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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARY MILLER,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICES, LLC, et al.,

Defendants and Respondents.

A140403

(Marin County  
Super. Ct. No. CIV1202426)

Appellant Mary Miller filed this suit against several entities connected with her mortgage<sup>1</sup> after a nonjudicial foreclosure proceeding was initiated. On appeal, she contends the trial court erred in sustaining a demurrer to the operative complaint because she sufficiently alleged causes of action for negligence, negligent misrepresentation, a violation of Civil Code section 2923.5,<sup>2</sup> wrongful mortgage securitization, quiet title, and unfair competition. We reject her contentions, except we reverse the trial court's sustaining of the demurrer on her claim under section 2923.5 and her unfair-competition claim to the extent it is predicated upon the section 2923.5 claim.

<sup>1</sup> The named defendants included Wholesale America Mortgage, Inc. (Wholesale America); Lehman Brothers Holdings, Inc.; Secured Assets Securities Corporation; U.S. Bank National Association (U.S. Bank) as trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2006-GPI (Lehmann Trust); Aurora Loan Services, LLC (Aurora); Nationstar Mortgage, LLC (Nationstar); and Does 2-50.

<sup>2</sup> All further statutory references are to the Civil Code unless otherwise indicated.

FACTUAL AND PROCEDURAL  
BACKGROUND

We take our facts from the operative complaint and the parties' concessions in their briefs. Generally, the parties agree Miller took out a home mortgage, the mortgage was transferred to various entities, Miller defaulted on her loan, and a foreclosure was initiated. But they disagree whether the entity initiating the foreclosure had authority to do so and whether it properly tried to explore alternatives to foreclosure. These disagreements are the core of the issues in this appeal.

The specific allegations are as follows: In 2006, Miller purchased a home in Novato with a loan from Wholesale America. To secure the loan, she signed a deed of trust, which named Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary and nominee for the lender. In November 2010 or early 2011, she defaulted on her loan.

In February 2011, MERS substituted Cal-Western Reconveyance Company as trustee under the deed of trust. The next month, MERS, as nominee for Wholesale America, transferred all beneficial interest under the deed of trust to Aurora. Shortly thereafter, a notice of default was recorded by Cal-Western. A notice of trustee's sale was recorded in August 2011.

Miller asserts that the current owner of the loan and the beneficiary under the deed of trust is Lehman Trust, with U.S. Bank as its trustee. She also asserts that in July 2012, Aurora transferred the servicing of the loan to Nationstar.

Miller brought this action in state court in May 2012. According to the Marin Superior Court's register of actions, a temporary restraining order was entered prohibiting the sale of the property.<sup>3</sup> The case was removed to federal court, and during the course of the federal proceedings, Miller amended her complaint several times, with the last operative amendment being her third amended complaint. Three defendants, Aurora,

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<sup>3</sup> The record does not indicate whether a preliminary injunction was entered, but Miller asserts in her brief that she remains "in possession of" the property.

U.S. Bank, and Nationstar,<sup>4</sup> filed a motion to dismiss the third amended complaint and sought judicial notice of five mortgage- and foreclosure-related documents and one Securities and Exchange Commission document. After dismissing the federal claims, the federal court remanded the case to state court. On remand, the trial court granted a request for judicial notice and sustained a demurrer without leave to amend.<sup>5</sup> A judgment of dismissal was then entered.

## II. DISCUSSION

### A. *The Standard of Review.*

We review de novo a trial court's legal determinations on a demurrer. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) Because the record includes the third amended complaint, we can “ ‘independently evaluate [it], construing it liberally, giving it a reasonable interpretation, if possible, and reading it as a whole, while viewing its parts in context.’ ” (*Alameda County Joint Apprenticeship & Training Comm. v. Roadway Elec. Works Inc.* (2010) 186 Cal.App.4th 185, 190; but cf. *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72 [trial court's sustaining of demurrer could not be reviewed without record of the arguments advanced in support of and in opposition to

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<sup>4</sup> The record does not indicate whether the remaining defendants were served or participated in the proceedings, and it does not indicate whether or how any claims against them were resolved.

<sup>5</sup> Our review of this appeal is hampered because of an incomplete record. The pertinent materials in the record include the original complaint filed in state court, several amended complaints, including a third amended complaint, filed in federal court, a motion to dismiss the third amended complaint with an accompanying request for judicial notice also filed in federal court, and the order of remand. The record on remand includes a “decision on demurrer,” which references a third amended complaint, and a subsequent judgment. But the record does *not* include any actual demurrer or request for judicial notice filed in state court. We assume, as the parties apparently do, that the motion to dismiss the third amended complaint and accompanying request for judicial notice filed in federal court constitute the record for purposes of these missing pleadings. In doing so, however, we note that the request for judicial notice filed in federal court identifies six exhibits, but the decision on demurrer references a request for judicial notice identifying 10 exhibits.

demurrer].) In addition to the operative complaint, we may also consider facts that were judicially noticed. A “ “complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective.” [Citation.]’ [Citations.]” (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 296.)

