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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DAVID BRYAN,

Plaintiff and Appellant,

v.

U.S. BANK, NATIONAL
ASSOCIATION, as Trustee, etc.,

Defendant and Respondent.

A138021

(San Francisco City and County
Super. Ct. No. CGC-10-506392)

David Bryan sued to enjoin a nonjudicial foreclosure sale of his property. (Civ. Code, § 2924.) The trial court sustained a demurrer to his second amended complaint without leave to amend. Bryan contends that the allegations of his complaint were sufficient to state a cause of action for declaratory relief, based on his claim that the promissory note and the deed of trust on his property were never validly assigned to respondent U.S. Bank, National Association (U.S. Bank) as trustee for a securitized trust. He contends that consequently U.S. Bank was neither entitled to payments under the promissory note nor authorized to initiate a foreclosure. We affirm.

I. LEGAL BACKGROUND

“California’s nonjudicial foreclosure scheme is set forth in Civil Code sections 2924 through 2924k, which ‘provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.’ (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*)). ‘These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.’

(*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) ‘The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ (*Moeller*, at p. 830.) ‘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, fn. & parallel citations omitted.)

“Notably, [Civil Code] section 2924, subdivision (a)(1), permits a notice of default to be filed by the ‘trustee, mortgagee, or beneficiary, or any of their authorized agents.’ The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid.” (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 (*Debrunner*)). Thus, “California courts have refused to allow trustors to delay the nonjudicial foreclosure process by pursuing preemptive judicial actions challenging the authority of a foreclosing ‘beneficiary’ or beneficiary’s ‘agent.’” (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511 (*Jenkins*); *Gomes* [*v. Countrywide Home Loans, Inc.*], *supra*, 192 Cal.App.4th at pp. 1154–1156 & fn. 5.)” (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82 (*Siliga*), parallel citation omitted.)

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 1998, Bryan purchased real property located at 4148 23rd Street in San Francisco (the Property). In January 2007, he obtained a refinance loan of \$1 million from Ampro Mortgage (Ampro), a division of United Financial Mortgage Corp. (United Financial). The loan is evidenced by a promissory note (the Note). For the first two years of the loan, the interest rate was fixed at 7.5 percent per annum, and thereafter became adjustable based on the six-month LIBOR (London Interbank Offered Rate) plus 2.875 percent, with a ceiling rate of 13.5 percent.

Bryan also signed a deed of trust (the Deed of Trust) on the Property securing the Note, wherein he was designated as “borrower,” Ampro was designated as “lender,” Alliance Title was designated as “trustee,” and MERS (Mortgage Electronic Registration Systems, Inc.)¹ was designated as the “beneficiary” and “nominee” for Ampro. The Deed of Trust provides: “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.” It further provides: “**Substitute Trustee.** Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.”

At some point after the loan closed, the Note and Deed of Trust were to be transferred to a securitized trust, the J.P. Morgan Alternative Loan Trust 2007-A2 (the Trust), with U.S. Bank as its trustee. A pooling and service agreement (PSA), dated May 1, 2007, was signed by the depositor, J.P. Morgan Acceptance Corporation, by the

¹ “MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*).

servicer, Wells Fargo Bank, N.A., and by the trustee, U.S. Bank. The PSA set forth the manner in which mortgages would be purchased by the Trust, as well as the duties of the trustee. Section 2.01 of the PSA requires that transfer and assignment of mortgages must be effected by delivery of the original note endorsed to the trustee or in blank. Section 2.04 of the PSA requires that the depositor transfer all right, title, interest in the mortgages to the trustee, on behalf of the Trust, as of the closing date. The closing date was May 31, 2007.

In a letter, dated May 31, 2007 (the BONY Letter), the Bank of New York Trust Company, N.A. certified that “as to each Mortgage Loan listed on the Mortgage Loan Schedule, it has reviewed the Trustee Mortgage File . . . and has determined that . . . each Mortgage Note has been endorsed and each assignment has been assigned as required under Section 2.01 of the [PSA].” An undated allonge, attached to the Note, indicates that it was endorsed to [J.P. Morgan Chase Bank, N.A.] by Ampro. However, MERS, acting “as nominee for Ampro” assigned “all beneficial interest under [Bryan’s] Deed of Trust . . . [t]ogether with the [N]ote” to U.S. Bank, on July 11, 2008, approximately 13 months after the Trust had closed. The assignment was signed by David Seybold as “Assistant Secretary” for MERS and recorded.

