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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHANHT REATREY KEO,
Plaintiff and Appellant,

v.

NATIONSTAR MORTGAGE LLC,
Defendant and Respondent.

A141781

(Marin County
Super. Ct. No. CIV1201779)

Plaintiff Chanht Reatrey Keo (Keo) appeals from a judgment of dismissal following the sustaining, without leave to amend, of a demurrer by defendant Nationstar Mortgage LLC (Nationstar). Keo contends she alleged sufficient facts in her first amended complaint to support causes of action for wrongful foreclosure and cancellation of instruments. For reasons we explain, that is not the case, and we affirm the judgment.

BACKGROUND

Rules of Court

Keo’s briefing on appeal violates numerous rules of court, including California Rules of Court, rule 8.204(a)(2)(C) requiring “a summary of the significant facts limited to matters in the record,” and rule 8.204(a)(1)(C) requiring litigants to “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Cal. Rules of Court, rules 8.204(a)(1)(C), 8.204(a)(2)(C).) Thus, stating facts without providing any record cite, or citing to only a document rather than to a page, violates this rule. (See, e.g., *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 166 [“plaintiffs repeatedly cite to 170

pages of their motion to vacate without directing us to specific pages”] (*Evans*); *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990 [“Sections of the statement of facts in the appellant’s opening brief include no record citations at all.”].) When a litigant repeatedly provides no page citations to the record, the rule violation is “egregious,” significantly burdening the opposing party and the court. (*Evans, supra*, 134 Cal.App.4th at pp. 166–167.)

In this appeal, Keo’s opening and reply briefs fail to provide a *single* page-specific citation to the record. Had Keo largely complied with the Rules of Court, we could overlook minor shortcomings. However, “it is counsel’s duty to point out portions of the record that support the position taken on appeal,” and “[t]he appellate court is not required to search the record on its own seeking error.” (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 (*Del Real*).)

Accordingly, “any point raised that lacks citation may, in this court’s discretion, be deemed waived” or disregarded. (*Del Real, supra*, 95 Cal.App.4th at p. 768; see also *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1267 [“To further complicate review, plaintiffs make numerous factual assertions in their briefs without record citation” but “[w]e are entitled to disregard such unsupported factual assertions.”]; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 60 (*Lueras*) [rule applies in demurrer context]; *Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1453 (*Hernandez*) [“ ‘an appellate court may disregard any factual contention not supported by a proper citation to the record’ ”]; *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 788 [“No record citation is given for this assertion, therefore we disregard it.”].)

Given that not a single factual assertion in Keo’s briefs is supported in a manner that complies with the Rules of Court, we disregard them and base our understanding of the parties’ dispute on the portions of the record correctly cited to by defendants. Because this is not the first appeal in which counsel for Keo has submitted briefing which fails to comply with the Rules of Court (see *Keo v. Bank of America, N.A.* (Feb. 25, 2015, A138826) [nonpub. opn.] [appeal by Keo from dismissal in favor of other defendants in

same case]), we also hereby put counsel on notice that if he submits briefs flagrantly violating the rules in future appeals we will consider imposing sanctions.

The Parties' Dispute

In our recent opinion in Keo's appeal from a judgment of dismissal in favor of other defendants (*Keo v. Bank of America, N.A., supra*, A138826),¹ we summarized the factual allegations and procedural background as follows:

“In December 2008, Keo executed a promissory note for \$417,000 with Countrywide Bank, FSB (Countrywide). The note was secured by a deed of trust that named ReconTrust Company as the trustee, and Mortgage Electronic Registration System, Inc. (MERS) as the beneficiary and sole nominee for the lender, its successors, and assigns. It also identified Cal Land as the escrow company.

“Two and a half years later, in August 2011, MERS recorded an assignment, transferring all its interest under the deed of trust, to Bank of America Home Loans Servicing, LP, including but not limited to ‘the right to foreclose and sell the [p]roperty.’

“By then, Keo was behind in her payments, and on September 15, 2011, a substitution of trustee was recorded on behalf of Bank of America, N.A., as successor by merger to Countrywide and Bank of America Home Loans Servicing, LP, designating Quality Loan Service Corporation (Quality Loan) as the new trustee under the deed of trust.

“Also on September 15, Quality Loan recorded an un-notarized Notice of Default for \$79,511.31, the amount required as of September 13 to reinstate the loan. In December, Quality Loan recorded a notice of trustee's sale, but Bank of America represents, and Keo does not dispute, there has been no sale of the property to date.

