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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOSEPH ABE et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A., et al., Defendants and Respondents.	B258828 (Los Angeles County Super. Ct. No. BC 493037)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Affirmed.

Rodriguez Law Group, Inc., Patricia Rodriguez, and George M. Hill for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Kerry W. Franich, and Loren Coe for Defendants and Respondents.

INTRODUCTION

Joseph and Jonelen Abe appeal from a judgment of dismissal, following an order sustaining the demurrer of respondents Wells Fargo Bank, N.A., (Wells Fargo), HSBC Bank, N.A. (HSBC), as Trustee for DBALT 2006-AB2 (a securitized trust), and Mortgage Electronic Registration Systems, Inc. (MERS) to their third amended complaint (TAC) without leave to amend. Appellants contend the court erred in determining that they lacked standing to bring a preforeclosure action based on the alleged invalidity of the assignment of the promissory note and deed of trust to the securitized trust. They also contend the operative complaint stated viable causes of action based on the allegation that the terms of the mortgage loan were unconscionable. They further contend that the TAC stated a claim under title 15 United States Code section 1641(g) (section 1641(g)). Finally, they contend the trial court abused its discretion in denying them leave to amend. For the reasons explained below, we find no error in the trial court's order sustaining respondents' demurrer.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Appellants filed their original complaint on October 4, 2012 Respondents demurred to the complaint. Before the trial court ruled on the demurrer, appellants filed a first amended complaint (FAC). Respondents demurred to the FAC, and on August 13, 2013, the trial court sustained the demurrer with leave to amend. On September 3, 2013, appellants filed their second amended complaint (SAC). Respondents also demurred to the SAC. A hearing was held on respondents' demurrer, and the matter was continued.

On February 20, 2014, appellants filed their TAC, alleging six causes of action against respondents. The TAC alleged that in February 2006, appellants applied for a $487,500 mortgage loan. It further alleged that their former mortgage

broker and lender secured a mortgage loan for them by falsely overstating their income. The TAC alleged that the broker and lender made the loan knowing that appellants would not be able to make the mortgage payments. It further alleged that due to appellants' "lack of knowledge," they acquiesced to the loan terms as the loan was done on a "take it or leave it basis, with no meaningful opportunity to negotiate for better or conscionable terms." It also alleged that the broker and lender charged excessive and/or sham fees. In addition, it alleged that the lender charged for 23 days of interest before closing when California law permits only three days of interest.

When appellants defaulted in 2012, they contacted Wells Fargo, the loan servicer, for a loan modification. Wells Fargo allegedly refused to modify the loan. Instead, appellants were served with a notice of default and threatened with foreclosure.

The TAC alleged that the loan was securitized, with the promissory note and deed of trust transferred in connection with the execution of a pooling and servicing agreement (PSA).[1] It further alleged that respondent HSBC, as Trustee for DBALT 2006-AB2, claimed to be the holder and owner of the promissory note and the beneficiary of the deed of trust. However, the promissory note and deed of trust allegedly were not assigned to the securitized trust before the trust's closing date on May 1, 2006, in violation of the terms of the PSA. Thus, the TAC alleged, the assignment was void, and HSBC lacked standing to collect on the promissory note or to foreclose on the property.

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[1] "In simplified terms, 'securitization' is the process where (1) many loans are bundled together and transferred to a passive entity, such as a trust, and (2) the trust holds the loans and issues investment securities that are repaid from the mortgage payments made on the loans. [Citation.]" (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1082, fn. 1 (*Glaski*).)

The TAC asserted causes of action for cancellation of contract, violation of Business and Professions Code section 17200 et seq. (UCL), violation of the covenant of good faith and fair dealing, declaratory relief, and lack of standing/wrongful foreclosure against all respondents. With respect to the wrongful foreclosure cause of action, the TAC alleged that because the assignment of the note and deed of trust was invalid, respondents lacked standing to foreclose on the property. The other causes of action were based on both the same purportedly invalid assignment and the purportedly unconscionable terms in the loan agreement. As to the latter, the TAC alleged that the unconscionable loan terms included "unqualified amount in payments, unjust and fraudulent funding fees, and an excessive interest rate not justified based on [appellants'] credit rating." Finally, the TAC alleged that HSBC violated section 1641(g), the federal "Truth in Lending Act" (TILA) by failing to timely provide appellants written notice of the February 7, 2012 assignment of the deed of trust by MERS.[2]

