Filed 12/22/17 Chacker v. JPMorgan Chase Bank CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MELODY CHACKER, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A. et al., Defendants and Respondents.	B272380 (Los Angeles County Super. Ct. No. BC547853)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

Law Office of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Parker Ibrahim & Berg, John M. Sorich, Bryant Delgadillo, and Mariel Gerlt-Ferraro for Defendants and Respondents JPMorgan Chase Bank, N.A. and California Reconveyance Company.

Wright, Finlay & Zak, Gwen H. Ribar, and James J. Ramos for Defendants and Respondents Select Portfolio Servicing, Inc. and U.S. Bank.

Plaintiff and appellant Melody Chacker (Chacker) sued to stop defendants,[1] who had begun the nonjudicial foreclosure process, from proceeding with a foreclosure sale of her home. The gist of her third amended complaint (the operative complaint) is that defendants disregarded a statute that required them to contact her before beginning the foreclosure process; that the assignment of the deed of trust from Chase to a securitization trust for which U.S. Bank now serves as trustee is void (not merely voidable) because Chase claims it still holds the promissory note; and that the initiation of the foreclosure process violates state and federal debt collection statutes. The trial court sustained defendant's demurrers to the operative complaint without leave to amend and denied her subsequent motion for reconsideration that invoked our Supreme Court's intervening decision in *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 (*Yvanova*). We are asked to decide whether the trial court correctly sustained the demurrer without leave to amend, and we consider in arriving at our decision the arguments made by Chacker in her motion for reconsideration.

---

[1] Defendants and respondents are JP Morgan Chase Bank (Chase), California Reconveyance Company (CRC), Select Portfolio Servicing, Inc. (SPS), and U.S. Bank as Trustee for WAMU Mortgage Pass-Through Certificates, Series 2006-AR9.

I. BACKGROUND[2]

A. The Property and Foreclosure

Chacker and her then-husband purchased a home in Hermosa Beach, California in 1995. In 2006, they refinanced the home and executed a promissory note for $1,700,000. The repayment of the loan was secured by a deed of trust (DOT), which was recorded in June 2006. The DOT lists Washington Mutual Bank, FA as the "lender" and CRC as the "trustee."

According to the operative complaint, Chacker's promissory note was placed into a mortgage backed security trust entitled "WaMu Mortgage Pass-Through Certificates Series 2006-AR9 Trust" (the Trust). The Trust was created under Delaware law in 2006 as a Real Estate Mortgage Investment Conduit (REMIC). The Trust "closed" in July 2006, meaning all mortgages purchased by the trust had to be pooled and placed into the trust by that date. Once the Trust closed, no mortgages or other investments could be placed in or taken out of the Trust. After the pool of mortgages were placed in the Trust, only the Trust had the right to receive scheduled monthly payments due on the loans. The operative complaint does not allege when plaintiff's promissory note was placed in the Trust.

The operative complaint attached and incorporated by reference the prospectus supplement for the Trust. The prospectus supplement provides the following additional details about the Trust and the promissory notes it held. On the Trust's closing date, the mortgage loans that supported the certificates

---

[2] The facts are derived from the operative complaint, the exhibits attached to it, and documents subject to judicial notice. (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. 1.)

were to be sold by Washington Mutual Bank to WaMu Asset Acceptance Corp., the depositor, which would, in turn, sell the mortgage loans and related assets to the Trust. The mortgage loans were to be "serviced by Washington Mutual Bank, as servicer." LaSalle Bank was designated the trustee of the Trust.

In 2008, Washington Mutual Bank was seized by the Federal Deposit Insurance Corporation and sold to Chase. In October 2009, Chacker (or her then-husband) sent Chase a "Qualified Written Request" seeking information related to the mortgage. Chase responded the following month, stating it was investigating in response to Chacker's questions. According to the operative complaint, Chase failed to substantively respond to the October 2009 request in a timely manner, in violation of federal statutes and regulations. As a result, Chacker suspended payments pending the receipt of an appropriate response. Chacker continued to send letters to Chase asking questions about the mortgage.

