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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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CARLOS GONZALEZ,

Plaintiff and Appellant,

v.

JPMORGAN CHASE BANK, N.A. et al.,

Defendants and Respondents.

C070537

(Super. Ct. No. CV103009)

This case is a challenge to a nonjudicial foreclosure where the beneficiary of the deed of trust securing the loan was not the lender, but a mortgage registry company as the nominee of the lender. The issue on appeal is whether the complaint stated a cause of action for wrongful foreclosure, premised on the assertion that the mortgage registry company did not have authority to assign the deed of trust, and thus all subsequent foreclosure documents are invalid.

After plaintiff Carlos Gonzalez defaulted on his home loan, his residence was scheduled for a nonjudicial foreclosure, a trustee's sale. Gonzalez brought suit, alleging wrongful foreclosure because, he claimed, the mortgage registry company, Mortgage Electronic Registration Systems, Inc. (MERS), was not a true beneficiary under the deed of trust. Defendants, JPMorgan Chase (Chase), MERS, and California Reconveyance Company (CRC) demurred. The trial court sustained the demurrer without leave to amend and dismissed the suit.

As we will explain, a plaintiff may not bring a peremptory action to determine if the proper party initiated the nonjudicial foreclosure. In order to challenge the authority of the party initiating foreclosure, a plaintiff must identify a specific factual basis for his allegation that an incorrect party is involved in the foreclosure. Here, Gonzalez's vague allegations, made on "information and belief" without any reference to the information upon which the belief is based, fail to satisfy his burden to state a cause of action, and he has not shown how he could amend his pleadings to do so. Accordingly, we shall affirm.

## **FACTS**

In May 2007, Gonzalez sought to refinance his home in West Sacramento. He obtained an adjustable rate mortgage from MortgageIt, Inc., and signed a promissory note for \$301,500.<sup>1</sup> The note was secured by a deed of trust on the property, which included a power of sale. The deed of trust identified MortgageIt, Inc., as the lender and MERS as the beneficiary.<sup>2</sup> The deed of trust provided: "The beneficiary of this Security

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<sup>1</sup> The deed of trust identifies the borrower as Gonzalez and his wife Joi. Only Gonzalez is the plaintiff.

<sup>2</sup> The MERS System is "a method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*)). "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a

Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." It further provided: "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 cancelling this Security Instrument."

In May 2010, after contacting Gonzalez to discuss his financial situation, CRC recorded a notice of default and election to sell under the deed of trust. The notice indicated the amount due was \$28,014.04. At the same time, MERS assigned the deed of trust to Chase. The assignment stated it was an assignment of "all beneficial interest" under the deed of trust "together with the note or notes therein described and secured thereby." Chase then substituted CRC as trustee under the deed of trust.

CRC gave notice of a trustee's sale, scheduled for September 1, 2010.<sup>3</sup> The amount of the unpaid balance on the loan was estimated at \$325,175.37.

Gonzalez sought legal counsel. In December 2010, he filed suit against numerous defendants alleging a "predatory lending scheme."

The operative complaint on appeal is the third amended complaint (TAC), and the only cause of action against Chase, MERS, and CRC is the sixth cause of action for wrongful foreclosure. The TAC alleges, on information and belief, that MortgageIt, Inc., transferred its interest in the note and deed of trust to an unknown financial entity, which

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grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.]" (*Ibid.*)

<sup>3</sup> Nothing in the record indicates that the sale was ever held or the foreclosure completed.

in turn transferred its interest to unknown third party investor(s); none of the named defendants is the current beneficiary of the note or deed of trust; and they do not own the loan and are therefore not entitled to enforce the security interest.

