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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

PATRICIA GAIL BAILEY,

Plaintiff and Appellant,

v.

GMAC MORTGAGE, LLC et al.,

Defendants and Respondents.

E053796

(Super.Ct.No. RIC10006504)

OPINION

APPEAL from the Superior Court of Riverside County. John W. Vineyard,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Cameron H. Totten and Cameron H. Totten for Plaintiff and  
Appellant.

Severson & Werson, Yaron Shaham and Jan T. Chilton for Defendants and  
Respondents GMAC Mortgage, LLC, Mortgage Electronic Registration Systems, Inc.,  
ETS Services, LLC, LSI Title Co. and Federal National Mortgage Association.

Law Offices of Mary A. Dannelley and Mary a. Dannelley for Defendant and  
Respondent American Interbanc Mortgage, LLC.

## I

### INTRODUCTION

This matter arises from plaintiff Patricia Gail Bailey (plaintiff) defaulting on a promissory note secured by real property, resulting in a nonjudicial foreclosure sale of plaintiff's home. Plaintiff filed a wrongful foreclosure lawsuit seeking to recover title to her property and damages. Plaintiff appeals a judgment of dismissal entered following the trial court sustaining, without leave to amend, a demurrer filed by defendants American Interbank Mortgage (AIM), Mortgage Electronic Registration Systems, Inc. (MERS), Federal National Mortgage Association (Fannie Mae), Executive Trustee Services, LLC (ETS), and LSI Title Company (LSI), collectively referred to as "defendants."

Plaintiff contends her failure to allege tender of the outstanding loan balance did not defeat her claims because the foreclosure sale was void, since the foreclosing trustee and beneficiary did not have legal authority to conduct the sale. Alternatively, plaintiff contends the trial court erred in failing to grant plaintiff leave to amend to allege causes of action for promissory estoppel, negligence, fraud, and violations of the One Action rule, Rosenthal Act, and Business and Professions Code section 17200. We conclude the trial court properly sustained defendant's demurrer without leave to amend.

## II

### FACTS AND PROCEDURAL BACKGROUND

The following summary of facts is based on plaintiff's allegations in the verified third amended complaint (complaint), documents attached to the complaint, and

documents judicially noticed.

In 2006, plaintiff purchased a home located in Hemet. Plaintiff obtained a home mortgage loan from AIM in the amount of \$315,000. The loan was secured by a promissory note and deed of trust (DOT) on the property. The DOT, recorded in February 2007, named plaintiff as the borrower, AIM as the lender, Pacific Title as the trustee, and MERS as beneficiary, “acting solely as a nominee for Lender and Lender’s successors and assigns.” According to the DOT, plaintiff agreed that “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 . . . .”

GMAC became the servicer of plaintiff’s mortgage loan. As the loan servicer, GMAC collected payments and performed other loan servicing obligations under the note and DOT. Plaintiff stopped making payments on her loan in January 2009 allegedly because GMAC told her that it would not consider modifying her mortgage unless she did so.

In May 2009, MERS, as beneficiary and nominee for AIM, signed and recorded a substitution of trustee, substituting ETS as trustee, in place of Pacific Title, the original trustee under the DOT. ETS was a subsidiary of GMAC. Also in May 2009, ETS executed and recorded a notice of default and election to sell under the DOT. The notice informed plaintiff that she was behind in her mortgage payments in the amount of \$8,591.27, and therefore her property was in foreclosure.

In response to the notice of default, in June 2009, plaintiff sent MERS, ETS, GMAC and LSI a letter making various demands, including (1) demanding to know why there were no recorded debt instrument transfers, (2) requesting proof defendants had authority to issue a notice of default and foreclose, and proof the debt was collectible, and (3) compliance with Civil Code section 2923.5 by contacting plaintiff before proceeding with foreclosure. Plaintiff also complained that GMAC violated Real Estate Settlement Procedures Act (RESPA), 12 United States Code section 2605, by not responding to plaintiff's request made in October 2008, for a loan modification and therefore the notice of default was void. Plaintiff stated she was disputing the default claim and requested validation. Defendants did not respond to plaintiff's response to the notice of default.