Chase later assigned its beneficial interest in the DOT to Bank of America, successor by merger to La Salle Bank, as trustee for the Trust. On June 24, 2010, CRC recorded a notice of default and election to sell under deed of trust. The notice of default stated the arrearage on the property was $28,043.38. The notice of default also included a declaration of compliance that stated, "[t]he mortgagee, beneficiary[,] or authorized agent tried with due diligence but was unable to contact the borrower to discuss the borrower's financial situation and to explore options for the borrower to avoid foreclosure as required by Cal. Civ. Code Section 2923.5. Thirty days or more have elapsed since these due diligence efforts were completed."

CRC recorded the first notice of trustee's sale in September 2010. In 2011, Richard Chacker, who is not a party to this appeal, transferred his interest in the property to plaintiff via an Interspousal Grant Deed. CRC also recorded notices of trustee's sale in April 2012, August 2012, and June 2013. So far as the record reveals, however, the Hermosa Beach property has not been sold at a foreclosure auction.

B. Plaintiff's Lawsuit

1. Earlier iterations of the complaint

Plaintiff filed her original complaint in Los Angeles Superior Court in June 2014. Plaintiff's original complaint alleged four causes of action: (1) a request for stay of non-judicial foreclosure and injunctive relief predicated on an asserted violation of Civil Code section 2923.5,[3] (2) breach of contract, (3) quiet title, and (4) declaratory and injunctive relief. The original complaint specifically alleged her mortgage had been placed in the Trust prior to the sale of Washington Mutual to Chase and had been transferred to Chase along with other mortgages. (The operative complaint would later delete this allegation.) Chase and CRC demurred, as did SPS and U.S. Bank. The trial court sustained Chase and CRC's demurrer with leave to amend, and took SPS and US Bank's demurrer off-calendar.

Chacker filed her first amended complaint in April 2015, re-stating the same four causes of action in her original complaint. Defendants demurred again. The trial court sustained the demurrer, denied Chacker leave to amend the

---

[3] Undesignated statutory references that follow are to the Civil Code.

breach of contract cause of action, and granted leave to amend the other causes of action.

Chacker then filed a second amended complaint in June 2015, restating the three causes of action that survived the court's latest ruling. Defendants demurred. In response, Chacker filed a motion for leave to file an amended complaint. The court granted that motion.

2. The operative complaint

Chacker filed the operative complaint in September 2015. The operative complaint alleged the same four causes of action as the original complaint, although styled somewhat differently.

The operative complaint includes a "Factual Background" section that includes general factual allegations. Among them is the statement that "[Chacker] alleges that her promissory note was indeed placed into a mortgage backed security[ ] trust . . . . The . . . Trust was created on or around July of 2006, under specific regulations issued by [the] SEC and the trust laws of the state of Delaware which govern the creation and administration of the [T]rust."

In her first cause of action, alleged against all defendants, Chacker requested a stay of non-judicial foreclosure proceedings and injunctive relief for violation of California Civil Code section 2923.5. Chacker alleged section 2923.5 requires a mortgagee, beneficiary, or authorized agent to contact a borrower in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure, and to include in a notice of default a declaration stating either that contact was made, or that the mortgagee, beneficiary, or agent tried to contact the borrower with due diligence. Chacker then alleged the

declaration attached to the notice of default concerning her property "falsely stated" that "someone . . . had tried with due diligence 'to contact the borrower to discuss the borrower's financial [*sic*] and to explore options for the borrower to avoid foreclosure[.]'"

Chacker's second cause of action for quiet title described the Hermosa Beach property by its legal description and alleged "defendants' claims to an interest or estate in the . . . property are without merit that is adverse to her interest." Chacker specifically alleged two theories by which defendants' interest in the Hermosa Beach property should be quieted: (1) defendant Chase falsely asserted the DOT and her promissory note had been assigned from the Trust to its then-Trustee because the Trust "had already closed well before this assignment allegedly took place"; and (2) a Chase employee designated for a person most knowledgeable deposition, Coleen Irby, had admitted Chase continued to claim an interest in the property, notwithstanding the Trust's claim to the property, by testifying, "'We held the original note.'"