The TAC alleges that MERS is named as the beneficiary on the deed of trust, but is not named in the note. As a consequence, “MERS was never a true beneficiary under the Deed of Trust and therefore does not have the legal right to enforce the Deed of Trust, assign the Deed of Trust, substitute a trustee, or assign any foreclosure rights or execute any document in connection therewith. [¶] MERS has never been the Holder of the Note, therefore any alleged assignment of the Note to defendant is also invalid, null and void.” The TAC alleges that none of the defendants is currently a beneficiary of the note or deed of trust and thus none can enforce the security interest. Further, the TAC alleges that “Defendants have represented that they have the right to payment under the Note, payment of which was secured by the Deed of Trust. In fact, Defendants, and each of them, are not the real parties in interest because they are not the legal trustee, mortgagee or beneficiary, nor are they authorized agents of the trustee, mortgagee or beneficiary, nor holders of the Note, or non-holders of the Note entitled to payments, as required by California Commercial Code sections 3301 and 3309, and Civil Code section 2924, et seq.”<sup>4</sup>

The TAC sought damages and to rescind the loan and deed of trust, as well as other remedies. Gonzalez attached certain documents to the TAC as exhibits, including the deed of trust.

Chase, MERS, and CRC demurred on the basis that the sixth cause of action failed to state a cause of action. They asserted that Gonzalez’s basic claim that MERS lacked

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<sup>4</sup> The TAC also alleges that Gonzalez “unconditionally tenders all sums properly due and owing to the true holders of the Note . . . .” If true, this allegation indicates Gonzalez could cure the default since apparently no foreclosure sale has yet taken place.

the authority to assign the deed of trust was contradicted by the express language of the deed of trust that gave MERS the right to exercise the lender's interest, including the right to foreclose.

The trial court sustained the demurrer without leave to amend. It entered a judgment of dismissal. Gonzalez appeals.

## DISCUSSION

### I

#### *Standard of Review*

“On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the petition states a cause of action as a matter of law. [Citations.]” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869.)

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“To satisfy that burden on appeal, a plaintiff ‘must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.’ [Citation.] The assertion of an abstract right to amend does not satisfy this

burden. [Citation.] The plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*)).)

## II

### *Nonjudicial Foreclosure*

#### A. *The Statutory Scheme*

“Civil Code 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. The purposes of this comprehensive scheme are threefold: (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 wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. [Citations.]” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

These statutory provisions cover every aspect of exercise of the power of sale contained in a deed of trust. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) “Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute. [Citations.]” (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1098.) A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly. (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1258.) “It is the burden of the party challenging the trustee's sale to prove such

irregularity and thereby overcome the presumption of the sale's regularity. [Citation.]”  
(*Ibid.*)

Here, we are concerned only with the initial steps of the nonjudicial foreclosure. Upon default by the trustor, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. (Civ. Code, § 2924; 4 Miller & Starr, Cal. *Real Estate* (3d ed. 2011-2013 Supp.) § 10.224, p. 10-830.) The first step in the foreclosure process is the recording of a Notice of Default and Election to Sell by the “trustee, mortgagee, or beneficiary, or any of their authorized agents.” (Civ. Code, § 2924, subd. (a)(1).) “No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.” (Civ. Code, § 2924, subd. (a)(6).)

The statutory provisions for nonjudicial foreclosure do not require that the promissory note be in the physical possession of the person initiating the foreclosure. (*Debrunner v. Deutsche Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 440.) Nor do they require a beneficial interest in both the note and the deed of trust to commence a nonjudicial foreclosure. (*Id.* at p. 441.)

#### *B. Case Law*

Three recent cases that have upheld sustaining demurrers to actions for wrongful foreclosure where MERS was named as the beneficiary under the deed of trust are instructive. In *Gomes v. Countrywide Home Loans, Inc* (2011) 192 Cal.App.4th 1149 at page 1152 (*Gomes*), plaintiff alleged, “on information and belief, that MERS did not have authority to initiate the foreclosure because the current owner of the Note did not

authorize MERS” to so proceed. The appellate court rejected the attempt “to interject the courts into this comprehensive nonjudicial scheme.” (*Id.* at p. 1154.) The court held there was no peremptory cause of action to determine whether the owner of the note authorized the nonjudicial foreclosure. (*Id.* at p. 1155; accord *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46.) To attack the authority of the entity initiating a nonjudicial foreclosure, a plaintiff must identify “a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party.” (*Gomes, supra*, at p. 1156; accord *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511-512.)