In August 2009, ETS executed and recorded a notice of trustee's sale, stating that the amount plaintiff owed on the promissory note, including interest, amounted to \$322,215.70.

In October 2009, plaintiff resubmitted a loan modification package to GMAC. GMAC provided plaintiff with trial loan modification workout plan documents. In accordance with the plan, plaintiff made timely payments for the months of December 2009, January, February, and March 2010. In December 2009, plaintiff received an unsigned letter dated December 24, 2009, from GMAC, stating that the documents plaintiff had submitted were incomplete and, if the missing documentation was not received by December 31, GMAC would "presume that no assistance is needed and the pending review of your request for a loss mitigation alternative will be canceled."

By letter dated December 28, 2009, plaintiff responded to the notice. She also notified state and federal agencies that she suspected defendants' acts constituted wrongdoing. Plaintiff continued to make monthly payments in accordance with her loan modification workout plan. Her last payment was for the month of March 2010. Plaintiff claimed she would have continued making the payments but stopped because she suspected mortgage servicer misconduct, consisting of GMAC not paying the loan investors the money she had paid GMAC in accordance with the loan modification plan. GMAC incorrectly stated in the loan modification plan that GMAC was the lender and a party in interest but there were no recorded assignments, transfers or instruments granting GMAC any power of sale or authority over the property. Plaintiff alleged that any such transfer or assignment of an interest in the property to GMAC, in the absence of a recorded assignment, violated Civil Code section 2932.5.

On February 22, 2010, plaintiff received final loan modification documents from GMAC. The documents included instructions to "review, sign, have notarized, make copies for her records, and (should she decide to) have an attorney review/advise her," and then arrange to have the documents returned to GMAC by February 24, 2010. Plaintiff did not comply with these instructions because she believed they were unreasonable and coercive. She also suspected that the loan modification documents were fraudulent and therefore it would be inappropriate for her to sign them without first receiving clarification regarding her concerns and suspicions.

By letter dated February 25, 2010, GMAC notified plaintiff that the time period within which to return the signed modification agreement and documents had expired.

Plaintiff sent GMAC a response objecting to GMAC's loan modification demands as coercive and intimidating.

On April 8, 2010, plaintiff filed a complaint against defendants, alleging causes of action for quiet title and injunctive and declaratory relief. Plaintiff also filed a notice of pendency of action.

By letter dated April 14, 2010, GMAC notified plaintiff that her request for a loan modification had been denied.

According to the trustee's deed upon sale, executed on May 3, 2010, and recorded on May 6, 2010, the trustee, ETS, sold plaintiff's property at public auction on April 30, 2010. Fannie Mae purchased the property for \$269,893.46, with the existing unpaid debt amounting to \$337,553.83. The trustee's deed upon sale further states that Fannie Mae was the foreclosing beneficiary. On June 7, 2010, Fannie Mae filed an unlawful detainer action against plaintiff.

In May 2010, plaintiff voluntarily filed a first amended complaint. Defendants demurred to the first and second amended complaints. The trial court sustained the demurrers with leave to amend. In February 2011, plaintiff filed a third amended complaint, alleging the following causes of action: (1) quiet title, (2) declaratory relief, (3) cancellation of instruments, and (4) wrongful foreclosure. Defendants filed a demurrer to the third amended complaint and a motion to strike. Following oral argument on March 25, 2011, the trial court sustained defendants' demurrer, without leave to amend, and ruled the motion to strike was moot. A judgment of dismissal was entered against plaintiff.

### III

#### STANDARD OF REVIEW

For purposes of reviewing the trial court’s ruling sustaining defendants’ demurrer without leave to amend: “““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.’ [Citations.]” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 107.)

