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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HYOJA AKIKO MOORE,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICES, LLC, et al.,

Defendants and Respondents.

A137220

(Contra Costa County
Super. Ct. No. MSC11-01677)

Hyoja Akiko Moore appeals from judgments entered after the trial court sustained without leave to amend the demurrers of defendants Aurora Loan Services, LLC (Aurora), U.S. Bank, N.A. (U.S. Bank), and Quality Loan Service Corporation (Quality Loan) to her second amended complaint. Moore contends she alleged sufficient facts to support causes of action for wrongful foreclosure, misrepresentation, and other wrongs asserted against defendants. We disagree, and affirm the judgments.

I. BACKGROUND

A. Facts

In January 2007, Moore borrowed \$428,000 from PMC Bancorp (PMC), securing the loan with a trust deed on property located on Canyon Drive in Pinole, California. Commonwealth Land Title Company was the original trustee under the trust deed and Mortgage Electronic Registration Systems, Inc. (MERS) was named beneficiary as nominee for lender and lender's successors and assigns.

During the loan origination, PMC disclosed to Moore that "[a]s a regular practice, most loans are sold in the secondary marketplace." The trust deed she signed also

included a provision that “The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.” Effective a short time after Moore’s loan closed, PMC transferred the servicing rights to GreenPoint Mortgage Funding, Inc. (GreenPoint), and the loan and deed of trust were transferred to a securitized trust, “GreenPoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-AR2,” with U.S. Bank as its trustee. GreenPoint in turn transferred the servicing rights to Aurora effective May 1, 2007.

Moore defaulted on the loan a few years later. A notice of default was recorded. MERS assigned its interests under the trust deed to Aurora. Aurora then substituted Quality Loan for Commonwealth Land Title Company as trustee. Quality Loan recorded a notice of trustee’s sale. The property was sold at the trustee’s sale to Aurora on November 10, 2011, and a trustee’s deed upon sale was duly recorded. Moore was evicted on or about June 21, 2012.

B. Trial Court Proceedings

Moore filed her original complaint in July 2011. She followed it shortly thereafter with an amended complaint. Aurora and U.S. Bank demurred to the amended complaint.

Following the trustee’s sale, Moore sought leave to file a second amended complaint (SAC), which was granted. Moore’s SAC, filed in March 2012, alleged that Aurora and U.S. Bank had no authority to enforce the promissory note or trust deed because they are not parties to these instruments. In addition, the SAC averred that any transfer of these instruments to defendants was defective because of MERS’s involvement and because the transfer happened after the closing date of the securitized pool that held the loan. The SAC alleged Aurora had no authority to substitute Quality Loan as the trustee, and could not have properly initiated foreclosure through Quality Loan as trustee.

Based primarily on these allegations, the SAC asserted causes of action for (1) misrepresentation; (2) breach of contract; (3) wrongful foreclosure; (4) violation of

the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.; FDCPA); (5) unjust enrichment; and (6) quiet title.¹

Defendants Aurora and U.S. Bank demurred to the SAC, originally setting a hearing date for May 22, 2012. The May 22 hearing date was dropped by the trial court because another defendant filed for bankruptcy and the trial court requested briefing on how the automatic stay in bankruptcy affected the case. Defendant Quality Loan filed its demurrer on June 11, 2012, to be heard on August 14, 2012.² On June 29, 2012, defendants Aurora and U.S. Bank renoticed their demurrer for hearing on the same date.

Under Code of Civil Procedure section 1005, subdivision (b), Moore's opposition to the demurrers was due on or before August 1, 2012, nine court days before the hearing. Moore filed her opposition on August 6, 2012. On August 13, 2012, the trial court issued tentative rulings treating the demurrers as unopposed and sustaining them without leave to amend. As no party contested the tentative rulings, the trial court adopted them as its final rulings on the demurrers, and entered written orders sustaining the demurrers without leave to amend and dismissing the SAC as to all three defendants. It appears from the register of actions that defendant Quality Loan served notice of entry of the written order dismissing it from the action on August 14, 2012. Defendants Aurora and U.S. Bank served notice of entry on October 16, 2012.

Moore filed a notice of appeal from the orders sustaining defendants' demurrers on November 28, 2012.³ The trial court thereafter entered a "Judgment of Dismissal of Aurora Loan Services, LLC and U.S. Bank, N.A." on January 25, 2013.

¹ The breach of contract claim was not asserted against any of the respondents to this appeal. Only the wrongful foreclosure, unjust enrichment, and quiet title claims were asserted against defendant Quality Loan.

² Quality Loan's demurrer and the trial court's order sustaining it were not made part of the record on appeal.

³ Moore's appeal from the judgment dismissing Quality Loan might have been untimely depending on the wording of the written order. (See, e.g., *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4.) Since the pertinent documents are not part of the record on appeal, we will not presume this to be the case.

II. DISCUSSION

In her opening brief on appeal, Moore contends it was an abuse of discretion and a denial of substantial justice for the trial court to treat defendants' demurrers as unopposed based on the late filing of her opposition. She further maintains she was not given actual or proper notice of the date and time when the demurrers were to be heard. Finally, she objects that the trial court failed to issue proper findings and conclusions on the issues presented by the demurrers.

