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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FERMIN SOLIS ANIEL et al.,  
Plaintiffs and Appellants,

v.

T.D. SERVICE COMPANY,  
Defendant and Respondent.

A134396

(San Francisco City & County  
Super. Ct. No. CGC-10-505131)

In this action challenging the authority of a trustee's agent to conduct a nonjudicial foreclosure, the trial court sustained the demurrer of respondent T.D. Service Company (T.D. Service) without leave to amend. Appellants Fermin, Erlinda and Marc Aniel (the Aniels) appeal the judgment dismissing their action. They contend that (1) the trial court erred by taking judicial notice of the legal effect of certain documents allowing it to conclude that T.D. Service was actually the agent for the trustee in foreclosure; (2) their causes of action for wrongful foreclosure, injunction and fraud were properly pled; and (3) even if the demurrer was properly sustained, they should have been granted leave to amend. We affirm the judgment.

**I. FACTS**

*A. Prior History*

In April 2007, the Aniels borrowed \$676,000 from Bayporte Enterprises, Inc. The promissory note to repay this loan was secured by a deed of trust against the Aniels' rental property on Persia Avenue in San Francisco. The deed of trust specified that Mortgage Electronic Registration Systems, Inc. (MERS) was the beneficiary. It also

provided that the underlying note could be sold without notice and that if the Aniels defaulted on their loan, the lender had the right to sell the underlying property.

By October 2008, the Aniels stopped making payments on their loan. Later, they admitted that their rental income was insufficient to pay increased mortgage payments and their overall family's income had fallen because of the decline of the housing market.

On May 8, 2009, a notice of substitution of trustee was executed, designating American Home Mortgage Servicing, Inc. (AHMSI) as trustee. This notice identified Deutsche Bank National Trust Company (Deutsche Bank) as the beneficiary. T.D. Service did not record this notice of substitution until almost a year had passed on April 9, 2010. As we shall see, because Deutsche Bank had not yet become the beneficiary of the deed of trust at the time that this notice was executed in 2009, the substitution of trustee was invalid.

On May 11, 2009, T.D. Service recorded a notice of default against the Persia Avenue property, in an attempt to institute foreclosure proceedings. The notice of default identified Deutsche Bank as the beneficiary of the deed of trust, named AHMSI as trustee, and cited T.D. Service as the trustee's agent—again, prematurely, as shall be seen. Fermin and Erlinda Aniel were soon in bankruptcy proceedings and by December 2009, this initial attempt at foreclosure was rescinded.

#### *B. Assignments and Substitution*

On February 15, 2010, MERS executed an assignment of its beneficial interest in the deed of trust to AHMSI. The assignment was recorded by T.D. Service in San Francisco on April 14, 2010. On February 22, 2010, a second assignment of the deed of trust on the same property was executed, conveying AHMSI's new beneficial interest to Deutsche Bank. T.D. Service also recorded this assignment on April 14, 2010, a few seconds after recording the MERS-AHMSI assignment.

On March 1, 2010, T.D. Service filed a second notice of default against the Aniels' property. This notice again identified Deutsche Bank as beneficiary, AHMSI as trustee, and T.D. Service as the authorized agent for the beneficiary of the deed of trust. On June 2, 2010, T.D. Service recorded a notice of trustee sale pursuant to the terms of

the deed of trust. The notice of sale stated that Power Default Services, Inc.—the entity formerly known as AHMSI—was the trustee and T.D. Service was the trustee’s agent.

*C. Legal Proceedings*

In November 2010, the Aniels filed a complaint against T.D. Service and others<sup>1</sup> challenging the foreclosure of the Persia Avenue property. The complaint alleged seven causes of action against T.D. Service—violation of the federal Fair Debt Collection Practices Act, violation of the state Rosenthal Fair Debt Collection Practices Act, fraud, wrongful foreclosure, negligence, injunctive relief and quiet title. (See 15 U.S.C. §§ 1692-1692p; Civ. Code, §§ 1788-1788.33.) The gravamen of the Aniels’ complaint was that the attempted foreclosure was fraudulent, because the parties asserting themselves as beneficiary, trustee and agent were not the true beneficiary, trustee and agent. In support of their complaint, they cite several claimed irregularities in the documents, including that the two assignments of the deed of trust were recorded on the same date, mere seconds apart; that the same two people signed some documents on behalf of different entities; and that Deutsche Bank purported to substitute AHMSI as trustee in 2009 before it had actually been assigned the deed of trust in 2010.

