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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DONNA GIBSON,

Plaintiff and Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST  
COMPANY et al.,

Defendants and Respondents.

A133721

(Contra Costa County  
Super. Ct. No. C11-00073)

Appellant Donna Gibson appeals the trial court's dismissal of her complaint following the sustaining of the demurrer of respondent Deutsche Bank National Trust Company (Deutsche Bank) without leave to amend. She undergoes appeal on the grounds that Deutsche Bank is a foreign company; the attorney in fact improperly transferred Argent Mortgage Company, LLC's (Argent) interest in the property to Deutsche Bank; she was not properly served with the notice of default; and she could allege tender in an amended complaint.

Appellant also appeals the trial court's award of fees to respondent Tom Casazza (Casazza), arguing in part that the lawsuit was not based on a contract. We affirm the judgment in favor of Deutsche Bank, but reverse the judgment in favor of Casazza to the extent it awards him attorney fees under Civil Code section 1717.

**I. FACTS**

In January 2005 appellant purchased two parcels of property, commonly known as the 1521 Elm Street property in El Cerrito, California where appellant lived. On January 14, 2005, she took out a loan for \$343,000 from Argent secured by a deed of trust. In

2009, Citi Residential Lending, Inc. (Citi), acting as attorney in fact for Argent, executed an assignment transferring Argent's interest in the deed of trust to Deutsche Bank.

Appellant failed to make the November 1, 2009 payment and any subsequent payments, defaulting on the loan. As of May 27, 2010, when Deutsche Bank sent out a notice of default and intent to sell, she owed \$20,313.61. Citi, acting as attorney in fact for Deutsche Bank, recorded a substitution of trustee transferring interest to Power Default Services, Inc. (Power Default). On August 28, 2010, Power Default executed and posted a notice of trustee's sale on the property. Deutsche Bank purchased the property at a public auction. Appellant did not vacate the property after the notice of sale was posted. Appellant has asserted that Casazza, a Deutsche Bank agent, worked to evict appellant from the property.

Deutsche Bank successfully prosecuted an unlawful detainer action in court. Appellant appealed the unlawful detainer action, but later abandoned it to pursue this appeal.

On January 12, 2011, appellant filed her complaint alleging four causes of action: quiet title, cancellation of instruments, abuse of process, and unfair business practices against Deutsche Bank and Does 1 through 10. She amended the complaint to substitute Casazza for Doe 1. Appellant alleged that Deutsche Bank had no authority or ability to sell or purchase her land because it was a foreign company not registered to legally conduct business in California. She also claimed the substitution of trustee was improper and incorrect. She was not served with the notice of default. Further, appellant alleged the substitution of trustee was wrongfully recorded because the signatory, a limited liability company acting as "attorney in fact" did not constitute a "person" under Probate Code section 4200. As well, she claimed defendants abused the nonjudicial foreclosure process in numerous ways, and committed unfair business practices under Civil Code section 1770.

Deutsche Bank demurred on the grounds that appellant failed to state sufficient facts in her complaint to sustain any of the causes of action and failed to allege tender. In its tentative ruling, the trial court sustained Deutsche Bank's demurrer to the entire

complaint, concluding appellant failed to allege tender of the amounts owed, and set forth specific reasons for sustaining the demurrer as to each cause of action. The court heard oral arguments on the tentative ruling and allowed appellant to submit supplemental opposition. After reviewing appellant's supplemental opposition, the court affirmed its tentative ruling, sustaining the demurrer without leave to amend upon finding that appellant "failed to present any arguments in her supplemental opposition showing she has a viable theory to support any cause of action in her complaint. In addition, it is still the case that [appellant] failed to allege tender, which was an alternative basis for sustaining the Demurrer."

Casazza also demurred, asserting that appellant failed to state sufficient facts in her complaint to sustain the four causes of action. Sustaining his demurrer without leave to amend, the court explained that although appellant alleged that defendants committed various acts, the allegations were directed at Deutsche Bank. Appellant asserted no version of the facts indicating that Casazza wrongfully recorded any documents, claimed any interest in the subject property, or brought an unlawful detainer action against her. Therefore, leave to amend was denied. Appellant subsequently voluntarily dismissed Casazza from the case without prejudice before the final judgment was recorded. Casazza moved for attorney fees and costs under Civil Code section 1717 and other authority. The court entered judgment in his favor for statutory costs (\$435) and attorney fees (\$6,616.25), "along with any post-judgment costs, interest, and attorneys' fees as allowed by law."