The third cause of action alleged, solely against defendant Chase, unlawful debt collection practices. Chacker alleged Chase had no legal right to any sum allegedly due on the loan nor any right to assert the promissory note default debt on behalf of the lawful beneficiary. This contention was based, in part, on her allegation that Chase's person most knowledgeable had failed to produce any documents demonstrating Chacker had a contract with or owed any money to Chase, or that Chase had any equitable or beneficial interest in the property. Chacker contended Chase's recording of the notice of default and CRC's recording of the notice of trustee's sale accordingly constituted

violations of California's Rosenthal Fair Debt Collections Practices Act (Rosenthal Act).[4]

Chacker's fourth cause of action, for "declaratory and injunctive relief," alleged a controversy existed between Chacker and all defendants concerning their rights and duties regarding Chacker's promissory note. Specifically, Chacker alleged none of the defendants was the present holder in due course or beneficiary of the promissory note, and she maintained defendants did not have standing and were not entitled to accelerate the maturity of any obligation because they were not authorized by the Trust. Chacker sought a judicial determination of her rights and duties regarding the validity of defendants' claims concerning their right to collect payment, accelerate the maturity of the note, and sell Chacker's property under the deed of trust. She alleged defendants would unlawfully sell the property and cause her irreparable injury unless restrained by the court.

3. Defendants demurred and the trial court sustained the demurrers without leave to amend

Chase and CRC, and SPS and U.S. Bank, each demurred to the third amended complaint. Defendants asserted (1) the section 2923.5 claim was barred by the statute of limitations, (2)

---

[4] Chacker's third cause of action does not fully distinguish whether it alleges a claim for violation of the Rosenthal Act or the federal Fair Debt Collection Practices Act (FDCPA). Chacker's prayer for relief, however, seeks relief under the Rosenthal Act only. Chacker's briefing also confirms that she seeks relief under the Rosenthal Act only, and not directly through the FDCPA.

Chacker lacked standing to challenge the assignment of the loan, and (3) Chacker's demand for declaratory or injunctive relief failed for the same reasons the other substantive causes of action failed. Chase and CRC also argued Chacker's cause of action pursuant to the Rosenthal Act and the FDCPA failed because the statutes do not apply to non-judicial foreclosures and the claim was, in any event, barred by the statute of limitations.

As documented by a written ruling dated February 5, 2016, the trial court sustained the demurrers on all causes of action without leave to amend. The trial court agreed the statute of limitations barred Chacker's claims under Civil Code section 2923.5 and the Rosenthal Act because the limitations period began running in June 2010 (when the first Notice of Default was recorded) but Chacker did not file suit until June 2014. The trial court also found Chacker failed to state sufficient facts to assert a Civil Code section 2923.5 violation and the "continuing violations" doctrine was not applicable because Chacker knew or should have known of the alleged violation of Civil Code section 2923.5 on June 24, 2010, when she received the first Notice of Default. As to Chacker's quiet title cause of action, the trial court found it defective because she lacked standing to challenge the assignment and because she had not alleged tender of the amount due under the promissory note. The trial court further found that nonjudicial foreclosure process was not "debt collection" within the meaning of the Rosenthal Act or the FDCPA, and that Chacker's cause of action for declaratory relief failed because Chacker could not preemptively challenge the authority of a foreclosing entity to proceed with a foreclosure sale. The court denied Chacker yet another opportunity to amend the

complaint because she "ha[d] not demonstrated a reasonable possibility of curing the above defects . . . ."