Finally, where, as here, “the trial court sustains a demurrer without leave to amend, we review the determination that no amendment could cure the defect in the complaint for an abuse of discretion. [Citation.] The trial court abuses its discretion if there is a reasonable possibility that the plaintiff could cure the defect by amendment. [Citation.] The plaintiff has the burden of proving that amendment would cure the legal defect, and may meet this burden on appeal. [Citations.]” (*Cansino, supra*, 224 Cal.App.4th at p. 1468.) With these standards and caveats in mind, we turn to apply the substantive law to Miller’s claims.

#### *B. The Nonjudicial Foreclosure Process.*

We begin with a general overview of the nonjudicial foreclosure process. A nonjudicial foreclosure sale is a “quick, inexpensive[,] and efficient remedy against a defaulting debtor/trustor.” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) To preserve this remedy for beneficiaries while protecting the rights of borrowers, “sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.” (*Ibid.*) Under a deed of trust, the trustee holds title and has the authority to sell the property in the event of a default on the mortgage. (See *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 333-336.) To initiate the foreclosure process, “[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents” must first record a notice of default. (§ 2924, subd. (a)(1).) The notice of default must identify the deed of trust “by stating the name or names of the trustor or trustors” and provide a “statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred” and a “statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy

[the] obligation . . . that is in default.” (§ 2924, subd. (a)(1)(A)-(C).) After three months, a notice of sale must then be published, posted, mailed, and recorded in accordance with the time limits prescribed by the statute. (§§ 2924, subd. (a)(3), 2924f.)

*C. Miller Failed to State Causes of Action for Negligence, Negligent Misrepresentation, or “Securitization” and “Chain-of-Title” Defects.*

In her first, second, and fourth causes of action, Miller asserted claims based on Aurora’s alleged lack of authority to initiate the foreclosure. In her first cause of action (negligence), she alleged that “Aurora ordered the Notice of Default to be issued by falsely claiming that it is the beneficiary of the loan and [by] making associated statements . . . .” In her second cause of action (negligent misrepresentation), she reiterated that defendants misrepresented their interest or status in connection with the mortgage. The only entities specifically alleged to have done so, however, were Aurora and “Defendant Lehman Trust,” which is not a party to this appeal. As to Aurora, Miller alleged that it “made statements showing that [it was] aware in February 2012 that [it was] at best the alleged servicer of Plaintiff’s loan,” represented it “is the beneficiary of Plaintiff’s loan through [its] statements on, and issuance of the [Notice of Default],” and represented it “is the servicer of Plaintiff’s loan by attempting to collect payments and sending correspondence identifying itself as the servicer.” Finally, in her fourth cause of action, Miller alleged that the current trustee, U.S. Bank, “has no right, title, or interest to Plaintiff’s residence and may not proceed with foreclosure” due to various defects in the loan transfers.

The trial court properly sustained the demurrer as to these causes of action because Miller lacks standing to assert them and cannot show prejudice. A debtor in default is not in a position to complain that an unauthorized entity has initiated a foreclosure because, even assuming the complaint’s truth, the injured party is not the debtor but is instead the entity owning the unpaid mortgage. Thus, trustor-debtors are generally precluded from challenging “the right, power, and authority of a foreclosing ‘beneficiary’ or beneficiary’s ‘agent’ to initiate and pursue foreclosure.” (*Jenkins v. JPMorgan Chase*

*Bank, N.A.* (2013) 216 Cal.App.4th 497, 511, citing *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-442 and *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157.) “[N]owhere does the [nonjudicial foreclosure] statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action.” (*Gomes, supra*, at p. 1155.) Permitting such an action “would unnecessarily ‘interject the courts into [the] comprehensive nonjudicial scheme’ . . . and ‘would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy. [Citation.]’ ” (*Jenkins, supra*, at p. 512.) Miller argues *Gomes* is distinguishable because she “is not attacking the authorization of the mortgage servicer to foreclose, but [is] rather . . . focusing on the lack of ownership of the note by defendant Aurora.” But this is a distinction without a difference. Even if Aurora was not, and U.S. Bank is not, the true owner of the note, the entity injured by a wrongful foreclosure would be the actual owner of the note—not Miller.