### IV

#### THE TENDER RULE APPLIES

Plaintiff contends the trial court erred in sustaining defendants’ demurrer without leave to amend based on plaintiff’s failure to comply with the tender rule. Plaintiff argues the tender rule does not apply and, even if it does, plaintiff properly alleged tender. We disagree.

The tender rule is succinctly explained in *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112 (*Lona*), as follows: “Because the action is in equity, a defaulted borrower who seeks to set aside a trustee’s sale is required to do equity before the court will exercise its equitable powers. [Citation.] Consequently, as a condition precedent to an action by the borrower to set aside the trustee’s sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. [Citation; *Onofrio v. Rice* (1997) 55 Cal.App.4th 413,] 424 [the borrower must pay, or offer to pay, the secured debt, or at least all of the delinquencies and costs due for redemption, before commencing the action].) ‘The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].’ [Citation.]” In other words, “[I]n the context of overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust. [Citations.] *This requirement is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose.* [Citation.]” (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877-878 (*Dimock*), original italics.)

There are, however, exceptions to the tender requirement. One such exception is when a foreclosure sale is void, rather than voidable: “[N]o tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee’s deed is void on its face. (*Dimock, supra*, 81 Cal.App.4th at p. 878 [beneficiary substituted

trustees; trustee's sale void where original trustee completed trustee's sale after being replaced by new trustee because original trustee no longer had power to convey property].)" (*Lona, supra*, 202 Cal.App.4th at p. 113.)

*A. Substitution of Trustee*

Citing *Dimock, supra*, 81 Cal.App.4th 868, plaintiff in the instant case argues the tender rule does not apply because the foreclosure sale was void. In *Dimock*, the foreclosure sale was conducted by the former trustee and therefore was void because the former trustee no longer had authority to initiate foreclosure. (*Id.* at p. 876.) The *Dimock* court held that, because the foreclosure sale was void, rather than voidable, the tender rule did not apply. (*Id.* at p. 878.) *Dimock* is not on point because EST had authority to initiate foreclosure.

Plaintiff argues EST did not have authority as trustee to conduct the foreclosure sale because MERS did not have authority to substitute EST in place of Pacific Title, the trustee named in the DOT. Under Civil Code section 2924a, only the beneficiary has legal authority to substitute the trustee under the DOT. Plaintiff argues MERS was not a beneficiary with such authority. MERS was only acting as the agent/nominee for the beneficiary, AIM.

The California courts have rejected this argument. In *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, the court held that MERS, as beneficiary and nominee for the lender, was authorized to initiate foreclosure under the language in the DOT and under Civil Code section 2924, subdivision (a)(1). (*Gomes*, at p. 1157.) Likewise, in the instant case, as AIM's nominee/beneficiary, MERS had the authority to

substitute ETS as trustee. The DOT provision giving MERS, as the lender's nominee, the power to foreclose and sell the property, extends to the lender's right to appoint a successor trustee. (*Karimi v. GMAC Mortg.*, No. 11-CV-00926-LHK, 2011 U.S. Dist. LEXIS 136071, at p. \*12 (N.D. Cal. Nov. 28, 2011).)

We thus reject plaintiff's contention that MERS had no authority to substitute EST as trustee because MERS was merely the lender's nominee. The DOT expressly states that MERS, not only had authority to act "solely as a nominee for Lender and Lender's successors and assigns," but also had authority as "the beneficiary under this Security Instrument [the DOT]." As beneficiary, acting as nominee for AIM, MERS had the authority to exercise the rights and obligations of a beneficiary of the DOT, a role ordinarily afforded the lender. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 273 (*Fontenot*).) Such authority to exercise the rights of a DOT beneficiary included authority to substitute EST as trustee.

*B. Lack of Written Assignment of the DOT to the Foreclosing Beneficiary, FNMA*

Plaintiff contends the foreclosure sale was void because under Civil Code section 1091 there was no written assignment of the DOT to FNMA, which was named as the foreclosing beneficiary on the trustee's deed upon sale. But a written assignment of the DOT was not required.

