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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BERT G. COTTON,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. et al.,

Defendants and Respondents.

E054921

(Super.Ct.No. RIC10011709)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Reversed and remanded.

Law Offices of Douglas E. Klein and Douglas E. Klein for Plaintiff and Appellant.

AlvaradoSmith, S. Christopher Yoo, and Lashon Harris for Defendants and Respondents.

Plaintiff Bert G. Cotton's house was sold in a nonjudicial foreclosure. The trust deed had named defendant Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary, albeit solely as nominee for the lender. Before the foreclosure, MERS named defendant California Reconveyance Company (CRC) as trustee and defendant JPMorgan Chase Bank, N.A. (JPMorgan Chase) as new beneficiary.

Cotton's original complaint in this action focused on MERS's role in the foreclosure. It alleged — contrary to the terms of the trust deed itself — that MERS was neither the beneficiary nor the beneficiary's nominee under the trust deed. A series of demurrers and amended complaints ensued. In the process, Cotton's attorneys refined his allegations somewhat. After the last demurrer, however, they failed to file an opposition; instead, they filed a motion for leave to withdraw. Ultimately, the trial court sustained demurrers to all causes of action, without leave to amend.

Cotton obtained new counsel, then filed a notice of appeal. His central contention is that he should be allowed to amend his complaint so as to refocus it on JPMorgan Chase's role. In particular, he claims that he could allege that the assignment of the trust deed to JPMorgan Chase was ineffective because that assignment (and/or an intermediate assignment to a trust) violated the applicable trust documents. He also claims that he could allege that judicial estoppel bars JPMorgan Chase from claiming to be the holder of the trust deed.

Defendants respond only glancingly to the substance of Cotton's contentions. Their major argument is that Cotton's arguments depend on facts outside the record.

Well, of course — that happens every time an appellant argues, for the first time on appeal, that he or she should be given one more opportunity to amend the complaint. But this is permitted, because we need not determine whether the newly asserted facts are true; we need only determine whether they show a reasonable possibility that the appellant can amend to state a valid cause of action.

We conclude that Cotton has shown just such a reasonable possibility.

Accordingly, we will reverse and remand.

I

FACTUAL BACKGROUND

Consistent with the applicable standard of review (see part IV.A, *post*), the following facts are taken from the complaint, supplemented by matters of which defendants asked the trial court to take judicial notice.

The relevant complaint is the second amended complaint, because, as we will discuss below (see part II, *post*), the trial court sustained a demurrer, without leave to amend, to four of the five causes of action in that complaint.¹

¹ The parties' statements of facts cite to the original complaint and/or the first amended complaint. Those pleadings, however, are irrelevant to the rulings challenged in this appeal, which involve the second and third amended complaints.

The parties also cite to the statements of facts in defendants' demurrers. Counsel's summary or paraphrase of a complaint, however, is not an adequate substitute for the complaint itself. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, fn. 11 ["It is axiomatic that the unsworn statements of counsel are not evidence."].)

In 2006, Cotton bought a house in Thousand Palms. At the same time, he took out a purchase money loan in the amount of \$200,750, secured by the house. Thus, he signed a deed of trust. However, he did not sign (and was not asked to sign) a note.

In the trust deed, MERS was named as beneficiary, albeit “solely as a nominee for Lender and Lender’s successors and assigns.”

The original lender was Amerifund Lending Group (Amerifund) (not a party to this action). Amerifund, however, transferred the “servicing rights” to the loan, through a series of intermediaries, to Washington Mutual Bank (WaMu) (also not a party to this action). JPMorgan Chase claims that it acquired certain assets of WaMu, and thus that it (or possibly one of its subsidiaries) now holds the “servicing rights” to the loan.

In 2008, MERS substituted CRC as trustee. In 2009, MERS assigned the trust deed to JPMorgan Chase. At the same time, CRC started nonjudicial foreclosure proceedings. On June 28, 2010, a trustee’s sale was held and the house was sold.

II

PROCEDURAL BACKGROUND

Cotton filed this action in 2010, naming as defendants MERS, CRC, and JPMorgan Chase. He was represented by the law firm of Geraci & Lopez and by attorney Alan L. Geraci.

Eventually, Cotton filed a second amended complaint, asserting causes of action for declaratory relief, wrongful foreclosure, violations of Civil Code sections 2923.5 and

2924, unfair competition in violation of Business and Professions Code section 17200, and conversion. He prayed that the foreclosure sale be set aside.

Defendants filed a demurrer to the second amended complaint. The trial court sustained the demurrer to the cause of action for unfair competition, with 30 days' leave to amend. It sustained the demurrer to all other causes of action without leave to amend.

