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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHAUN KNOPP et al.,

Plaintiffs and Appellants,

v.

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

Defendants and Respondents.

F062321

(Super. Ct. No. CV54873)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Shaun Knopp, in pro. per., for Plaintiff and Appellant.

Dean Knopp, in pro. per., for Plaintiff and Appellant.

AlvaradoSmith, Theodore E. Bacon and Rick D. Navarette for Defendant and Respondent JPMorgan Chase Bank, N.A.

McCarthy & Holthus, Matthew Podmenik, James Hester, and Melissa Robbins Coutts for Defendant and Respondent Quality Loan Service Corporation.

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This is an appeal, primarily, from a judgment entered against plaintiffs and appellants Shaun Knopp and Dean Knopp after the trial court sustained, without leave to amend a demurrer by defendant and respondent JPMorgan Chase Bank, N.A. (Chase), to plaintiffs' fourth amended complaint. In addition, plaintiffs seek to appeal from the denial of their motion for relief from default, which denied leave to file an objection to a statutory declaration of nonmonetary status filed by defendant and respondent Quality Loan Service Corporation (Quality). (See Civ. Code, § 2924l.)

We conclude the trial court did not err. The court correctly sustained the demurrer without leave to amend and correctly denied the motion for relief from default. As a result, the judgment of dismissal in favor of Chase is affirmed and, by operation of Civil Code section 2924l, subdivision (d), as we will explain, the action as to Quality is dismissed.

### **FACTS AND PROCEDURAL HISTORY**

Plaintiffs obtained a loan from Washington Mutual Bank (Washington Mutual) for a vacation home in Tuolumne County. On August 1, 2008, defendants allege, plaintiffs defaulted on the loan.

On September 25, 2008, federal authorities closed Washington Mutual and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver of the bank. On the same date, Chase acquired certain assets of the bank pursuant to a contract with FDIC. Those assets included all the loans made by the bank and owned by the bank or its subsidiaries. Chase did not record the assignment of plaintiffs' deed of trust, nor was it required by law to do so. (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 336.)

On March 19, 2009, Quality, purporting to act on behalf of Washington Mutual, recorded a notice of default demanding payment of \$44,683.14 then in arrears on the loan. On June 29, 2009, Quality recorded a notice of trustee's sale. The sale was scheduled for July 15, 2009.

On July 13, 2009, plaintiffs filed this action, naming Washington Mutual as the defendant. Subsequently, plaintiffs filed a first amended complaint naming Chase as an additional defendant, “as Successor in Interest to Washington Mutual Bank.” As relevant here, the trial court sustained, without leave to amend, Chase’s demurrer to two causes of action in the first amended complaint: those for defamation and for failure to produce the original promissory note. The demurrer to other causes of action was sustained with leave to amend.

Plaintiffs filed a second amended complaint, naming Chase as a defendant, as “an acquirer of certain assets and liabilities of Washington Mutual Bank” and naming Quality as an additional defendant. Chase’s motion to strike portions of the complaint was granted; its demurrer to two causes of action (for violation of Civil Code sections 2923.5 and 2923.6) was sustained without leave to amend. Quality responded to the second amended complaint by filing a Civil Code section 2924*l* declaration of nonmonetary status.<sup>1</sup> Plaintiffs failed to file a timely objection to the declaration.<sup>2</sup> As a result, Quality

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<sup>1</sup> Civil Code section 2924*l*, subdivision (a) states, in relevant part: “In the event that a trustee under a deed of trust is named in an action or proceeding in which that deed of trust is the subject, and in the event that the trustee maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee, then, at any time, the trustee may file a declaration of nonmonetary status.” Subdivision (b), setting forth the required contents of the declaration, requires, in part, that the trustee “agree[] to be bound by whatever order or judgment is issued by the court regarding the subject deed of trust.”

