Filed 11/13/14 Krause v. Aurora Loan Services CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAUL L. KRAUSE et al., Plaintiffs and Appellants, v. AURORA LOAN SERVICES, LLC, et al., Defendants and Respondents.	B251574 (Los Angeles County Super. Ct. No. YC062322)

APPEAL from a judgment of the Superior Court for Los Angeles County, Stuart M. Rice, Judge. Affirmed.

Paul L. Krause and Jennifer A. Krause, in pro. per., for Plaintiffs and Appellants.

Green & Hall, Howard D. Hall and Michael E. Lisko for Defendants and Respondents.

Plaintiffs Paul and Jennifer Krause (collectively, the Krauses) appeal from a summary judgment in favor of defendants Aurora Loan Services, LLC (Aurora) and Mortgage Electronic Registration Systems, Inc. (MERS) on the Krauses' complaint for wrongful foreclosure and other claims related to the foreclosure on their home. We affirm the judgment.

BACKGROUND

In June 2007, the Krauses owned a residential property (the Property) in Hermosa Beach. They refinanced the Property on June 25, 2007, obtaining a loan for $1,500,000 from Homecomings Financial, LLC (Homecomings), secured by a deed of trust. They signed an adjustable rate note in favor of Homecomings, and a deed of trust that identified Homecomings as the Lender, First American Title as the Trustee, and MERS as the beneficiary. The deed of trust was recorded on July 2, 2007.

The deed of trust stated that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Under the provision entitled "TRANSFER OF RIGHTS IN THE PROPERTY," the deed of trust stated: "The 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. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, [the Property]. . . . 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."

In September 2007, the Krauses transferred their interest in the Property to themselves as Trustees of The Krause Family Living Trust (the Family Trust); the trust transfer deed was recorded on October 15, 2007. Seven months later, in April 2008, the Krauses received correspondence that Aurora had become the loan servicer, and that the Krauses were in arrears in the amount of more than $27,000. The Krauses disputed that they were in arrears, and contacted both Aurora and Homecomings, from April to November 2008, to try to resolve the issue. They were not successful.

On December 1, 2008, MERS executed a substitution of trustee, substituting Quality Loan Service Corporation (Quality) as Trustee under the deed of trust. That same day, a notice of default and election to sell under deed of trust was executed by an authorized agent for First American Title Insurance Company on behalf of Quality, as agent for the beneficiary. Two days later, on December 3, 2008, MERS executed a corporate assignment of deed of trust, transferring its beneficial interest in the deed of trust to Aurora, together with the note described in the deed of trust. The notice of default was recorded on December 3, 2008, and the substitution of trustee was recorded on January 14, 2009; the corporate assignment of deed of trust was not recorded.

On December 11, 2008, the Krauses received a workout agreement from Aurora, dated December 8, 2008. Under the agreement, which the Krauses signed on January 1, 2009, the Krauses admitted they were in arrears in the amount of $29,752.55, and Aurora agreed to forbear exercising its rights under the default provisions of the loan documents (provided the Krauses complied with the payment schedule) and allow the Krauses to repay the arrearage in accordance with

certain terms. The agreement required the Krauses to pay a specific portion of the arrearage by the first of every month, starting January 1, 2009 and ending April 1, 2009. The agreement provided that it would expire on April 1, 2009.

On February 13, 2009, Aurora sent a letter to the Krauses, indicating that the Krauses had made the payments required to date. Aurora wrote that, based upon the Krauses' performance, it "would like to offer [the Krauses] a more permanent home . . . retention option," but "[i]n order to do so," Aurora needed certain financial information from the Krauses. The Krauses mailed the requested documents to Aurora, but on March 14, 2009, the Krauses received a letter from Aurora stating that it had determined it was unable to continue to pursue any home retention option. A few days later, the Krauses received correspondence from Aurora that included a copy of the corporate assignment of deed of trust that MERS had executed on December 3, 2008.