At no point in her opening brief does Moore address the substantive issues raised by the demurrers, attempt to show her opposition had merit, or explain why she failed to contest the tentative ruling. Although she does address the merits of her opposition in her reply brief, we need not consider arguments raised for the first time in reply. (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 471, fn. 19.) On this basis alone, we find Moore fails to meet her burden on appeal to establish that the trial court abused its discretion, or that such abuse of discretion was prejudicial to her.

Although not required to do so in order to resolve the appeal, this court has in any event reviewed the SAC, the demurrers, and Moore's opposition to the demurrer de novo, and has considered the arguments on the merits that she raises in her reply brief. For the reasons explained below, we find Moore's SAC failed to state facts sufficient to sustain any of her causes of action against defendants. Therefore, even assuming for the sake of analysis that Moore had met her burden of showing the trial court abused its discretion in treating the demurrers as unopposed, her opposition would have been ineffective to change the result.

A. Misrepresentation and Wrongful Foreclosure

The fundamental premise of the SAC is that defendants had a burden upon the filing of her lawsuit to demonstrate their authority to enforce Moore's promissory note and trust deed. She alleges there was no proof or documentation of record showing who the owner of the note and deed is, and that any transfer of an interest in her loan to Aurora or U.S. Bank was defective because MERS had no proven authority to assign the loan. California cases have consistently rejected these theories as a basis for interjecting

the courts into the comprehensive nonjudicial foreclosure scheme created by statute. A party nonjudicially foreclosing under a deed of trust is not required to physically possess or prove it holds a beneficial interest in the underlying note secured by the deed of trust. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511–512 (*Jenkins*); *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 439, 440–442 [foreclosing beneficiary-creditor need not produce the promissory note or otherwise prove it holds the note to nonjudicially foreclose on a real property security].) In *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*), this court explained that “a nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut this presumption.” (*Id.* at p. 270.)

We further held in *Fontenot* that a challenge to a nonjudicial foreclosure based in MERS’s alleged lack of authority to assign the note also falls short. MERS’s authority derives from its status as nominee for the lender, which did possess an assignable interest in the note. (*Fontenot, supra*, 198 Cal.App.4th at p. 270.) MERS’s status as “nominee for Lender and Lender’s successors and assigns” was expressly set forth in Moore’s deed of trust. Moreover, as we pointed out in *Fontenot*, “If MERS indeed lacked authority to make the assignment, the true victim was not [the borrower] but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note.” (*Id.* at p. 272.) Since an assignment merely substituted one creditor for another without changing Moore’s obligations under the note, Moore cannot prove that MERS’s alleged lack of authority was prejudicial to *her* as the borrower. (*Ibid.*) Other California cases have also rejected Moore’s theory based on MERS’s role, citing similar grounds. (See *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1503–1505; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156–1158.)

Moore’s allegation that MERS’s assignment of the deed of trust to Aurora did not occur until four years after the closing date of the securitized trust also does not support her fraud and wrongful foreclosure claims. “As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the

promissory note, [Moore] lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions. [Citation.] [¶] Furthermore, even if any subsequent transfers of the promissory note were invalid, [Moore] is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note.” (*Jenkins, supra*, 216 Cal.App.4th at p. 515.)

Moore’s failure to allege tender of the amount of the secured debt is also fatal to her wrongful foreclosure cause of action. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512; accord, *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 [“ ‘Without an allegation of such a tender in the complaint that attacks the validity of the sale, the complaint does not state a cause of action.’ ”]; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 [sustaining demurrer because “appellants are required to allege tender of the amount of [United Savings Bank’s] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure”].) The tender rule is strictly enforced. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.)^{4 5}

Moore’s misrepresentation cause of action against Aurora also fails because she does not plead facts showing specific misrepresentations by defendants, reliance on such misrepresentations, or out-of-pocket damages caused by her reliance. (*Robinson*

⁴ Allegations that PMC, GreenPoint, and Aurora each used a different number to designate Moore’s loan account, without more, do not excuse noncompliance with the tender requirement.

⁵ We disregard Quality Loan’s claim it is protected from liability by Civil Code section 2924, subdivision (b). This court is disturbed that Quality Loan’s brief on appeal materially misquotes the statutory language. Quality Loan quotes the statute as stating the trustee “ ‘shall incur no liability for any good faith error resulting from reliance on information *received* in good faith *from* the beneficiary regarding the nature and amount of the default’ ” (Italics added.) The italicized words do not appear in the statute. In fact, the statute provides the trustee “shall incur no liability for any good faith error resulting from reliance on information *provided* in good faith *by* the beneficiary regarding the nature and amount of the default” (Civ. Code, § 2924, subd. (b), italics added.)

Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal.4th 979, 990 [stating elements of fraud including material misrepresentation, justifiable reliance, and damages]; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 66 [defrauded party is ordinarily limited to recovering out-of-pocket damages].)