## **II. DISCUSSION**

### *A. Standard of Review*

A demurrer tests the sufficiency of the complaint as a matter of law. On appeal we apply a de novo standard of review. "The reviewing court gives the pleading a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded. [Citation.] The reviewing court does not, however, assume the truth of contentions, deductions or conclusions of law." (*First Aid Services of San Diego, Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th, 1470, 1476.)

The trial court exercises its discretion in determining whether to grant the plaintiff leave to amend the complaint. It is an abuse of discretion to deny leave to amend in the event the plaintiff shows there is a reasonable possibility he or she could cure any defect with an amendment, and the trial court's decision to sustain the demurrer without leave to amend must be reversed. (*First Aid Services of San Diego, Inc. v. California Employment Development Dept.*, *supra* 133 Cal.App.4th at p. 1477).

Appellant claims she alleged sufficient facts in her complaint to go to trial. In addition, she states that she could allege tender in an amendment, but is not required to do so where a sale is invalid.

*B. Trial Court Properly Sustained Demurrer without Leave to Amend as to Deutsche Bank*

*1. The Demurrer Was Properly Sustained as to the Quiet Title and Cancellation of Instrument Causes*

Appellant first contends that her complaint stated causes of action for quiet title and cancellation of instrument. She cites *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 for the proposition that a case can proceed to trial where there is a specific factual showing that the foreclosure was not conducted by the proper trustee.

Appellant has failed to provide specific facts to establish these causes. She has relied almost exclusively on conclusory assertions of wrongdoing and lack of authority. On the other hand, the record shows the following duly recorded instruments establishing that Gibson was in default, Power Default was legitimately substituted as trustee and had authority to execute the notice of default and set the foreclosure sale: (1) deed of trust in favor of Argent; (2) assignment of deed of trust by Citi, as attorney in fact for Argent, to Deutsche Bank; (3) substitution of trustee executed by Citi, as attorney in fact for Deutsche Bank, naming Power Default as the substitute trustee under the deed of trust; (4) notice of default and election to sell under deed of trust setting the amount in default at \$20,313.61 as of June 3, 2010; and (5) notice of trustee's sale by T.D. Service Company, as agent for trustee Power Default.

Appellant scatters a host of arguments attacking the validity of these instruments and the ensuing foreclosure sale. None have merit.

First, she maintains that the sale was improper because no written document authorized Citi to act on behalf of Argent under California's equal dignities rule. (See Civ. Code, § 2309.) Civil Code section 2309 reads: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." However, "Civil Code section 2309 does not require an agent to have written authorization to exercise a right required by agreement, but not by law, to be in writing. [¶] Likewise, we find that nothing in Civil Code section 1624 requires that any right exercised under a valid written agreement of the parties be supported by written authorization of the agent exercising the right." (*Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 610.) Here, appellant's claims, demands for, and even lack of certain written documents from Citi do not render the sale of the property invalid.

Second, appellant attempts to argue that Deutsche Bank never had a right to enforce the deed of trust and promissory note, citing Commercial Code section 3309 pertaining to enforcement of a lost, stolen or damaged instrument. The purported argument is not understandable to this court.

Third, appellant complains that the foreclosure sale was improper because Citi was never given power of attorney from Argent, and thus had no power or standing to substitute trustees, assign the note or proceed with the foreclosure. Appellant has never provided any facts to support this claim. Moreover, Civil Code section 2924, subdivision (a)(1) provides that a "trustee, mortgagee, or beneficiary, *or any of their authorized agents*" may initiate the foreclosure process, i.e., may file and record the notice of default (italics added). That statute does not, on its face or by implication, provide for a judicial action to determine whether the person initiating the foreclosure was indeed authorized to do so. (*Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at p. 1155.)

Fourth, appellant attacks the validity of the substitution of trustee naming Power Default as trustee under the deed of trust. She claims Deutsche Bank did not comply

with the requisites of Civil Code section 2934a, which she asserts provide that the substitution of trustee “may be signed by a single beneficiary, if there is only one. If not, then more [than] 50% of the beneficiaries must agree to substitute trustees. In addition . . . , the parties [may] follow the procedure for substitution contained in the deed of trust. [Citations.] Neither procedure was followed in this case.” However, pursuant to this same statute, “[o]nce recorded, the substitution [of trustee] shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section.” (*Id.*, subd. (d).) Apparently appellant neglected to read the entire statute. Once Deutsche Bank, through its agent, recorded the substitution of trustee, that instrument was conclusive evidence that Power Default had authority to act as trustee.

