Filed 9/16/19 Townsend v. Harborview Mortgage Loan Trust CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TAMARA TOWNSEND, Plaintiff and Appellant, v. HARBORVIEW MORTGAGE LOAN TRUST 2006-SB1 et al., Defendants and Respondents.	B290337 (Los Angeles County Super. Ct. No. LC104809)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rupert A. Byrdsong, Judge. Affirmed.

Kellener & Kellener, Joseph W. Kellener and Thomas Townsend for Plaintiff and Appellant.

Wargo & French, Shanon J. McGinnis, Jeffrey N. Williams and Scott R. Laes for Defendants and Respondents Select Portfolio Servicing, Inc. and Deutsche Bank National Trust Company, as Trustee for Harborview Mortgage Loan Trust 2006-SB1.

Tamara Townsend defaulted on a home loan secured by a deed of trust on her property. In 2012, following a notice of foreclosure, a trustee's deed upon sale was recorded stating Townsend's home had been sold at a trustee's sale in 2011. Over the next four years Townsend continued to receive correspondence from the beneficiary of the deed of trust and its agents and assignees stating Townsend was in default on the loan and the property would be foreclosed upon, and notifying her of changes to the servicers and trustees on the deed of trust. At the same time the purported purchaser listed in the 2012 trustee's deed and his grantees and assignees caused to be filed a series of grant deeds, deeds of trust and assignments relating to Townsend's home.

In 2016 Townsend sued her original lender, its assignee and several other grantees, lenders, assignees and servicers in the chain of title. Townsend alleged a 2011 assignment of the interest in the deed of trust was void and the 2011 foreclosure sale was fraudulent. She also alleged claims against various groupings of defendants for intentional infliction of emotional distress, negligent infliction of emotional distress and fraud. The trial court sustained without leave to amend the demurrer of Select Portfolio Servicing, Inc. (SPS) and Deutsche Bank National Trust Company as Trustee for Harborview Mortgage Loan Trust 2006-SB1 (Deutsche Bank), finding Townsend's claims were time-barred, and entered a judgment of dismissal as to SPS and Deutsche Bank. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Loan, Assignment and Substitution of Trustee*

On July 17, 2006 Townsend executed a promissory note and deed of trust encumbering real property located at 4836 Calhoun Avenue, Sherman Oaks, to obtain a home loan in the principal amount of $832,000 from SBMC Mortgage (SBMC). The deed of trust identified the lender (that is, the beneficiary) as Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for SBMC, and named T.D. Service Co. as the trustee. The deed of trust was recorded with the Los Angeles County Recorder's Office on July 17, 2006.

On August 16, 2011 SBMC, through MERS, executed an Assignment of Deed of Trust assigning all rights in the deed of trust to Deutsche Bank. On August 17, 2011 Deutsche Bank executed a Substitution of Trustee stating Executive Trustee Services, LLC (ETS) was the new trustee under the deed of trust. The assignment was recorded with the County Recorder on August 24, 2011, and the substitution of trustee was recorded on August 30, 2011.[1]

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[1] We grant Townsend's unopposed request to take judicial notice of the following recorded documents: the 2011 assignment from SBMC to Deutsche Bank; the 2011 substitution of trustee; the 2011 notice of default and election to sell; the 2011 notice of trustee's sale; and the 2012 trustee's deed upon sale. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 [existence and facial contents of recorded documents properly noticed under Evidence Code sections 452, subdivisions (c) and (h)]; *City of Port Hueneme v. Oxnard Harbor Dist.* (2007) 146 Cal.App.4th 511, 514 [material documents

2. *The Purported Trustee's Sale*

In August 2011 Deutsche Bank, through its authorized agent ETS, initiated nonjudicial foreclosure proceedings pursuant to Civil Code section 2923.5 et seq. A notice of default and election to sell was issued and recorded in August 2011. A notice of trustee's sale was issued on November 29, 2011 and recorded on December 1, 2011. The notice of trustee's sale stated the sale was to occur on December 27, 2011.

On December 20, 2011 the servicer for Townsend's loan sent her a letter regarding loan modification assistance.