4. Plaintiff's motion for reconsideration

Nearly two weeks after the trial court ruled on defendants' demurrers, our Supreme Court decided *Yvanova, supra*, 62 Cal.4th 919. Chacker then filed a motion of reconsideration arguing *Yvanova* established plaintiff had standing to challenge the June 2010 assignment of the deed of trust so long as she alleged it was void, not merely voidable. Chacker additionally argued the court should reconsider its decision that the statute of limitations on her section 2923.5 claim had run. Defendants opposed the motion, arguing, among other things, that Chacker had misinterpreted *Yvanova* and had not demonstrated any change in law or discovery of new facts requiring reconsideration of the section 2923.5 claim. The trial court denied the motion for rehearing, finding (1) *Yvanova* did not work a change in applicable law for complaints, like Chacker's, that are pre-foreclosure actions; and (2) there was no basis to revisit its ruling that the first cause of action for violation of Civil Code section 2923.5 was barred by the state of limitations.

II. DISCUSSION

Chacker's complaint challenges various aspects of a foreclosure process that was initiated in 2010 but that has yet to culminate in an actual foreclosure sale. Such a legal challenge is not permissible under California law, and our Supreme Court's recent decision in *Yvanova*, which expressly addressed only post-foreclosure standing, did not alter this principle—at least when a complaint alleges facts that show only that an assignment of a

trust deed and promissory note is voidable, rather than void. Chacker has at most alleged a voidable assignment and she thus lacks standing to pursue her causes of action for declaratory relief and quiet title. Her cause of action for violation of section 2923.5 fails because the statute of limitations ran well before she filed her original complaint. And her cause of action for violation of the Rosenthal Act fails because the weight of California authority holds actions required by California non-judicial foreclosure statutes are not "debt collection" under the Act. Because Chacker has not demonstrated she can plead additional facts to cure the defects in her complaint, we will affirm the judgment of dismissal in full.

A. Standard of Review

We review de novo an order sustaining a demurrer without leave to amend. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[(*Evans*)].) To determine whether the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081[(*Schifando*)].)" (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. omitted.) "A judgment of dismissal after a demurrer has been

sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the [trial] court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [validity of the trial court's *action*, not the *reason* for its action, is what is reviewable].)

B. Chacker Lacks Standing to Assert Her Causes of Action for Declaratory Relief and Quiet Title

Chacker's claims for declaratory relief and quiet title are challenges to defendants' authority to foreclose, and both are premised on her theory that Chase's assignment of her loan to the securitization Trust is void. In order to evaluate the viability of these arguments, we first examine California law concerning nonjudicial foreclosures and a plaintiff's standing to challenge the initiation of such proceedings.

1. Overview of nonjudicial foreclosures

"A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. 'The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.' (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813 [ ].) The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring a properly conducted sale is final between the parties and conclusive as to a bona fide

purchaser. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830[ ].)" (*Yvanova*, *supra*, 62 Cal.4th at pp. 926-927.)

"To preserve this remedy for beneficiaries while protecting the rights of borrowers, 'Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' [Citation.]" (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10, fn. omitted.) "[I]t is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale[; however,] the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity's agent." (*Yvanova*, *supra*, 62 Cal.4th at p. 927.)

"'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.' [Citations.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 (*Gomes*).)

2. Borrowers generally lack standing to bring a pre-foreclosure challenge to an entity's authority to foreclose

"[C]alifornia courts do not allow . . . preemptive suits [to determine whether a given entity had authority to initiate a nonjudicial foreclosure] because they 'would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.' (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513[ ] (*Jenkins*), disapproved on other grounds in *Yvanova*, *supra*, 62 Cal.4th at p.

939, fn. 13[ ]; see *Gomes*[, *supra*,] 192 Cal.App.4th [at p.] 1156[ ] ['California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure'].) As the court reasoned in *Gomes*: '[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.' (*Gomes*, *supra*, at p. 1154, fn. 5.)" (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814-815, fn. omitted.)

