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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHIRLEY BROWN,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Respondents.

B264022

(Los Angeles County  
Super. Ct. No. BC525177)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Michelle R. Rosenblatt, Judge. Affirmed.

Shirley Brown, in pro per, for Plaintiff and Appellant.

Reed Smith, Kasey J. Curtis and Elena O. Gekker for Defendants and  
Respondents.

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After Shirley Brown (Brown) stopped making home loan payments and defaulted on her home loan, she brought this lawsuit against Bank of America (BOA) and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively, Defendants) in order to preempt a threatened foreclosure of her home. Brown contended generally that Defendants lacked the authority to foreclose. Her second amended complaint alleged seven causes of action (e.g., fraud, quiet title to property, and cancellation of instrument) and requested, inter alia, quiet title of the property in her favor, damages in the amount of all loan payments that she had paid to BOA, and cancellation of the deed of trust.

Brown appeals a judgment that dismissed with prejudice her second amended complaint after the trial court sustained Defendants' demurrer without leave to amend. Brown contends, inter alia, that (1) the trial court erred when it concluded that Brown lacked standing to challenge preemptively the foreclosure and (2) the trial court abused its discretion when it denied leave to amend. We affirm the judgment.

## **BACKGROUND**

### **I. Facts of the case**

In March 2008, Brown and her now deceased husband obtained a \$447,000 loan secured by a deed of trust on real property located in Inglewood, California (Deed of Trust). The Deed of Trust named Brown and her late husband as the borrowers, Casa Blanca Mortgage, Inc. dba Shearson Mortgage (Casa Blanca) as the lender, Commonwealth Land Title Company (Commonwealth) as the trustee, and MERS as the "beneficiary" and "acting solely as a nominee for Lender and Lender's successors and assigns." Specifically, the Deed of Trust stated, "MERS is the beneficiary under this Security Instrument." The Deed of Trust stated further, "The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS" and "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.”

In May 2010, BOA notified Brown that it “would be the new servicing agent” for the loan and thereafter Brown made 60 loan payments to BOA totaling \$171,731.40.<sup>1</sup>

In May 2013, after Brown allegedly “discovered that the California Department of Corporations had revoked CASA BLANCA’s charter” and that Casa Blanca “was no longer an active or operating corporation,” she stopped making loan payments on the loan. In June 2013, BOA sent Brown a notice that BOA was the “servicer” of the loan which was “now in default.”

In July 2013, MERS “AS NOMINEE FOR CASA BLANCA” issued and recorded an assignment of “all its right, title, and interest in and to a certain Deed of Trust” to BOA. In August 2013, BOA as “the present Beneficiary” under the Deed of Trust substituted ReconTrust Company, N.A. (ReconTrust) to replace Commonwealth as trustee under the Deed of Trust and recorded the substitution. In the same month, ReconTrust “acting as Trustee for the Beneficiary under [the] Deed of Trust” recorded a notice of default and election to sell under the Deed of Trust.

## **II. Procedural history**

On October 21, 2013, Brown filed this lawsuit. After Defendants filed a demurrer to the complaint but before the trial court issued a ruling on the demurrer, Brown filed a first amended complaint on January 22, 2014. On June 17, 2014, the trial court sustained Defendants’ demurrer to the first amended complaint but granted Brown leave to amend within 10 days.

On June 23, 2014, Brown filed a second amended complaint that alleged claims for (1) fraud, (2) quiet title to property, (3) cancellation of instrument, (4) declaratory

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<sup>1</sup> Brown alleged that this May 2010 notice as well as the subsequent June 2013 notice mistakenly referred to a prior 2005 mortgage rather than the 2008 mortgage.

relief, (5) intentional infliction of emotional distress, (6) breach of the covenant of good faith and fair dealing, and (7) unjust enrichment.

The overriding assertion in Brown's second amended complaint is that the nonjudicial foreclosure proceedings have been initiated by a party which asserts its authority to initiate such proceedings but is, in fact, not the lawful entity entitled to do so. Specifically, Brown alleges that because the "California Department of Corporations revoked CASA BLANCA's business charter to perform mortgage-related business in the State of California," Casa Blanca "could not legally [transfer] and therefore did not transfer" its interest in the deed of trust to BOA nor could Casa Blanca direct MERS to do so. Brown further alleges that because the attempted transfer was not effective, BOA never had lawful authority to initiate a nonjudicial foreclosure and any attempt by BOA to substitute a new trustee was ineffective for the same reason. Thus, Brown alleges that "there is no true Deed of Trust holder" and that no entity "holds any perfected or secured claim or interest in the subject PROPERTY or insurance proceeds adverse to PLAINTIFF's." Brown requests, inter alia, quiet title of the property in her favor, damages in the amount of all mortgage payments that she made to BOA (\$171,731.40), and cancellation of the Deed of Trust.

