent conduct will result in wrongfully taking from [plaintiff] the

right to peaceful possession and enjoyment of the real property." He alleged he was the owner and entitled to possession of the property. He alleged that the defendants "claim an interest in the property adverse to the [plaintiff's] herein[,]" and that the defendants' claim "is without any right whatsoever, and said [defendants] have no legal or equitable right, claim, or interest in said property." He sought a declaration "that the title to the subject property is vested in [plaintiff] alone and that the [defendants] . . . be declared to have no estate, right, title or interest in the subject property and that said [defendants] . . . be forever enjoined from asserting any estate, right, title or interest in the subject property adverse to [plaintiff's] herein."

Defendants' demurrer to the quiet title cause of action claimed (incorrectly) that the complaint did not identify the legal description of the property. Defendants pointed out that the title documents (citing the deed of trust) did not indicate that JPMorgan Chase had a recorded interest in the property, and contended plaintiff therefore did not establish that JPMorgan Chase had any adverse claim to title on the property. (The deed of trust names Washington Mutual as the beneficiary.) Finally, defendants argued that under case law precedents, plaintiff "should be required to tender the amount of the unpaid debt under the loans in order to state a claim to quiet title."

Plaintiff's opposition to the demurrer did not specifically address the quiet title cause of action (instead addressing the allegations of fraud, misrepresentation and Civil Code violations), but did state that "[t]he causes of action outlined in the complaint are pled with specificity to include all elements sufficient to state a claim to relief that is plausible on its face with facts sufficient to constitute causes of action." Defendants' reply to the opposition asserted that plaintiff's failure to mention the quiet title cause of action was a concession that the claim was "fatally flawed."

At the hearing on the demurrer, plaintiff's counsel did not argue against the court's tentative ruling sustaining the demurrer, stating that she "[knew] the court has considered the paperwork." The trial court granted defendants' demurrer to all causes of action without leave to amend. The court's ruling recounts the parties' arguments, but does not otherwise address the quiet title cause of action. (The court took judicial notice of

various documents, including JPMorgan Chase's purchase agreement with the FDIC, and found JPMorgan Chase was Washington Mutual's successor and did not assume any borrower claims related to loans made by Washington Mutual before the purchase, so there was no basis for plaintiff to make a claim rising from the origination of the loan.) At the hearing, plaintiff's counsel asked if the court was "inclined to allow us to amend the complaint." The court declined to do so, saying, "[T]here's just nothing here[,]" and that the reasoning in federal precedents supplied to the court "is incontrovertible and makes perfect sense to the court."

Judgment was entered and plaintiff appealed.

DISCUSSION

As a preliminary matter, we reject defendants' contention that plaintiff waived his right to appeal the court's ruling as to the quiet title cause of action. The facts we have recited do not support a waiver, but in any event the Code of Civil Procedure tells us that, when a court sustains a demurrer without leave to amend, the question whether or not the court abused its discretion in making such an order "is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 ["The issue of leave to amend is always open on appeal, even if not raised by the plaintiff."].) Further, a demurrer tests the legal sufficiency of the complaint and we review the complaint de novo (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318); "the rule that on appeal a litigant may not argue theories for the first time does not apply to pure questions of law." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.)

On the merits, we conclude plaintiff cannot state a quiet title claim as a matter of law.

The substance of plaintiff's claim is that JPMorgan Chase "did not acquire the note and deed of trust at issue from the FDIC, despite Chase's claim it did." This is because, according to plaintiff's appellate brief, (1) Washington Mutual "transferred its interest in the note and deed of trust to a REMIC [real estate mortgage investment conduit] trust" *before* JPMorgan Chase acquired Washington Mutual's assets, and (2) in

addition, JPMorgan Chase "did not acquire all of [Washington Mutual's] assets and in fact in many instances acquired only servicing right[s] to loan[s] such as Plaintiff's." Based on these allegations, plaintiff seeks a declaration that JPMorgan Chase has "no legal or equitable right, claim or interest" in the property and that title is vested in plaintiff alone.