This court has previously observed, “a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff’s interests. [Citations.] Prejudice is not presumed from ‘mere irregularities’ in the process.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.) “Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her objections under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer [of her loan] interfered in any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented.” (*Ibid.*)

Miller relies on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1095-1097, which held under applicable New York law that a transfer of a deed of trust in contravention with its terms is “void, not merely voidable.” Her reliance is misplaced. *Glaski* turned on the application of New York’s foreclosure law, and we join the many

courts that have rejected its analysis and have declined to apply it to California's nonjudicial foreclosure laws.<sup>6</sup> (See *In re Davies* (9th Cir. 2014) 565 Fed.Appx. 630, 633; *Moran v. HSBC Bank USA, N.A.* (N.D.Cal., Aug. 4, 2014, No. 5:14-cv-00633-LHK) 2014 WL 3851305, at \*16 [“reliance on *Glaski* is misplaced, both because *Glaski* does not state the majority rule and because its reasoning is unpersuasive”]; *Ordoneo v. US Bank N.A.* (N.D.Cal., July 21, 2014, No. 14-cv-00774-JD) 2014 WL 3610952, at \*10 [“In the absence of controlling authority from the Supreme Court or the Ninth Circuit, this Court agrees with the well-settled majority view”]; *Banares v. Wells Fargo Bank, N.A.* (N.D.Cal., Mar. 7, 2014, No. C-13-4896 EMC) 2014 WL 985532, at \*4-5; *Covarrubias v. Fed. Home Loan Mortgage Corp.* (S.D.Cal., Jan. 28, 2014, No. 12cv2775 WQH) 2014 WL 311060, at \*4-5; *Rivac v. Ndex West LLC* (N.D.Cal., Dec. 17, 2013, No. C 13-1417 PJH) 2013 WL 6662762, at \*4 [“This court is persuaded by the ‘majority position’ of courts within this district, which is that *Glaski* is unpersuasive”]; *Subramani v. Wells Fargo Bank N.A.* (N.D.Cal., Oct. 31, 2013, No. C 13-1605 SC) 2013 WL 5913789, at \*3; *Newman v. Bank of New York Mellon* (E.D.Cal., Oct. 11, 2013, No. 1:12-CV-1629 AWI GSA) 2013 WL 5603316, at \*3, fn. 2 [“no courts have yet followed *Glaski* and *Glaski* is in a clear minority”]; *Diunugala v. JP Morgan Chase Bank, N.A.* (S.D.Cal., Oct. 3, 2013, No. 12cv2106-WQH-NLS) 2013 WL 5568737, at \*8; *In re Sandri* (N.D.Cal. 2013) 501 B.R. 369, 374-377.)

Because Miller lacks standing and cannot show prejudice, the trial court properly sustained the demurrer as to the first, second, and fourth causes of action.

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<sup>6</sup> Whether a borrower in an action for wrongful foreclosure has standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void is currently pending before the California Supreme Court. (*Yvanova v. New Century Mortgage Corp.* (2014) 226 Cal.App.4th 495, review granted Aug. 27, 2014, S218973.)

D. *The Trial Court Erred in Sustaining the Demurrer to Miller's Causes of Action Under Section 2923.5 and the Unfair Competition Law.*

Miller also alleged a cause of action for wrongful foreclosure under section 2923.5. This statute precludes a mortgagee or trustee from recording a notice of default until 30 days after the lender contacts the borrower or can demonstrate it tried to contact the borrower through various means. (§ 2923.5, subd. (a)(1).)<sup>7</sup> The lender must contact the borrower in person or by telephone “in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” (§ 2923.5, subd. (a)(2).) Section 2923.5 may be enforced by a private right of action. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214 (*Mabry*).) But the *only* relief available under the statute is postponement of a scheduled foreclosure sale to permit the lender to comply with the law; the statute does not provide for damages or for setting aside a foreclosure sale after it has taken place. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1058, fn. 4; *Skov v. U.S. Bank National Assn.* (2012) 207 Cal.App.4th 690, 696; *Stebly v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526; *Mabry, supra*, 185 Cal.App.4th at pp. 214, 231-232, 235.)<sup>8</sup>

In sustaining the demurrer to the fourth cause of action, the trial court took judicial notice of the notice of default, which includes language stating, “The mortgagee, beneficiary or authorized agent for the mortgagee or beneficiary pursuant to California Civil Code [section] 2923.5(b) declares that the mortgagee, beneficiary or the mortgagee’s or beneficiary’s authorized agent has either contacted the borrower or tied with due diligence to contact the borrower as required by California Civil Code 2923.5.” The court concluded that “where the wording of the [notice of default] tracks the

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<sup>7</sup> The statute was amended in 2012, but the amended statute does not become effective until January 1, 2018. (Stats. 2012, ch. 87, § 5.) Citations to the statute are to the previous version.

<sup>8</sup> The record suggests that Miller is still in possession of the property. A temporary restraining order was entered prohibiting the property’s sale, and Miller asserts in her brief that she remains “in possession of” the property. She will only be entitled to relief under section 2923.5 on remand if she, in fact, still possesses the property.

statutory language, Plaintiff must allege that such assertion is false in order to state a cause of action,” but it then found that Miller had “not alleged any facts contending Defendant[s] failed to satisfy the due diligence requirement.”

