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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KRISTJAN T. KRISTJANSSON, Plaintiff and Appellant, v. WELLS FARGO HOME MORTGAGE et al., Defendants and Respondents.	2d Civil No. B281985 (Super. Ct. No. 56-2016-00483719-CU-OR-VTA) (Ventura County)

Kristjan T. Kristjansson appeals from a judgment of dismissal entered after the trial court sustained, without leave to amend, defendants', Wells Fargo Bank, N.A. and Mortgage Electronic Registration Systems, Inc., demurrer to appellant's wrongful foreclosure complaint. We affirm.

Facts and Procedural History

In 2007 appellant took out a $1 million residential mortgage loan from Wachovia Mortgage Corporation (Wachovia) to build a new house at 4196 Summit Ridge Court, Westlake Village. The loan was secured by a deed of trust that was

allegedly assigned/transferred to a mortgage investment trust known as the MASTR Asset Securitization Trust 2007-1 in violation of New York law.

After appellant defaulted on the loan, appellant claimed that Wachovia and its successor, Wells Fargo Bank, N.A. (Wells Fargo), falsely represented that the loan would be converted into a construction loan. Appellant filed three bankruptcy petitions to stay the trustee's sale, requiring Wells Fargo to renotice the trustee's sale five times.

On July 5, 2016, *before the property was foreclosed upon*, appellant sued for declaratory relief, "illegal trustee sale," rescission, and violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200). The complaint was modeled after *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079 (*Glaski*) and alleged that Wells Fargo lacked the authority to initiate the foreclosure because the deed of trust was assigned after the mortgage investment trust closed, in violation of the trust pooling service agreement.[1]

Wells Fargo and Mortgage Electronic Registration Systems, Inc. (MERS) filed a demurrer to the complaint. The trial court sustained the demurer on the ground that appellant lacked standing to challenge the trust deed assignment before the property was sold and found that the rescission cause of action was time barred.

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[1] "A securitized [mortgage] investment trust is created by pooling [mortgages] into a trust and selling to investors the right to receive the mortgage interest and principal payments. [Citation.]" (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1254, fn. 2.) The terms of trust and the rights and obligations of the parties are set forth in the trust pooling and service agreement. (*Ibid.*)

Discussion

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) In our de novo review of the order, we assume the truth of all facts properly pleaded, but not contentions, deductions, or conclusions of law. (*Ibid*.) We determine whether the alleged facts are sufficient, as a matter of law, to state a cause of action under any legal theory. (*Ibid*.) In making this determination, we also consider facts of which the trial court properly took judicial notice. (*Ibid*.)

MERS

We affirm the judgment in favor of Mortgage Electronic Registration Systems, Inc. because no cause of action is stated. The complaint alleges that MERS was named as the trust deed beneficiary and acted as the nominee for the lender and its successors and assigns. It is settled that MERS is permitted to act as the beneficiary of the deed of trust and may assign the deed of trust, as was done here. (*Gomes v. Countrywide Home Loans*, *Inc.* (2011) 192 Cal.App.4th 1149, 1157; *Intengan v. BAC Home Loans Servicing LP*, *supra,* 214 Cal.App.4th at pp. 1055-1056.) The complaint states that "defendants" had no right to initiate the foreclosure but the recorded documents on which the trial court took judicial notice show that MERS had nothing to do with the property after the deed of trust was assigned in 2010. The trial court did not err in sustaining MERS' demurrer without leave to amend.

Glaski - Voidable or Void Assignment?

The complaint is based on the theory that the assignment of the deed of trust is void and that Wells Fargo

lacked the authority to initiate the foreclosure. Appellant argues that the deed of trust was assigned after the mortgage investment trust closing date, in violation of the pooling service agreement and New York law. The cases on which appellant relies (*Glaski*, *supra,* 218 Cal.App.4th 1079 and *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*)) discuss wrongful foreclosure actions filed *after* the property was sold at a trustee's sale. *Yvanova*, however, acknowledged that California law does not permit a preemptive judicial action to challenge the right, power, or authority of a foreclosing beneficiary or beneficiary's agent to initiate a foreclosure. (*Id.* at p. 933, citing *Gomes v. Countrywide Homes Loans*, *Inc.*, *supra*, 192 Cal.App.4th at p. 1155.) Until the property is sold, the borrower has not suffered a cognizable injury.[2] (*Id.* at p. 941.) Appellant has alleged no harm because the assignment did not change his loan obligations.

