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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARIO VARGAS,

Plaintiff and Appellant,

v.

GMAC MORTGAGE, LLC, et al.,

Defendants and Respondents.

B235473

(Los Angeles County  
Super. Ct. No. BC450701)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John A. Kronstadt, Jr., and Robert H. O'Brien, Judges. Dismissed.

Law Offices of Patricia Rodriguez, Patricia Rodriguez and Adlore V.

Clarambeau for Plaintiff and Appellant.

Severson & Werson, Kerry W. Franich and Jan T. Chilton for Defendants and Respondents.

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Plaintiff Mario Vargas defaulted on a home loan and defendant GMAC Mortgage, LLC (GMAC), acquired the property at a trustee's foreclosure sale. Plaintiff filed this action against GMAC, Mortgage Electronic Registration Systems, Inc. (MERS), and Federal Home Loan Mortgage Corporation (collectively defendants) alleging causes of action for "lack of standing" and unfair business practices, based on various unspecified defects in the foreclosure process, the deed of trust not being properly "securitized," and MERS's "lack[] [of] authority to assign the mortgage." The trial court sustained defendants' demurrer to the complaint without leave to amend. GMAC then initiated an unlawful detainer action against plaintiff, alleging it purchased the property at a trustee's sale, and that its title was "duly perfected." In his answer to the unlawful detainer complaint, plaintiff stated that he had filed a lawsuit (the subject of this appeal), and asserted as defenses the same claims asserted in the lawsuit, namely that "the entity which allegedly sold the Home at the foreclosure sale did not have the interest to sell because the entity never properly acquired title." Plaintiff and GMAC later stipulated to entry of judgment for possession, in favor of GMAC, in the unlawful detainer.

In this appeal, plaintiff contends his claims were well stated, the trial court improperly took judicial notice of the truth of various foreclosure documents, and he should be given leave to amend his complaint to state his claims, all of which attack the validity of the foreclosure sale and GMAC's title. Because we determine the unlawful detainer judgment conclusively established GMAC's title and lawful possession, plaintiff's claims are barred by collateral estoppel, and any amendment would be futile. Therefore, reversal would afford plaintiff no relief, and we dismiss the appeal as moot.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In May 2006, plaintiff refinanced a single family residence in Los Angeles. He obtained a loan in the amount of \$352,000 from Greenpoint Mortgage Funding, Inc. (Greenpoint), which secured the loan by a deed of trust recorded against the property. The deed of trust identified Greenpoint as the lender, Marin Conveyance Corp. as the

trustee, and MERS as the beneficiary. The deed of trust gave the beneficiary the right to foreclose and sell the property.

Plaintiff defaulted on the loan. On February 25, 2009, a notice of default was recorded by ETS Services, LLC (ETS), “as agent for the . . . beneficiary,” identifying MERS as the beneficiary. A substitution of trustee was also recorded on February 25, 2009, substituting ETS as the trustee. Although both documents were recorded on the same date, it appears the substitution was recorded first, based on its instrument No. 20090260071; the notice of default bears the instrument No. 20090260072. On May 24, 2010, an assignment of the deed of trust in favor of GMAC was recorded by MERS, “as nominee for GreenPoint.” Notices of trustee’s sale were recorded by ETS on May 27, 2009 and July 16, 2010. A notice of default was recorded on August 5, 2010, by C&H Trust Deed Service, “as agent for the Beneficiary.” Another notice of trustee’s sale was recorded on December 23, 2010, by ETS. A trustee’s deed upon sale, in favor of GMAC, was recorded on March 10, 2011.

On December 7, 2010, plaintiff filed a complaint alleging causes of action for declaratory relief, injunctive relief, violation of the Business and Professions Code, among other claims, against GMAC, MERS, and Federal Home Loan Mortgage Corporation. Defendants demurred, and on March 15, 2011 (before the hearing on defendants’ demurrer), plaintiff filed a first amended complaint stating claims for “lack of standing,” and violations of Business and Professions Code section 17200. The amended complaint alleged that MERS lacked authority to “assign the mortgage” and therefore all subsequent assignments and transfers were void. The complaint also alleged that a mortgage debt cannot be assigned unless the promissory note is “physically deliver[ed],” among other allegations of the “no note,” “improper assignment,” and “fraudulent documents” variety. Plaintiff also alleged that he was subject to various “unfair” fees related to his default and foreclosure.

Defendants again demurred, seeking judicial notice of various loan and foreclosure documents (most of which were appended as exhibits to the first amended complaint), reasoning the claims lacked substantive merit because the foreclosure was

properly conducted, and that plaintiff's claims were barred because he failed to tender the amount due under the promissory note. The trial court sustained the demurrer without leave to amend, and a judgment of dismissal was entered on June 10, 2011. Plaintiff filed his notice of appeal on August 9, 2011.