Cotton then filed a third amended complaint, asserting a single cause of action for unfair competition. Once again, he prayed that the foreclosure sale be set aside.

Defendants filed a demurrer to the third amended complaint. The demurrer was set for hearing on August 30, 2011.

Geraci & Lopez did not file an opposition to the demurrer. Rather, on August 16, 2011, Geraci & Lopez filed a motion to withdraw.² The motion to withdraw was set for hearing on September 22, 2011.

On August 18, 2011, Cotton, in propria persona, attempted to file a request to continue the hearing on the demurrer, but it was rejected because it was not in proper form.

On August 30, 2011, at the hearing on the demurrer, Cotton appeared in person; no one from Geraci & Lopez appeared. There was this exchange:

“[THE COURT:] And, Mr. Cotton, you’re represented by —

“MR. COTTON: Al[a]n —

² This is according to the register of actions. The motion itself has not been included in the appellate record.

“THE COURT: Counsel.

“MR. COTTON: G[eraci]. He filed a motion to be relieved as counsel.

“THE COURT: Right.

“MR. COTTON: I’m in the process of trying to find new counsel, to pay attorney fees.

“THE COURT: All right. I took that into consideration because it didn’t seem fair to me that you’d lose your rights because your attorney decided not to oppose the demurrer. Then it occurred to me you might be in a better position to have been represented at the time of the motion. It might help you out in the long run

Otherwise, I would have continued the motion past the September 22nd date, but under the circumstances, I thought it would put you in a better position if the Court granted the motion while you were still represented by counsel.”³

The trial court proceeded to sustain the demurrer without leave to amend. It took the motion to withdraw off calendar, as moot. Thereafter, it entered a judgment of dismissal.

³ It also told Cotton that, by sustaining the demurrer, it was not “prevent[ing] you from getting counsel and trying to come back into court.”

It is not entirely clear why the trial court felt Cotton was “in a better position.” It may have expected him to seek discretionary relief from the judgment based on “abandonment” by his attorney. (See *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682-683.) Alternatively, it may have expected him to seek mandatory relief based on an attorney affidavit of fault under Code of Civil Procedure section 473, subdivision (b). (Whether Geraci would have been willing to supply an affidavit of fault is an intriguing but ultimately speculative question.)

III

DENIAL OF A CONTINUANCE

Cotton contends that the trial court erred by denying him a continuance to obtain new counsel.

We may assume, without deciding, that the trial court erred. We may further assume, without deciding, that this error was preserved for appeal, even though at the hearing on the demurrer, Cotton did not expressly request a continuance.

Even if so, the error was harmless. “A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. [Citations.] Therefore, any error in failing to grant a request for a continuance . . . is reversible only if it is tantamount to the denial of a fair hearing. [Citations.] There is no presumption of prejudice. [Citation.] Instead, the burden to demonstrate prejudice is on the appellant. [Citation.]” (*Freeman v. Sullivan* (2011) 192 Cal.App.4th 523, 527-528, fns. omitted.)

“The function of a demurrer is to test the sufficiency of the complaint as a matter of law, and it raises only a question of law. [Citations.]” (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) If there is some viable legal argument that Cotton was unable to raise below, then he is entitled to raise it in this appeal and thus obtain relief on the merits. If, on the other hand, there was no such argument, then he still was not prejudiced by the denial of a continuance, because eventually, the demurrer would have been sustained anyway. (Cf. *Byars v. SCME Mortgage Bankers, Inc.* (2003)

109 Cal.App.4th 1134, 1146 [failure to state reasons for granting summary judgment is harmless when “independent review establishes the validity of the judgment”].)

Cotton suggests that, with a continuance and new counsel, he would have been able to show that he could amend the complaint. As we will discuss in more detail below, however, he is entitled to seek leave to amend for the first time on appeal. Thus, once again, if he is correct, he is not prejudiced, because he is entitled to relief on the merits.

IV

THE DEMURRERS

A. *Standard of Review.*

A demurrer should be sustained when “[t]he pleading does not state facts sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subd. (e).)

“We independently review the superior court’s ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] 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. [Citations.] We liberally construe the pleading with a view to substantial justice between the parties. [Citations.]” (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.)

“If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. [Citation.] It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if the plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment. [Citation.]’ [Citation.]” (*Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1204.) However, “[s]uch a showing can be made for the first time to the reviewing court [citation]’ [Citation.]” (*San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 606.) “Whether a plaintiff will be able to prove its allegations is not relevant. [Citation.]” (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1057.)

B. *Causes of Action for Wrongful Foreclosure, Statutory Violations, and Declaratory Relief.*

1. *The wrongfulness of the foreclosure.*

One of the grounds on which defendants demurred to the wrongful foreclosure, statutory violation, and declaratory relief causes of action was that there was no allegation that the foreclosure was unlawful. Cotton had alleged that defendants lacked standing to foreclose, but defendants argued that this allegation was conclusory and ineffective.