On March 28, 2014, respondents demurred to the TAC, arguing that the complaint failed to allege facts sufficient to constitute a cause of action. They argued that any claim arising from the loan origination was time-barred. Moreover, any wrongful conduct related to the loan origination was not committed by the current loan servicer (Wells Fargo), the current beneficiary (HSBC) or the original nominee beneficiary (MERS). As to the theory that the promissory note and deed of trust were not assigned in accordance with the terms of the PSA, respondents argued that appellants lacked standing to enforce the PSA. Additionally, respondents argued, any faulty assignment did not prejudice

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[2] The TAC also alleged two causes of action (actual fraud and breach of fiduciary duties) against appellants' former mortgage broker and the mortgage lender. This appeal concerns only the claims against the respondents listed above.

appellants, as the purportedly faulty assignment did not cause appellants to default on the loan. Respondents also argued that the TILA claim failed, as section 1641(g) applies only to transfers of debt, not transfers of deeds of trust.

On July 14, 2014, following a hearing, the trial court sustained respondents' demurrer to the TAC without leave to amend. A judgment in favor of respondents and dismissing the case with prejudice was entered the same day. Appellants timely noticed an appeal from the judgment.

DISCUSSION

Appellants contend the order sustaining respondents' demurrer to the TAC without leave to amend was erroneous. On appeal from a demurrer, "'"[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

A. *Appellants Lack Standing to Assert Claims Based on Violation of the PSA.*

The wrongful foreclosure cause of action is based on appellants' allegation that the promissory note and the deed of trust were not assigned in accordance with

the terms of the PSA. Likewise, the causes of action for cancellation of contract, violation of the covenant of good faith and fair dealing, declaratory relief, and violation of the UCL are based in part on the allegedly invalid assignment. However, it is uncontradicted that appellants were not parties to or intended beneficiaries of the PSA. Thus, appellants lack standing to assert claims for violation of the PSA. (See *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515 (*Jenkins*) ["As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [debtor plaintiff] lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions."].)

Appellants' reliance on *Glaski*, *supra*, 218 Cal.App.4th 1079 is misplaced. That case involved a wrongful foreclosure action brought after the foreclosure was completed. (See *id*. at p. 1087.) In contrast, the instant matter is a preforeclosure action. "[A] preforeclosure, preemptive action is not authorized by the nonjudicial foreclosure statutes because it creates an additional requirement that a foreclosing entity first demonstrate in court that it is entitled to foreclose." (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 743, citing *Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1154-1156; accord, *Jenkins*, *supra*, 216 Cal.App.4th at p. 513.) We agree with the reasoning of *Kan*, *Gomes*, and *Jenkins*. The trial court did not err in sustaining the demurrer on the ground that appellants lacked standing to assert claims based on an assignment of the promissory note and deed of trust purportedly in violation of the terms of the PSA.[3]

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[3] We note that the California Supreme Court has granted review of the following issue: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the

B. *Appellants Failed to Demonstrate That They are Entitled to any Relief Based on any Other Legal Theory.*

The TAC alleged that appellants were entitled to relief on their causes of action for cancellation of contract, violation of the covenant of good faith and fair dealing, declaratory relief, and violation of the UCL because the mortgage loan terms were unconscionable. In their appellate brief, however, appellants do not further address unconscionability. Thus, they have forfeited the argument. (See *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 19, fn. 12 ["[I]ssues and arguments not addressed in the briefs on appeal are deemed forfeited. [Citations.]"].)

Moreover, as the purportedly unconscionable terms were disclosed to appellants when they obtained the mortgage loan in February 2006, appellants' claims would be time-barred, absent delayed accrual under the discovery rule or tolling. (See Bus. & Prof. Code, § 17208 [four-year limitations period on UCL claim]; Code Civ. Proc, §§ 337 [action on contract has four-year limitations period], 338, subd. (d) [action based on fraud has three years limitations period];

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note and deed of trust on the basis of defects allegedly rendering the assignment void?" (See *Yvanova v. New Century Mortgage Corp*. (2014) 331 P.3d 1275 (*Yvanova*).) Although the plaintiff in *Yvanova* challenged a foreclosure sale that already had occurred, the California Supreme Court also has granted review in a case that presents the same issue we face here -- whether a borrower may seek to prevent foreclosure proceedings based on alleged deficiencies in the assignment of the deed of trust. (See *Keshtgar v. U.S. Bank, N.A.* (2014) 226 Cal.App.4th 1201, review granted Oct. 1, 2014, S220012.) The court granted review and deferred further action in *Keshtgar* pending the decision in *Yvanova*. (See *Keshtgar v. U.S. Bank, N.A.* (2014) 334 P.3d 686.) Based on the current state of the law, however, we conclude appellants lacked standing to bring a preforeclosure action based on a purportedly invalid assignment of the promissory note and deed of trust.