<sup>2</sup> Civil Code section 2924*l*, subdivision (c) states: “The parties who have appeared in the action or proceeding shall have 15 days from the service of the declaration by the trustee in which to object to the nonmonetary judgment status of the trustee. Any objection shall set forth the factual basis on which the objection is based and shall be served on the trustee.”

was “not [] required to participate any further in the action or proceeding.” (Civ. Code, § 2924*l*, subd. (d).)<sup>3</sup>

After the trial court granted in part and denied in part plaintiffs’ motion for leave to file a third amended complaint, plaintiffs filed a third amended complaint alleging a single cause of action based on violation of Business and Professions Code section 17200 (unfair business practices). The cause of action primarily alleged that Washington Mutual did not own plaintiffs’ loan at the time of the assignment of ““certain assets and liabilities”” to Chase, that Chase therefore had no interest in the loan, and that its acts and Quality’s acts were ““practices forbidden by law”” under Business and Professions Code section 17200.<sup>4</sup> The court sustained Chase’s demurrer with leave to amend; the court required plaintiffs to “include allegations as to the actual injury in fact that they are alleged to have suffered as a result of the unfair business practice.”<sup>5</sup>

The fourth amended complaint alleged a single cause of action for violation of Business and Professions Code section 17200, alleging that Chase did not have an ownership interest in the loan, and that its acts and Quality’s acts in pursuing foreclosure were “unfair, unlawful, deceptive and fraudulent” business practices. The complaint alleged plaintiffs were injured by those practices because they were “force[d] to spend hundreds of hours of time on legal research, consultation, preparation and legal issues in

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<sup>3</sup> Civil Code section 2924*l*, subdivision (d) states: “In the event that no objection is served within the 15-day objection period, the trustee shall not be required to participate any further in the action or proceeding, shall not be subject to any monetary awards as and for damages, attorneys’ fees or costs, shall be required to respond to any discovery requests as a nonparty, and shall be bound by any court order relating to the subject deed of trust that is the subject of the action or proceeding.”

<sup>4</sup> Quality filed an additional Civil Code section 2924*l* notice on September 3, 2010. Once again, plaintiffs failed to file a timely objection.

<sup>5</sup> Chase requested judicial notice of, inter alia, its contract with FDIC for the purchase of assets of Washington Mutual. The court did not rule on this request at the time of its ruling on the demurrer to the third amended complaint.

place of gainful employment to protect Plaintiffs['] interests.” Plaintiffs also filed, on November 9, 2010, a “motion in opposition” (full capitalization omitted) to Quality’s notice of nonmonetary status. Quality’s notice had been filed September 3, 2010. The court denied the plaintiffs’ “motion in opposition” as it was not “filed within the statutory timeframes.” By written order filed January 19, 2011, the court sustained without leave to amend Chase’s demurrer to the fourth amended complaint. In its order, the court stated: “In sustaining Defendant’s Demurrer to the Third Amended Complaint with leave to amend, this Court found that the allegation in that complaint, that there was not a proper assignment of the Deed of Trust from Washington Mutual to Defendant, was not sufficient to state a cause of action. The Court granted leave to amend to provide Plaintiffs the opportunity to include allegations as to the actual injury in fact that they had suffered as a result of an unfair business practice.” The court entered judgment accordingly. Subsequently, the court denied plaintiffs’ motion for relief from default with respect to their failure to file a timely objection to the notice of nonmonetary status and their motion for reconsideration of both that ruling and the ruling on the demurrer to the fourth amended complaint.

Plaintiffs appealed from the judgment for Chase and from the trial court’s failure to grant relief from default as to Quality pursuant to Civil Code section 2924*l*, subdivision (e) and Code of Civil Procedure section 473.

## **DISCUSSION**

### *A. The Judgment for Chase.*

““On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.”” (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.)

