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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RAMON ARLANTE, NELIDA SEVERO,

Plaintiffs and Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY, Trustee for INDYMAC
INDX MORTGAGE TRUST 2005-AR27,

Defendant and Respondent.

B254570

(Los Angeles County
Super. Ct. No. BC514119)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Ronald M. Sohigian, Judge. Affirmed.

Gomez & Simone, PC, Mark A. Gomez and Stuart R. Simone for Plaintiffs and Appellants.

Chuck Birkett Tsoong, Stephen S. Chuck, Tiffany M. Birkett and Victoria J. Tsoong for Defendant and Respondent.

Plaintiffs Ramon Arlante and Nelida Servero sued Deutsche Bank National Trust Company (the “Bank”), as trustee for IndyMac INDX Mortgage Trust 2005-AR27, following the sale of their residence at a nonjudicial foreclosure sale. Plaintiffs did not dispute that their loan was in default, but maintained that, for various reasons, including the ineffective “securitization” of the loan, neither the Bank which had initiated the foreclosure nor the substituted trustee which carried it out was authorized to do so. The trial court sustained the Bank’s demurrer to plaintiffs’ second amended complaint, ruling that the recorded documents of which it took judicial notice established that plaintiffs were not entitled to relief. We agree with that conclusion, and so affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2005, plaintiffs obtained a loan in the amount of \$277,600 (the “Loan”) from E-Loan, Inc. (“Lender”) to purchase the real property located at 330 N. Howard Street in Glendale (the “Property”). The Loan was secured by a deed of trust (the “Deed of Trust”) on the Property, which contained a power of sale in the event of plaintiff’s default. Pursuant to the Deed of Trust, Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee on behalf of the Lender and its successors and assigns was named the original beneficiary.¹

Starting in or about June 2011, plaintiffs were not able to make their regular mortgage payments. Plaintiffs sought assistance from the mortgage servicer, IndyMac Mortgage Servicing, but “could not make any meaningful contact with any of IndyMac’s agents.”

On August 27, 2012, MERS assigned its beneficial interest under the Deed of Trust to the Bank (“Assignment”). On September 7, 2012, the Bank substituted Aztec Foreclosure Corporation (“Aztec”) as the trustee of the Deed of Trust.

¹ As did the trial court, we take judicial notice of the contents of the documents recorded in the Los Angeles County Recorder’s Office and attached to the Bank’s request for judicial notice as Exhibits 1 through 7. (Evid. Code, §§ 452, 459; see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-267 (*Fontenot*).)

On August 31, 2012, Aztec caused to be recorded a Notice of Default and Election to Sell Under Deed of Trust.

A Notice of Trustee's Sale pursuant to the Deed of Trust was recorded on November 28, 2012. A second such notice was recorded on May 28, 2013, designating a foreclosure sale date of June 20, 2013. On that date, Preferred Group Properties purchased the Property at the foreclosure sale. Aztec executed a Trustee's Deed Upon Sale, which was recorded in the Los Angeles County Recorder's Office on July 2, 2013.

On July 5, 2013, plaintiffs, in pro. per., filed this lawsuit for wrongful foreclosure, breach of contract, violation of Business and Professions Code section 17200, and declaratory relief. After the Bank demurred, plaintiffs, in pro. per., filed a first amended complaint bringing causes of action to set aside the trustee's sale, to cancel the trustee's deed of sale, and for wrongful foreclosure and unfair and unlawful business practices. The Bank again demurred, arguing that the gravamen of the allegations concerning the Bank was simply a challenge to the Bank's authority to commence foreclosure proceedings, an action a borrower is not entitled to bring pursuant to the holding of *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149. The Bank also contended that the recorded documents, which were subject to judicial notice, refuted all of plaintiffs' claims.

The trial court granted the Bank's request for judicial notice of the recorded documents and, in a written order filed on November 5, 2013, sustained the demurrer for "failure to state facts sufficient to constitute a cause of action for the reasons argued by demurrant." The court granted plaintiffs 10 days' leave to amend. While acknowledging their right to proceed in pro. per., the court noted that persons not represented by counsel are usually at a disadvantage.