Having concluded that appellants lacked standing, we need not consider respondents' argument that appellants were required to tender the money they borrowed before seeking redress from foreclosure proceedings.

United Pacific-Reliance Ins. Co. v. DiDomenico (1985) 173 Cal.App.3d 673, 677 [where action for declaratory relief is based on a contract, limitations period is the same as that for a contract action].) The TAC alleged that appellants became aware that their broker and lender may have committed fraud when "monthly payments became so excessive that it aroused their suspicion." As the first monthly payment on appellants' 30-year, fixed-rate mortgage occurred in March 2006, appellants were on inquiry notice of their causes of action at that time. Allegations that appellants were unaware that the loan terms were unconscionable due to their "limited knowledge of real estate" are insufficient to support delayed accrual or equitable tolling. Once appellants had inquiry notice, they were obligated to conduct a reasonable investigation. (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808 ["plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation"].) The TAC acknowledges that appellants' counsel formed the opinion that the fees and costs were excessive after reviewing the loan documents. In addition, as prevailing interest rates for mortgage loans are a matter of public record, a reasonable investigation would have revealed facts to support appellants' claim that they were charged an excessive interest rate. In short, the allegations in the TAC do not support delayed accrual.

With respect to equitable tolling, the doctrine is "'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations -- timely notice to the defendant of the plaintiff's claims -- has been satisfied.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99.) "Broadly speaking, the doctrine applies '"[w]hen an injured person has several legal remedies and, reasonably and in good

faith, pursues one.""" (*Id*. at p. 100.) Here, the TAC does not allege that appellants pursued any legal remedy before filing the action. Thus, appellants were not entitled to any equitable tolling or delayed accrual of their claims and accordingly, those claims are time-barred.

C. *Appellants have not Alleged a Viable TILA Claim Against HSBC.*

On May 20, 2009, TILA was amended to add section 1641(g). The amendment provides that, "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer . . . ." (§ 1641(g).) Appellants contend they stated a cause of action under TILA, as the TAC alleged (1) on information and belief, that the promissory note was transferred on February 7, 2012, as evidenced by the recordation of an assignment of the deed of trust to HSBC, and (2) appellants did not receive written notice of the assignment within 30 days. We disagree.

A "'[p]laintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true.'" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, quoting *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792.) Here, appellants' allegation that the note was assigned on February 7, 2012 is based on the date of the recordation of the transfer of the deed of trust by MERS. That date, however, does not reveal when the mortgage loan was transferred or assigned. As explained in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267, "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing

rights. The notes may thereafter be transferred among members without requiring recordation in the public records." Thus, the date on which the transfer of a deed of trust is recorded is not evidence of when a note was transferred.

Moreover, the assignment of a deed of trust by MERS is not sufficient to trigger the notice obligations under section 1641(g), as that statutory provision applies only to assignment of the mortgage loan or debt. (See *Terry v. Mortgage Elec. Registration Sys.* (D.Md. Apr. 30, 2013, No. CV 00773-AW) 2013 U.S. Dist. LEXIS 61234, *8-*9 [assignment by MERS of its beneficial interest to the holder of the underlying mortgage does not implicate § 1641(g)]; accord, *McCray v. Fed. Home Loan Mortg. Corp*. (D. Md. Jan. 24, 2014, No. GLR-13-1518) 2014 U.S. Dist. LEXIS 9025, *30.) In short, appellants have not stated a claim under section 1641(g) of TILA.

D. *The Trial Court did not Abuse its Discretion in Denying Plaintiffs Leave to Amend.*

Appellants contends the trial court abused its discretion in denying them leave to amend the TAC. Appellants have the burden of demonstrating that an amendment would permit them to maintain their causes of action. (*Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126.) Moreover, "[a]bsent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found "'only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case." [Citation.]'" (*Jenkins, supra*, 216 Cal.App.4th at p. 507, quoting *Herrera v. Federal National Mortgage Assn*. (2012) 205 Cal.App.4th 1495, 1501.) Here, appellants had three chances to amend their complaint following substantively similar demurrers. More important, on appeal, appellants do not propose how they could amend their TAC to address any grounds for sustaining the demurrer, including their lack of standing to assert

claims for violation of the PSA. Thus, we conclude the trial court did not abuse its discretion in denying appellants leave to amend the complaint a fourth time.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.