We note first that a number of federal district courts have rejected plaintiff's first premise. "The argument that parties lose their interest in a loan when it is assigned to a trust pool has . . . been rejected by many district courts." (*Lane v. Vitek Real Estate Ind. Group* (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1099 (*Lane*).) Plaintiff's second argument, that JPMorgan Chase "did not acquire all of [Washington Mutual's] assets" is conclusory and provides no factual allegations to support the implicit claim that plaintiff's loan was somehow not among the assets JPMorgan Chase acquired from the FDIC under the September 2008 purchase agreement. But we need not discuss or decide either point in order to conclude that plaintiff cannot state a cause of action to quiet title.

The necessary contents of a complaint to quiet title are specified by statute. Plaintiff has met all those requirements: a verified complaint including the property description; the basis of the plaintiff's title; "[t]he adverse claims to the title of the plaintiff against which a determination is sought" (here, JPMorgan Chase's claim that it is the holder of the note and beneficiary of the deed of trust, and plaintiff's claim that it is not); the date as of which determination is sought (here, September 25, 2008, the date JPMorgan Chase claims to have acquired its interest in the deed of trust by virtue of its purchase of Washington Mutual's assets from the FDIC); and a prayer "for the determination of the title of the plaintiff against the adverse claims."[1] (Code Civ. Proc., § 761.020.)

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1 Defendants contend, without citation to authority, that plaintiff has not alleged an adverse claim because JPMorgan Chase's "interest and right to enforce the Deed of Trust does not amount to a claim of ownership" in the property. This misreads the quiet title statute. A " '[c]laim' " is defined to include "a legal or equitable right, title, estate, lien, or interest in property or cloud upon title." (Code Civ. Proc., § 760.010, subd. (a).) The statute authorizes an action "to establish title against adverse claims to real or personal

But there is a further requirement of California law that plaintiff cannot meet. Almost 40 years ago, the Court of Appeal held, relying on Supreme Court precedent, that a mortgagor cannot quiet title without discharging his debt. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477-478 ["The cloud upon his title persists until the debt is paid. [Citation.] He is entitled to remain in possession, but cannot clear his title without satisfying his debt."].) *Aguilar* was based on now-century-old precedent stating that " '[w]henever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the conditions that he shall do that which is consonant with equity.' " (*Burns v. Hiatt* (1906) 149 Cal. 617, 621-622 (*Burns*).)

In *Burns*, the fact that the underlying debt was barred by the statute of limitations was "immaterial in such a case, the statute barring the remedy only, and not extinguishing, or even impairing, the obligation of the debtor. *As long as the obligation to pay the debt exists, it is not equitable that the mortgagor should have relief against the mortgage given to secure the same, and such relief can be given only on condition that he discharges the obligation.*" (*Burns, supra*, 149 Cal. at p. 622, italics added.) *Burns* involved "a party standing in the position of a mortgagor [the mortgagor's grantee] seeking to quiet his title against the mortgagee, without paying or offering to pay the debt for which the mortgage was created." (*Id.* at p. 621.) *Burns* observed: "It is the settled rule in this state that this cannot be done." (*Ibid.*)

Other cases have followed the rule that a mortgagor cannot quiet title without discharging his debt. In *Mix v. Sodd* (1981) 126 Cal.App.3d 386, the court said: "It is

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property or any interest therein." (Code Civ. Proc., § 760.020, subd. (a).) A right to enforce a deed of trust is certainly a "lien" or an "interest in property," and it is adverse to plaintiff's claim in his complaint that "the title to the subject property is vested in [plaintiff] alone and that [defendants] . . . have no estate, right, title or interest in the subject property . . . ."

