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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RAPHAEL AHARONOFF et al., Plaintiffs and Appellants, v. AMERICAN HOME MORTGAGE SERVICING, INC. et al., Defendants and Respondents.	B227463 (Los Angeles County Super. Ct. No. LC088110)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael B. Harwin, Judge. Reversed and remanded with directions.

Anthony A. Roach for Plaintiffs and Appellants Raphael Aharonoff and Yaffa Aharonoff.

Wright, Finlay & Zak, T. Robert Finlay and Peter M. Watson for Defendants and Respondents American Home Mortgage Servicing, Inc. and Wells Fargo, N.A.

This appeal arises from an action whose predominant claim for relief is to cancel a trustee's deed delivered upon a trustee's sale in a nonjudicial foreclosure. The trial court sustained a demurrer to the plaintiffs' first amended complaint (FAC), without leave to amend, and entered an order dismissing the action. We reverse the order of dismissal and remand the cause to the trial court with directions to grant leave to file a second amended complaint.

FACTS[1]

In April 2006, plaintiffs and appellants Raphael and Yaffa Aharonoff (hereafter collectively Aharonoff) borrowed funds from Bryco Funding Inc. (Bryco), who is not a party to the current appeal, signing two promissory notes ($700,000 and $175,000), each with a corresponding deed of trust (DOT) identifying Bryco as the beneficiary. The DOTs were recorded against real property on Clark Street in Tarzana. In April 2006, Bryco assigned the first DOT to Option One Mortgage Corporation (Option), not a party to the current appeal. In March 2008, Option executed an assignment of the first DOT to Wells Fargo Bank N.A.; this assignment was recorded in April 2008. Aharonoff's operative FAC alleges that Wells Fargo was the beneficiary under the first DOT at all relevant times.[2] That allegation is binding on Aharonoff.

Beginning in mid to late 2008, Aharonoff stopped making payments on the note secured by the first DOT. In February 2009, an entity going by the name of "Default Resolution Network," who is also not a party to the current appeal, recorded a notice of default as to Aharonoff, and delivered the notice of default to Aharonoff. The notice of default identified Default Resolution Network as the "agent" for the "beneficiary" under the first DOT (i.e., Wells Fargo). The notice of default instructed Aharonoff that, to find

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[1] As always on review of an order sustaining a demurrer, we assume the facts alleged in the operative complaint are true. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

[2] According to the operative pleading in this case, the April 2006 Bryco-to-Option assignment was not recorded until June 2008. There are suggestions in the record that Option "pooled" the first DOT into a "mortgage backed certificate." We are only concerned with the first DOT after it got into the hands of Wells Fargo.

out the amount he needed to pay to stop foreclosure, or to arrange for payment, he was to contact "American Home Mortgage Servicing, Inc" (hereafter AHMSI). Aharonoff did not cure the default.

On May 18, 2009, an entity going by the name "AHMSI Default Services, Inc." (hereafter AHMSI-DESI), identified as "trustee" under the first DOT, recorded a notice of a trustee's sale, informing Aharonoff that, unless he took action, the Clark Street property would be sold at a trustee's sale to be conducted on June 8, 2009.

In May 2009, Aharonoff retained an attorney, Howard Nassiri, "for the purpose of negotiating a loan modification with AHMSI." We understand this allegation to refer to AHMSI and not AHMSI-DESI. Nassiri "initiated negotiations for the modification of the loan with AHMSI, and the foreclosure sale was postponed several times." Eventually, the foreclosure sale was set to be conducted on November 9, 2009.

On October 26, 2009, Nassiri sent an e-mail to Barbara Cochran, a representative in the "Home Ownership Preservation Office" at AHMSI (not AHMSI-DESI), regarding Aharonoff's recent tax returns, and asking what needed to be done to qualify Aharonoff for the "HAMP program." Nassiri's e-mail further stated: "We have a trustee sale schedule for 11/9/2009 that we would like to have postponed while in review." Later the same day, AHMSI, by Cochran, sent a reply e-mail to Nassiri which had this language: "I went ahead and put the foreclosure/sale on hold until 12/23/09."

Despite the statement by AHMSI's representative that the trustee sale had been "put . . . on hold" until December 23, 2009, the trustee, going by the name of "Power Default Services, Inc., former known as AHMSI Default Services, Inc.," nevertheless conducted the sale on November 9, 2009.[3] Following the sale, Power Default Services nee AHMSI-DESI conveyed title to the Clark Street property to Wells Fargo Bank by a trustee's deed dated November 10, 2009, and recorded November 13, 2009. Less than a week later, on November 18, 2009, Nassiri "contacted AHMSI by letter . . . demanding a reversal of the sale."