T.D. Service demurred to all causes of action in February 2011. It also filed a request for judicial notice, asking the trial court to notice various documents including the April 2007 deed of trust, the March 2010 notice of default, the May 2009 substitution of trustee and the June 2010 notice of trustee sale. The Aniels opposed the demurrer and sought leave to amend should it be sustained. Apparently, the Aniels did not file formal opposition to the request for judicial notice.

At an April 26, 2011 hearing, the trial court focused on the allegations that Deutsche Bank had not become the beneficiary until after it had appointed the trustee in foreclosure, who had in turn appointed T.D. Service as its agent. The trial court observed that it was required to accept those factual allegations as true on demurrer, absent any evidence of which it could take judicial notice that would show the contrary. The

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<sup>1</sup> The other defendants are not parties to this appeal.

documents that the trial court had before it indicated that in 2009 when Deutsche Bank appointed AHMSI the trustee, the bank had yet to become the beneficiary of the deed of trust, rendering the appointment of trustee invalid. The invalid appointment made the acts undertaken by T.D. Service as agent void, as well.

The trial court agreed that if a new substitution of trustee and a new notice of trustee sale were recorded, then a new sale could proceed and the Aniels' concerns about T.D. Service's authority to conduct a sale as the trustee's agent would become moot. The Aniels argued that even if these new documents were filed, their complaint would survive demurrer. The errors in the 2009 and 2010 documents were not clerical, they argued, but intentional attempts to claim interests that the various opposing parties did not possess. They also reasoned that because many of the documents were signed by the same people for different entities, their complaint raised an inference of impropriety. The trial court rejected this contention as a "conspiracy theory," concluding that the only argument that the Aniels had made that had any merit was that the trustee was appointed before Deutsche Bank acquired its beneficial interest in the deed of trust.

One day after the hearing, the trial court filed an order sustaining the T.D. Service demurrer without leave to amend on the violation of the federal Fair Debt and Collection Practices Act, violation of the state Rosenthal Act and the quiet title causes of action. The demurrer was sustained with leave to amend on the wrongful foreclosure and injunctive relief causes of action. The demurrers to the fraud and negligence causes of action were taken under submission pending further briefing. On May 3, 2011, the Aniels filed a first amended complaint, again alleging causes of action against T.D. Service for fraud, wrongful foreclosure, negligence, and injunctive relief.

Meanwhile on May 2, 2011, a second notice of substitution of trustee was executed and notarized, in which beneficiary Deutsche Bank designated AHMSI as the new trustee. T.D. Service caused this notice to be recorded on May 31, 2011. On May 10, 2011, T.D. Service recorded a new notice of default against the Persia Avenue property. The notice identified Deutsche Bank as the beneficiary, Power Default Services (formerly AHMSI) as trustee and T.D. Service as agent.

In June 2011, T.D. Service demurred to the first amended complaint. At the same time, it filed a request for judicial notice, asking the trial court to take judicial notice of the April 2007 deed of trust, the May 2, 2011 substitution of trustee and the May 10, 2011 notice of default. The Aniels opposed the demurrer and the request for judicial notice.

In August 2011, the trial court conducted a hearing on the demurrer to the first amended complaint. The Aniels argued that they had alleged a cause of action for wrongful foreclosure, citing allegations that T.D. Service had no authority to initiate a foreclosure as the trustee's agent. The trial court disagreed, taking judicial notice of the new documents demonstrating that T.D. Service did have that authority, over the Aniels' objection. It sustained T.D. Service's demurrer without leave to amend because the Aniels failed to show any basis of liability.

In November 2011, the trial court filed an order sustaining T.D. Service's demurrer to four of the five causes of action in the Aniels' first amended complaint without leave to amend. As the only remaining cause of action in that complaint was not alleged against T.D. Service, the trial court filed a judgment of dismissal of the underlying action against the service.