well established in the law that a mortgagor in possession may not maintain an action to quiet title, even though the debt is unenforceable because of the statute of limitations." (*Id.* at p. 390.) The *Mix* court explained: "This rule is based upon the equitable principle that he who seeks equity must do equity. That is, even though the debt is unenforceable, a court of equity will not aid a person in avoiding the payment of his or her debts." (*Ibid.*; see *Shimpones v. Stickney* (1934) 219 Cal. 637, 649 ["The plaintiff in a quiet title suit is not helped by the weakness of his adversary's title but must stand upon the strength of his or her own. The fatal weakness in plaintiff's position is that she did not do equity by paying her debt[.] . . . It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured."]; see also *Horton v. Cal. Credit Corp. Ret. Plan* (S.D.Cal. 2011) 835 F.Supp.2d 879, 893 [even if Code Civ. Proc., § 761.020 requirements are met, "California courts have pronounced that in order to maintain a cause of action to quiet title, the mortgagor must allege tender or ability to tender the amounts admittedly borrowed"]; *Lane*, *supra*, 713 F.Supp.2d at p. 1103 ["As plaintiffs concede they have not paid the debt secured by the mortgage, they cannot sustain a quiet title action against defendants."]; *Kelley v. Mortg. Electronic Registration Systems* (N.D.Cal. 2009) 642 F.Supp.2d 1048, 1057 [plaintiffs did not state a claim to quiet title because they "have not alleged that they are the rightful owners of the property, i.e.[,] that they have satisfied their obligations under the Deed of Trust"].)

Plaintiff asserts that, if necessary, he can plead that he will pay the note "if in fact [JPMorgan] Chase is the actual mortgage[e] therefor entitled to payment as a condition of an order quieting title." This is not enough. Nothing in the law suggests that a plaintiff may, in a court of equity, place conditions on his payment of a debt he concedes is owed, and indeed that he contends he is currently paying. It is undisputed that plaintiff executed the note and the deed of trust securing repayment of the note, and it is likewise indisputable that the deed of trust conveys the property to CRC in trust, with the power of sale, and permits the note or a partial interest in the note to be sold without prior notice to the borrower. (See also *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204

Cal.App.4th 433, 440 ["nothing in the applicable statutes . . . precludes foreclosure when the foreclosing party does not possess the original promissory note"].)

In short, whether or not JPMorgan Chase is "the actual mortgage[e]" or the holder of the note is irrelevant to plaintiff's obligation, in a court of equity, to pay the debt secured by the mortgage in order to sustain a quiet title cause of action. As *Burns* long ago stated, "As long as the obligation to pay the debt exists, it is not equitable that the mortgagor should have relief *against the mortgage given to secure the same*, and such relief can be given only on condition that he discharges the obligation." (*Burns*, *supra*, 149 Cal. at p. 622, italics added.) That was the law in 1906, and it is the law today.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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GRIMES, J.

I CONCUR:

BIGELOW, P. J.

RUBIN, J. – DISSENTING

I respectfully dissent.

A jurist once wrote, "We bristle against the suggestion of cutting off a litigant's claim because of inartful or sloppy pleading." The authority for this observation comes from a long line of California Supreme Court cases starting at least as far back as *Kelley v. Kriess* (1885) 68 Cal. 210. "If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend." (*Id.* at p. 212.) Apparently the "bristling" has not found a home in this appeal as the majority rejects appellant's repeated requests for leave to amend. I would reverse for that limited purpose.

This case emanates from the financial crisis of 2008. It is part of the seemingly interminable wave of foreclosures and evictions that have threatened homeowners who had executed deeds of trusts or mortgages on residences of declining value or with accelerating interest rates. Courts throughout the country continue to see the aftermath of the crisis, for example, in litigation that in one fashion or another attempts to forestall foreclosure efforts.