On June 14, 2011, GMAC filed an unlawful detainer complaint against plaintiff.<sup>1</sup> In the complaint, GMAC alleged that it was "entitled to possession of, and is the recorded owner of" the property, further alleging that it "purchased the property at a Trustee's Sale held on February 14, 2011. Plaintiff's title has been duly perfected." Appended to the complaint was a copy of the trustee's deed upon sale, which provided, among other things, that "Trustee [has complied] with all applicable statutory requirements of the State of California" and "performed all duties required by the Deed of Trust." Plaintiff filed an answer, admitting the material allegations in the complaint, except asserting that the trustee sale was "void because [ETS] had no authority (no standing) to sell the Home." The answer also stated that plaintiff had filed a lawsuit alleging causes of action for lack of standing and violations of the Business and Professions Code, and that he intended to appeal the trial court's judgment of dismissal.

On August 15, 2011, the parties stipulated to a judgment for possession in the unlawful detainer case, providing that judgment would be entered in favor of GMAC if plaintiff failed to surrender the keys by an agreed date. Specifically, the stipulation provided that "Vargas represents that he has vacated the premises. If . . . Vargas returns the keys to the premises by the continued date of this matter, then the case shall be dismissed as to him. If he fails to turn over the keys, then judgment for possession only shall be entered, upon [GMAC's] declaration to such effect, w/o further notice or hearing." GMAC filed a declaration of noncompliance, and a judgment for possession was entered on August 24, 2011.

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<sup>1</sup> We grant defendants' request to take judicial notice of the documents filed in the unlawful detainer proceeding. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 266-267.)

Thereafter, GMAC transferred the property to D & B Real Estate Holding, LLC, as reflected in a grant deed recorded January 5, 2012.

We sent a letter to the parties under Government Code section 68081, inviting briefing on whether “the stipulated judgment in the unlawful detainer action precludes Mr. Vargas’s claims concerning defects in the foreclosure process (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968 [*Malkoskie*]), therefore rendering this appeal moot.” We received a letter brief from plaintiff, but no response from defendants.

### DISCUSSION

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “On appeal, we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself.” (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.)

We apply the abuse of discretion standard in reviewing a trial court’s denial of leave to amend. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) The plaintiff bears the burden of proving there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan, supra*, at p. 318; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) A request for leave to amend and the showing necessary to cure the defects may be made for the first time on appeal. (Code Civ. Proc., § 472c, subd. (a); *Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) “[H]owever, leave to amend should *not* be granted where, in all probability, amendment would be futile[.]” (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685), such as when no liability exists under substantive law. (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486.)

On appeal, plaintiff contends the trial court erroneously sustained the demurrer without leave to amend, reasoning his claims were well stated, and any defects could have been cured by amendment; the trial court improperly accepted the truth of the foreclosure documents of which it took judicial notice; and the trial court erroneously applied the “tender rule” in sustaining the demurrer. He argues that the sale of his home was unauthorized because of “flaws in the securitization process,” and that the foreclosure sale was not “in accordance with the requirements of . . . Civil Code § 2932.5 . . . , which renders the foreclosure sale void as a matter of law.” In essence, plaintiff is claiming that he should be permitted to attack and unwind the foreclosure sale by which GMAC acquired the property, or is entitled to damages for irregularities in the process. We disagree, finding that plaintiff’s claims are collaterally estopped by the judgment in the unlawful detainer action.

“ ‘Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.’ ” (*San Remo Hotel, L. P. v. City and County of San Francisco* (2005) 545 U.S. 323, 336, fn. 16; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813.) “ ‘The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]’ ” (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.) “ ‘The purposes of the doctrine are said to be “to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, [and] to protect against vexatious litigation.” [Citation.]’ ” (*Ibid.*) Under California law a “ ‘judgment entered without contest, by consent or stipulation, is usually as conclusive a merger or bar as a judgment rendered after trial.’ [Citations.]” (*Malkoskie, supra*, 188 Cal.App.4th at pp. 973-974.)

Our Supreme Court has recognized that an unlawful detainer judgment may bar subsequent litigation of issues other than possession. “Applying the traditional rule that a judgment rendered by a court of competent jurisdiction is conclusive as to any issues necessarily determined in that action, the courts have held that subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee’s sale are barred by the prior unlawful detainer judgment.” (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 256.) Although the fundamental issue in an unlawful detainer proceeding is the plaintiff’s right to possession (*Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460, 465), where the unlawful detainer action is brought based on a plaintiff’s claim of duly perfected title pursuant to a trustee’s sale, title is also an issue. (See, e.g., Code Civ. Proc., § 1161a, subd. (b)(3) [an unlawful detainer action may be filed “[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected”]; *Malkoskie, supra*, 188 Cal.App.4th at p. 974.)