On June 15, 2009, Quality (the substituted trustee under the deed of trust) executed a notice of trustee's sale; the notice was recorded on June 23, 2009. The sale was set for July 13, 2009. Aurora was the highest bidder at the sale held on that date; the amount paid was $1,668,013.87, the amount of unpaid debt and costs. Quality executed a trustee's deed upon sale the following day, and the deed was recorded on July 16, 2009.

The Krauses, representing themselves, filed a verified complaint against Homecomings and Aurora on May 5, 2010, alleging claims for declaratory relief, breach of contract, misrepresentation and failure to disclose, quiet title, and violation of federal RICO statutes. The procedural history of this case is not relevant to the issues on appeal, so we need not discuss it in detail. Suffice to say that the Krauses amended their complaint several times over the next two years (all of the amended complaints were verified), culminating in the verified fifth amended complaint, which was filed on March 16, 2012. That complaint names

Homecomings, Aurora, and MERS as defendants, and alleges claims for (1) wrongful foreclosure/set aside trustee sale; (2) concealment and misrepresentation/fraud; (3) violation of the federal and California Fair Debt Collection Practices Acts (the FDCPA) (15 U.S.C. § 1692 et seq.; Civ. Code, § 1788 et seq.;); (4) quiet title; and (5) unfair business practices (Bus. & Prof. Code, § 17200). The Krauses dismissed Homecomings as a defendant in December 2012.

In January 2013, Aurora and MERS (hereafter, defendants) filed a motion for summary judgment, or in the alternative, summary adjudication. As to the first cause of action for wrongful foreclosure and the fourth cause of action for quiet title, defendants argued that (1) the Krauses lacked standing to bring claims on behalf of the Family Trust (the entity to which the Krauses transferred the Property); (2) there was no legal basis to challenge Aurora's authority to foreclose and sell the Property; (3) the Krauses did not suffer any prejudicial procedural irregularity in the nonjudicial foreclosure proceedings; and (4) the Krauses were unable to tender the full amount due under the note. As to the second cause of action for misrepresentation, defendants argued that the Krauses could not establish any misrepresentation or fraud in connection with MERS' corporate assignment of deed of trust or substitution of trustee, or with Aurora's workout agreement. Defendants argued that the third cause of action for violation of the FDCPA fails because the FDCPA does not apply to a loan servicer, such as Aurora, or to a nominee for the lender, such as MERS, nor does it apply to a foreclosure under a deed of trust. Finally, defendants argued the fifth cause of action for unfair business practices under Business and Professions Code section 17200 fails because the Krauses lack standing to bring a lawsuit under that statute, and they cannot establish that defendants' actions were unlawful, unfair, or deceptive.

In support of their motion, defendants submitted the declaration of its counsel, attaching copies of each of the verified complaints the Krauses had filed and Aurora's and MERS' verified responses to interrogatories, which attached copies of the corporate assignment of deed of trust. Defendants also submitted declarations from Mary Jane Sarne, the person who signed the substitution of trustee, and from Bonnie J. Dawson, the notary who notarized the execution of that document. Finally, defendants asked the trial court to take judicial notice of the recorded documents associated with the foreclosure (the deed of trust, the notice of default and election to sell under deed of trust, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale) -- all of which had been attached to one or more of the Krauses' verified complaints -- as well as the trust transfer deed by which the Krauses transferred the Property to themselves as trustees of the Family Trust.

In their initial opposition to defendants' motion, the Krauses argued that neither MERS nor Aurora had authority to foreclose on the Property because the note that the deed of trust secured was transferred by Homecomings to Residential Funding Company, LLC (Residential), and then to a securitized trust, RALI Mortgage Asset Backed Pass-Through Certificates, Series 2007-QH9 (RALI trust). As a result, Deutsche Bank Trust Company Americas as Trustee (Deutsche), as RALI trust's trustee, was the owner of the note at the time of the foreclosure. The Krauses argued that, since the closing date of RALI trust was September 1, 2007, the only party authorized to transfer any beneficial interests under the note or deed of trust after that date was Deutsche, and therefore the substitution of trustee, corporate assignment of deed of trust, notice of default, notice of trustee's sale, and trustee's deed upon sale were void. The Krauses also challenged the validity of the substitution of trustee on the grounds that (1) Sarne's declaration in which she stated she was authorized to sign the document was inconsistent with her

deposition testimony, and (2) Dawson's commission as a notary was revoked by the California Secretary of State in 2013. Finally, the Krauses requested that the trial court continue defendants' motion to allow the Krauses to conduct additional discovery.