Plaintiffs claim that their loan was sold by Washington Mutual to its subsidiary, Washington Mutual Mortgage Securities Corporation, that the contract between FDIC

and Chase does not contain a listing of each individual loan or deed of trust, that Chase failed to establish by evidence subject to judicial notice that it was assigned the deed of trust plaintiffs had signed with Washington Mutual, and that the loan was subsequently securitized.<sup>6</sup>

The trial court impliedly took judicial notice of Chase's contract with FDIC.<sup>7</sup> The trial court's reliance on the agreement was appropriate under Evidence Code section 452, subdivision (h), as facts "not reasonably subject to dispute[,] ... capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Ibid.*) That document established that Chase was assigned all loans owned by Washington Mutual and its subsidiaries. The mere fact that the FDIC contract did not contain a listing of each individual loan or deed of trust did not negate the broad and inclusive language of the agreement itself, assigning *all* such loans to Chase. Nor does the fact, the loan was subsequently securitized deprive Washington Mutual of the ownership necessary to support assignment of the loan and deed of trust to Chase under the terms of the FDIC agreement. (See, e.g., *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46 (*Robinson*); *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*).)

Plaintiffs rely on an unpublished opinion of the United States District Court for the Central District of California, *Javaheri v. JPMorgan Chase Bank, N.A.* (C.D. Cal.

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<sup>6</sup> Securitization is the financial practice of pooling loans and packaging them in a manner that allows for sale to investors. (See, *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc., etc. v. Love Funding Corp.* (2d Cir. 2009) 556 F.3d 100, 104 [explaining securitization process for mortgage loans].)

<sup>7</sup> Courts are entitled to consider facts subject to judicial notice in deciding a demurrer. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 165, fn. 12.) Plaintiffs do not contend it was erroneous for the trial court to take judicial notice of Chase's contract with FDIC, although plaintiffs appear to disagree with the court's interpretation of the document itself.

Mar. 24, 2011) 2011 WL 1131518, for the proposition that the agreement between FDIC and Chase does not sufficiently establish the assignment of their loan to Chase and, therefore, the judicially noticed contract is insufficient to defeat their allegation that Washington Mutual had securitized the mortgage prior to any purported transfer to Chase.<sup>8</sup> In *Javaheri*, the federal court noted that, “[o]n September 25, 2008, the Office of Thrift Supervision (‘OTS’) closed [Washington Mutual] and appointed the Federal Deposit Insurance Corporation ... as Receiver for [Washington Mutual].... On that date, the bulk of [Washington Mutual’s] assets were transferred to JPMorgan pursuant to a Purchase and Assumption Agreement ... between the FDIC-Receiver and JPMorgan.” (*Id.* at p. \*1.) The district court in *Javaheri* took judicial notice of the FDIC/JPMorgan purchase and assumption agreement. (*Id.* at p. \*2 & fn. 2.) It is the same contract that is before us in the present case. The district court found plaintiff’s claim that JPMorgan did not own their note to be without merit. “The transfer of interest to JPMorgan ... is evidenced in documents of which the Court has ... taken judicial notice—namely, the OTS Order and the P & A Agreement.” (*Id.* at p. \*2.) The federal court had previously concluded that, under the FDIC agreement, Chase did not assume the *liabilities* of Washington Mutual for such claims as misrepresentation. (*Javaheri v. JPMorgan Chase Bank, N.A.* (C.D. Cal. Jan. 11, 2011) 2011 WL 97684 at p. \*3.) That conclusion has no bearing, however, on the assignment of *assets* of Washington Mutual to Chase. In summary, there is nothing in *Javaheri* that supports plaintiffs’ claims in the present case.<sup>9</sup>

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<sup>8</sup> The California Rules of Court prohibit citation to unpublished California cases, but do not prohibit citation to unpublished federal cases. (*Gomes, supra*, 192 Cal.App.4th at p. 1155, fn. 6; Cal. Rules of Court, rule 8.1115.)