“In April 2012, Keo filed the instant case against Bank of America, Quality Loan, and Countrywide Bank asserting nine causes of action: breach of the covenant of good

¹ We take judicial notice of our prior opinion on our own motion. (Evid. Code, §§ 451, subd. (a), 452, subd. (a), 459.)

faith and fair dealing, “concealment,” unjust enrichment, wrongful foreclosure, violation of Civil Code section 1788.17, misrepresentation/fraud, breach of contract, quiet title, and declaratory relief. Bank of America interposed a demurrer, asserting none of plaintiff’s claims stated facts sufficient to constitute a cause of action. The trial court sustained the demurrer with leave to amend the claims for wrongful foreclosure, misrepresentation/fraud against Countrywide Bank only, quiet title, and declaratory relief.

“Keo filed a first amended complaint (FAC), reasserting her causes of action for wrongful foreclosure, misrepresentation/fraud, quiet title, and declaratory relief, and adding a new claim for ‘recoupment.’ She also added six new defendants: BAC, MERS, Bryan Cave, Jessica T. Ehsanian (a Bryan Cave attorney²), Nationstar Mortgage LLC and Cal Land. The only allegations regarding Cal Land were that it never ‘gave any accounting or evidence’ of the loan funding, and that its agent ‘orchestrated this manipulation of [Keo’s] need to finance.’

“Bank of America (individually and as successor to Countrywide and Bank of America Home Loans Servicing, LP), Bryan Cave, MERS and Cal Land filed demurrers. The court granted the Bank’s request for judicial notice of: (a) the deed of trust, (b) the assignment of the deed of trust from MERS to Bank of America Home Loans Servicing, LP, BAC, (c) the substitution of trustee on behalf of Bank of America, N.A. (as successor by merger to Countrywide and Bank of America Home Loans Servicing, LP), designating Quality Loan as the new trustee under the deed of trust[,] substitution of Quality Loan as trustee by Bank of America as the successor in interest to BAC, (d) the notice of default and election to sell under the deed of trust, and (e) the notice of trustee’s

² On its own motion under Code of Civil Procedure section 436, the court struck Ehsanian as a defendant from the FAC.

sale. Keo opposed the Bank's demurrer, but did not file any opposition to Cal Land's demurrer.

“Given the absence of any opposition to Cal Land's demurrer, the trial court sustained it without leave to amend. The court also sustained Bank of America's demurrer without leave to amend. As to the wrongful foreclosure and quiet title claims, the court ruled the FAC failed to allege facts showing Keo suffered prejudice from any of the asserted irregularities in the foreclosure process.” (*Keo v. Bank of America, N.A.*, *supra*, A138826.)

In August, 2013, after successfully setting aside the default entered against it, Nationstar also demurred to the FAC. The sole allegation as to Nationstar was that it “is the new servicer for the alleged ‘loan’ effective November 01, 2012. N[ationstar] is located at 350 Highland Drive, Lewisville, TX 75067.”

After a number of continuances of the hearing on the demurrer in order for Keo's attorneys to review “new evidence,” the trial court sustained Nationstar's demurrer without leave to amend in March 2014 and entered a judgment of dismissal.

DISCUSSION

No Operative Allegations as to Nationstar

When the trial court dismisses a case after sustaining a demurrer without leave to amend, we ordinarily “review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory” and, if the complaint is lacking, “we then consider whether the court abused its discretion in denying leave to amend the complaint.” (*Estate of Dito* (2011) 198 Cal.App.4th 791, 800.) “As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) “The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “Nevertheless, where the nature

of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*Ibid.*)

In this appeal, Keo addresses only her cause of action for wrongful foreclosure, but alleges that, although she did not set forth a cause of action for cancellation of instruments in the FAC, the "net effect" of the alleged illegal assignments, robo-signing, and securitization of her loan was that "all of the wrongly recorded documents . . . should be cancelled." To the extent Keo has not briefed other causes of action, we deem those claims abandoned and affirm their dismissal on that ground. (See *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 984, fn. 1 ["failure to discuss cause of action on appeal from trial court's order sustaining demurrer constitutes abandonment of that cause of action on appeal"]; *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948 ["When a brief fails to contain a legal argument with citation of authorities on the points made, we may 'treat any claimed error in the decision of the court sustaining the demurrer as waived or abandoned,' " thus "our review is limited to only those causes of action briefed on appeal."].)

Moreover, although the FAC asserted each cause of action was pleaded against "each and every Defendant," the complaint made no specific allegations against Nationstar other than it was "the new servicer for the alleged 'loan' effective November 01, 2012" and it was "located at 350 Highland Drive, Lewisville, TX 75067." Given the lack of *any* alleged operative facts as to Nationstar, its demurrer was properly sustained on that ground alone. (See *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 529 (allegations of complaint "failed to show any harmful conduct by [defendant] or any injury as a result of any acts of [defendant].")