The *Gomes* court also found another basis for affirming the order sustaining the demurrer. The deed of trust, which Gomes had attached to his complaint, “establishes as a factual matter that his claims lack merit. As stated in the deed of trust, Gomes agreed that ‘MERS (as nominee for Lender and Lender’s successors and assigns) has . . . the right to foreclose and sell the Property.’ ” (*Gomes, supra*, 192 Cal.App.4th at p. 1157.) This agreement precluded a cause of action premised upon the assertion that MERS lacked authority to foreclose. (*Ibid.*)

In *Fontenot, supra*, 198 Cal.App.4th 256, the issue was MERS’s assignment of the note to defendant bank. The complaint alleged that MERS was not a true beneficiary under the deed of trust, never had ownership of the promissory note, and never held an assignable interest in the deed of trust or the note. As a result, any assignment of the deed of trust was invalid. (*Id.* at p. 262.) The appellate court affirmed the sustaining of a demurrer on several bases.

First, the court rejected the argument that the trial court erred in taking judicial notice of the deed of trust to establish that MERS was a beneficiary under the deed of trust. (*Fontenot, supra*, 198 Cal.App.4th at p. 266.) The court held MERS’s status as beneficiary under the deed of trust “was not a matter of fact existing apart from the document itself. Rather, MERS was the beneficiary under the deed of trust because, as

the legally operative document, the deed of trust designated MERS as the beneficiary.”  
(*Ibid.*)

Second, the *Fontenot* court rejected the contention that MERS lacked authority to assign the note because it was a mere nominee and had no interest in the note. (*Fontenot, supra*, 198 Cal.App.4th at p. 270.) “While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which *did* possess an assignable interest.”<sup>5</sup> (*Ibid.*)

Next, plaintiff argued any assignment was invalid under the common law of secured transactions. (*Fontenot, supra*, 198 Cal.App.4th at p. 271.) Plaintiff argued the assignment of the deed of trust was a nullity because the debt or note must also be assigned. The court rejected this argument because the assignment of the deed of trust, as here, stated that MERS assigned its interest in the deed of trust “ ‘together with the note or notes therein described or referred to.’ ” (*Ibid.*) The court held that to plead a claim on this ground, plaintiff was required to plead this assignment was invalid, and plaintiff failed to adequately plead such invalidity. (*Ibid.*)

The *Fontenot* court found “a further, overriding basis” to reject plaintiff’s claim based on an invalid assignment. (*Fontenot, supra*, 198 Cal.App.4th at p. 271.) Since the assignment of a note need not be recorded, the lender could have assigned the note to the bank in an unrecorded document. Accordingly, to state a claim, plaintiff was required to allege that not only was the purported assignment of the note by MERS invalid, but that the bank “did not receive an assignment of the debt in any other manner. There is no such allegation.” (*Id.* at p. 272.)

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<sup>5</sup> Here, the assignment did not indicate that MERS was acting as nominee for the lender.

Finally, the *Fontenot* court noted the requirement that a suit for wrongful foreclosure show prejudice. (*Fontenot, supra*, 198 Cal.App.4th at p. 272.) “Plaintiff effectively concedes she was in default, and she does not allege that the transfer to [the bank] 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. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note.” (*Ibid.*)

In *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75 (*Siliga*), defaulting borrowers brought suit challenging the authority of MERS to assign the note and deed of trust. The borrowers had executed a deed of trust identifying MERS as the beneficiary in language identical to the deed of trust here. (*Id.* at pp. 78-79.) MERS demurred, and the trial court sustained the demurrer without leave to amend and entered an order of dismissal. (*Id.* at p. 80.) Relying on *Gomes* and *Fontenot*, the appellate court affirmed. It found the borrowers could not maintain a preemptive action challenging defendants’ authority to foreclose, and they had alleged no specific facts to support their conclusion that MERS lacked authority to assign the note and deed of trust. (*Id.* at pp. 82-85.)

### III

#### *Plaintiff’s Contention and Analysis*

Gonzalez contends the assignment of the note and deed of trust from MERS to Chase was invalid, so the notice of default and all subsequent foreclosure documents were invalid. He asserts the basis of the sixth cause of action is that MERS had no authority *on its own* to issue the assignment. Gonzalez contends the TAC sufficiently alleged that MERS had no authority on its own to issue the assignment, and if the allegations are not sufficiently clear, he should be granted leave to amend.