In support of their initial opposition, the Krauses submitted a declaration from Paul Krause that attached various documents, including the note (showing the endorsements from Homecomings to Residential to Deutsche), the prospectus for RALI trust (showing the closing date), and a declaration from Neil F. Garfield, a self-described "expert in securitization of debt, the application of property law, securities law and the law of contracts." In his declaration, Garfield -- who provides no information about his background or experience, or the evidence upon which he bases his opinion and analysis (he simply states that he "studied the relevant documents in the public domain together with direct experience with the parties seeking foreclosure in this case") -- discusses how mortgage-backed securities typically are created and operated, offers criticism of the process, observing that generally there is a lack of consideration for the transfers involved in the process, and concludes that notes transferred as part of the securitization process become unsecured debts and the deeds of trusts associated with them should be nullified.

Defendants objected to the Garfield declaration and much of the other evidence the Krauses submitted, and argued the Krauses failed to raise a disputed issue of material fact. Defendants also objected to the Krauses' request for a continuance.

The trial court granted the Krauses request for a continuance, and the Krauses subsequently filed a supplemental opposition to the summary judgment motion.

In that supplemental opposition, the Krauses argued that (1) defendants failed to meet their burden on summary judgment because the documents related to the foreclosure were not properly authenticated and there is no declaration from a custodian of records; (2) defendants "have a troubled history of conducting defective mortgage servicing and foreclosure practices," as evidenced by consent decrees they entered into with federal banking regulators and a $500 payment the Krauses received as a result of those consent decrees; (3) the corporate assignment of deed of trust was not recorded, which renders the foreclosure subject to challenge on the grounds of irregularity; (4) there is a disputed issue of fact regarding the validity of the substitution of trustee, based upon the revocation of Dawson's commission as a notary and Sarne's deposition testimony that she did not recognize Dawson's signature on the 2013 stipulated decision in which Dawson's commission was revoked; (5) the documents attached to the declaration of defendants' counsel (i.e., all versions of the complaints the Krauses filed and defendants' verified responses to interrogatories) were not properly authenticated because counsel did not have personal knowledge of the facts set forth in those documents; (6) the tender requirement to set aside a trustee's sale does not apply in this case; (7) the Krauses have standing to sue as individuals because, as trustees of the Family Trust, they were shared owners of the Property; (8) any authority granted to MERS under the deed of trust was rescinded when Homecomings transferred the note, because the deed of trust follows the note, and therefore neither MERS nor Aurora had the authority to foreclose; (9) Aurora is a debt collector subject to the FDCPA because it did not become a beneficiary (under the corporate assignment of deed of trust) until after the notice of default was executed and recorded; and (10) the claim for unfair business practices survives because the Krauses' other claims survive.

In support of their supplemental opposition, the Krauses submitted another declaration from Paul Krause that attached many of the documents submitted in support of their original opposition, including the Garfield declaration, and some additional documents. Defendants once again objected to several of those documents, including the Garfield declaration, and argued that the Krauses failed to raise a triable issue of material fact.

The trial court sustained defendants' objections and granted defendants' motion in its entirety. The court found the Krauses failed to raise a disputed issue as to the first and fourth causes of action (wrongful foreclosure and quiet title) because (1) the Krauses' assertion that Aurora did not have authority to foreclose because the corporate assignment of deed of trust was not recorded was incorrect; (2) the Krauses did not present evidence that they suffered any prejudice from the manner in which the lending industry transferred and executed documents related to the nonjudicial foreclosure proceedings; and (3) there is no evidence to support the Krauses' argument that the tender requirement should not be applied. As to the second cause of action for misrepresentation, the court found that defendants established, and the Krauses failed to dispute, that Aurora was the beneficiary under the deed of trust once MERS executed the corporate assignment of deed of trust, and there are no facts to support the Krauses' assertion that the substitution of trustee was fraudulently executed. Addressing the third cause of action for violation of the FDCPA, the court found that the FDCPA does not apply because neither defendant is a debt collector under those statutes. Finally, the court found that the fifth cause of action for unfair business practices (Bus. & Prof. Code, § 17200) fails because all of the underlying causes of action fail.