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[3] Aharonoff's FAC does not name Power Default Services, Inc. nee AHMSI-DESI as a defendant.

In December 2009, Wells Fargo filed an unlawful detainer complaint against Aharonoff. In its unlawful detainer complaint, Wells Fargo alleged that it had the right to commence the unlawful detainer action; that the foreclosure sale had been conducted in compliance with Civil Code section 2924 *et seq*.;[4] that title was perfected in Wells Fargo as of November 13, 2009 (the date the trustee's deed was recorded); and that Wells Fargo was entitled to possession of the Clark Street property.

In January 2010, Aharonoff filed a complaint against Wells Fargo and AHMSI.[5] Following a demurrer, Aharonoff filed his operative FAC in May 2010. Aharonoff's FAC alleged three causes of action: (1st) promissory estoppel; (2nd) negligence and (3rd) quiet title. As to the cause of action for promissory estoppel, Aharonoff alleged he had relied on AHMSI's representation that the trustee's sale had been postponed to December 23, 2009, and that the actual sale on November 9, 2009 caused Aharonoff to suffer an injustice which could be remedied by the court.[6] The second cause of action alleged that AHMSI had breached a duty of care by "failing to ensure that the November 9, 2009 sale had actually been postponed." In his third cause of action (as well as in other areas of the FAC), Aharonoff alleged that, as a result of "invalidities in the foreclosure process," Wells Fargo acquired "mere bare title" to the Clark Street property, meaning the bank "currently holds title as a constructive trustee for the benefit of [Aharonoff]." Aharnoff further alleged that Wells Fargo was "the holder of the beneficial interest under the [first DOT] and, accordingly, acquired its own property at the trustee sale, . . . [and] cannot therefore be considered a bona fide purchaser of the [Clark Street] property against whom invalidities in the foreclosure process or other torts are not actionable."

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[4] All further section references are to the Civil Code.

[5] But not AHMSI-DESI.

[6] It is not altogether clear to us from reading the FAC just what action Aharonoff allegedly took or did not take in reliance on the representation that the trustee's sale had been postponed.

In June 2010, Wells Fargo and AHMSI filed a joint demurrer to Aharonoff's FAC. The demurrer argued that Aharonoff was "seek[ing] to invalidate a foreclosure sale . . . based on the allegation that the sale occurred prior to an agreed upon date," and that the "entire action fail[ed]" because Aharonoff had not alleged and could not allege "a valid tender sufficient to cure the outstanding balance of the loan as required under California non-judicial foreclosure law in order to challenge and/or unwind a foreclosure sale." Aharonoff filed a late opposition to the demurrer in which he argued that the trustee's sale was "held prematurely" in that Aharonoff detrimentally relied on a written assurance the sale would be postponed. Aharnoff further argued that the trustee sale was "void based on [his] challenge of the very right of [Wells Fargo and AHMSI] to conduct the sale to begin with . . . ."

On July 2, 2010, the parties argued the demurrer to the trial court. At the end of the hearing, the trial court signed and entered a formal written order sustaining Wells Fargo's and AHMSI's demurrer, without leave to amend, and dismissing Aharonoff's action.[7] On July 13, 2010, Wells Fargo and AHMSDI served notice of entry of the order of dismissal.

On September 13, 2010, Aharonoff filed a timely notice of appeal.

DISCUSSION

Our task on appeal is to determine whether the alleged facts are sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors*, *supra*, 48 Cal.4th at p. 42.) Aharonoff argues his FAC states a cause of action because the "tender rule" upon which Wells Fargo and AHMSI relied in their demurrer, and upon which the trial court relied in sustaining the demurrer, does not apply where a trustee's sale is "void." In this vein, and given the procedural context of a demurrer, we understand Aharonoff to argue that a trustor/borrower's action to cancel an

[7] The record on appeal does not include the minute order nor a reporter's transcript of the hearing on July 2, 2010. The order of dismissal does not shed light on the basis for the trial court's order.

allegedly void trustee's deed does not necessary require that the plaintiff allege he or she tendered the money due. For the reasons that follow, we agree.