This principle was undisturbed by our Supreme Court's recent decision in *Yvanova*, a case in which the Court considered a narrow question: "whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." (*Yvanova, supra*, 62 Cal.4th at p. 923.) As to that limited issue, our Supreme Court concluded that the borrower has standing "to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest . . . was not merely voidable but *void*." (*Id.* at pp. 942-943, italics added.) The Court underscored the narrowness of its holding: "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Id.* at p. 924.) The limited nature of *Yvanova*'s holding was correctly recognized by the Fourth District Court of Appeal

in *Saterbak*, which held the plaintiff may not bring a pre-foreclosure lawsuit to challenge the defendants' ability to foreclose. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815.)

3. Chacker's effort to allege the assignment was void does not entitle her to bring a pre-foreclosure lawsuit

Chacker argues a plaintiff is nevertheless entitled to bring a pre-foreclosure action if the plaintiff alleges "specific facts" showing the assignment was void, and Chacker contends she has alleged a void assignment. Assuming a void assignment is a proper basis for bringing a pre-foreclosure lawsuit post-*Yvanova*,[5] Chacker has failed to allege a valid basis for concluding the assignment at issue here was void.

Chacker bases her "specific facts" argument on language in *Gomes*, *supra*, 192 Cal.App.4th 1149. The Court of Appeal in *Gomes* denied a similar preforeclosure challenge to a defendant's authority to initiate the foreclosure process, noting that "[n]othing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated." (*Id.* at p. 1154.) *Gomes* has been summarized as follows: "After examining the nonjudicial

---

[5] We note, again, that *Yvanova*'s holding was, by its own terms, confined to post-foreclosure lawsuits. (*Yvanova*, *supra*, 62 Cal.4th at p. 935.) We recognize, however, that courts that have analyzed *Yvanova*'s impact on a pre-foreclosure claim have gone on to evaluate whether or not the plaintiff alleged a void assignment. (See, e.g., *Saterbak*, *supra*, 245 Cal.App.4th 808; *Brewer v. Wells Fargo Bank, N.A.* (N.D.Cal., Apr. 6, 2017, No. 16-CV-02664-HSG) 2017 WL 1315579, at *2-4.)

foreclosure statutes and considering the well-established purposes of nonjudicial foreclosure, the *Gomes* court found no express or implied grounds for allowing such a preemptive action. (*Id*. at p. 1156[ ].) Consequently, the *Gomes* court concluded that allowing a trustor-debtor to pursue such an action, absent a '*specific factual basis* for alleging that the foreclosure was not initiated by the correct party' would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature, and 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy. [Citation.]' (*Id*. at pp. 1154-1156 [ ].)" (*Jenkins*, *supra*, 216 Cal.App.4th at p. 512.)

Chacker contends she has alleged specific facts demonstrating the assignment from Chase to Bank of America, as trustee of the Trust, was void. Careful review of the operative complaint in light of relevant precedent reveals both of her theories of a void assignment—that multiple parties claim to own her loan and that the assignment post-dated the Trust's closing date—are defective.

Chacker's first theory, that the assignment is void because multiple parties claim an interest in the loan, is insufficiently alleged. Chacker's opening brief argues that "according to deposition testimony from Chase, Chase still insists it owns the loan, despite the assignment," and the brief purports to quote an allegation in the operative complaint that Coleen Irby (the Chase person most knowledgeable deponent) testified, "'We [i.e., Chase] hold the original note.'" That, however, is not what the operative complaint actually alleges. Rather, it quotes Ms. Irby as testifying that Chase "held" the original note, and the difference

in tense is important.[6] While testimony that Chase "holds" the note might be inconsistent with facts indicating the note and DOT were previously assigned to another, testimony that Chase held the note (at some unspecified time in the past) is not at all inconsistent and does not establish there are multiple competing claims on the loan such that one party might have instituted the foreclosure process without proper authority.

Thus, Chacker's citation to *Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552 is unavailing. In that case, the plaintiff alleged the initial beneficiary, Chase, had assigned the plaintiff's mortgage to Deutsche Bank approximately seven months before Chase purported to assign that same mortgage to Bank of America, which then foreclosed on the loan. (*Id.* at pp. 562-564.) Here, the operative complaint contains no similar allegation that all beneficial interest in the DOT and promissory note belonged to another party at the time of the contested assignment.