The Krauses timely filed a notice of appeal from the resulting judgment.

DISCUSSION

On appeal, the Krauses argue that defendants did not meet their burden on summary judgment because (1) defendants failed to show that Aurora had authority to foreclose; (2) defendants failed to address the Krauses' evidence that MERS and Aurora admitted culpability for foreclosure deficiencies by entering into a consent decree with federal regulators and making a $500 payment to the Krauses; (3) Sarne's declaration regarding the substitution of trustee was not credible; and (4) defendants failed to address the Krauses' theories regarding why the tender rule did not apply in this case. The Krauses also argue the trial court erred by sustaining defendants' objection to the Garfield declaration. We find no merit to any of the Krauses' arguments.

A. *Summary Judgment and the Standard of Review*

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . A defendant [moving for summary judgment] bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) In addition, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Ibid.*) If, and only if, the moving party carries that burden, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*) Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The

court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, that raise a triable issue of material fact. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865-866.)

On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.)

B. *Defendants Established That Aurora Had Authority to Foreclose*

The Krauses argue that defendants failed to meet their burden on summary judgment because they failed to show that Aurora had authority to foreclose on the Property. The Krauses contend that the deed of trust did not grant foreclosing authority to the beneficiary of the deed of trust, and therefore defendants' assertion that Aurora acted as the beneficiary in foreclosing on the Property failed to establish Aurora's authority. They are mistaken.

As best we can determine, the Krauses' argument is as follows. The deed of trust names MERS in two capacities, as nominee for the lender (and the lender's successors and assigns), and as the beneficiary. The deed of trust does not define the role or authority of the beneficiary. The deed of trust states that MERS -- solely as nominee for the lender and its successors and assigns -- has the right to exercise any of the lender's interests, including the right to foreclose. Therefore,

the right to exercise the lender's interests applies only to MERS as nominee and not to MERS (or its successors and assigns) as beneficiary.

The Krauses misapprehend the meaning of the deed of trust's reference to MERS as nominee for the lender and as beneficiary. "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*).) The reference in the deed of trust to MERS as both nominee and beneficiary does not mean that MERS was granted different rights in different capacities. Rather, "[t]he legal implication of the designation [of MERS as the beneficiary and as a nominee] is that MERS may exercise the rights and obligations of a beneficiary of the deed of trust, a role ordinarily afforded the lender, but it will exercise those rights and obligations only as an agent for the lender, not for its own interests." (*Id.* at p. 273.)

The deed of trust states that the beneficiary is "MERS (solely as nominee for Lender and Lender's successors and assigns) *and the successors and assigns of MERS*." (Italics added.) Defendants presented evidence -- the December 3, 2008 corporate assignment of deed of trust -- that MERS assigned its beneficial interest in the deed of trust to Aurora. Therefore, the undisputed evidence before trial court demonstrated that at the time of the trustee's sale on July 13, 2009, Aurora was the beneficiary of the deed of trust and, as nominee for the lender, it had the authority to exercise the legal rights of the lender, including the right to foreclose.

C. *The Payment Made Under the Consent Decree Does Not Preclude Summary Judgment*

In opposition to defendants' summary judgment motion, the Krauses submitted evidence regarding a payment they received as a result of a consent decree between Aurora and federal banking regulators. That evidence consisted of a notice they received sometime shortly before April 12, 2013, stating they were "eligible to receive a payment as the result of an agreement between Aurora and federal banking regulators . . . related to an enforcement action regarding deficiencies in the mortgage servicing and foreclosure processes of Aurora," and a letter that accompanied that payment (a check for $500) from Paying Agent -- Rust Consulting, Inc., explaining why they were receiving the payment. The letter stated: "Earlier this year, Aurora entered into an agreement with federal banking regulators -- the Office of Comptroller of the Currency and the Board of Governors of the Federal Reserve System. This agreement resolved the Independent Foreclosure Review required by the regulators. . . . [¶] Regulators determined your payment amount based on the stage of your foreclosure process and other considerations related to your foreclosure."[1]

The Krauses argued in the trial court that this evidence establishes that defendants engaged in deficient foreclosure practices, which precludes summary judgment. On appeal, the Krauses argue that defendants failed to object to this evidence, which the Krauses contend constitutes a binding admission of deficiencies in the foreclosure process, and that the trial court ignored their evidence. They are incorrect.