On March 29, 2012 a Trustee's Deed Upon Sale was recorded. The deed stated Townsend's home had been sold at public auction on December 27, 2011 to Alan Mikaelyan, the successful bidder at the trustee's sale.

3. *Correspondence Received by Townsend After the Purported Trustee's Sale*

Townsend continued to live in her home after the purported purchase by Mikaelyan, and she continued to receive correspondence from Deutsche Bank, its agents and assignees that was at odds with the fact her home had been purchased at a foreclosure sale and the loan extinguished. For example, in December 2012 Townsend received a notice of trustee's sale from ETS stating a trustee's sale would take place in January 2013; no sale occurred on that date. In February 2013 Townsend received a letter from the servicer of the loan advising her that a new servicer would be assuming service of her loan. Such letters

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specifically identified in complaint may be considered on demurrer].)

continued until shortly before the complaint was filed in this case—as late as June 2016 Townsend received a letter stating SPS would be substituted as the servicer of her loan as of July 1, 2016.

4. *Mikaelyan's Actions After the Purported Trustee's Sale*

Mikaelyan never had any contact with Townsend after his purported purchase of the property, and he never visited the home. Nonetheless, on August 14, 2012 Mikaelyan executed a grant deed transferring the property to Equity Partners International as a bona fide gift. Equity Partners subsequently transferred the home to Sahakyan Management Trading (Sahakyan) and Arthur Abrahamov. Sahakyan then executed a promissory note and deed of trust encumbering the property to obtain a loan of over $430,000. The beneficiary of that deed of trust later assigned more than 95 percent of its interest to various parties. In June 2013 the beneficiary filed a notice of default and election to sell. A few days later Sahakyan executed a grant deed transferring its interest in the property to Hovhannes Yesayan. Yesayan then executed a deed of trust and promissory note secured by Townsend's home for a loan of more than $680,000. The assignee on that deed of trust issued and recorded a notice of default and election to sell in September 2014, followed by a notice of trustee's sale in June 2015. In July 2015 Townsend filed for bankruptcy protection, which she alleges automatically stayed the foreclosure proceedings. Like Mikaelyan, none of the purported owners in the chain of title since 2012 has had any contact with Townsend or visited the home.

5. *The Operative Second Amended Complaint*

On October 28, 2016 Townsend filed a complaint and on November 4, 2016 a first amended complaint against the Harborview Trust, SBMC, Mikaelyan, Equity Partners, Sahakyan, Abrahamov, Yesayan, ETS, SPS and other entities associated with the deeds of trust in the chain of title. After Deutsche Bank (having been erroneously sued as Harborview Mortgage Loan Trust 2006-SB1) and SPS's demurrer was sustained with leave to amend, Townsend filed a second amended complaint on November 20, 2017 adding Deutsche Bank, in its capacity as trustee for the Harborview Trust, as a named defendant and alleging 10 causes of action: (1) wrongful foreclosure; (2) quiet title; (3) declaratory relief; (4) intentional infliction of emotional distress related to Deutsche Bank and ETS's alleged failure to inform Townsend no foreclosure sale took place in December 2011; (5) negligent infliction of emotional distress related to Deutsche Bank and ETS's failure to inform Townsend no foreclosure sale took place in December 2011; (6) intentional infliction of emotional distress related to an allegedly false Notice of Pending Acquisition received by Townsend; (7) negligent infliction of emotional distress related to the allegedly false Notice of Pending Acquisition; (8) fraudulent concealment related to Deutsche Bank's alleged concealment of the assignment of the deed of trust; (9) fraud; and (10) fraudulent concealment related to alleged fraud in the origination of Townsend's home loan.[2] Townsend's claims against Deutsche

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[2] Deutsche Bank was named in causes of action one through five and eight; SPS was named in causes of action one through three. Only these causes of action are at issue in this appeal.

Bank and/or SPS were based on two theories: First, Deutsche Bank had no authority to foreclose because the assignment from SBMC violated the Pooling and Services Agreement (PSA) governing the Harborview Trust, making the assignment legally void; and second, the December 2011 trustee's sale never took place, and thus the trustee's deed upon sale listing Mikaelyan as the purchaser was false and fraudulent.[3]

6. *Deutsche Bank and SPS's Demurrer*

Deutsche Bank and SPS demurred to the causes of action directed to them, arguing Townsend's claims were time-barred, Townsend lacked standing to challenge the assignment to Deutsche Bank and the second amended complaint failed to allege facts sufficient to state a cause of action.