Insufficient Allegations to Support "Preemptive" Wrongful Foreclosure Claim

Even apart from the lack of operative allegations as to Nationstar, the FAC fails to state a pre-foreclosure sale (or "preemptive") wrongful foreclosure claim. (See *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*); *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*).)

The purposes of California’s comprehensive nonjudicial foreclosure statutory scheme are: “ ‘(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 a wrongful loss of property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ [Citation.]” (*Gomes, supra*, 192 Cal.App.4th at p. 1154.) “ ‘Because of the exhaustive nature of this scheme, California courts have refused to read any additional requirements into the nonjudicial foreclosure statute.’[Citation.]” (*Ibid.*; see also *Jenkins, supra*, 216 Cal.App.4th at p. 510.) California courts only allow a defaulting borrower to pursue “additional remedies for misconduct arising out of a nonjudicial foreclosure sale when not inconsistent with the policies behind the statutes.” (*California Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1070.)

Thus, the California courts have uniformly concluded a defaulting borrower cannot, on mere speculation, test in court whether an entity conducting a non-judicial foreclosure has the authority to foreclose. (*Gomes, supra*, 192 Cal.App.4th at p. 1154 [“Nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated.”]; *Jenkins, supra*, 216 Cal.App.4th at p. 513 [allowing a “preemptive” action “would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature”].)

When loan and default are conceded, hypothetical disputes between those transferring or securitizing the loan do not create an actual controversy between the owing borrower and the foreclosing entity. (See *Gomes, supra*, 192 Cal.App.4th at p. 1156 [defaulting borrower must “identi[fy] a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party”]; see also *Jenkins, supra*, 216 Cal.App.4th at pp. 512–513 [indicating preemptive wrongful foreclosure claims are categorically banned and, thus, suggesting doubt as to whether there is any viable “*Gomes* exception” to the general rule against preemptive wrongful foreclosure claims].)

Accordingly, a borrower cannot halt the nonjudicial foreclosure process with boilerplate allegations and condemnatory rhetoric about the evils of the banks' creation of securitized loan investment vehicles and thereby put the burden on the foreclosing entity to establish in court its right to proceed with a nonjudicial foreclosure. (*Jenkins, supra*, 216 Cal.App.4th at pp. 512, 515.) A “preemptive” cause of action “ ‘would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.’ ” (*Jenkins, supra*, 216 Cal.App.4th at p. 513, quoting *Gomes, supra*, 192 Cal.App.4th at p. 1155.) Indeed, as a result of this preemptive lawsuit, Keo has remained on the property at issue here for over three years, without any payment on the mortgage.³

While Keo claims she “produced evidence in the complaint regarding the Defendant’s attempt to notarize on the faulty foundation of events before it took title,” her only specific assertion is that a “botched securitization of her loan led to a break in chain of title,” apparently because one Beverly Brooks, “a known robo signer” executed an assignment of “the Deed of Trust to BAC Home Loans Servicing FKA Countrywide Home Loans Servicing, L.P.” She maintains this allegation was sufficiently specific to support a preemptive wrongful foreclosure claim, citing to *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868 (*Dimock*) and *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*). However, both cases are *postforeclosure sale* cases in which defaulting borrowers sought to set aside trustee sales and both are readily distinguishable on their facts.⁴

In *Dimock*, a note and deed of trust were purchased by the defendant, Bankers Trust Company. (*Dimock, supra*, 81 Cal.App.4th at p. 871.) The trustee was Commonwealth Trust Deed Services, whose agent, T.D. Service Company, prepared and

³ That a “preemptive” action is not proper does not preclude a postsale claim for wrongful foreclosure based on “misconduct with regards to the initiation and processing of the nonjudicial foreclosure.” (*Jenkins, supra*, 216 Cal.App.4th at p. 512.)

⁴ We also note that California federal courts have rejected the applicability or reasoning of *Glaski*. (See *Haddad v. Bank of America, N.A.* (S.D.Cal. Jan. 8, 2014, No. 12cv3010-WQH-JMA) 2014 WL 67646, and cases cited therein.)

recorded a notice of default. (*Ibid.*) Thereafter, the plaintiff entered into a forbearance agreement, under which Bankers agreed to hold off on foreclosure. After the plaintiff failed to pay in accordance with the agreement, Bankers recorded a substitution of trustee, replacing Commonwealth with Calmco Trustee Services. (*Id.* at p. 872.) T.D. filed another notice of default. (*Ibid.*) It then abandoned that notice and acted under the previously recorded notice, but it never vacated the substitution to Calmco. (*Ibid.*) The Court of Appeal held that under the statutory provisions governing substitution of trustees, once the substitution of Calmco was recorded, that gave it the sole power to convey the property. (*Id.* at pp. 875–877.) As a result, Commonwealth had no power to convey the property and its conveyance to the lender-purchaser at the foreclosure sale was void, not merely voidable. (*Id.* at pp. 877–878.) The court further held that since the plaintiff was not relying on the court’s equity powers to attack a voidable deed, the usual requirement of tender did not apply. (*Ibid.*) Here, Keo made no allegations along the lines of the facts in *Dimock*.