Defendants demurred to the second amended complaint and requested judicial notice of the following instruments: (1) Deed of Trust, (2) July 8, 2013 assignment of the Deed of Trust recorded in the Los Angeles County Recorder's Office, (3) August 16, 2013 substitution of trustee under the Deed of Trust recorded in the Los Angeles County Recorder's Office, and (4) notice of default and election to sell under the Deed of Trust recorded in the Los Angeles County Recorder's Office.

On December 4, 2014, the trial court granted Defendants' request for judicial notice, sustained their demurrer on multiple grounds, and denied Brown leave to amend. As to all claims, the trial court relied on *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, disapproved on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), in concluding that Brown lacked standing to challenge preemptively the foreclosure. The trial court stated that it followed

considerable precedent from California courts that such preemptive challenges requiring the foreclosing party to prove its authority to initiate foreclosure in a judicial action merely delay the nonjudicial foreclosure process and Brown has not disputed that caselaw. The trial court also agreed with Defendants' four other challenges to the second amended complaint: MERS had authority to assign the Deed of Trust to BOA, Defendants had the authority to initiate foreclosure proceedings on the property, California courts have uniformly rejected the holder of the note theory, and securitization of the loan did not affect the right to foreclose.

On December 10, 2014, Brown filed a motion for reconsideration of the trial court's December 4, 2014 order sustaining Defendants' demurrer on the grounds that she had discovered allegedly new evidence and also that the trial court had erred in excluding the exhibits that Brown had filed with the second amended complaint. The trial court denied the motion on multiple grounds.

The trial court entered judgment in favor of Defendants on April 30, 2015; Brown timely appealed. Brown filed an opening brief; Defendants filed a respondent's brief; but Brown did not file a reply brief.

## **DISCUSSION**

In reviewing the sufficiency of a complaint against a demurrer, "we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law." (*Yvanova, supra*, 62 Cal.4th at p. 924.) We also consider matters subject to judicial notice. (*Ibid.*) To determine whether the trial court should have granted the plaintiff leave to amend, we decide whether on the pleaded and judicially-noticed facts there is a reasonable possibility that an amendment would cure the legal defects in the complaint. (*Ibid.*) The plaintiff has the burden to prove that an amendment would cure the complaint's legal defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Leave to amend should not be granted if it would be an exercise in futility. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1468.)

**I. The trial court properly sustained Defendants’ demurrer without leave to amend.**

**A. *Brown lacks standing to challenge preemptively Defendants’ authority to initiate foreclosure proceedings.***

Standing is a “threshold issue, because without it no justiciable controversy exists.” (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.) Thus, we must resolve the question of standing before the matter can be reached on its merits. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128.) Standing “goes to the existence of a cause of action.” (*Ibid.*)

On the ground that a plaintiff borrower lacks standing, California courts do not permit preemptive lawsuits to determine whether a foreclosing party may initiate a nonjudicial foreclosure: such lawsuits are an “impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.” (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814–815.) The statutory scheme enacted by the California Legislature “cover[s] every aspect of exercise of the power of sale contained in a deed of trust” (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154) and provides for a nonjudicial foreclosure sale that is ““quick, inexpensive and [an] efficient remedy against a defaulting [trustor-debtor]”” (*Jenkins v. JPMorgan Chase Bank, NA, supra*, 216 Cal.App.4th at p. 509).

Because the comprehensive framework described above is exhaustive, California courts have repeatedly held that preforeclosure preemptive lawsuits are an impermissible attempt to incorporate another cure provision into the statutory nonjudicial foreclosure proceedings. (E.g., *Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at pp. 814–815; *Gomes v. Countrywide Home Loans, Inc., supra*, 192 Cal.App.4th at p. 1154; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82–83, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th 919; *Jenkins v. JPMorgan Chase Bank, NA, supra*, 216 Cal.App.4th at p. 513.)