The trial court sustained the demurrer without leave to amend based on its finding Townsend's claims were time-barred.

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[3] Deutsche Bank and SPS do not dispute Townsend's assertion the 2011 trustee's sale never took place and the 2012 trustee's deed upon sale was fraudulent. While Townsend may have a viable legal claim against the parties involved in the fraudulent recording, for the reasons discussed, she has failed to state a cause of action against Deutsche Bank and SPS in relation to the trustee's deed.

DISCUSSION[4]

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the trial court's ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *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. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074,

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[4] California Rules of Court, rule 8.204(a)(1)(B) requires appellate briefs to "support each point by argument and, if possible, by citation of authority." "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeited]." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [finding issues forfeited where briefs did "not even so much as cite to [applicable statutes], much less discuss their provisions or their application to the evidence presented at trial and to the causes of action framed under them"].)

Townsend's briefs are inadequate in this regard. Townsend has failed to provide any authority to support the vast majority of the positions asserted in her briefs. For example, her opening brief cites only to five cases, four of which concern the standard of review on demurrer. While we could affirm the trial court's decision on this basis alone, we exercise our discretion to address the issues on the merits.

1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1257.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1340; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

2. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action for Wrongful Foreclosure*

a. *Governing law*

To plead a cause of action for wrongful foreclosure, a plaintiff must allege "'(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.'"[5] (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.)

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[5] Townsend has not alleged she tendered the amount owed on her home loan, nor has she alleged she was excused from tendering. However, Deutsche Bank has not argued Townsend failed to state a cause of action for wrongful foreclosure on this basis; thus, the argument is forfeited. (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 ["'[a]ppellate courts are

b. *Townsend does not have standing to challenge the assignment from SBMC to Deutsche Bank*

Townsend alleged Deutsche Bank had no authority to foreclose on her property because the assignment from SBMC to Deutsche Bank was void and did not pass any interest in the deed of trust to Deutsche Bank. Townsend contends the assignment was void because it violated various provisions of the PSA governing the Harborview Trust. For example, the assignment was made five years after the securitized trust's closing date, and the loan was not eligible to be part of the trust because Townsend was in default and the loan had been fraudulently originated.

The Supreme Court has held a plaintiff may challenge an assignment of a deed of trust when the allegations, if true, would render the assignment "void, and not merely voidable at the behest of the parties to the assignment . . . ." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 923, (*Yvanova*).) The Court explained, "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale . . . ." (*Id.* at p. 935.) On the other hand, "[w]hen an assignment is merely voidable, the

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loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider'"]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226 [issues not raised in the trial court cannot be raised for the first time on appeal].)

power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Id.* at p. 936.)

Other than setting forth the basic explanation of the difference between void and voidable documents, the Supreme Court declined in *Yvanova* to provide guidance on what types of defects might render an assignment void; and "[i]llustrations of agreements that are wholly void of legal effect are not very numerous." (1 Corbin on Contracts (1993) § 1.7, p. 21.) Generally, though, documents may be considered void when they "violate[] an express mandate of the law or the dictates of public policy" (*Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 644; see also *Estate of Molino* (2008) 165 Cal.App.4th 913, 925 ["'[i]f a bargain violates public policy, it is void and of no legal effect'"]), or when the object of the contract is "wholly impossible . . . or so vaguely expressed as to be wholly unascertainable" (Civ. Code, § 1598). Likewise, a contract will be void when it involves fraud in the inception of the agreement, such as where the "promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all . . . ." (*Ford v. Shearson Lehman American Express, Inc.* (1986) 180 Cal.App.3d 1011, 1028.)[6]

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[6] Unlike fraud in the inception, fraud in the inducement renders a contract merely voidable. (*Ford v. Shearson Lehman American Express*, *Inc., supra*, 180 Cal.App.3d at p. 1028.)