In May 2009, NDEx West, LLC, “acting as Agent for the . . . Beneficiary under [the Deed of Trust],” recorded a notice of default after Bryan had failed to make payments totaling \$31,203.30 on the Note. On June 29, 2009, Chase Home Finance LLC, as attorney-in-fact for U.S. Bank, substituted NDEx West, LLC as trustee. Thereafter, NDEx West, LLC, as trustee, gave notice that a trustee’s sale was scheduled for September 20, 2010. No such sale has occurred.

Original Complaint

On December 20, 2010, Bryan filed his complaint against U.S. Bank seeking to enjoin the trustee’s sale of his property. He also sought declaratory relief and damages for U.S. Bank’s alleged unfair business practices (Bus. & Prof. Code, § 17200). Bryan focused on possession of the Note and alleged that U.S. Bank was not entitled to receive payment “because there is no evidence that . . . U.S. Bank is actually the holder of the

Note.” Bryan alleged that the Note was improperly endorsed to J.P. Morgan, via an allonge rather than on its face, and as a result, U.S. Bank was not entitled to receive any payments. Bryan acknowledged that a substitution of trustee, dated June 29, 2009, provided that U.S. Bank was then beneficiary under the Deed of Trust and substituted NDEx West, LLC as trustee. However, he alleged that the employee of Chase Home Finance LLC, who purportedly signed the substitution as U.S. Bank’s attorney-in-fact, was not authorized to do so. Specifically, he alleged that Chase Home Finance LLC was “under investigation in the State of Ohio for using ‘robo-signers.’ ”

On December 22, 2010, Bryan obtained a temporary restraining order to stop the foreclosure sale. Then, on February 17, 2011, the trial court granted a preliminary injunction, which enjoined U.S. Bank from holding a trustee’s sale. The court concluded: “[Bryan] has shown a probability of prevailing on the merits and the balance of harm tips in [his] favor. Bond required in the amount of \$10,000.00.” The court also overruled U.S. Bank’s demurrer to the complaint, explaining that “[Bryan] has standing to bring the [Unfair Competition Law] action because he is only seeking injunctive relief and he has properly pled fact[s] that support his claim.”

After filing its answer, U.S. Bank filed a motion for judgment on the pleadings, arguing that under then recently decided *Debrunner, supra*, 204 Cal.App.4th 433, any impropriety in assignment of the promissory note was insufficient to state a claim. The trial court granted the motion, as well as leave to amend.

First Amended Complaint

On June 13, 2012, Bryan filed his first amended complaint, which included the same causes of action. His allegations were very similar to those included in the original complaint, but he added the following allegations: “[Bryan] disputes . . . U.S. Bank’s contention that it is entitled to receive payments under the Note, because . . . there is no evidence of written assignment from Ampro to [U.S. Bank] in 2007, or there was a void assignment in 2008. [¶] The [PSA] is the trust agreement that created and governs [the Trust]. . . . Section 2.01 of the trust agreement reads in part that [U.S. Bank] received conveyance ‘without limitation’ of the Mortgage Loans. . . . Furthermore, 2.03 (vi) states

that ‘the Depositor was the sole owner of record and holder of each Mortgage Loan’ before the transfer to [U.S. Bank.] In fact, the trust agreement requires the trust to have all the loans by the Closing Date.”

Bryan alleged in his first amended complaint that the BONY Letter was insufficient evidence of a 2007 assignment to U.S. Bank. Bryan acknowledged the July 2008 assignment of the Deed of Trust and Note to U.S. Bank from “[MERS] as Nominee for [Ampro], a Division of [United Financial].” However, Bryan alleged the 2008 assignment was void because United Financial lost its California mortgage banker license in 2007 and that, accordingly, Seybold lacked authority, as an agent of United Financial, to make the assignment. Bryan further alleged: “If [U.S. Bank] truly took ownership of the loan in 2007 as claimed by the BONY letter, then it is not possible that in 2008, [Seybold] could assign the [N]ote and [D]eed of [T]rust to [U.S. Bank] again.”