Four published cases since *Yvanova* have declined to follow *Glaski* because it misconstrues New York law. (*Saterbak v. JPMorgan Chase Bank*, *N.A.* (2016) 245 Cal.App.4th 808, 814-815; *Mendoza v. JPMorgan Chase Bank*, *N.A.* (2016) 6 Cal.App.5th 802, 816-817 (*Mendoza*); *Yhudai v. IMPAC Funding Corp.*, *supra*, 1 Cal.App.5th at pp. 1257-1259; *Kalnoki v. First American Trustee Servicing Solutions*, *LLC* (2017) 8 Cal.App.5th 23, 42-43 (*Kalnoki*) [assignment to a securitized deed of trust made after the trust's closing date is merely voidable].) The Second Circuit and a New York state appellate court have also rejected *Glaski*'s interpretation of New York law. (See *Turner v. Wells Fargo Bank N.A.* (9th Cir. 2017) 859 F.3d 1145, 1149

[2] The property was sold at a May 16, 2017 trustee's sale, a month after appellant filed his notice of appeal.

[rejecting *Glaski*]; *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89 [unauthorized act by the trustee is not void but merely voidable]; *Wells Fargo Bank, N.A. v. Erobobo* (N.Y. App. Div. 2015)] 9 N.Y.S.3d 312, 314 [no standing].) "Because the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected, we decline to follow *Glaski* on this point. [Citation.]" (*Yhudai v. IMPAC Funding Corp.* at p. 1259.) The late assignment of a deed of trust in violation of a pool servicing agreement is voidable rather than void and does not confer standing on the borrower to challenge the assignment. (*Ibid.*; *Mendoza*, *supra*, at p. 815.)

Appellant argues that the assignment violated real estate mortgage investment conduit (REMIC) guidelines under the federal tax code[3] and that it confers standing on a borrower to challenge the foreclosure. A similar argument was rejected in *Mendoza*, *supra*, 6 Cal.App.5th at pp. 817-818, which held that the tax implications of transferring a deed of trust after the investment trust closing date do not render a voidable transaction void. The same principal applies here. Appellant has

[3] Transfer of a mortgage into a REMIC trust more than 90 days after the trust is created renders the transfer void under the Internal Revenue Code and causes the trust to lose tax advantages that normally accrue to a REMIC trust. (See *Glaski*, *supra*, 218 Cal.App.4th at p. 1093, fn. 12; cf. *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 743 [rejecting *Glaski*-REMIC argument in a preforeclosure action to quiet title].)

no standing to bring an action for wrongful initiation of the foreclosure.[4]

Rescission

The complaint alleges that Wells Fargo violated the federal Truth in Lending Act (TILA; 15 U.S.C. § 1601 et seq.) and Regulation Z (12 C.F.R. 226.1 et seq. (2017)) which permits appellant to rescind the loan. The trial court sustained the demurrer on the ground that no facts are alleged that appellant tendered the loan funds back to Wells Fargo. (See *Kalnoki*, *supra*, 8 Cal.App.5th at p. 48 [borrower required to tender amount owing on the debt to maintain an action challenging foreclosure sale].) Appellant argues that a tender is not required where the assignment is void. As discussed, appellant's reliance on *Glaski,* a post-foreclosure case, is misplaced. Because the property had not been sold when the complaint was filed, there is no causal link between the voidable assignment and the harm suffered. The cause of action for declaratory relief, which is derivative of the other causes of action, fails to state a cause of action. (See *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794.) The rescission claim is also time barred because the action was filed in 2016, more than three years after

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[4] Appellant argues that the foreclosure violates the Homeowner's Bill of Rights (HBOR; Civ. Code, § 2923.4 et seq.) which provides that "[n]o entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust . . . ." (Civ. Code, § 2924, subd. (a)(6).) There is no private cause of action for alleged violations of section 2924, subdivision (a)(6). (*Lucioni v. Bank of America, NA.* (2016) 3 Cal.App.5th 150, 157-158.)

appellant sent Wells Fargo a hardship letter claiming that he had suffered harm. (See 15 U.S.C. § 1635(f) [three-year limitation for rescission]; *Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1351.)

UCL Cause of Action

The UCL claim is derivative of the wrongful foreclosure and rescission causes of action and stands or falls with the underlying claims. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 [UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices"]; *Jordan v. Paul Financial, LLC* (N.D. Cal. 2010) 745 F.Supp. 1084, 1098 [UCL claim predicated on TILA violation that was time-barred].) Appellant claims that Wachovia and Wells Fargo falsely represented that the residential home mortgage would be converted into a construction loan. Assuming, arguendo, that Wachovia and Wells Fargo made such a misrepresentation, the claim is barred by the four-year statute of limitations. (Bus. & Prof. Code, § 17208; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 470-471.) The misrepresentation allegedly occurred in 2007, when the loan was taken out. Appellant filed suit nine years later and no facts are alleged that the statute of limitations was tolled.

Appellant claims that he should be given leave to amend but has failed to describe how he would amend the complaint to correct its defects. (See, e.g., *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.) The trial court did not abuse its discretion in denying leave to amend. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 439.)

Disposition

The judgment (order sustaining demurrer without leave to amend) is affirmed. Appellant is to pay costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Law Offices of Douglas E. Klein and Douglas E. Klein for Plaintiff and Appellant.

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