Fifth, appellant argues that Deutsche Bank, as a foreign corporation, did not obtain a certificate of qualification from the Secretary of State qualifying it to transact intrastate business in California, as mandated by Corporations Code section 2105, and therefore it may not partake in any legal action according to Corporations Code section 2203, subdivision (c).<sup>1</sup>

Corporations Code section 191 provides an exception to these statutes for foreign corporations. A foreign corporation is not considered to be transacting intrastate business when “[c]reating evidences of debt or mortgages, liens or security interests on real or personal property.” (Corp. Code, § 191, subd. (c)(7).) In addition, section 191, subdivision (d)(3) states that foreign lending institutions are not considered to be transacting or engaging in business in this state by reason of “[t]he ownership of any loans and the enforcement of any loans by trustee’s sale . . . .” Deutsche Bank is exempt from the requirements of chapter 21 of the Corporations Code by virtue of these provisions.

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<sup>1</sup> Corporations Code section 2203, subdivision (c) reads in relevant part: “A foreign corporation subject to the provisions of Chapter 21 (commencing with Section 2100) which transacts intrastate business without complying with Section 2105 shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state, commenced prior to compliance with Section 2105 . . . .”

Sixth, appellant also asserts that Deutsche Bank failed to comply with the fictitious business name filing provisions of Business and Professions Code section 17910, which apply to “[e]very person who regularly transacts business in this state for profit under a fictitious business name . . . .” Failure to comply with these filing requirements, she contends, triggers Business and Professions Code section 17918, which provides that a business entity may not “maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published . . . .” From this appellant argues that Deutsche Bank lacked the capacity and standing to pursue judicial and nonjudicial proceedings to force her from her home.

The simple response to this assertion is two-fold. First, the above statute prohibits maintenance of *an action* pending the proper filing. “An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” (Code Civ. Proc., § 22.) A nonjudicial foreclosure is not an “ ‘action’ ” within the language of section 22. (*Birman v. Loeb* (1998) 64 Cal.App.4th 502, 509.) Second, appellant abandoned the appeal from the unlawful detainer action, and that judgment is final.

Seventh, appellant claims she was not given the statutory time to cure her default before the sale. This contention apparently relates to allegations in the complaint that she was not served with the notice of default, and the recorded notice of default was defective.

Likewise, the plaintiffs in *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 577 sought to set aside a foreclosure sale based on a defective notice. However, the court stated: “It is settled that an action to set aside a trustee’s sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security. [Citations.] . . . [¶] . . . [O]nce the trustor fails to effectively exercise his right to redeem, the sale becomes valid and proper.” (*Id.* at pp. 578-579.) “A valid and viable tender of payment of the

indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.” (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) “The basic rule is that an offer of performance is of no effect if the person making it is not able to perform.” (*Id.* at p. 118.)

Here, appellant alleged in her complaint and on appeal that she did not receive the notice of default until after the sale was conducted. However, as with *Arnolds Management Corp. v. Eischen*, *supra*, 158 Cal.App.3d 575, appellant failed to allege tender in her complaint, opposition to the demurrer, supplemental opposition, or in this appeal thereby rendering the sale of property valid and final despite any defect in notice.

Nor is it enough that appellant claims she can tender or allege tender.<sup>2</sup> A tender or offer of performance must be made in good faith, must be unconditional, and the party making the tender must have the ability to perform. (Civ. Code, §§ 1493-1495.) Civil Code section 1495 could not be clearer: “An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.” A plaintiff must show facts demonstrating that a valid and viable tender offer was made. (*Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1184.) To prevail on an action to set aside a foreclosure on the ground that notice was improper, the challenger must “first make full tender and thereby establish his ability to purchase the property.” (*United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1225.) This appellant has failed consistently to do.

## *2. Trial Court Did Not Abuse Its Discretion in Sustaining Deutsche Bank’s Demurrer Without Leave to Amend*

Appellant asserts that it was an abuse of discretion for the trial court not to allow her leave to amend her complaint. She states she pled at least one good cause of action, which should have allowed her to survive the demurrer.