Our decision in *Malkoskie* is instructive. There, the homeowners refinanced with a loan from Home Loans USA, Inc. The deed of trust identified Home Loans USA, Inc. as the beneficiary and Premier Trust Deed Services as the trustee. Later, a substitution was recorded by Option One Mortgage Corporation, as beneficiary, making Alliance Title Company the new trustee, even though there was no recorded substitution making Option One the new beneficiary of record. (*Malkoskie, supra*, 188 Cal.App.4th at p. 971.) Wells Fargo acquired the property at a nonjudicial foreclosure sale, and it was not until two months later that a substitution was recorded designating Option One as the new beneficiary. (*Id.* at pp. 971-972.) The deed from the foreclosure sale giving title to Wells Fargo was recorded the same day. Wells Fargo then initiated an unlawful detainer action. The homeowners’ answer raised “ ‘irregularities in the sale’ ” and improper notice in the nonjudicial foreclosure sale as affirmative defenses. (*Id.* at p. 972.) The parties agreed to entry of a stipulated judgment in favor of Wells Fargo in the unlawful detainer action, and the homeowners ceded possession. (*Ibid.*)

The homeowners then filed a lawsuit against Wells Fargo and others attacking defendants' authority to foreclose, claiming the sale was conducted by an improper trustee, and that Wells Fargo therefore did not acquire valid title. (*Malkoskie, supra*, 188 Cal.App.4th at p. 972.) The homeowners claimed "the issue of the improper trustee conducting the sale was not embraced by or otherwise resolved by the stipulated judgment such that there is no bar to plaintiffs' claims seeking to undo the foreclosure sale as invalid." (*Id.* at p. 973.) We disagreed, concluding that "[b]y stipulating to judgment against them, plaintiffs conceded the validity of Wells Fargo's allegations that the sale had been duly conducted and operated to transfer 'duly perfected' legal title to the property. 'Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt . . . [citation], which includes good record title [citation] . . . [.]' [Citation.]" (*Id.* at p. 975.)

In this case, GMAC "alleged in its complaint the specific facts it contended established it had perfected legal title to the property" (*Malkoskie, supra*, 188 Cal.App.4th at p. 974) by including allegations that its title was "duly perfected," as well as a copy of its trustee's deed upon sale, which recited that the sale "complied with all applicable statutory requirements of the State of California" as well as "all duties required by the Deed of Trust." In his answer to the unlawful detainer complaint, plaintiff contended that he had rightful title to the property because "Title was not successfully acquired because upon [the] original note being securitized it was illegally transferred without proper assignments" and "any purported sale of the Home is void as a matter of law . . . ; thus, Mr. Vargas owns the property." Under these circumstances, "[t]he conduct of the sale and the validity of the resulting transfer of title to [GMAC] were . . . directly in issue in the unlawful detainer case" (*ibid.*) and "the validity of [GMAC's] title *had* to be resolved." (*Id.* at p. 974.) Plaintiff's consent to judgment, therefore, conclusively determined the factual contentions embraced by the complaint, specifically that GMAC obtained valid record title pursuant to a nonjudicial foreclosure

sale that had been properly conducted pursuant to statute and the requirements of the deed of trust. (*Id.* at p. 975.) Plaintiff’s stipulation conceded these facts.

Because all of plaintiff’s claims against all defendants are premised on the alleged invalidity of the foreclosure sale and defects in the title, we find that plaintiff is collaterally estopped from asserting any of these claims against any defendant. The legality and validity of the foreclosure sale were finally determined and are established as a matter of law against plaintiff, thereby defeating his claims against all defendants. The unlawful detainer judgment was entered after the trial court sustained the demurrer at issue in this appeal, so collateral estoppel was not raised below, but the unlawful detainer judgment now precludes us from considering the merits of plaintiff’s claims on appeal. Allowing plaintiff leave to amend would be futile because plaintiff’s proposed amendments concern the legality and validity of the foreclosure sale, issues that have been conclusively and finally decided against him.

Plaintiff seeks to distinguish *Malkoskie*, claiming he “did not consent to an entry of judgment in Respondent’s favor,” that the “claims were not fully litigated in the unlawful detainer proceeding,” and that GMAC “did not allege that title had been duly perfected.” Plaintiff is mistaken. Plaintiff stipulated to entry of judgment against him and in favor of GMAC if he failed to deliver possession by a certain date, and he cannot now claim he did not consent to the judgment when he failed to satisfy the condition that would have avoided its entry. The law clearly does not require litigation on the merits to establish claim or issue preclusion; stipulated judgments are sufficient. (*Malkoskie, supra*, 188 Cal.App.4th at p. 973.) And, GMAC *did* allege that its title was duly perfected.

Because there is no possibility of further amendment to revive the complaint, the issues raised by this appeal have become moot. (See, e.g., *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10-11 [“It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events.”].)

**DISPOSITION**

The appeal is dismissed. Respondents are entitled to recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.