U.S. Bank filed another demurrer, which the trial court granted with leave to amend. Specifically, the trial court instructed Bryan that he needed “to allege tender or [an] exception to [the] tender rule and to allege facts showing [Bryan’s] prejudice by imperfections in [the] closing process.” (Citing *Fontenot, supra*, 198 Cal.App.4th at p. 272.)

Second Amended Complaint

On December 8, 2012, Bryan filed his second amended complaint (SAC) for declaratory relief, and for a permanent injunction against sale of the Property. In the SAC, Bryan now alleged “[t]he closing of the loan was defective for two reasons. First, because [U.S. Bank] never received assignment of the loan in any way. Second, the closing was defective because the Note used LIBOR as its interest rate index, and we now know that major financial institutions conspired to fix LIBOR for their own benefit.”² Bryan alleged that he was prejudiced by the purported imperfections because the interest rate set in the Deed of Trust was based on LIBOR. Bryan also alleged that he

² Bryan referenced an alleged conspiracy of a group of banks, including J.P. Morgan Chase, to fix the LIBOR rate.

should be excused from the tender requirement because he had posted a \$10,000 bond in 2011, and because he had sought a loan modification in 2009 and 2010, which indicated his willingness to make “some level of payment, just not to the level required by the rigged LIBOR [rate].”

U.S. Bank again demurred. The trial court agreed that Bryan’s allegations continued to be insufficient to allege tender, an excuse of the tender requirement, or prejudice and sustained the demurrer without leave to amend. A judgment of dismissal was entered the same day. Bryan filed a timely notice of appeal.

III. DISCUSSION

Bryan argues that his SAC was sufficient to state a cause of action for declaratory relief because he was not required to allege either tender or prejudice. He also maintains that the court abused its discretion by denying leave to amend because his SAC stated the elements of a cause of action for cancellation of instruments. His arguments are without merit.

A. *Standard of Review*

“On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Next, we treat the demurrer as admitting all material facts properly pleaded. Then we determine whether the complaint states facts sufficient to constitute a cause of action. [Citations.] [¶] We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.]” (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439–440.)

A complaint is properly subject to demurrer if judicially noticeable facts render it defective. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) “Under the doctrine of truthful pleading, the courts ‘will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.’ [Citation.] ‘False allegations of fact, inconsistent

with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded’ [Citations.]” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; accord, *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 [allegations in conflict with judicially noticeable facts are null].) However, “ ‘[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.’ [Citations.]” (*Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 64 [denying request for judicial notice of deposition testimony].)

On appeal from a demurrer we search the facts to see if they make out a claim for relief under *any* theory, regardless of whether the theory was raised before the trial court. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629–630.) “[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) “The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. *The SAC Does Not State a Cause of Action for Declaratory Relief.*

Declaratory relief is available “in cases of actual controversy relating to the legal rights and duties of the respective parties.” (Code Civ. Proc., § 1060.) Bryan argues: “Since [he] alleged that the loan was never assigned to the Trust, his complaint stated a valid claim for declaratory relief.” He apparently realizes that his assertion is contrary to the recorded documents referenced in his pleadings. Instead, he asks us to look beyond these documents by pointing to his allegation that Ampro’s parent company, United Financial, lost its California mortgage banking license before the date of the attempted

2008 assignment by Seybold.³ Bryan argues that “Ampro lost its capacity when it lost its license” and that “[United Financial] was then barred from making residential mortgage loans” He relies on Financial Code section 50002, subdivision (a), which provides: “No person shall engage in the business of making residential mortgage loans or servicing residential mortgage loans, in this state, without first obtaining a license from the commissioner . . . , unless a person or transaction is excepted from a definition or exempt from licensure by a provision of this law or a rule of the commissioner.” Even if we assume that Ampro lost its license, Bryan’s allegations remain insufficient.