In cases of nonjudicial foreclosure under Civil Code section 2924 et seq., such as this one, these challenges often come in the form of declaratory relief or quiet title actions filed by homeowners seeking to stop the foreclosure proceedings. (See, e,.g. *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*).) Many of the cases have a familiar fact pattern: the original beneficiary of the deed of trust is no longer in the picture, having assigned the deed of trust and underlying note to another financial institution. The fact pattern continues: the foreclosing institution often cannot produce the underlying documentation. (See generally Silver-Greenberg, *E-Mails Imply JPMorgan knew Some Mortgage Deals Were Bad*, The New York Times (Feb. 6, 2013) http://dealbook.nytimes.com/2013/02/06/e-mails-imply-jpmorgan-knew-some-mortgage-deals-were-bad/?hp> [as of Feb. 7, 2013].)

If the original complaint in this case had sought such limited relief by, for example, seeking a declaratory judgment that respondent JPMorgan Chase[1] had no security or other interest in the subject property refinanced by appellant in 2007, this case might still be in the trial court, moving beyond the pleading stage and towards trial or summary judgment. Instead appellant, through prior counsel, filed a kitchen sink complaint that alleged fraudulent concealment, intentional misrepresentation, negligent misrepresentation, quiet title, declaratory relief/constructive or resulting trust, and violation of California Civil Code section 2924 et seq. which provides for nonjudicial foreclosures.

Predictably, the proceedings in the trial court became a bit messy. In the first three causes of action, appellant sought to hold respondent JPMorgan Chase responsible for alleged predatory loan practices by its predecessor Washington Mutual Bank. In the quiet title action, appellant sought a determination that none of the defendants, including respondent, had any interest in the property, apparently suggesting that respondent is a stranger. In its points and authorities in support of its demurrer, respondent JPMorgan Chase took the unusual position that "the title documents do not indicate that Chase has a recorded interest in the Subject Property. [Citation.] As a result, [appellant] fails to establish that Chase or JPMorgan has any adverse claim to title on the Subject Property." In appellant's opposition to the demurrer, he focused on his causes of action for damages and argued that respondent is not exempt from liability based on its agreement to purchase the assets of Washington Mutual Bank. At the same time, appellant both challenged respondent's interest in the property – "Defendants have yet to supply him with an ink signed copy of his loan documents, which poses the question of who legally holds possession of the title and/or deed of trust." And he seemed to concede

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[1] In the papers filed on appeal and in the trial court, respondent is sometimes referred to as Chase and other times as JPMorgan. The respondent's brief is filed on behalf of JPMorgan Chase Bank. I use these names interchangeably because the legal differences in name do not appear to be significant to the issues on appeal.

respondent's interest in the property – "Plaintiff has attempted numerous times to request a loan modification from Defendants . . . ." Presumably a stranger would be in no position to modify appellant's loan.

One way of reading this exchange in the trial court is that, according to appellant, respondent both has an interest in the property and has no interest in it, and respondent contends the relevant documents do not show respondent has any interest in the property at all.

With this backdrop in mind, appellant's counsel on appeal made the apparently wise choice to narrow his client's lawsuit. Appellant does not challenge the court's ruling on any of the damages causes of action. His substantive argument is simple: appellant has stated a cause of action for quiet title against respondent. He asks in his opening brief and in his reply brief that, if the quiet title cause of action as alleged is somehow deficient, he be given an opportunity to amend the complaint. The trial court denied any leave to amend. Instead of using a scattergun, now appellant's legal theory has become concrete and precise: "Plaintiff claims that Chase did not acquire the note and deed of trust at issue from the FDIC [which had acquired the Washington Mutual Bank assets], despite Chase's claim that it did. In fact in his cause for quiet title Plaintiff specifically alleges that Chase and [co-respondent] CRC have . . . no legal or equitable right, claim or interest in (the) . . . property." ~(AOB 7)~