Gonzalez asserts that *Gomes* is distinguishable because it did not involve an assignment of a deed of trust, but only the right to foreclose. He argues that *Fontenot* supports his position because, unlike the plaintiff there, he did allege that MERS had no orders from the lender to assign the deed of trust.

Gonzalez's contention fails. First, contrary to Gonzalez's assertion, the TAC contained no allegation that MERS was not authorized by the lender to assign the deed of trust or that MERS acted on its own in making the assignment. Rather, it alleged, on information and belief, that MERS was never the "true beneficiary" under the deed of trust and there was no legal transfer of the note or deed of trust to give any defendant the right to exercise the powers of a trustee, beneficiary, or authorized agent of the same.

As to the first allegation, the trial court properly took judicial notice of the deed of trust attached to the TAC, to establish that MERS was the beneficiary under the deed of trust. (*Fontenot, supra*, 198 Cal.App.4th at p. 266.) In ruling on a demurrer, courts reject allegations in a complaint that are contradicted by facts of which the court has properly taken judicial notice. (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 786.)

As to the second allegation, the law is clear that Gonzalez cannot bring suit to require MERS to establish its authority to assign the deed of trust or otherwise commence foreclosure proceedings. (*Gomes, supra*, 192 Cal.App.4th at pp. 1155-1156; *Siliga, supra*, 219 Cal.App.4th at p. 82.) There is no right to turn a nonjudicial foreclosure procedure into a judicial proceeding by vaguely challenging the authority of those commencing foreclosure. (*Gomes, supra*, at p. 1154.) Instead, Gonzalez must identify a specific factual basis for his allegation that MERS had no authority to assign the deed of trust. (*Id.* at p. 1156.)

Gonzalez asserts he has complied with this requirement because he alleged there was no legal transfer of the note or deed of trust by MERS or anyone else. These vague, conclusory allegations, made on information and belief, are insufficient. While a plaintiff

may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true, he must also allege the information that leads him to believe the allegations are true. (*Gomes, supra*, 192 Cal.App.4th at pp. 1158-1159.) “[A] pleading made on information and belief is insufficient if it ‘merely assert[s] the facts so alleged without alleging such information that “lead[s] [the plaintiff] to believe that the allegations are true.” ’ [Citation.]” (*Ibid.*)

The *Gomes* court explained the necessary specificity of the pleading by reference to federal cases which recognized the right to bring a legal challenge to an entity’s right to initiate foreclosure proceedings. (*Gomes, supra*, 192 Cal.App.4th at pp. 1158-1159.) For example, in *Ohlendorf v. Am. Home Mortg. Servicing* (E.D.Cal. 2010) 279 F.R.D. 575, the court denied a motion to dismiss a wrongful foreclosure action insofar as the motion was premised on defendants being proper beneficiaries.<sup>6</sup> The court found that plaintiff “may” have stated a claim that defendants were not proper parties to foreclose because the assignments were backdated. (*Id.* at p. 583.) The “suspicious dating in the assignments” called into question the validity of the notice of default. (*Ibid.*) Gonzalez has not identified a specific infirmity, such as backdating, in the assignment he challenges.

Gonzalez requests leave to amend if his allegations are not sufficiently clear. He does not state how he will amend his pleadings. “The assertion of an abstract right to amend does not satisfy” a plaintiff’s burden to show how he can amend his pleadings to cure the defects. (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) To satisfy that burden on

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<sup>6</sup> “Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority. [Citations.]” (*Landmark Screens, LLC v. Morgan, Lewis Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6.)

appeal, a “plaintiff must clearly and specifically state ‘the legal basis for amendment, i.e., the elements of the cause of action,’ as well as the ‘factual allegations that sufficiently state all required elements of that cause of action.’ [Citation.]” (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95.) Gonzalez has failed to carry his burden to show how he can amend because he fails to identify what factual allegations--what “specific factual basis” for his belief that there was no proper assignment--he can add to the complaint.

### DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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DUARTE, J.

We concur:

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ROBIE, Acting P. J.

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MAURO, J.