On November 15, 2013, plaintiffs, now represented by counsel, filed the operative pleading, a second amended complaint, against the Bank and others for wrongful foreclosure, violations of Civil Code section 2923.5 and the Business and Professions Code, breach of contract and of the implied covenant of good faith and fair dealing, and to set aside the trustee's sale and to quiet title. The critical factual allegations which

formed the basis of plaintiffs' claims were that the "Defendants, by virtue of their actions to securitize Plaintiffs['] loan, had no legal authority to execute the foreclosure process which culminated in the non-judicial trustee['s] sale of Plaintiffs['] home on June 20, 2013." This is so because the agreement governing the IndyMac Trust which held the securitized loans "required that all mortgage files transferred to the trust be delivered to the trustee or initial custodian of the IndyMac Trust, before the closing date of October 28, 2005. . . . [¶] Plaintiffs' note and loan were not transferred to the IndyMac Trust before the closing date of October 28, 2005, as the IndyMac Trust only ever received the loan and note on August 27, 2012, as per the Assignment of Deed of Trust. Thus the attempted assignment was ineffective as the IndyMac Trust could not have accepted Plaintiffs['] deed of trust after the closing date, pursuant to the pooling and servicing agreement and the statutory requirements applicable to a real estate mortgage investment conduit trust."

The Civil Code claim was based on the allegation that the Bank failed in its duty under section 2923.5 "to contact Plaintiff and conduct a good faith assessment of the financial situation and explore the options to avoid foreclosure." The remainder of the causes of action alleged in the second amended complaint were grounded in the allegation that the Bank initiated the foreclosure proceedings on the Property without the requisite authority to do so, due to the faulty "securitization" of the Loan and Deed of Trust.

The Bank demurred to the second amended complaint, again contending that the recorded documents judicially noticed by the trial court established that MERS assigned to the Bank all beneficial interest under the Deed of Trust, and as assigned beneficiary the Bank substituted Aztec as trustee under the Deed of Trust. Thus, under California's statutory nonjudicial foreclosure law, Aztec was indisputably authorized to complete the foreclosure in the manner in which it did. Moreover, because the additional causes of action alleged in the second amended complaint were based on the allegation that the Bank was without authority to initiate the foreclosure process, they too failed to state a cause of action. As to the claim for violation of Civil Code section 2923.5, the Bank

relied on the Fourth District Court of Appeal opinion in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 235 (*Mabry*), which stated, “under the plain language of section 2923.5, read in conjunction with section 2924g, the *only* remedy provided [under section 2923.5] is a postponement of the sale before it happens.” Finally, the Bank contended that plaintiffs could not state a claim for quiet title or to set aside the sale because they failed to allege that they tendered payment of the indebtedness to the Bank, an essential element of those claims.

The trial court sustained the demurrer in its entirety and dismissed the action. Plaintiffs timely appealed the order of dismissal.

DISCUSSION

“A demurrer tests the legal sufficiency of the complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court’s stated reasons. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)” (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81 (*Siliga*).)

1. *Wrongful foreclosure*

The elements of a claim for wrongful foreclosure are: “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in

cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104; see also *Fontenot, supra*, 198 Cal.App.4th at p. 272 [discussing the general requirement that irregularities in the foreclosure process be prejudicial to the plaintiff’s interest]; *Herrera v. Federal Nat. Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507 [discussing prejudice requirement].)

The factual underpinning of plaintiffs’ lawsuit is that their loan was pooled with other residential real estate loans in a securitized investment trust, but without complying with the terms of the investment trust’s pooling and servicing agreement. Specifically, plaintiffs claim that the Note and Deed of Trust were transferred to the IndyMac Trust after the closing date of that trust. As a result, they contend that the Deed of Trust was never held by the IndyMac Trust, and thus the trust could not pass valid title to the Bank. As a consequence, the Bank was not authorized to execute the Substitution of Trustee naming Aztec Foreclosure Corp. as substitute trustee. “Therefore, neither Deutsche Bank nor Aztec had the authority to cause the trustee’s sale of the Subject Property on June 20, 2013.”