The purposes of the statutory scheme governing a trustee's power of sale pursuant to a deed of trust in a nonjudicial foreclosure (see generally section 2920 *et seq*.) include: (1) to provide the beneficiary with a quick, inexpensive and efficient remedy against a defaulting trustor; (2) to protect the trustor from a wrongful loss of the property; and (3) to ensure that a trustee's sale is properly conducted and, thus, conclusive as to a bona fide purchaser. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) The issue of whether a trustee's sale pursuant to a power of sale in a deed of trust is "void" — in which case the trustor/debtor need not tender money due to set aside the sale — or whether the sale is merely "voidable" — in which case the trustor/debtor may be required to tender money due to set aside the sale —is not always easily determined. As Division One of this court observed in *Little v. CFS Service Corp.* (1987) 188 Cal.App.3d 1354, the published cases have lent to the difficulty of the issue by using the terms "void," "voidable" and "invalid" interchangeably. (*Id*. at p. 1358.) The issue appears to us to be one largely of degree in that ordinary " 'defects and irregularities in a sale under a power [of sale in a DOT] render it merely voidable and not void,' " whereas " 'substantially defective sales have been held void.' " (*Ibid*.) "Substantially defective" in this context means that " 'the defect lay in a particular as to which [an applicable] statutory provision was regarded as mandatory.' " (*Ibid*.)

On appeal, Aharonoff argues he sufficiently alleged that the trustee's sale of the Clark Street property was "void," thus negating any pleading requirement that he allege that he tendered money due, which concededly he did not do. His argument relies on section 2924g, subdivision (c)(1)(C). Aharonoff concedes he did not expressly argue this section 2924g, subdivision (c)(1)(C), issue in the trial court.[8] The respondent's brief filed by Wells Fargo and AHMSI takes the position that Aharonoff's new argument on appeal is forfeited because it was not raised in the trial court. We disagree.

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[8] Aharonoff is represented by new counsel on appeal.

Aharonoff's argument pursuant to section 2924g, subdivision (c)(1)(C), is not forfeited under unique rules applicable in the context of a demurrer. When a demurrer is sustained without leave to amend, the plaintiff and appellant generally is not precluded from raising a new legal issue or theory on appeal to support an argument that his or her complaint states a cause of action. (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259.) We agree with Wells Fargo and AHMSI that Aharonoff's FAC did not expressly allege that the trustee's sale in November 2009 was void under section 2924g, subdivision (c)(1)(C), and that Aharonoff did not expressly argue the statute in opposing their demurrer. However, we agree with Aharonoff that his FAC alleges *facts* which, liberally construed, may support a legal claim under the statute. The FAC alleges AHMSI represented that the trustee's sale which had been scheduled for November 2009 had been postponed to December 2009. Because Aharonoff's argument under section 2924g, subdivision (c)(1)(C), raises an issue of law that may be applicable to undisputed alleged facts — the effect of the failure to postpone the trustee's sale, we will consider the merits of his argument.

Section 2924g, subdivision (c)(1)(C), provides: "There may be a postponement or postponements of the sale proceeding, including a postponement upon instruction by the beneficiary to the trustee that the sale proceedings be postponed, at any time prior to the completion of the sale . . . . The trustee shall postpone the sale in accordance with any of the following: [¶] By mutual agreement, whether oral or in writing, of any trustor and any beneficiary . . . ." According to Aharonoff, the "failure to postpone the [trustee's] sale upon the agreement of the trustor [i.e., Aharonoff] and beneficiary [i.e., Wells Fargo, by its agent, AHMSI] is a violation of one of the mandatory requirements of the statutory scheme regulating nonjudicial foreclosure sales."

We conclude the outcome of Aharonoff's appeal should be guided by *Residential Capital v. Cal-Western Reconveyance Corp*. (2003) 108 Cal.App.4th 807 (*Residential Capital*). In *Residential Capital*, a trustor/borrower defaulted on a loan secured by a DOT. In a nonjudicial foreclosure context, the beneficiary/lender was represented by loan servicing agent, HomeComings Financial Network. Prior to the date set for a

scheduled trustee's sale, HomeComings and the trustor/borrower orally agreed to postpone the sale. HomeComings e-mailed the trustee, Cal-Western Reconveyance Corp., instructing it to postpone the sale. Cal-Western did not read the e-mail until after it had already conducted the trustee's sale as originally scheduled. Residential Capital was the highest bidder at the sale, and presented a valid cashier's check to Cal-Western. At about the same point in time, Cal-Western became aware of the e-mail about postponing the trustee's sale, and it responded by refusing to deliver a trustee's deed upon sale to Residential Capital. As a result, Residential Capital sued Cal-Western and the beneficiary/lender on several theories, including breach of contract.