Chacker's second theory, which she mentions only in passing in her appellate briefing, is that the assignment was invalid because it post-dated the Trust's closing. Numerous recent opinions have analyzed this question as to securitized trusts and held an untimely assignment is merely voidable. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 42-43 [same]; *Mendoza v. JPMorgan Case Bank, N.A.* (2016) 6 Cal.App.5th 802, 811-817 [same]; *Yhudai v. IMPAC Funding*

---

[6] As noted previously, the operative complaint also alleges Chacker's promissory note "was indeed placed into a mortgage backed security[ ] trust . . . ."

Corp. (2016) 1 Cal.App.5th 1252, 1256-1260; *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89 [same].) We agree with these decisions and conclude Chacker's trust closing date allegations would at most establish a voidable assignment, not a void assignment.[7]

C. Chacker's Section 2923.5 Claim Is Barred by the Statute of Limitations

"Section 2923.5 is one of a series of detailed statutes that govern mortgages that span sections 2920 to 2967. . . . [¶] Section 2923.5 concerns the crucial first step in the foreclosure process: The recording of a notice of default as required by section 2924." (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 220-221.)

---

[7] Although the operative complaint alleges the Trust is governed by Delaware law, Chacker cites no Delaware authority to support her argument that the assignment was somehow defective in light of the rules governing the Trust. We note, however, that Delaware law allows beneficiaries to ratify or consent to acts of a trustee that were initially prohibited. (See, e.g., *Oberly v. Kirby* (Del. 1991) 592 A.2d 445, 466 [beneficiaries may consent to an interested transaction by the trustee, which is otherwise prohibited]; *Vredenburgh v. Jones* (Del.Ch. 1975) 349 A.2d 22, 33 [trustee cannot be a purchaser from the estate for which he is trustee, but purchase in violation of that rule is voidable, not void]; *Hardy v. Hardy* (Del.Ch. July 29, 2014, No. 7531-VCP) 2014 Del. Ch. LEXIS 135, at *28 [act of trustee that constitutes breach of trust is voidable and may be consented to or ratified by beneficiary].) Insofar as Delaware law would apply, we accordingly see no basis to conclude the allegedly defective assignment was void rather than merely voidable.

When CRC recorded the notice of default in June 2010, "section 2923.5 prohibited a 'mortgagee, trustee, beneficiary, or authorized agent' from recording a notice of default until 30 days after (1) 'contact[ing] the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure'; or (2) making diligent efforts to contact the borrower, including 'sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified counseling agency,' 'attempt[ing] to contact the borrower by telephone at least three times at different hours and on different days,' and 'send[ing] a certified letter, with return receipt requested.' (Former § 2923.5, subds. (a) & (g).) Former section 2923.5 further required the notice of default include a declaration stating that 'the mortgagee, beneficiary, or authorized agent . . . has contacted the borrower [or] tried with due diligence to contact the borrower as required by this section . . . .' [fn omitted] (Former § 2923.5, subd. (b).)" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1493-1494.)

The parties contend the statute of limitations for a violation of former section 2923.5 is either three years under Code of Civil Procedure section 338 or one year under section 340. We need not determine which statute of limitations applies because Chacker's claim is barred under either term because the notice of default was recorded in 2010.

In an attempt to avoid the statute of limitations, Chacker proffers two related arguments. First, Chacker argues a cause of action for violation of former section 2923.5 does not accrue until a foreclosure sale has been scheduled. Second, she argues each notice of trustee's sale that was recorded was a separate wrong

and they represent, collectively, a continuing violation of former section 2923.5. Neither argument is persuasive.