The majority does not quite address head on the quiet title claim as alleged or as proposed. It first considers this case as a "lost note" case. I agree with the majority's legal analysis but part with its application here. Briefly, homeowners facing foreclosure often argue that unless the foreclosing entity can produce the underlying promissory note given by the borrower, properly endorsed, the foreclosure proceedings are a nullity. (*Debrunner, supra,* 204 Cal.App.4th at p. 439.) A number of courts, both state and federal (applying California law), have rejected this argument. "We likewise see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note." (*Id.* at p. 440, citing *Geren v. Deutsche Bank National* (E.D.Cal. 2011) 2011 WL 3568913; *Kolbe v. JP Morgan Chase Bank, N.A.*

(N.D.Cal. 2011) 2011 WL 4965065; *Hague v. Wells Fargo Bank, N.A.* (N.D.Cal. 2011) 2011 WL 3360026, at p. *3; *Impink v. Bank of America* (S.D.Cal. 2011) 2011 WL 3903197.)

These so called lost-note cases involve notes lost in the maelstrom in which unqualified and often unsuspecting homeowners signed notes and deeds of trust for homes they could not afford, and the ensuing rush by financial institutions to memorialize and eventually package and sell those notes and deeds of trust without an adequate paper trail. The majority correctly relies on *Lane v. Vitek Real Estate Indust. Group* (E.D.Cal. 2010) 713 F.Supp. 2d 1092, 1099, which deals with notes that had been assigned to a trust pool. The broader point is as stated in *Debrunner, supra,* 204 Cal.App.4th at page 440 that possession of the note is not simply a precursor to foreclosure.

To the extent a lost note claim might have been lurking in the complaint, appellant no longer pursues that theory. As his opening and reply briefs reveal, it is appellant's present theory that respondent is simply a stranger to this property: respondent's claims to the contrary, respondent never acquired an interest in the property, that respondent was not a mortgagee, trustee, or beneficiary of the deed of trust that appellant signed, and may not cause a foreclosure. (See *Debrunner, supra,* 204 Cal.App.4th at p. 441.)

The majority also concludes that appellant cannot satisfy another element of a quiet title claim, namely the requirement that a mortgagor (or trustor) discharge the debt before obtaining a quiet title. Initially, I observe that this is not a case in which the trustor is contending that the foreclosure was technically deficient, for example, by the failure to give adequate notice, or hold a proper sale, or otherwise comply with Civil Code section 2924 et seq. In those situations, quieting title against the beneficiary without tender of the debt owing would be inequitable, something, as the majority

correctly points out, the courts of equity will not countenance. (See *Burns v. Hiatt* (1906) 149 Cal. 617, 621-622.)[2]

None of the tender-of-debt cases cited by the majority deals with the contention that the beneficiary is a stranger. *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475 involved a claimed fraudulent mortgage signed by a criminal defendant in favor of his attorney, and the effect of the statute of limitations that had barred the underlying debt. There was no stranger to the title. In *Burns v. Hiatt*, *supra*, 149 Cal. 617, there was no dispute that the defendant was the mortgagee; the case dealt primarily with joinder in the underlying foreclosure proceeding. *Mix v. Sodd* (1981) 126 Cal.App.3d 386, also stated the rule that a borrower must pay its debt to quiet title even if the underlying debt is barred by the statute of limitations. There, the appellate court reversed the trial court's order refusing to quiet title expressing the law's disfavor of stale clouds on title, this cloud some 55 years old. *Shimpones v. Stickney* (1934) 219 Cal. 637 is somewhat far afield from the issues here. The opinion primarily addresses a finding by the trial court that an attorney-defendant in a quiet title action had engaged in fraudulent practices. By the time the case reached the Supreme Court the property had been sold a number of times, another quiet title action had started and the plaintiff had lost the property through foreclosure. The court concluded ownership of the property was moot. (*Id*. at p. 644.)