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[1] The Krauses also provided references to pages on governmental websites where the consent decrees entered into by MERS and Aurora could be found.

First, defendants *did* object to the evidence, and the trial court sustained their objection.

Second, defendants' objection on the grounds of relevance was well taken. Aurora's decision to enter into a consent decree with federal regulators in an enforcement action related to Aurora's alleged deficiencies in its mortgage servicing and foreclosure processes overall does not constitute an admission by Aurora that there were deficiencies in the foreclosure process in *this* case. Although the Krauses received a $500 payment as a result of the consent decree, that fact is insufficient to raise a triable issue regarding their wrongful foreclosure claim because the letter accompanying the payment stated that "[t]his payment does not mean that you necessarily suffered financial injury or harm." Thus, even if the payment was relevant to show there was some sort of deficiency in the foreclosure process, it does not show that the Krauses suffered prejudice from that deficiency, which is a necessary element of a wrongful foreclosure claim. (*Fontenot*, *supra*, 198 Cal.App.4th at p. 272 ["[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. [Citations.] Prejudice is not presumed from 'mere irregularities' in the process"].) Therefore, the trial court did not err in excluding evidence of the consent decrees and payment to the Krauses.

D. *The Krauses' Objections to the Sarne Declaration are not Well Taken*

The Krauses argue the trial court erred in considering the declaration of Mary Jane Sarne, which the defendants submitted in support of their summary judgment motion. They contend the declaration should not have been considered because Sarne failed "to affirmatively attest to her signing authority as a Vice President of MERS including when her authority started and when it terminated"

(boldface omitted), and because Sarne's deposition testimony (which the Krauses submitted in opposition to defendants' motion) "contradicted SARNE'S personal knowledge of her own signing authority." We disagree.

The Krauses' assertion that Sarne did not affirmatively attest to her signing authority is belied by the declaration. Sarne states in the declaration that she personally appeared before notary Bonnie J. Dawson, presented her with a substitution of trustee, proved to Dawson that she was the person who executed the document, and acknowledged that she executed it in an authorized capacity as Vice President of MERS. Those statements, which Sarne made based upon personal knowledge, are sufficient show that Sarne signed the substitution of trustee in an authorized capacity, in the absence of any evidence to the contrary.

The Krauses' contention that Sarne's deposition testimony contradicted her assertion of personal knowledge of her signing authority also is unsupported by the evidence. Sarne was asked at her deposition when she first was given signing authority, and when her signing authority was rescinded. She testified that she could not recall. The fact that Sarne could not recall the exact time period during which she had signing authority does not support the Krauses' assertion that she did not have personal knowledge of her signing authority at the time she executed the substitution of trustee in this case. Thus, the trial court did not err by considering the Sarne declaration.

E. *It Was Not Defendants' Burden to Show That None of the Exceptions to the Tender Rule Applied*

Citing a case that stands for the proposition that a defendant moving for summary judgment has the burden to show that it is entitled to judgment with respect to all theories of liability, the Krauses contend that defendants failed to meet their burden because they failed to show that none of the exceptions to the

tender rule applied. (Citing *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.) The Krauses misunderstand the burdens in this case.

Under California law, "[a] valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) "Because the action is in equity, a defaulted borrower who seeks to set aside a trustee's sale is required to do equity before the court will exercise its equitable powers. [Citation.] Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. [Citation.] 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].' [Citation.]" (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 (*Lona*).)