Civil Code section 1091 provides: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

Civil Code section 1091 does not require a written assignment of the DOT because a DOT does not convey any estate in real property. A DOT provides merely a lien on the land encumbered. (4 Miller & Starr, Cal. Real Estate (3d ed. 2003) § 9.1.) A promissory note may be transferred without a written assignment, with the transferee acquiring a beneficial interest in the DOT by operation of law. (*Fontenot, supra*, 198 Cal.App.4th at p. 272; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) § 10:38.) Therefore a written assignment of the DOT to FNMA was not required under Civil Code section 1091. AIM could have legally transferred the promissory note to FNMA, with FNMA acquiring a beneficial interest in the DOT by operation of law. (*Fontenot*, at p. 272.) Notice to plaintiff of the transfer was not required. The DOT states, “The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.”

*C. Civil Code Section 2932.5*

Plaintiff contends the foreclosure sale was void and should be set aside because FNMA invoked the power of sale as beneficiary without complying with the requirement of Civil Code section 2932.5 to record the assignment of the deed of trust from the original lender, AIM. We disagree.

Civil Code section 2932.5 provides: “Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.”

This statutory requirement, that an assignment of a beneficiary interest in a debt secured by real property must be recorded, applies only to a mortgage and not to a deed of trust. (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122.) “The rule that section 2932.5 does not apply to deeds of trust is part of the law of real property in California.” (*Id.* at p. 123.)

Civil Code section 2932.5 is inapplicable in the instant case. Therefore not recording the assignment of the DOT to FNMA did not render the foreclosure sale void.

#### *D. Equity*

Plaintiff argues it is inequitable to apply the tender rule because the foreclosure sale was knowingly wrongful. But plaintiff has not alleged any facts establishing that the foreclosure sale was wrongful. The allegations in the complaint and attached documents show that plaintiff defaulted on her home loan, was given an opportunity to comply with a modification workout plan, refused to comply with the terms of the plan, and did not tender the outstanding loan balance. As a consequence, the DOT trustee, EST, lawfully proceeded with nonjudicial foreclosure proceedings.

### V

#### LEAVE TO AMEND WAS PROPERLY DENIED

Plaintiff contends the trial court abused its discretion in denying leave to amend to allege new causes of action for (1) promissory estoppel, (2) negligence, (3) fraud, (4) violation of the One Action Rule, (5) violation of the Rosenthal Act, and (6) violation of Business and Professions Code section 17200. In plaintiff’s opposition to defendants’ demurrer to the third amended complaint, plaintiff requested leave to amend to add these

causes of action in the event the trial court sustained defendants' demurrer. Plaintiff asserted in the trial court and in her appellate opening brief that defendants' wrongful conduct led to the foreclosure. Specifically, GMAC allegedly misled plaintiff by falsely representing in the loan modification documents that GMAC was the lender with authority to modify plaintiff's loan.

“The elements of a promissory estoppel claim are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3)[the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.”. . .” (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1672; *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225.) “The elements of fraud are similar to the elements of promissory estoppel, with the additional requirements that a false promise be made and that the promisor know of the falsity when making the promise. (See *McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792-794 [discussing elements of fraud].)” (*Aceves*, at p. 231.)

Relying on *Aceves v. U.S. Bank, N.A.*, *supra*, 192 Cal.App.4th 218 and *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, plaintiff argues she established that promissory estoppel and fraud were viable causes of action, which the trial court should have permitted her to allege. In *Aceves*, the plaintiff filed a Chapter 7 bankruptcy because she could not make her mortgage payments. The defendant bank promised to modify her loan if the plaintiff agreed not to proceed with bankruptcy and not convert the matter to a Chapter 13 bankruptcy. In reliance on the bank's promise, the plaintiff