<sup>9</sup> Although plaintiffs have not provided adequate citations to locate most of the federal authorities they have cited, those cases we have located similarly involve Chase’s denial that it assumed liabilities of Washington Mutual, not a claim by Chase that it did not receive assignment of assets of Washington Mutual. (See, e.g., *Deutsche Bank Nat.*

Plaintiffs cite also to *Ansanelli v. JPMorgan Chase Bank, N.A.* (N.D. Cal. Mar. 28, 2011) 2011 WL 1134451 (*Ansanelli*). In *Ansanelli*, the same purchase and assumption agreement (between the FDIC receiver and JPMorgan on September 25, 2008) was at issue. (*Id.* at pp. \*2, \*10.) The relevant issue in *Ansanelli* was not, however, whether the agreement transferred the assets of Washington Mutual to Chase. The issue was whether the agreement conferred on Chase liability for certain acts of Washington Mutual occurring prior to September 25, 2008, relating to its loans. (*Id.* at pp. \*6-\*7.) The court found it did not, but that Chase was responsible for its own liability related to such loans. (*Ibid.*) *Ansanelli* does not assist plaintiffs.

Plaintiffs also point to additional language in the FDIC contract in which Chase assumed certain liabilities, namely, the “mortgage servicing rights and obligations” of Washington Mutual. Plaintiffs contend that because Chase was constituted as a mortgage servicer under this provision (§ 2.1 of the FDIC contract), it could not have had the right to foreclose on the deed of trust. Chase’s right to foreclose, however, arises under a different section of the contract, namely section 3.1, entitled “Assets Purchased by Assuming Bank.” (Underlining omitted.) Chase’s ownership of the loan under that section is not restricted in any manner.

Plaintiffs contend that, whether or not Chase is the assignee of the deed of trust, they have stated a cause of action for wrongful foreclosure. They point out that there is a well-established cause of action under state law for wrongful foreclosure, citing *Miller v. Cote* (1982) 127 Cal.App.3d 888 (*Miller*) and *Munger v. Moore* (1970) 11 Cal.App.3d 1 (*Munger*). While we agree that, in general terms, there is an action for wrongful foreclosure, the problem with each successive complaint filed by plaintiffs is that they have not alleged facts constituting a wrongful foreclosure. In *Munger, supra*, 11

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*Trust Co. v. F.D.I.C.* (D.D.C. May 18, 2012) \_\_\_ F.Supp.2d \_\_\_ [2012 WL 1766656 at p. \*1.)

Cal.App.3d at page 8, for example, the lender had wrongfully refused the plaintiff's tender of all arrearages, and proceeded with the foreclosure sale. In *Miller, supra*, 127 Cal.App.3d at page 895, the court concluded there had been no event of default under the deed of trust and affirmed an injunction against the foreclosure sale. (*Id.* at p. 896.) The most important difference between the cases cited by plaintiffs and the facts before us is that plaintiffs clearly were in default on the loan and remained in default after the expiration of the period to cure the default provided in the statutory notice recorded against their property. In *Miller* and *Munger* the plaintiff was either not in default or had acted in a timely manner to cure the default. (See also, *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

We conclude the trial court correctly found that Chase properly asserted the right to foreclose on the deed of trust pursuant to the assignment of loans by FDIC.

All other defects in the foreclosure procedure alleged by plaintiffs do not constitute acts supporting an action for wrongful foreclosure. At various points, the trial court sustained, without leave to amend, all plaintiffs' causes of action that could be considered wrongful foreclosure causes of action. In particular, these included the causes of action for failure to produce the original promissory note, for violation of Civil Code sections 2923.5 and 2923.6, and for violation of Business and Professions Code section 17200. First, California law does not require the beneficiary of the deed of trust to have possession of the promissory note to foreclose on a deed of trust. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440 [so holding, and collecting extensive federal case law applying California law, to same effect].) Second, a plaintiff cannot state a cause of action under Civil Code section 2923.5, in the absence of allegations of prejudice which are not present here. (See *Debrunner v. Deutsche Bank National Trust Co., supra*, 204 Cal.App.4th at p. 443; *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 225.) In addition, Civil Code section 2923.5 does not create a private right of action for damages or permanent injunctive relief; instead, it permits only