B. Violation of FDCPA

This cause of action pertains only to defendant Aurora. To be held liable for violation of the FDCPA, Aurora must fall within the FDCPA's definition of "debt collector." (*Jara v. Aurora Loan Servs.* (N.D.Cal. 2012) 852 F.Supp.2d 1204, 1210.) "The term [debt collector] does not include,' however, 'any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was originated by such person [or] . . . concerns a debt which was not in default at the time it was obtained by such person.' [Citation.] Indeed, '[t]he legislative history of section 1692a(6) [of title 15 of the United States Code] indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.' " (*Id.* at p. 1211; see also *Scott v. Wells Fargo Home Mortg., Inc.* (E.D.Va. 2003) 326 F.Supp.2d 709, 718, *affd.* (4th Cir. 2003) 67 Fed.Appx. 238 [well-settled that mortgagors and mortgage servicing companies are not debt collectors and are statutorily exempt from liability under the FDCPA].)

Moore's loan was not in default when it was assigned to Aurora for servicing a few months after origination in 2007. The first notices of default were not sent until 2011. Under settled law, Aurora was not a "debt collector" for purposes of the FDCPA, and could not have violated it.⁶

⁶ Boilerplate debt collection language in correspondence from Aurora and Quality Loan is not determinative of whether these entities are acting as debt collectors for purposes of the FDCPA. (See *Nowke v. Countrywide Home Loans, Inc.* (7th Cir. 2007) 251 Fed.Appx. 363; *Somin v. Total Cmty. Mgmt. Corp.* (E.D.N.Y. 2007) 494 F.Supp.2d 153, 160.)

Further, Moore alleges Aurora violated the FDCPA by failing to verify the debt despite her request. This allegation is contradicted by the documents she attached to the SAC showing that Aurora responded exhaustively to Moore's letters, and provided her a copy of the loan origination file, including copies of the note, deed of trust, closing documents, and other documentation of her debt. If facts appearing in an exhibit attached to a complaint contradict those expressly pleaded, those in the exhibit are given precedence upon review of a trial court ruling sustaining a demurrer. (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 244–245.)

C. Unjust Enrichment

Moore's unjust enrichment cause of action was properly dismissed because California law recognizes no such cause of action. (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) Unjust enrichment is a general principle underlying various legal doctrines and remedies, rather than a remedy itself. (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315.) It is the result of a failure to make restitution where it is equitable to do so. (*Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448.) Moore in this case alleges all of the defendants had been unjustly enriched by "soliciting payments" from her and foreclosing on her property. She purports to seek "[r]estitution damages in an amount equal to the amount paid to PMC and Greenpoint," later alleged to be \$105,100.

Moore has not pleaded facts showing a right to restitution as against defendants. First, there is no allegation that Quality Loan, a trustee with no personal interest in the property on which it foreclosed, obtained either payment or property from Moore which it could have any equitable duty to restore to her. Its mere receipt of funds for its services and alleged failure to do due diligence do not afford Moore the right to restitution of those funds.

Second, Moore does not plead any facts showing Aurora and U.S. Bank were unjustly enriched. She acknowledges she signed the promissory note and deed of trust, thereby agreeing her house could be sold if she failed to repay the amount borrowed. She does not allege she made any payments beyond those required by the terms of the note

and deed of trust she signed, nor does she allege she timely paid or tendered all amounts due under the note. Therefore, collection of the payments she made and foreclosing when she stopped making payments gave rise to no equitable right of restitution as against Aurora or U.S. Bank. As discussed, their asserted failure to provide Moore with “authenticated proof of authority” or a “chain of custody of the documents” showing their authority does not give her a basis for legal or equitable relief against them.

D. Quiet Title

Moore’s quiet title claim is defective in a number of respects. It was not verified as required by Code of Civil Procedure section 761.020. No valid quiet title claim lies against U.S. Bank or Quality Loan because neither of these parties claims title to the property. (Code Civ. Proc., § 761.020; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802–803.) The claim fails as to Aurora because Moore does not allege she tendered or is willing and able to tender all amounts due under the deed of trust. (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649 [mortgagor cannot quiet title without paying the debt secured]; see also *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526; *Horton v. Cal. Credit Corp. Ret. Plan* (S.D.Cal. 2011) 835 F.Supp.2d 879, 893 [“even if [Code Civ. Proc., § 761.020] requirements are met, California courts have pronounced that in order to maintain a cause of action to quiet title, the mortgagor must allege tender or ability to tender the amounts admittedly borrowed”].) “Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt.” (*Stebley*, at p. 526.)

E. Leave to Amend

Moore concluded her opposition to the demurrer in the trial court by asking the court to “order[] defendants to answer the complaint or grant Plaintiff leave to amend.” This was her second amended complaint. It was her burden to explain *how* she could further amend it to overcome the issues raised by the demurrers. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) She failed to meet that burden either in the trial court or on this appeal. Leave to amend was properly denied.

III. DISPOSITION

The judgments of dismissal are affirmed.

Margulies, Acting P.J.

We concur:

Banke, J.

Becton, J.*

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