Cotton now claims he could amend to allege that defendants lack standing because his trust deed was never properly assigned. He suggests that there was an effort to “securitize[e]” it by “pooling” it with other loans and transferring it to a trust, pursuant to

a “pooling and servicing agreement.” He “seeks to establish,” however, that the terms of the pooling and servicing agreement were not complied with and hence the transfer to and/or from the trust was not valid. He offers to show, on remand, that the trust deed was never actually assigned to defendants.

Defendants’ *only* response is that this claim depends on facts outside the record. However, as already discussed, Cotton is entitled to assert, for the first time on appeal, that he could amend the complaint. Admittedly, he has the “burden” of showing a reasonable possibility that an amendment can cure the defect. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 520, fn. 16.) However, this does not mean that he has to meet this burden by pointing to *evidence* in the *record*. Precisely because he is asserting a new theory for the first time on appeal, it is unlikely that there would be any such evidence. It simply means that he “must identify some legal theory or state of facts . . . that would change the legal effect of [his] pleading.” (*Ibid.*)

Defendants also state, “If the Court is inclined to entertain such matters, not raised below, Respondent’s [*sic*] request an opportunity to brief those issues.” We agree that respondents are entitled to such an opportunity. However, they already had that opportunity — in their respondents’ brief. The rules of court do not allow them to pick and choose among the appellants’ arguments, to forgo responding to some arguments, and then to demand another round of briefing if the court finds those arguments potentially meritorious. Otherwise, the briefing would never be closed.

We note that, in general, when a party other than the true beneficiary purports to initiate a foreclosure, the borrower has a cause of action for wrongful foreclosure. (*Glaski v. Bank of America, National Association* (2013) 218 Cal.App.4th 1079, 1094;⁴ 4 Miller & Starr, Cal. Real Estate (3d ed. 2013) Deeds of Trust and Mortgages, § 10:254, p. 987 [“A trustor may have grounds to set aside the sale if the foreclosing ‘beneficiary’ acquired its interest in a wholly void transfer”].) Admittedly, it has been held that a borrower cannot bring “a court action to determine whether the owner of the [n]ote has authorized its nominee to initiate the foreclosure process” (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154; see also *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511-513.) Defendants, however, have not argued that this limitation applies here. Indeed, in his opening brief, Cotton specifically argued that *Gomes* did not apply; in their respondents’ brief, defendants did not argue otherwise.⁵ We deem them to have forfeited any reliance on *Gomes* or its progeny.

⁴ Cotton has filed a request for judicial notice of the opinion in *Glaski*. Defendants have filed an opposition to that request.

Judicial notice of the decisional law of California is mandatory (Evid. Code, § 451, subd. (a)), *even in the absence of a request*. (Assem. Com. on Judiciary com., reprinted at 29B, pt. 1B West’s Ann. Evid. Code (2011 ed.) foll. § 451, p. 99.) Thus, the better procedure would have been to submit a “new authority” letter. (Cal. Rules of Court, rule 8.254.) However, because we regard the substance of the request rather than its form, we deem Cotton to have submitted a new authority letter citing *Glaski*.

⁵ Both sides appear to have viewed the request for judicial notice as an additional opportunity to reargue the merits of the case. That is not the purpose of *either* a request for judicial notice *or* a new authority letter. Hence, we will disregard all such material in their respective submissions.

In any event, the issue Cotton seeks to raise is not whether the holder of the trust deed authorized MERS or CRC to foreclose. Rather, it is whether any of the defendants have any interest whatsoever in the trust deed. *Gomes* recognized that a borrower may seek a remedy for “misconduct” relating to a nonjudicial foreclosure (*Gomes v. Countrywide Home Loans, Inc., supra*, 192 Cal.App.4th at p. 1154, fn. 5), provided “the plaintiff’s complaint identifie[s] a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party.” (*Id.* at p. 1156.) Thus, *Gomes* does not bar “claims that challenge a foreclosure based on specific allegations that an attempt to transfer the deed of trust was void.” (*Glaski v. Bank of America, National Association, supra*, 218 Cal.App.4th at p. 1099; see also *Lester v. J.P. Morgan Chase Bank* (N.D. Cal. 2013) 926 F.Supp.2d 1081, 1092.)