First, we question whether any involvement with the 2008 assignment qualifies as “making” or “servicing” a residential mortgage loan.⁴ Moreover, the 2008 assignment

³ In his SAC, Bryan also alleged that the assignment to U.S. Bank was void because the Trust closed before the assignment occurred. He abandons this theory in his opening brief and has thereby forfeited any argument that the allegation supports a cause of action. (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1096; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.) In any event, we would conclude that Bryan has no standing to raise this argument. The question is currently pending before our Supreme Court in *Yvanova v. New Century Mortgage Corp.* (2014) 226 Cal.App.4th 495, review granted August 29, 2014, S218973. Unless or until our Supreme Court holds otherwise, we agree with the majority of courts that have concluded a borrower lacks standing to object to irregularity in a loan’s securitization. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, 1030–1034; *Keshtgar v. U.S. Bank, N.A.* (2014) 226 Cal.App.4th 1201, 1205–1207, petn. for review pending, petn. filed July 28, 2014; *Jenkins, supra*, 216 Cal.App.4th at p. 515.) “As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [the borrower] lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions.” (*Jenkins*, at p. 515; but see *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1083 [“[t]ransfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement”].)

⁴ “ ‘Makes or making residential mortgage loans’ or ‘mortgage lending’ means processing, underwriting, or as a lender using or advancing one’s own funds, or making a commitment to advance one’s own funds, to a loan applicant for a residential mortgage loan.” (Fin. Code, § 50003, subd. (o).) “ ‘Service’ or ‘servicing’ means receiving more than three installment payments of principal, interest, or other amounts placed in escrow,

was made by MERS, acting “as nominee for Ampro.” Bryan argues that the principal-agent relationship between MERS and Ampro was automatically terminated when the principal became “incapacitated.” Under the plain language of the Deed of Trust, even if Ampro was “incapacitated” at the time of the 2008 assignment, MERS still had the authority to make the assignment “as nominee for Lender and Lender’s successors and assigns.” “California courts have held that a trustor who agreed under the terms of the deed of trust that MERS, as the lender’s nominee, has the authority to exercise all of the rights and interests of the lender, including the right to foreclose, is precluded from maintaining a cause of action based on the allegation that MERS has no authority to exercise those rights. [Citations.]” (*Siliga, supra*, 219 Cal.App.4th at p. 83.) “The courts in California have universally held that MERS, as nominee beneficiary, has the power to assign its interest under a [deed of trust].” (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1498 (*Herrera*).

In *Herrera, supra*, 205 Cal.App.4th at page 1499, Indymac made the original loan. Pursuant to the terms of the deed of trust, MERS held the right to exercise all interests and rights held by the lender and its successors and assigns, including the right to assign the deed of trust and to foreclose on the subject property. (*Id.* at p. 1504.) Subsequently, the FDIC and IndyMac Federal succeeded to Indymac’s beneficial interest in the loan. (*Id.* at p. 1505.) Thereafter, MERS assigned the deed of trust and the beneficial interest in the mortgage note to OneWest. (*Ibid.*) OneWest assigned the deed of trust to Fannie Mae. Fannie Mae then foreclosed on the plaintiffs’ property. (*Id.* at p. 1498.)

The plaintiffs alleged that MERS lacked the authority to transfer the beneficial interest in the loan to OneWest because it did not have an agency relationship with the FDIC or IndyMac Federal. (*Herrera, supra*, 205 Cal.App.4th at p. 1505.) This allegation was deemed insufficient to defeat the foreclosure sale because the plaintiffs

pursuant to the terms of a mortgage loan and performing services by a licensee relating to that receipt or the enforcement of its receipt, on behalf of the holder of the note evidencing that loan.” (Fin. Code, § 50003, subd. (x).)

agreed, in the deed of trust itself, that MERS had the right to exercise all rights of the lender. (*Ibid.*) The court affirmed the trial court’s order granting Fannie Mae’s demurrer without leave to amend. (*Id.* at p. 1506.)