Recently, the California Supreme Court in *Yvanova, supra*, 62 Cal.4th 919 dealt with a claim of *post*-nonjudicial foreclosure and permitted the borrower standing because the claim was allegedly based on a void transaction as opposed to a voidable one. In *Yvanova*, the borrower brought an action to set aside a *completed* foreclosure sale and alleged that the assignment of the deed of trust to the foreclosing party (an investment trust) was void for two reasons: prior to that assignment, (1) the assignor's assets had already been transferred to another entity (a bankruptcy trust) and (2) the closing date by which all loans, mortgages, or trust deeds must be transferred to the investment pool of the investment trust had already passed. (*Id.* at p. 925.) The Supreme Court granted review on the limited question of whether a borrower whose property had been sold has standing to sue for wrongful foreclosure on the ground that an alleged defect in an attempted assignment to the foreclosing party rendered the document void. (*Id.* at pp. 924, 934.) Answering that question in the affirmative because only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, the Supreme Court remanded to allow the Court of Appeal to reconsider whether the borrower may amend her complaint to plead wrongful foreclosure. (*Id.* at pp. 923, 943.) But, the Supreme Court admonished that it did not address whether a borrower may bring a preemptive judicial action to prevent a threatened nonjudicial foreclosure from going forward and it did not address whether the borrower in that case had alleged facts showing that the assignment *is* indeed void. (*Id.* at pp. 924, 934, 943.)

Here, we have a *pre*-nonjudicial foreclosure. The court in *Yvanova* reiterated that it was *not* addressing an attempt by a borrower to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. (*Yvanova, supra*, 62 Cal.4th at pp. 924, 934.) In contrast, that is what is happening here: Brown is questioning Casa Blanca's status to transfer title given its alleged subsequent disqualification to do business in California.

Brown does not address this precedent. Rather, she summarily concludes, without any citation to legal authority or any substantive legal argument, that "there is no valid substitution of trustee, nor any valid assignment of the deed of trust, and without those

Bank of America does [sic] have the right to foreclose and plaintiff Brown has standing to sue.” (Capitalization and boldface omitted.) Her arguments that concern the merits of her causes of action do not establish that she has standing to assert them.

Further, Brown agreed to the express terms of the Deed of Trust granting MERS the power to foreclose and the power to assign all of its beneficial interest and all the rights attendant thereto under the Deed of Trust. We have previously held that identical contractual language in a deed of trust authorized MERS to exercise all of the rights and interests of the lender which necessarily included the authority to assign the deed of trust and the right to foreclose. (See *Siliga v. MERS*, *supra*, 219 Cal.App.4th at pp. 78–79, 83–84.) Accordingly, under the express terms of the Deed of Trust, MERS had the legal authority to execute the disputed assignment of the Deed of Trust to BOA.

Having voluntarily agreed to the terms of the Deed of Trust, Brown cannot complain that MERS’s exercise of its rights under those provisions of the Deed of Trust render it void or voidable. (See *Siliga v. MERS*, *supra*, 219 Cal.App.4th at p. 83.) Brown’s allegation that the original lender, Casa Blanca, had its mortgage-related business charter revoked prior to the assignment does not affect MERS’s power to act as the beneficiary under the terms of the Deed of Trust. Notwithstanding Casa Blanca’s charter revocation, MERS retained its status as the beneficiary under the terms of the Deed of Trust with the power to exercise the lender’s rights including the authority to assign the Deed of Trust to BOA. Subsequently, once BOA became the successor beneficiary of the Deed of Trust, by executing the substitution of trustee under the Deed of Trust it could legally designate ReconTrust as the new trustee to conduct the foreclosure under the Deed of Trust.

Thus, Brown has failed to establish she has standing to bring a preemptive judicial action to challenge a nonjudicial foreclosure. Because Brown cannot overcome the threshold standing requirement, we do not address the other issues raised by Brown in her appeal.

***B. The trial court did not abuse its discretion in denying leave to amend Brown's second amended complaint.***

Brown bears the burden to prove that there is a reasonable possibility that the defects in her second amended complaint can be cured by amendment. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491.) To meet that burden, Brown must clearly and specifically set forth the legal basis for the amendment and factual allegations that sufficiently state all required elements of that cause of action. (*Ibid.*)

Brown contends that the trial court abused its discretion in denying her leave to amend the second amended complaint. However, Brown identifies no attempt by her before the trial court to describe additional facts she would allege in a new complaint to overcome the defects in her second amended complaint. (*Rossberg v. Bank of America, supra*, 219 Cal.App.4th at p. 1491.) Similarly, her sole brief on appeal fails to describe how she would amend the second amended complaint to state a cause of action. (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.) Consequently, Brown fails to carry her burden and we conclude that the trial court correctly denied leave to amend.

**DISPOSITION**

The judgment is affirmed. We award costs to Bank of America, N.A. and Mortgage Electronic Registration Systems, Inc.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.