In *Horton v. Cal. Credit Corp. Ret. Plan* (S.D.Cal. 2011) 835 F.Supp.2d 879, another case cited in the majority opinion, the court in fact quieted title in favor of the plaintiff /borrowers, finding that "Plaintiffs have sufficiently alleged their ability to tender." (*Id.* at p. 893.) *Lane v. Vitek Real Estate Indust. Group*, *supra*, 713 F. Supp.2d 1092, was a predatory lending case, and states the general rule about tender. But the court cited to specific evidence of a valid assignment of the underlying deed of trust. (*Id*. at p. 1096.) *Kelley v. Mortg. Electronic Registration Systems* (N.D.Cal. 2009)

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[2] Appellant concedes the point in his opening brief: "Plaintiff does not dispute that as between a mortgagee and a mortgagor equity requires that the mortgagee [sic] must pay the debt as a condition to an order quieting title."

642 F.Supp.2d 1048, another predatory lending case, found the plaintiffs' quiet title claim deficient at the pleading stage because it did not allege tender but the court permitted plaintiffs leave to amend. (*Id*. at p. 1057.)

What all of these cases have in common is that none states that in order to plead a quiet title action, the plaintiff must allege payment or tender of the indebtedness to someone who is alleged to have no interest in the property. That observation notwithstanding, at page 13 of his opening brief, appellant states he can plead tender. "Finally, if necessary Plaintiff can plead as a condition of his action that he will pay the note if in fact Chase is the actual mortgage[e and] therefor[e] entitled to payment as a condition of an order quieting title." The majority says this offer is not enough because it is in the form of a conditional tender which equity does not recognize. There is no authority cited for the majority's conclusion, and it seems at odds with the notion that one of the main tasks given to courts in equity is to tailor orders to the specific equities presented. I also point out that, although not essential to the court's decision, the Supreme Court in *Shimpones v. Stickney*, *supra*, 219 Cal. at page 649 appeared to have approved of allegations in a complaint of " 'an offer of tender to the defendants, *or such of them as the court may adjudge entitled thereto*, of said principal sum of $1400 [the amount owing] together with all interest due thereon, and all costs, penalties and sums . . . rightfully due the defendants." (Italics added.) The italicized portion essentially conforms to what appellant has offered here: if the court determines that one of the defendants in this case, for example JPMorgan Chase, is entitled to be paid the underlying debt and other sums, appellant is prepared to do that.

At bottom, this lawsuit was started with a pleading run amok. It was drastically narrowed by appellant when he filed his opening brief, as the dismissed predatory lending claims were not pursued. Instead appellant has stated in his appellate briefs that he is prepared to file a tailored amended complaint in which he challenges whether Chase has

any an interest in the deed of trust. He should be permitted the opportunity to make those allegations and prove them up.[3]

RUBIN, J.

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[3] The proposed amendment is far from specious on its face. In conjunction with the demurrer, respondent filed some 80 pages of documents with a request for judicial notice. Although I have serious doubts about the propriety of taking judicial notice of at least some of the documents, for example the written contract between respondent and the FDIC for the purchase of Washington Mutual assets, and a press release from the Office of Thrift Supervision (see *Unlimited Adjusting Group, Inc. v. Wells Fargo Bank, N.A.* (2009) 174 Cal.App.4th 883, 888, fn. 4 [statements of facts contained in press release not subject to judicial notice]), what is telling is that none of these documents affirmatively shows that respondent has an interest in appellant's loan, deed of trust or promissory note. The press release does recite the enormity of respondent's purchase as Washington Mutual apparently was servicing $689.7 billion in loans, but no specific property is identified. The press release also suggests that Washington Mutual had changed its business strategy because of "declining housing and market conditions". The number of loans apparently was reduced through transfer. This statement is in keeping with a theory advanced by appellant that Washington Mutual Bank had in fact transferred its security interest in the subject property to a third party before the FDIC acquired its assets and sold them to respondent.

As to the recorded documents, although there is a reference to respondent in the subsequently rescinded default notice, there is no written assignment of the Washington Mutual Bank deed of trust to respondent or any other document that purports to track how it came to be that respondent supposedly acquired an interest in the subject property.