The *Herrera* court also determined that the plaintiffs could not assert a wrongful foreclosure cause of action because they could not demonstrate prejudice from the alleged wrongful transfer. (*Herrera, supra*, 205 Cal.App.4th at p. 1508.) It explained: “ ‘If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note.’ ” (*Ibid.*, quoting *Fontenot, supra*, 198 Cal.App.4th at p. 272.) Because plaintiffs conceded default, they would have been foreclosed upon regardless of the validity of the assignment. (*Herrera, supra*, 205 Cal.App.4th at pp. 1507–1508.)

Here, just as in *Herrera*, the Deed of Trust provides: “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.” Thus, by signing the Deed of Trust, Bryan agreed that MERS had assignment rights independent of Ampro.

Finally, even if we assume that Bryan’s allegations are sufficient to show a defect in the assignment, his SAC is still properly subject to demurrer because he did not allege “facts showing that [he] suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process.” (*Siliga, supra*, 219 Cal.App.4th at p. 85.) “Prejudice is not presumed from ‘mere irregularities’ in the process. [Citation.]” (*Fontenot, supra*, 198 Cal.App.4th at p. 272; accord, *Mendoza v. JPMorgan Chase Bank, N.A., supra*, 228 Cal.App.4th at p. 1035.)

Bryan concedes that he is in default and does not suggest how he has suffered prejudice. (See *Herrera, supra*, 205 Cal.App.4th at p. 1507; *Mendoza v. JPMorgan*

Chase Bank, N.A., supra, 228 Cal.App.4th at p. 1035 [“[t]he type of prejudice that must be shown is ‘ “that the foreclosure would have been averted but for [the] alleged deficiencies” ’ ”].) Bryan has not alleged, and apparently cannot allege, that the “true” beneficiary would have refrained from foreclosing after his conceded default.⁵ Instead, he contends that he need not demonstrate prejudice because it need only be alleged when the foreclosure sale has already occurred. Federal courts have held that “ ‘the *threat* of foreclosure by the wrong party would certainly be sufficient to constitute prejudice to the homeowner because there is no power of sale without a valid notice of default.’ ” (*Mena v. JP Morgan Chase Bank, N.A.* (N.D.Cal., Sept. 7, 2012, No. 12-1257 PSG) 2012 U.S. Dist. Lexis 128585, italics added, quoting *Tamburri v. Suntrust Mortg., Inc.* (N.D.Cal., Dec. 15, 2011, No. C-11-2899 EMC) 2011 U.S. Dist. Lexis 144442.) But we are not bound by federal decisional authority on matters of state law. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 55.) Other courts of appeal have recognized and applied the prejudice requirement in cases where foreclosure sales have not yet occurred. (*Keshtgar v. U.S. Bank, N.A., supra*, 226 Cal.App.4th at p. 1207; *Siliga, supra*, 219 Cal.App.4th at pp. 79, 85; *Debrunner, supra*, 204 Cal.App.4th at pp. 437, 443.) We find this authority more persuasive. Just as in *Herrera*, if MERS indeed lacked authority to make the 2008 assignment, the true victim was not Bryan but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note. (*Herrera, supra*, 205 Cal.App.4th at p. 1508.) Because Bryan’s claim fails for other reasons, we need not address tender as a basis for upholding the demurrer.

C. *Leave to Amend*

Bryan only argues that he should be allowed leave to amend to state a claim for cancellation of the 2008 assignment. “A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person

⁵ Bryan in fact concedes in his briefing that he continues to derive rental income from the Property (as a “vacation rental”) despite avoiding the obligations of the promissory note.

against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.” (Civ. Code, § 3412.) For the reasons explained *ante*, Bryan has failed to allege any facts suggesting that the 2008 assignment “may cause serious injury to a person against whom it is void or voidable.” (*Ibid.*) Bryan does not otherwise argue that the trial court abused its discretion in denying leave to amend. He has failed to show that it is reasonably probable he could amend his complaint to state a viable cause of action.

IV. DISPOSITION

The judgment is affirmed. U.S. Bank is entitled to its costs on appeal.

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.