The beneficiary/lender and trustee Cal-Western filed a motion for summary judgment, arguing that the agreement to postpone the trustee's sale rendered the foreclosure sale a void transaction. The trial court granted summary judgment. The Court of Appeal affirmed the judgment. In affirming the judgment, the Court of Appeal ruled that the trustee's sale, conducted as it was after an agreement had been reached to postpone the sale, amounted to a substantial defect in the statutorily-governed foreclosure process, rendering the foreclosure sale void: "The agreement to postpone the sale under section 2924g cannot be disregarded in evaluating whether the sale procedure was substantially defective. Only a properly conducted foreclosure sale, free of substantial defects in procedure, creates rights in the high bidder at the sale." (*Residential Capital*, *supra*, 108 Cal.App.4th at p. 822.)

Here, Aharonoff alleged sufficient facts to state a claim that there was an agreement to postpone the trustee's sale. Guided by *Residential Capital*, we conclude that an allegation of a breach of that agreement would be sufficient to state a cause of action pursuant to section 2924g, subdivision (c)(1)(C), for cancellation of the trustee's deed resulting from the non-postponed sale.

To avoid *Residential Capital*, Wells Fargo and AHMSI argue the current matter involves distinguishable circumstances. Although Wells Fargo and AHMSI are correct in highlighting that *Residential Capital* involved a buyer's action to enforce delivery of a trustee's deed after a trustee's sale, whereas Aharonoff is a trustor/borrower seeking to

cancel a trustee's deed already delivered after a trustee's sale, we find the contextual difference is not legally significant. *Residential Capital* teaches that, when a trustee conducts a trustee's sale in breach of an enforceable agreement to postpone the sale, the sale is a void transaction under section 2924g, subdivision (c)(1)(C).

We are not persuaded by the argument from Wells Fargo and AHMSI that it is legally important whom it is who either attempts to enforce rights under the sale or who challenges the sale. For pleading purposes, we are satisfied that Aharonoff may be able to state a claim that survives a demurrer. Whether or not Aharonoff is able to prove his claim that the trustee's sale was void because there was an enforceable agreement to postpone the trustee's sale is an issue for a context other than a demurrer.

This brings us to the issue of the effect of the recitals in the trustee's deed as to Wells Fargo in its role as a purchaser at the trustee's sale. Section 2924, subdivision (c), provides that a recital in a trustee's deed executed pursuant to the power of sale, stating there was compliance with all applicable requirements of law regarding notice of default and notice of the trustee's sale, "shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice." The conclusiveness of compliance with the requirements of law as to a purchaser receiving a trustee's deed only applies to a bona fide purchaser for value without notice. (See *Moeller v. Lien, supra*, 25 Cal.App.4th at p. 831.)

Application of the recital rule here means this: Aharonoff cannot state a claim for cancellation of the trustee's deed transferring the Clark Street property to Wells Fargo in the event Wells Fargo was a bona fide purchaser for value without notice of any defects in the sale. This is so because Aharonoff's FAC acknowledges that the trustee's deed contains a recital pursuant to section 2924, subdivision (c). Thus, we must determine if there is a reasonably possibility that Aharonoff will be able to allege that Wells Fargo is not a bona fide purchaser for value without notice of any defects in the trustee's sale. We believe the allegations make this likely.

Aharonoff's FAC, liberally construed, alleges that AHMSI acted as Wells Fargo agent in dealing with Aharonoff. The operative complaint alleges that AHMSI, on behalf of Wells Fargo, and Aharonoff reached an agreement to postpone the trustee's sale. This leads to a reasonable inference that Wells Fargo, through its agent, AHMSI, had notice of the agreement to postpone the trustee's sale. Having purchased the property at a trustee's sale that it knew was premature, Wells Fargo may or may not be a bona fide purchaser.

For the reasons explained above, we find the order of dismissal must be reversed. We agree with Aharonoff that he should be granted leave to file a second amended complaint that clarifies the claims and issues in his case as argued on appeal, i.e., a claim for cancellation of a void trustee's deed under section 2924g, subdivision (c)(1)(C). (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [when a reviewing court decides there is a reasonable possibility that a defect can be cured by amendment, "the trial court has abused its discretion [in denying leave to amend] and we reverse"].)[9]

DISPOSITION

The judgment is reversed. The cause is remanded to the trial court for further proceedings in accord with this opinion. Appellants are awarded their costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J. SORTINO, J.*

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[9] Aharonoff further argues that it is reasonably possible that he will be able to allege damages caused by the sale. We have some curiosity how Aharonoff could have suffered any loss of money by the trustee's sale, whether in November or December, when he has expressly alleged that he had, in fact, defaulted on his loan. Be this as it may, because Aharonoff will have one more opportunity to file a further amended complaint, we leave the issue of any claim for damages to his further amended complaint.

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