## **II. JUDICIAL NOTICE**

On appeal, the Aniels' pivotal claim of error is that the trial court took judicial notice of the legal effects of certain documents—most significantly, the 2010 assignments of the deed of trust and the 2011 substitution of trustee and notice of default. They reason that these documents lacked authenticity and that the trial court erred by taking judicial notice of their legal effect. The trial court relied on these documents to conclude that the defect in the earlier foreclosure attempt stemming from Deutsche Bank's invalid 2009 substitution of trustee had been cured by the May 2011 substitution of trustee and notice of default beginning the foreclosure process anew. In so doing, it necessarily concluded that the documents were authentic, over the Aniels' objection.

Judicial notice is a court's recognition of the existence of a matter of law or fact relevant to an issue as a substitute for formal proof of that matter. (*Fontenot v. Wells*

*Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264 (*Fontenot*); *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.) Courts often consider matters subject to judicial notice when ruling on a demurrer. (See, e.g., *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375, 381.) A court may take judicial notice of matters that cannot reasonably be disputed even if doing so negates express allegations in the complaint, rendering the pleading defective. (*Fontenot, supra*, 198 Cal.App.4th at p. 264; see *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

The challenged records were all recorded by the City and County of San Francisco, a legal subdivision of the State of California. (See Cal. Const., art. XI, § 1, subd. (a); Gov. Code, § 23002.) A trial court may take judicial notice of the official executive acts of any state. (Evid. Code, §§ 220, 452, subd. (c); *Fontenot, supra*, 198 Cal.App.4th at p. 264.) The trial court had the authority to take judicial notice of these county records as official executive acts. (See *Edna Valley Assn. v. San Luis Obispo County etc. Coordinating Council* (1977) 67 Cal.App.3d 444, 449-450.) A court may also take judicial notice of facts not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (h).)

Courts take judicial notice of the existence and recordation of real property records including deeds of trust when the documents' authenticity is unchallenged. The official acts of notarization and recordation assure the reliability of the documents. Maintenance of the documents in the recorder's office renders their existence and contents capable of confirmation, making these documents beyond reasonable dispute. (*Fontenot, supra*, 198 Cal.App.4th at pp. 264-266; see Evid. Code, § 452, subd. (h).)

In addition to taking judicial notice of the existence and recordation of these documents, a court may take judicial notice of matters that may be deduced from them. Although the court may not take judicial notice of hearsay statements contained in the documents, it may take judicial notice of the legal effect of the language contained in those documents when that effect is clear. (*Fontenot, supra*, 198 Cal.App.4th at p. 265.)

A court may take judicial notice of the fact that a document was recorded; the dates of execution and recordation; the parties to the transaction that are reflected in that document; and the document's legally operative language, assuming there is no *genuine* dispute about the document's authenticity. (*Fontenot, supra*, 198 Cal.App.4th at p. 265.) The Aniels dispute the authenticity of the documents, but we conclude that their speculations do not constitute a genuine dispute. They cannot demonstrate that the legal effect of these documents—that Deutsche Bank is the beneficiary of the deed of trust; that after it obtained its beneficial interest, it substituted a trustee, who in turn named T.D. Service as its agent—are *reasonably* subject to dispute. (See *id.* at p. 266; see also Evid. Code, § 452, subd. (h).)

For example, Deutsche Bank's status as beneficiary is not the type of fact that is generally an improper subject of judicial notice, because this status is not a matter of fact existing *apart from the document itself*. Deutsche Bank *became* the beneficiary of the deed of trust because, in a legally operative document, AHMSI—the earlier beneficiary—designated Deutsche Bank as the new beneficiary. As Deutsche Bank's beneficiary status arose from the legal effect of the assignment, rather than any statement of facts within that document, that status is not *reasonably* subject to dispute. Thus, the trial court properly took judicial notice of the facts contained in these documents and the legal effect of the documents. (See, e.g., *Fontenot, supra*, 198 Cal.App.4th at pp. 266-267.)<sup>2</sup>

### **III. PROPRIETY OF ORDER SUSTAINING DEMURRER**

The Aniels contend that they pled wrongful foreclosure, fraud and injunctive causes of action sufficient to overcome a demurrer.<sup>3</sup> A demurrer tests the legal

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<sup>2</sup> We recognize that the Third Appellate District might conclude that the trial court improperly took judicial notice of the legal effects of these documents, on hearsay grounds. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1374-1375.) To the extent that *Herrera* is inconsistent with *Fontenot*, we find the decision from Division One of our First Appellate District to be more persuasive.