We respectfully disagree. Miller specifically alleged that defendants “did not make initial contact in person or by telephone in order to assess [Miller’s] financial situation and explore options for [her] to avoid foreclosure.” She also alleged that “[n]o mortgagee, beneficiary, or authorized agent attempted to contact [her] by first class letter,” by “telephone,” by “automated system,” or by “send[ing] a certified letter.” And she alleged that “[i]f she had been contacted, [she] could have worked to resolve the issues surrounding the mortgage loan.” The trial court considered these allegations to be insufficient and conclusory. According to the trial court, Miller needed to allege, “for example[,] that she has an operable telephone, that her number has been unchanged, or any other factual allegations to support her conclusions.” But while additional details would have provided more context, Miller’s allegations asserted clearly and directly that no representative from any lender contacted or attempted to contact her to explore alternative options to foreclosure.

Thus, these allegations sufficiently created a factual question whether the lender complied with its statutory obligations. Compliance with section 2923.5 is generally a factual issue not susceptible to resolution by way of demurrer. (*Intengan, supra*, 214 Cal.App.4th at pp. 1058, 1060 [reversing sustaining of a demurrer where plaintiff alleged noncompliance with § 2923.5 before recordation of notice of default]; *Skov v. U.S. Bank National Assn., supra*, 207 Cal.App.4th at pp. 696-697, 702 [error to sustain demurrer because of factual issue regarding compliance with statute].) As we see it, either Miller’s allegations or the words expressed in the notice of default reflect the truth, but they are mutually exclusive, and we cannot resolve the conflict by reviewing the record on the demurrer. (*Mabry, supra*, 185 Cal.App.4th at p. 235 [“Lender Compliance in This Case? Somebody Is Not Telling the Truth and It’s the Trial Court’s Job to Determine Who It Is”].)

We reiterate that the only relief available to Miller on remand if she proves a violation of section 2923.5 is a preliminary injunction to enjoin the foreclosure until the lender complies with the statutory requirements. (E.g., *Mabry, supra*, 185 Cal.App.4th at p. 237 [“If the trial court finds that [the lender] has complied with section 2923.5, foreclosure may proceed. If not, it shall be postponed until [the lender] files a new notice of default in the wake of substantive compliance with section 2923.5”].)

Finally, because we reverse the trial court’s sustaining the demurrer on the fourth claim as alleged against Aurora, we will allow Miller to proceed with her fifth cause of action for unlawful business practices in violation of Business and Professions Code section 17200, which prohibits “any unlawful, unfair or fraudulent business act or practice.” “By proscribing ‘any unlawful’ business practice, ‘section 17200 ‘borrows’ violations of other laws and treats them as unlawful practices’ that the unfair competition law makes independently actionable.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Thus, we leave it to the trial court to decide in the first instance whether Miller on remand can establish a claim under section 17200 by proving her claim based on section 2923.5.

*E. Miller Failed to State a Quiet Title Cause of Action.*

Miller’s fifth cause of action to quiet title fails because Miller did not allege, as required, that she is the property’s rightful owner; that is, that she has satisfied her obligation under the deed of trust. (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477; see *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 [“a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee”].) “Allowing plaintiff[] to recoup the property without full tender would give [her] an inequitable windfall, allowing [her] to evade [her] lawful debt.” (*Stebly v. Litton Loan Servicing, LLP, supra*, 202 Cal.App.4th at p. 526.)

Miller admits she is in default, and she has not alleged she paid off the debt or made an offer to tender the remainder owed. Thus, she is unable to maintain a quiet title action. (*Miller v. Provost, supra*, 26 Cal.App.4th at p. 1707; *Stebly v. Litton Loan Servicing, LLP, supra*, 202 Cal.App.4th at p. 526.)

Relying on *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, Miller argues she is entitled to an exception to the tender requirement. She is mistaken. In *Lona*, the court held that the defendants were not entitled to summary judgment on the basis of the tender requirement because the debt was disputed. (*Id.* at p. 115.) But Miller does not dispute the debt here or allege that she should own the property free and clear. Accordingly, we conclude the trial court properly sustained the demurrer as to the claim to quiet title.

### III. DISPOSITION

The judgment is affirmed in part and reversed in part. On remand, the trial court shall determine whether the lender has complied with section 2923.5 by attempting to explore alternative options to foreclosure. If it has, the foreclosure may proceed. If it has not, a preliminary injunction against the foreclosure shall be entered until the lender complies with the statutory requirements. (*Mabry, supra*, 185 Cal.App.4th at p. 237.) The parties shall bear their own costs.

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.