Chacker's first argument is contradicted by the plain language of former section 2923.5. By its own terms, former section 2923.5 applies only to a "notice of default," not to a notice of trustee's sale. (See, e.g., former § 2923.5, subd. (a)(1) ["A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until" certain requirements are satisfied]; subd. (b) [a "notice of default" shall include a declaration that the servicer, mortgagee, trustee, beneficiary, or authorized agent "contacted" or "tried with due diligence to contact the borrower"].) The notice of default is the only document that triggers a cause of action under former section 2923.5.[8]

Also unpersuasive is Chacker's argument that the notices of trustee's sale collectively amounted to a continuing violation as discussed in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798 (*Richards*). *Richards* and the continuing violation theory it discusses is inapplicable here because only one alleged violation

---

[8] Chacker's argument that there is no threat of "irreparable harm" until the foreclosure sale is scheduled misconstrues the remedy provided by former section 2923.5. A successful cause of action under that section does not result in a traditional injunction and does not require a showing of irreparable harm. Rather, the remedy for a violation of former section 2923.5 is an order postponing a foreclosure sale pursuant to section 2924g, subdivision (c)(1)(A)—a plaintiff need neither plead nor prove irreparable harm to prevail. Rather, the plaintiff need only demonstrate that the defendant did not comply with the statute's requirements.

is relevant to plaintiff's claim: the recording of the notice of default. Chacker has not alleged "a continuing pattern and course of conduct" that would trigger the application of the continuing violation doctrine. (*Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 343.) We also reject Chacker's argument that any notices of trustee's sale referencing defendants' compliance with former section 2923.5 "continued" the wrong. Chacker was harmed by defendants' alleged failure to comply with the requirements set forth in former section 2923.5 when the notice of default was recorded. Chacker could have sued to postpone the foreclosure the day the notice was recorded. The statute of limitations began to run on that date and expired well before Chacker filed her complaint.

D. Chacker Fails to State a Valid Rosenthal Act Cause of Action

Chacker's final cause of action, alleged against Chase only, is for violation of the Rosenthal Act, which incorporates various provisions of the federal FDCPA. Chacker alleges Chase violated the Rosenthal Act by seeking to collect money from Chacker and filing the notice of default without the right to assert the debt on behalf of the beneficiary, failing to account for the money paid to Chase, and communicating debt information to credit reporting bureaus or agencies.

The Rosenthal Act is intended "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts[.]" (§ 1788.1, subd. (b).) It expressly incorporates certain provisions of the FDCPA, but does not incorporate the FDCPA's definitions. (§ 1788.17

["Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code"]; see also 15 U.S.C. § 1692a [FDCPA's definition provision].) Instead, the Rosenthal Act provides its own definitions in section 1788.2.

The Rosenthal Act defines "debt collection" as "any act or practice in connection with the collection of consumer debts." (§ 1788.2, subd. (b).) "Debt" is defined as "money, property or their equivalent which is due or owing or alleged to be due or owing from a natural person to another person." (§ 1788.2, subd. (d).) "Consumer debt" is defined as "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." (§ 1788.2, subd. (f).) The term "consumer credit transaction" is defined as "a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes." (§ 1788.2, subd. (e).) Finally, a "debt collector" is "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law." (§ 1788.2, subd. (c).)

California courts have held that "giving notice of a foreclosure sale to a consumer as required by the [California] Civil Code does not constitute debt collection activity under the

FDCPA." (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1264; see also *Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358, 1375.) A number of federal district courts in California have even more directly held "'[t]he law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the [Rosenthal Act].'" (*Sipe v. Countrywide Bank* (E.D.Cal. 2010) 690 F.Supp.2d 1141, 1151; see, e.g., *Rosal v. First Federal Bank of California* (N.D.Cal. 2009) 671 F.Supp.2d 1111, 1135; *Izenberg v. ETS Services, LLC* (C.D.Cal. 2008) 589 F.Supp.2d 1193, 1199; but see *In re Ganas* (Bankr. E.D.Cal. 2014) 513 B.R. 394, 401-409 [Rosenthal Act does not create exception for collection of secured debts].)