When, as here, the lower court exercises its discretion to sustain a demurrer without leave to amend, we must ascertain whether the complaint might state a cause of

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<sup>2</sup> Appellant claims she can allege tender in an amendment, but was not required to do so because the sale was totally void.

action if a defect could reasonably be cured by amendment. The plaintiff bears the burden of showing a reasonable probability of curing any defect by amendment. (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607.) In its tentative ruling sustaining the demurrer, the trial court clearly and in great detail articulated its reasons for sustaining the demurrer as to each cause of action. Nevertheless, the court also granted appellant a continuance to have more time to brief the issues raised at the hearing and appellant filed supplemental opposition. After having this opportunity to provide the trial court with additional facts and law, the court concluded appellant failed to present any arguments to show she had a viable theory to support any cause of action in the complaint, affirmed its original ruling and sustained the demurrer without leave to amend. And now, on appeal, appellant not only does not address the trial court's ruling, but she provides no additional facts or arguments to show how she could amend to cure the defects. Appellant has not sustained her burden.

*C. The Trial Court Erred in Awarding Attorney Fees to Casazza*

Casazza successfully moved for attorney fees under Civil Code section 1717<sup>3</sup> after the trial court sustained his demurrer without leave to amend as to all causes. Among other points, appellant argues that her suit against Casazza was not “on a contract” within the meaning of Civil Code section 1717, and thus the award must be reversed.

Casazza counters that appellant's third cause of action was based on a contract, and that she claimed entitlement to attorney fees on that contract. He claims courts have construed the phrase “on a contract” broadly, and that the cause of action for cancellation of void instruments under Civil Code section 3412<sup>4</sup> fits the bill of a suit on a contract

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<sup>3</sup> This statute provides in part: “In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.” (Civ. Code, § 1717, subd. (a).)

<sup>4</sup> Civil Code section 3412 states: “A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a

because therein she sought to cancel all documents relating to conveyance of the property, which would include the note and deed of trust. Casazza has not and does not identify any specific attorney fee clause in the various instruments.

In her second cause of action appellant alleged: “An illegally recorded non-judicial foreclosure deed, if allowed to remain on plaintiff[’s] title, shall cause plaintiff serious injury and financial damages if allowed to remain. Accordingly, to prevent such harm, plaintiff requests cancellation of all notices of default and sale pursuant to Civil Code § 3412. Exhibit A [substitution of trustee] is void on its face because only persons may act as an ‘attorney in fact’ . . . . In accordance with Civil Code § 3412, plaintiff[] requests that the court adjudge Exhibit A void and canceled along with any document purporting to convey the property to defendant, or any of them. . . . [¶] . . . [¶] . . . Plaintiff[] [has] been damaged by defendants including attorney fees, court costs, lost payments, lost interest, lost rent, emotional distress, threatened foreclosures by realtors claiming to work for defendants, and each of them. Accordingly, plaintiff seeks to have Exhibit A cancelled and be awarded attorney fees, court costs, interest, and damages according to the practices of this court.”

No matter how broadly courts may construe the term “on a contract,” a cause of action for cancellation of a void instrument under Civil Code section 3412 is not an action “on a contract.” Rather, it is an action in equity that seeks an equitable remedy. It is “aimed at a particular instrument . . . , which is dangerous to the plaintiff’s rights, and which may be ordered to be destroyed in whosoever hands it may happen to be.” (*Castro v. Barry* (1889) 79 Cal. 443, 445-446; see *Rocha v. Rocha* (1925) 197 Cal. 396, 401-402; *Santa Ana M. & I. Co. v. Kinslow* (1938) 30 Cal.App.2d 107, 109.)

Appellant did not sue Deutsche Bank or Casazza on any contract, nor did she seek contractual attorney fees. Although Civil Code section 3412 embodies an equitable action, in addition to seeking the equitable remedy of cancellation of instrument appellant also stated she was damaged by defendants, and her damages included attorney fees.

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person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.”

While not an appropriate plea under section 3412, neither was it a request for contractual attorney fees. The trial court erred in awarding Casazza attorney fees under Civil Code section 1717.

### **III. DISPOSITION**

We affirm the judgment of dismissal following the sustaining of the demurrer of Deutsche Bank without leave to amend. We deny Deutsche Bank's request for sanctions under Code of Civil Procedure section 907. We reverse the judgment in favor of Casazza to the extent it awards him attorney fees under Civil Code section 1717.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.