We therefore conclude that Cotton has established a *reasonable possibility* that he can amend his complaint. We hasten to add that this is *all* that he has established. We have no way of knowing whether he can *actually* amend, in good faith. Moreover, the amended complaint is strictly hypothetical at this point; accordingly, we cannot say whether any particular formulation will or will not be subject to demurrer. Depending on how the amended complaint is worded, it may be unduly conclusory, or it may fall afoul of the principles stated in cases such as *Gomes*. This opinion is *not* law of the case that any subsequent demurrer necessarily must be *overruled*.

We merely hold that Cotton is entitled to at least one more chance to attempt to plead a valid cause of action.

2. *Judicial estoppel.*

Cotton also claims he could amend to allege that JPMorgan Chase cannot obtain foreclosure as the successor in interest to WaMu because it is judicially estopped by various statements that it is *not* the successor in interest to WaMu.

Inasmuch as we are holding that Cotton must be given an opportunity to amend in any event, we decline to decide specifically whether he can amend to state a cause of action on this theory. Once again, we do not have any specific allegations before us. At this point, Cotton's judicial estoppel theory is not well fleshed out (to say the least). For example, he claims that, in other litigation, JPMorgan Chase asserted that it was not the successor in interest to WaMu. However, from his briefs, it is not at all clear whether JPMorgan Chase made this assertion *successfully*, as judicial estoppel would require. (See generally *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 408.) Defendants, however, do not claim that Cotton *cannot* so allege.

We therefore think it is the better part of valor to leave it up to the trial court, in the first instance, to determine whether Cotton can allege judicial estoppel.

3. *Tender.*

In his cause of action for wrongful foreclosure, Cotton alleged that, if the foreclosure were set aside, he would “be ready, willing and able to tender amounts due to the real party in interest.” In their demurrer, defendants argued, among other things, that this fell short of alleging the requisite “unconditional present ability to tend[er].”

Cotton does not contend that his allegation of tender was adequate. However, he does contend that he should be allowed to amend because, in light of the facts that he proposes to allege, he will not be required to allege tender.

Once again, defendants’ *only* response is that this contention is based on facts that are not in the record. Once again, and for the same reasons, (see part IV.B, *ante*), we disagree. Thus, we turn to the merits.

“[A]s 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. [Citations.]” (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.) “‘Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt.’ [Citation.]” (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1016.)

“There are, however, exceptions to the tender requirement.” (*Lona v. Citibank, N.A., supra*, 202 Cal.App.4th at p. 112.) One such exception is that “[t]ender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff

proves that the entity lacked the authority to foreclose on the property. [Citations.]” (*Glaski v. Bank of America, National Association, supra*, 218 Cal.App.4th at p. 1100; accord, *Lester v. J.P. Morgan Chase Bank, supra*, 926 F.Supp.2d at pp. 1093-1094, and cases cited.)

Here, Cotton claims he can amend his complaint so as to allege that defendants lacked the authority to foreclose. As we have already held, he is entitled to an opportunity to do so. On this record, it appears that, if he succeeds, he will not need to allege tender. Thus, the failure to allege tender is not a sufficient reason to prevent him from at least attempting to amend.

C. *Cause of Action for Unfair Competition.*

Defendants demurred to the cause of action for unfair competition, arguing that, because Cotton had not alleged a cause of action for wrongful foreclosure, he also could not allege a cause of action for unfair competition.

In our statement of facts, we summarized the allegations of the second amended complaint. With respect to the cause of action for unfair competition, however, the relevant complaint is the third amended complaint. Nevertheless, we need not summarize the allegations of that complaint, because Cotton’s main contention is not so much that it stated an unfair competition cause of action, but rather that he can amend to state such a cause of action.

“The UCL defines ‘unfair competition’ as ‘any unlawful, unfair or fraudulent business act or practice’ [Citation.] By proscribing ‘any unlawful’ business act or practice [citation], the UCL “‘borrows’” rules set out in other laws and makes violations of those rules independently actionable. [Citation.] However, a practice may violate the UCL even if it is not prohibited by another statute.” (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

As we held in part IV.B, *ante*, Cotton has shown a reasonable possibility that he can amend his complaint so as to allege a cause of action for wrongful foreclosure. It follows that there is also a reasonable possibility that he can amend to allege a cause of action for unfair competition. Moreover, he offers to allege several specifically fraudulent practices, including that defendants misrepresented JPMorgan Chase’s status as successor in interest to WaMu.

Once again, we are not in a position to hold that any particular wording does nor does not state a cause of action. We merely hold that Cotton is entitled to at least one additional opportunity to attempt to amend his complaint.

V

DISPOSITION

The judgment is reversed. The orders sustaining the demurrers to the second amended complaint and the third amended complaint are modified so as to sustain the demurrers with (rather than without) leave to amend; any amended complaint must be filed within 30 days after the issuance of the remittitur. Cotton is awarded costs on appeal against defendants.

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RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.