abstained from proceeding with bankruptcy proceedings and did not oppose the bank's motion for relief from the stay. Meanwhile, the bank proceeded with nonjudicial foreclosure proceedings and, after the stay was lifted, foreclosed on the plaintiff's property. The *Aceves* court held that the plaintiff had adequately alleged a cause of action for promissory estoppel. (*Aceves*, at p. 225.) Under similar facts in *Garcia*, in which the plaintiff held off obtaining a loan to repay her mortgage arrearages, the *Garcia* court held that the defendant bank's promise to postpone the trustee's foreclosure sale of the plaintiff's property supported a promissory estoppel cause of action. (*Garcia*, at p. 1046.)

The instant case is distinguishable from *Aceves* and *Garcia* in that plaintiff has not shown that defendants breached a promise to delay foreclosure. The operative complaint allegations and attached documents show that GMAC offered to work with plaintiff in modifying her loan, proposed a loan modification workout plan, and delayed foreclosure while providing plaintiff the opportunity to comply with the trial loan modification plan, but plaintiff refused to comply with the requirements for modification by not timely executing and returning the required modification documents. There was no breach of any promise not to proceed with foreclosure.

Plaintiff argues she refused to enter into the permanent loan modification because she wanted clarification as to erroneous statements that GMAC was the lender and MERS was GMAC's nominee, with the right to foreclose. Plaintiff has not established she can allege sufficient facts establishing that this was a reasonable basis for refusing to comply in a timely fashion with the loan modification plan requirements or that

defendants were unreasonable in terminating the trial loan modification plan because of plaintiff's noncompliance.

Plaintiff also has not established she can allege reasonable detrimental reliance. She asserts that she was injured by her reliance on defendants' alleged promise to suspend foreclosure proceedings while plaintiff complied with the trial loan modification plan. Plaintiff claims she forwent other means of curing her loan default, including obtaining a loan or filing a Chapter 13 bankruptcy. Unlike in *Aceves*, such claims are pure speculation and factually unsubstantiated. There are no allegations that plaintiff actually took any steps to initiate bankruptcy proceedings or obtain another loan. There are also no factual allegations that defendants requested plaintiff not to proceed with bankruptcy or other actions in return for defendants' promise to suspend foreclosure proceedings. The trial court thus did not abuse its discretion in denying plaintiff's request to amend to add promissory estoppel and fraud causes of action, because she did not establish she could allege sufficient facts supporting such claims.

There also was no abuse of discretion in denying plaintiff leave to amend to add causes of action for violations of the One Action Rule, Rosenthal Act, and Business and Professions Code section 17200. Plaintiff did not offer any facts or legal authority in support of her cursory request to add these three causes of action. As to the cause of action for violating Business and Professions Code section 17200, plaintiff merely stated that the allegations in plaintiff's complaint supported a cause of action for violation of Business and Professions Code section 17200.

As to the other two causes of actions, plaintiff argued that the payments defendants demanded and received from plaintiff violated the One Action Rule and Rosenthal Act because a bank cannot simultaneously offset its debt and foreclose against the security at the same time. In addition, plaintiff asserted the Rosenthal Act prohibits collection of improper debt, such as GMAC receiving payments from plaintiff without giving anything in return. Plaintiff has not provided any statutory authority for either the One Action Rule or Rosenthal Act, and does not refer to any facts in the record supporting such claims. We assume plaintiff's reference to the One Action Rule is to Code of Civil Procedure section 726, and plaintiff's reference to the Rosenthal Act is to the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.), also known as the Rosenthal Act.

Plaintiff forfeited in the trial court, as well as in this court, her request to amend to add causes of actions for violations of the One Action Rule, Rosenthal Act, and Business and Professions Code section 17200, because plaintiff has failed to provide any reasoned argument or cite any legal authority supporting her request: “Appellate briefs must provide argument and legal authority for the positions taken. “When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.” [Citation.] ‘We are not bound to develop appellants’ argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ [Citations.]” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

VI

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.