Glaski is equally distinguishable. In that case, the borrower’s loan was securitized by being placed into a trust formed under New York law. The Court of Appeal held the borrower had standing to challenge an assignment of his note because the defendants failed to assign it before the trust’s closing date, creating a defect in the chain of title. (*Glaski, supra*, 218 Cal.App.4th at p. 1096.) The court stated if the assignment was void, the defendant could not initiate a lawful foreclosure proceeding because it did not have a legal right to the property. (*Id.* at pp. 1095–1097.) Thus, *Glaski* turned on a specific New York statute. (*Ibid.*) Here, Keo made no allegations that any comparable California statute was violated.⁵

⁵ Keo has also cited *Bushell v. JPMorgan Chase Bank* (2013) 220 Cal.App.4th 915, claiming the appellate court “reversed a demurrer granted under similar circumstances.” On the contrary, this case is even farther afield. The Court of Appeal reversed a judgment dismissing breach of contract, promissory estoppel, and fraud claims. (*Id.* at p. 918.) It did not consider whether boilerplate allegations of “improper securitization” and “robosigning” are sufficient to state a preemptive wrongful

On the other hand, in *Jenkins, supra*, 216 Cal.App.4th 497, the Court of Appeal addressed similar “attempts to construct a dispute between [plaintiff] and Defendants with regard to the alleged improper transfer of the promissory note during the securitization process.” The court held “even if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note . . .) occurred, the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. ‘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 obligations under the note.’ [Citation.] As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions.” (*Id.* at pp. 514–515.)

While not a point she makes in the argument section of her opening brief, Keo maintains in passing elsewhere that the foreclosure process was not initiated by the correct entity because there allegedly is “no evidence a proper Substitution of Trustee was executed to give Quality Loan Service Corporation the right to foreclose.” The record, however, shows otherwise. The judicially noticed documents before the trial court in regard to the Bank of America’s demurrer showed an executed and recorded substitution.⁶ Moreover, as we have observed above, Keo neither alleged in her FAC, nor

foreclosure claim. We also note Keo provided an inadequate citation to this case, supplying only a superior court case number and not an appellate citation.

⁶ The trial court took judicial notice of these documents in connection with the Bank of America’s demurrer to Keo’s complaint. (See *Keo v. Bank of America, N.A., supra*, A138826.) In ruling on a demurrer, it is permissible to consider matters that have been judicially noticed, and judicially noticeable facts may undermine a pleading or render it defective. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 14 Cal.App.4th 743, 751–752 [contradicted allegations in pleading may be disregarded].)

addressed in her briefing on appeal, how Quality Loan Service’s right to foreclose has anything to do with Nationstar.

Keo also maintains “claims of wrongful foreclosure . . . may be fully supported by allegations of robo-signing” under Civil Code section 2924.17. However, section 2924.17 was enacted in January 2013—approximately two years after the documents at issue were signed. In addition, the prevailing view in federal district court cases considering California law is that defaulting borrowers lack standing to challenge the validity of robo-signatures. (See *Bennett v. Wells Fargo Bank, N.A.* (N.D.Cal. Aug. 9, 2013, No. CV 13-01693-KAW) 2013 WL 4104076; *Maynard v. Wells Fargo Bank, N.A.* (S.D.Cal. Sept. 11, 2013, Case No. 12cv1435 AJB (JMA) 2013 WL 4883202) [“Countless courts have concurred in this result, finding that where a plaintiff alleges that a document is void due to robo-signing, yet does not contest the validity of the underlying debt, and is not a party to the assignment, the plaintiff does not have standing to contest the alleged fraudulent transfer. ”])

Cancellation of Instruments

Keo contends she also sufficiently alleged a cause of action for cancellation of instruments. She never, however, pled such a cause of action in her FAC. In any case, her cancellation claim is entirely derivative of her claim for wrongful foreclosure. Since she has failed to state a cause of action for preemptive wrongful foreclosure, she also fails to state a claim for cancellation.

In sum, the trial court properly sustained Nationstar’s demurrer. It also did not abuse its discretion in denying leave to amend since Keo has not articulated facts she could allege that would overcome the deficiencies in her amended complaint. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

DISPOSITION

The judgment of dismissal is affirmed. Respondent to recover its costs on appeal.

Banke, J.

We concur:

Humes, P. J.

Margulies, J.