The rationale in these cited district court cases appears to derive from an Oregon district court case that ruled the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) was not implicated by foreclosure proceedings: "'[F]oreclosing on a trust deed is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property. . . . [¶] Foreclosure by the trustee is not the enforcement of the obligation because it is not an attempt to collect funds from the debtor.'" (See, e.g., *Moriarity v. Nationstar Mortgage, LLC* (E.D.Cal. July 3, 2013, No. 1:13-cv-00855-AWI-SMS) 2013 U.S. Dist. LEXIS 93825, at *13-14, quoting *Hulse v. Ocwen Federal Bank, FSB* (D.Or. 2002) 195 F.Supp.2d 1188, 1204 (*Hulse*); see also *Ho v. ReconTrust Company, NA* (9th Cir. 2016) 858 F.3d 568, 571-572 [affirming *Hulse* and stating: "The object of a nonjudicial

foreclosure is to retake and resell the security, not to collect money from the borrower. California law does not allow for a deficiency judgment following non-judicial foreclosure. This means that the foreclosure extinguishes the entire debt even if it results in a recovery of less than the amount of the debt. . . . Thus, actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the FDCPA."].) We find this reasoning persuasive and similarly hold no legal basis exists for Chacker to hold defendants liable under the Rosenthal Act.

Chacker argues her claim is nonetheless viable because she alleges more than the recordation of a notice of trustee's sale. She is incorrect. Most of Chase's alleged violations were simply steps in the nonjudicial foreclosure process. For example, the notice of default's recitation of the amount of money Chacker owed on the loan was required to comply with the relevant statutes. (§ 2923.3; former § 2924c.) The only action Chacker alleges Chase took (or failed to take) outside of the nonjudicial foreclosure context was Chase's alleged failure to provide Chacker with an accounting. However, Chacker does not allege the FDCPA required Chase to do so, and neither the Rosenthal Act nor the FDCPA contains any such requirement.

Chacker also relies on *Dowers v. Nationstar Mortgage, LLC* (9th Cir. 2017) 852 F.3d 964, 970 (*Dowers*), to support her argument that she has stated a valid claim under the Rosenthal Act. *Dowers* confirmed that enforcement of a security interest is not debt collection under section 1692e of the FDCPA. (*Dowers*, *supra*, at p. 970.) *Dowers* also reasoned section 1692f, subdivision (6) of title 15 of the United States Code, unlike

section 1692e, can regulate nonjudicial foreclosure activity under certain circumstances. (*Id.* at 971.) Section 1692f, subdivision (6) prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if — (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." (15 U.S.C. §1692f, subd. (6).) As discussed elsewhere in this opinion, Chacker lacks standing to challenge the assignment from Chase to the Trust. And, at most, Chacker has alleged the assignment is voidable, not void. Section 1692f, subdivision (6) applies only where a plaintiff alleges "there is no present right to possession of the property" at issue. Chacker's allegations fail to satisfy this requirement.

E. Leave to Amend

Where, as here, a trial court sustains a demurrer without leave to amend, we review the decision not to allow further amendment for an abuse of discretion. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 889-890 (*Cantu*).) A trial court abuses its discretion by sustaining a demurrer without allowing the plaintiff to amend if "there is a reasonable possibility that the defect can be cured by amendment . . . ." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The plaintiff bears the burden of proving such a reasonable possibility. (*Ibid.*) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action. [Citations.] Absent such a showing, the appellate court cannot assess whether or not

the trial court abused its discretion by denying leave to amend." (*Cantu*, *supra*, at p. 890; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"].)

So far as the record demonstrates,[9] Chacker made no showing in the trial court regarding how she could further amend her complaint to state a valid cause of action, nor did she file a proposed fourth amended complaint. Before us, Chacker likewise has identified no facts she could allege to resuscitate the defects in their complaint and her opening brief merely states that "[i]f the Court finds the [operative complaint] is defective but can be corrected by amendment, Chacker asks leave to make those amendments." This is, of course, insufficient to demonstrate the trial court abused its discretion in denying further leave to amend. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 ["Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 799, 784-785.)

---

[9] No reporter's transcript of the hearing on defendants' demurrers is included in the appellate record.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

---

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