The Krauses correctly observe that there are exceptions to the tender rule. "Recognized exceptions to the tender rule include when (1) the underlying debt is void, (2) the foreclosure sale or trustee's deed is void on its face, (3) a counterclaim offsets the amount due, (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale, or (5) the foreclosure sale has not yet occurred." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.) But a defendant moving for summary judgment on a wrongful foreclosure claim is not required to address any of those exceptions in its moving papers unless the plaintiff's complaint specifically alleges that the plaintiff is excused from the tender requirement under one or more of the recognized exceptions. (See *Lona*, *supra*, 202 Cal.App.4th at p. 115 [because issues on

summary judgment are framed by the pleadings, moving defendant must address exceptions to the tender rule that are alleged in the complaint].)

There is no such specific allegation in the operative complaint in this case. At most, there is a *suggestion* that it would be inequitable to require the Krauses to tender, because Aurora did not have the authority to foreclose.[2] In any event, although defendants in their moving papers did not specifically address any of the recognized exceptions to the tender rule, the evidence they produced in support of the summary judgment motion establishes that the ground the Krauses suggested to excuse their compliance with the tender requirement -- lack of authority by Aurora to foreclose -- had no merit.[3] (See Section B., *ante*.) Therefore, defendants met their burden of production on summary judgment.

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[2] The only reference to tender in the operative complaint is found in two paragraphs under the first cause of action for wrongful disclosure, in which the Krauses allege they are "ready, willing and able to tender all of the delinquencies and costs due for redemption of the Subject Property prior to entry of any equitable judgment of rescission . . . upon a proof of claim that (a) AURORA was assigned by the lender all beneficial rights to demand payment in US Dollars from the Plaintiffs, and (b) a full accounting to show the amount in US Dollars with proof that AURORA paid to HOMECOMINGS for those beneficial rights. [¶] In the absence of meeting the above requirements a tender demanded of the Plaintiffs would further prejudice the Plaintiffs. Currently there is no evidence in existence that AURORA was assigned a beneficial interest. . . . Simply put, the unfairness to the Plaintiffs is that AURORA was able to shuffle paperwork around to specific actors however they wanted with blatant disregard to the requirements in the Plaintiffs' [deed of trust] and as required by California law to obtain a property there exists no proof they were authorized to request equitable title be placed in its name."

[3] In their appellants' opening brief, the Krauses contend that Garfield's declaration "indicates the alleged debt is invalid," and therefore defendants were required to address the exception to the tender rule that applies when the borrower's action attacks the validity of the underlying debt. The operative complaint, however, did not allege that the Krauses were excused from the tender requirement on this ground.

F. *The Trial Court Properly Sustained the Objection to the Garfield Declaration*

The Krauses contend the trial court erred in sustaining defendants' objections to the Garfield declaration because declarations offered in opposition to a motion for summary judgment must be liberally construed, and an expert declaration in opposition to a summary judgment motion need not be detailed. We find no error.

Before a witness may testify as an expert, evidence must be presented to establish that he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates." (Evid. Code, § 720, subd. (a).) In addition, an expert witness's declaration is not admissible unless it discloses the matters relied upon in forming his or her opinion. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.)

In this case, as noted, Garfield provided no information about his background or experience; he simply stated that he was "an expert in securitization of debt, the application of property law, securities law and the law of contracts." He also failed to describe the matters he relied upon in forming his opinion, stating only that he "studied the relevant documents in the public domain together with direct experience with the parties seeking foreclosure in this case." While the Krauses are correct that declarations offered in opposition to a summary judgment motion must be liberally construed (*Michael J. v. Los Angeles County Dept. of Adoptions*, *supra*, 201 Cal.App.3d at p. 866), liberal construction of the Garfield declaration cannot overcome its lack of foundation. "[C]ourts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) Thus, the trial court properly sustained defendants' foundation objection to the declaration.

The trial court also properly sustained defendants' relevance objection. As the court noted at the hearing on the summary judgment motion, the Garfield declaration was "really an indictment of our lending system" or "an essay about the unfairness of the way our lending industry does business," rather than opinion evidence related to the causes of action the Krauses alleged. We agree with the trial court's assessment. There was no error.

DISPOSITION

The judgment is affirmed. Aurora and MERS shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.