After *Yvanova,* "the emerging consensus [is] that assignments, which allegedly violate PSA's and federal law are voidable rather than void, and as a result, borrowers do not have standing to challenge late transfers or other defects in the securitization process." (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 815 [plaintiff lacked standing to assert wrongful foreclosure claim based on untimely assignment into securitization trust]; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259 [same]; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814 [plaintiff "lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007–AR7 trust"].) Townsend has suggested no basis for us to disagree with those decisions. Accordingly, Townsend is without standing to challenge the 2011 assignment from SBMC to Deutsche Bank and cannot premise a cause of action for wrongful foreclosure on the alleged violations of the PSA.

In her reply brief Townsend appears to recognize the futility of her argument, conceding she cannot challenge the assignment based on certain PSA violations such as an untimely assignment. Nonetheless, Townsend contends she may challenge the assignment based on her allegation of fraud in the origination of her loan. The second amended complaint alleged that, when Townsend purchased the property in 2006, her real estate agent was paid a $27,000 yield spread premium, which Townsend maintains was in actuality an illegal "bribe" awarded by SBMC to Townsend's agent in exchange for procuring Townsend as an SBMC customer. Because of this alleged fraud, Townsend argues, the alleged PSA violations did not "involve only the immediate parties to the assignment"; instead, Townsend "was

directly affected." In other words, Townsend argues the alleged fraud in the origination of the loan rendered the assignment void rather than merely voidable.

This argument lacks merit. Townsend has failed to cite any authority for the proposition that fraud in the origination of the loan could have an impact on a borrower's standing to challenge an assignment to an assignee who was not involved in the loan's origination. While alleged fraud in the origination of the loan may render the loan and deed of trust voidable, Townsend has not raised that argument. She challenges only the assignment to Deutsche Bank. And an illegal payment to Townsend's agent in 2006 does not mean the subsequent assignment was void: Any preexisting irregularity did not render the assignment illegal, against public policy, wholly impossible, unascertainable or indicate fraud in the inception of the assignment itself.

c. *Allegations Mikaelyan filed a false and fraudulent trustee's deed upon sale do not support a claim for wrongful foreclosure*

Townsend's second theory in support of her wrongful foreclosure cause of action against Deutsche Bank is that the trustee's deed upon sale recorded in 2012 by Mikaelyan is a fraudulent document. However, Townsend's own allegations are fatal to her claim. Townsend alleges the Mikaelyan document is fraudulent because "no foreclosure sale ever took place." Accordingly, Townsend has not pleaded a cause of action for wrongful foreclosure, which requires an allegation the trustee or mortgagee "caused an illegal, fraudulent, or willfully oppressive sale of real property." (*Miles v. Deutsche Bank National Trust Co.*, *supra,* 236 Cal.App.4th at p. 408.) In the absence of an

actual foreclosure sale, Townsend cannot maintain a wrongful foreclosure action.

3. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action To Quiet Title or for Declaratory Relief*

To state a quiet title claim, a plaintiff must plead: (1) a description of the property that is the subject of the action; (2) the title of the plaintiff as to which a determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. (Code Civ. Proc., § 761.020.)

Declaratory relief is available to "[a]ny person interested under a written instrument . . . who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property . . . in cases of actual controversy relating to the legal rights and duties of the respective parties . . . ." (Code Civ. Proc., § 1060; see *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 728 ["[a] complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court"]; *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 615.)

Townsend's claims to title to the property and for declaratory relief against Deutsche Bank and SPS are based on the same allegations of wrongdoing contained in her wrongful foreclosure claim: Deutsche Bank had no interest in the deed of trust because the assignment from SBMC was void, and the

trustee's deed upon sale was fraudulent. As discussed, these arguments fail. Townsend cannot claim title or obtain declaratory relief based on the allegations of improprieties in the assignment because she does not have standing to challenge the assignment. Likewise, because no foreclosure sale took place, Townsend is unable to allege Deutsche Bank or SPS improperly foreclosed on the property; and she has not articulated a basis on which her claim to title is superior to Deutsche Bank's or SPS's.

4. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action for Intentional Infliction of Emotional Distress*

"'The elements of the tort of intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct . . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.] The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result."'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; accord, *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 945.) "Whether behavior is extreme and outrageous is a legal determination to be made by the court, in the first instance." (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 172; accord, *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 87; *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)

Townsend alleged Deutsche Bank's failure to inform her that the 2012 foreclosure sale never took place was outrageous conduct causing her emotional distress, anxiety and fear "over the apparent loss of her home and over her apparent imminent eviction." Townsend has failed to establish Deutsche Bank's actions were so extreme as to exceed the bounds of what is tolerated in a civilized community. "[C]ourts have recognized that the attempted collection of a debt by its very nature often causes the debtor to suffer emotional distress. . . . Such conduct is only outrageous if it goes beyond '"all reasonable bounds of decency."'" (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 745.) While it is concerning that Deutsche Bank allegedly cancelled the trustee's sale without informing Townsend, its purported failure to do so was not so extreme or outrageous as to satisfy this element of the tort. (See, e.g., *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009 [affirming order sustaining demurrer to cause of action for intentional infliction of emotional distress, noting "[t]here are no allegations that in conducting the foreclosure proceedings any of the defendants threatened, insulted, abused or humiliated the Wilsons"].)

5. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action for Negligent Infliction of Emotional Distress*

"There is no independent tort of negligent infliction of emotional distress; rather, '[t]he tort is negligence, a cause of action in which a duty to the plaintiff is an essential element.' [Citation.] 'That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.'" (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205.)

Townsend alleged Deutsche Bank had a duty to notify her that the foreclosure sale did not occur in 2011. However, Townsend has not alleged the basis for such a duty. "[A]s 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 mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; accord, *Ragland v. U.S. Bank National Assn., supra,* 209 Cal.App.4th at p. 206 ["[n]o fiduciary duty exists between a borrower and lender in an arm's length transaction"]; compare, e.g., *Sheen v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 346, 352 ["a lender does not owe a borrower a tort duty of care during a loan modification negotiation"] and *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67 [same] with, e.g., *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1183 [lender owes borrowers a duty of care in tort during home loan modification negotiations] and *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 [same].) The second amended complaint contains no allegations that would justify a finding Deutsche Bank had a relationship with Townsend giving rise to a duty that would permit Townsend to recover emotional distress damages if it were breached.

6. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action for Fraudulent Concealment*

"[T]he elements of a cause of action for fraud based on concealment are: '"(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant

must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage."'" (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.)

Townsend alleged Deutsche Bank fraudulently concealed that the assignment from SBMC to Deutsche Bank was void. This allegation is based on the same theory asserted in Townsend's wrongful foreclosure claim—that the assignment is void because it violated various terms of the PSA governing the Harborview Trust. As discussed, this argument fails. The alleged violation of the PSA renders the assignment voidable, not void. Thus, not only has Townsend failed to allege facts demonstrating Deutsche Bank concealed a void assignment, but also Townsend does not have standing to challenge the assignment. Accordingly, Townsend cannot maintain a cause of action for fraudulent concealment based on the facts alleged.

7. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

"'If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.' [Citation.] "'The burden of proving such reasonable possibility is squarely on the plaintiff.'" [Citation.] To satisfy this burden, "'a plaintiff 'must show in what manner he [or she] can amend his [or her] complaint and how that amendment will change the legal effect of his pleading'"' by clearly stating not only the legal basis for the

amendment, but also the factual allegations to sufficiently state a cause of action." (*Graham v. Bank of America, N.A.*, *supra*, 226 Cal.App.4th at p. 618.)

Townsend has failed to explain how, if given the opportunity, she would amend her complaint to properly assert the causes of action discussed. Instead, for the first time on appeal, Townsend requests leave to amend her complaint to add an 11th cause of action for fraudulent concealment against Deutsche Bank based on its failure to inform her of the allegedly fraudulent trustee's deed upon sale. Townsend has not satisfied her burden to demonstrate the proposed cause of action would be viable. (See *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098 [denying leave to add new cause of action when plaintiff "has offered no authority demonstrating that these new causes of action are viable"].) As discussed, Townsend has failed to present a sustainable legal theory supported by case authority or factual assertions that Deutsche Bank owed her a duty to disclose the failure to hold the noticed foreclosure sale or to inform her of the filing of the allegedly fraudulent trustee's deed upon sale. Accordingly, there is no basis to reverse the trial court's denial of leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Deutsche Bank and SPS are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. FEUER, J.