On facts very similar to those present here, including the allegation that the subject loan was transferred to a securitized trust after that trust’s closing date had passed in violation of the trust’s pooling and servicing agreement, the Fifth District Court of Appeal in *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079 (*Glaski*), held that the borrower’s complaint for wrongful foreclosure stated a cause of action. The court determined that, under New York law, “the trustee’s attempt to accept a loan after the closing date would be a void act in contravention of the trust document.” (*Glaski, supra*, 218 Cal.App.4th at p. 1096.) The court thus concluded that the borrower’s “factual allegations regarding post-closing date attempts to transfer his deed of trust into the WaMu Securitized Trust are sufficient to state a basis for concluding the attempted transfers were void.” (*Id.* at p. 1097.) Consequently, the borrower stated a “cognizable claim for wrongful foreclosure under the theory that the entity invoking the power of sale (i.e., [the] trustee for the WaMu Securitized Trust) was not the holder of the [borrower’s]

deed of trust.” (*Ibid.*) Relying on the authority of *Glaski, supra*, as well as several unpublished federal district court opinions, plaintiffs maintain that the second amended complaint alleges facts sufficient to state a cause of action for wrongful foreclosure based on the invalidity of the assignment of the Deed of Trust from MERS to the Bank.

We disagree with *Glaski’s* determination that a borrower has standing to challenge an assignment. *Glaski’s* analysis, relying on two federal court of appeals cases interpreting the laws of other jurisdictions (*Conlin v. Mortgage Electronic Registration Systems, Inc.* (6th Cir. 2013) 714 F.3d 355, 361; *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291) and an unpublished federal district court case (*Gilbert v. Chase Home Finance, LLC* (E.D. Cal., May 28, 2013, No. 1:13 Civ. 265) 2013 WL 2318890) is unpersuasive.

Other California cases hold that in post-foreclosure actions, a borrower lacks standing to challenge an assignment absent a showing of prejudice. (*Siliga, supra*, 219 Cal.App.4th at p. 85; *Herrera v. Federal Nat. Mortgage Assn., supra*, 205 Cal.App.4th 1495, 1507; *Fontenot, supra*, 198 Cal.App.4th at p. 271.) *Siliga*, decided by Division Three of this court, states: “[T]he Siligas fail to allege any facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process. The Siligas do not dispute that they are in default under the note. The assignment of the deed of trust and the note did not change the Siligas’ obligations under the note, and there is no reason to believe that Accredited as the original lender would have refrained from foreclose in these circumstances. Absent any prejudice, the Siligas have no standing to complain about any alleged lack of authority or defective assignment.” (*Siliga, supra*, at p. 85.) The same can be said of plaintiffs’ complaint.² Accordingly, the trial court properly sustained the demurrer to plaintiffs’ claim for wrongful foreclosure.

² We note as well that several recent cases have disagreed with the reasoning of *Glaski, supra*, 218 Cal.App.4th 1079, and the issue of a borrower’s “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 in the Supreme Court (*Yvanova v. New Century Mortgage Corporation* (No. S218973, Aug. 27, 2014).)

2. *Civil Code violations*

The complaint alleges that the Bank violated the provisions of Civil Code section 2923.5 by failing to contact plaintiffs in person or by telephone prior to filing a notice of default in order to assess their financial situation and explore options to avoid foreclosure. Plaintiff[s] alleges that they were thus denied the opportunity “to avoid foreclosure by renegotiating the terms of [their] mortgage, or by tendering payments in arrears according to a mutually agreeable repayment o[r] forbearance plan. Had Plaintiff[s] been aware of said options, [they] would have made [their] best effort to cure any default.”

However, as the court in *Mabry, supra*, 185 Cal.App.4th 208 held, when a lender fails to comply with the requirements of Civil Code section 2923.5, “the *only* remedy provided is a postponement of the sale before it happens.” (*Mabry, supra*, at p. 235.) Consequently, the trial court properly sustained the Bank’s demurrer to this cause of action.

3. *Remaining causes of action*

The complaint’s remaining causes of action are based on theories which we have determined do not support a claim for relief. Accordingly, we affirm the trial court’s

order sustaining the demurrer to the complaint in its entirety, and entry of judgment of dismissal.

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

TURNER, P.J.

KRIEGLER, J.

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