<sup>3</sup> The Aniels do not raise any issue in their brief challenging the trial court's order sustaining the demurrer on the negligence cause of action.

sufficiency of a complaint. On appeal from a dismissal entered after an order sustaining a demurrer, we review the complaint to determine whether—in our independent judgment—it stated a cause of action as a matter of law. All material facts that were properly pled and all inferences that may reasonably be raised from those facts are deemed to be true for purposes of our review. We must also consider matters that may be subject to judicial notice. We ignore those allegations that constitute contentions, deductions, or conclusions of fact or law when making our analysis. (*Evans v. City of Berkeley, supra*, 38 Cal.4th at p. 6; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Fontenot, supra*, 198 Cal.App.4th at p. 264; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

A trial court may deduce and rely on the legal effects of the recorded documents if those effects are clear on the face of the documents. (*Fontenot, supra*, 198 Cal.App.4th at p. 265.) Based on our independent review of the challenged documents on which the trial court relied to sustain T.D. Service’s demurrer, we agree with the trial court’s conclusion about the legal effect of these documents. They establish that Deutsche Bank was the beneficiary and that it substituted a trustee, who appointed T.D. Service to be its agent.

Having come to this conclusion, we also conclude that the trial court properly sustained the demurrer to the first amended complaint. The fraud cause of action turned on the Aniels’ claim that T.D. Service made false representations about whether Deutsche Bank was the beneficiary and Power Default Services, Inc. (formerly AHMSI) was the trustee of the Persia Avenue deed of trust. The wrongful foreclosure claim was also based on their insistence that Deutsche Bank and Power Default Services, Inc. were not the beneficiary and trustee of the deed of trust. The cause of action for injunctive relief also depends on these factual assertions. As the trial court properly concluded that the documentary evidence of which it lawfully took judicial notice established the identity of

the beneficiary and trustee at the time of the August 2011 hearing, all three of these causes of action are fatally flawed.<sup>4</sup> The trial court properly sustained the demurrer.

#### IV. LEAVE TO AMEND

Finally, the Aniels contend that the trial court erred by failing to grant them leave to amend.<sup>5</sup> On appeal, we review an order sustaining a demurrer *without* leave to amend for an abuse of discretion. If the Aniels show a reasonable possibility of curing the defect in the complaint by amendment, denial of leave to amend constitutes an abuse of discretion. As the plaintiffs, they bear the burden of proving that an amendment would cure the defect. (See *Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081; *Montclair Parkowners Assn. v. City of Montclair*, *supra*, 76 Cal.App.4th at p. 790.)

The Aniels reason that an opportunity to amend would allow them to challenge the legal effect of the 2011 substitution of trustee and notice of default. We disagree. The trial court properly determined the legal effects of those documents after a hearing at which the Aniels had an opportunity to raise these challenges. As they have not demonstrated that an amendment could cure the factual defects of their complaint, we find no abuse of discretion in the order sustaining the demurrer without leave to amend.

The judgment is affirmed.

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<sup>4</sup> The Aniels argue that a notice of trustee sale contradicts the documentary evidence, undermining its credibility. However, our review of the cited document titled “**NOTICE OF TRUSTEE SALE**” satisfies us that it is not a true notice of sale within the meaning of the Civil Code, but an advertisement from an attorney offering to represent the Aniels in the foreclosure action. A June 2010 notice of sale is also in the record, but as the foreclosure process was begun anew after the May 2011 substitution of trustee and notice of default, the earlier foreclosure is now moot. Under these circumstances, we conclude that the June 2010 notice of sale is now irrelevant.

<sup>5</sup> The trial court did allow the Aniels to amend part of their first amended complaint as to other defendants who are not before us on appeal.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Baskin, J.\*

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