a temporary delay in foreclosure which is not the remedy sought in the present case. (See 185 Cal.App.4th at p. 214.) Third, Civil Code section 2923.6 does not create a private right of action—nor, indeed, does it impose any duties on parties involved in a foreclosure. Instead, it “merely expresses the [Legislature’s] *hope* that lenders will offer loan modifications on certain terms.” (185 Cal.App.4th at p. 222.) Accordingly, an alleged violation of that section does not support a cause of action. Fourth, in the absence of any valid claims of unlawful conduct, and in the absence of prejudice to plaintiffs’ own monetary or property interests, no claim is stated under Business and Professions Code section 17200. (See *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507-1508 [concluding that, when plaintiff has not tendered payment or cured a default, foreclosure by the wrong entity does not financially prejudice the plaintiff].)

Accordingly, we conclude the trial court did not err in sustaining the demurrer to those causes of action in which plaintiffs attempted to state a cause of action for wrongful foreclosure.<sup>10</sup>

Finally, when a demurrer is sustained without leave to amend, “the burden is on the plaintiff to demonstrate that an amendment would cure the defect.” (*Robinson, supra*, 199 Cal.App.4th at p. 45.) Plaintiffs have not established that they can allege facts that would state a cause of action if permitted to further amend the complaint and, as a result, have not established that the trial court abused its discretion in denying leave to file a fifth amended complaint against Chase.

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<sup>10</sup> Plaintiffs do not contend on appeal that the trial court erred in sustaining without leave to amend the demurrer to the remaining causes of action, such as that for defamation.

*B. Denial of the Motion to Permit Objection to the Nonmonetary Status Declaration*

Plaintiffs contend that their motion for relief from default under Code of Civil Procedure section 473, subdivision (b) was timely because Quality filed a new declaration of nonmonetary status when plaintiffs named it again in the third amended complaint.

Section 473, subdivision (b) provides that a motion for relief from default (in this instance, plaintiffs' failure to file a timely objection to the notice of nonmonetary status) must be filed "within a reasonable time, in no case exceeding six months" after the default. Plaintiffs contend that, even though their motion was filed far more than six months after Quality filed its initial Civil Code section 2924*l* declaration, the motion was filed within six months of the declaration Quality filed in response to the third amended complaint. Plaintiffs contend the filing of an amended complaint superseded the earlier complaint for all purposes, and nullified Quality's original declaration.

Apart from their citation to cases standing for the proposition that the filing of an amended complaint nullifies (for most purposes) the original *complaint*, plaintiffs have cited no authority that such an action nullifies pleadings filed by defendants—i.e., pleadings that are not complaints. When a party does not file its objection to the nonmonetary judgment status within 15 days of service of the declaration by the trustee, the trustee is not required to participate any further in the action or proceeding. Nor is the trustee subject to any monetary award. (Civ. Code, § 2924*l*, subs. (c) & (d).) To change the trustee back to participation status, the party must bring a motion under Code of Civil Procedure section 473. That motion must specify the factual basis for such a demand: that the party, "through discovery, or otherwise, determine[d] that the trustee should participate in the action because of the performance of its duties as a trustee." (Civ. Code, § 2924*l*, subd. (e).) Because of the express requirement of such discovered evidence, we do not conclude that merely filing an amended complaint accomplishes the

same goal for plaintiffs. If it did, it would wholly negate the purpose of Civil Code section 2924*l*, subdivision (e).

In any event, even if plaintiffs could establish that they should have been permitted to file an objection to Quality's declaration, plaintiffs have not established that the failure to permit objection was prejudicial: all the allegations against Quality are the same as the allegations against Chase which, as we have discussed, are not sufficient to state a cause of action. In the absence of a showing of prejudice, plaintiffs are not entitled to reversal on this basis. (See Cal. Const., art. VI, § 13.)

**DISPOSITION**

The judgment is affirmed. The order denying leave to file an objection to the Civil Code section 2924*l* declaration is affirmed. The plaintiffs' motion to file and record lis pendens is denied. Defendants are awarded costs on appeal.

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DETJEN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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POOCHIGIAN, J.