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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BALJIT SINGH et al., Plaintiffs and Appellants, v. U.S. BANK NATIONAL ASSOCIATION et al., Defendants and Respondents.	G054977 (Super. Ct. No. 30-2016-00862025) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed. Request for judicial notice. Denied.

Law Office of Richard L. Antognini and Richard L. Antognini for Plaintiffs and Appellants.

Reed Smith, Abraham J. Colman, Elena O. Gekker and Raffi Kassabian for Defendants and Respondents.

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INTRODUCTION

Homeowners Baljit Singh and Baldev K. Singh (the Singhs) seek to prevent U.S. Bank National Association, as Trustee for Harborview Mortgage Loan (U.S. Bank), and Nationstar Mortgage, LLC (Nationstar) (collectively defendants) from foreclosing on the Singhs' property. The trial court correctly determined that California law does not permit borrowers to preemptively sue to block a nonjudicial foreclosure sale of their property. The alleged splitting of the promissory note and the deed of trust does not affect defendants' ability to undertake a nonjudicial foreclosure of the property. The Singhs failed to demonstrate a reasonable possibility that the defects in their complaint could be cured by amendment. Therefore, we affirm the trial court's order granting defendants' motion for judgment on the pleadings without leave to amend.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Singhs obtained a $1.16 million mortgage loan from Countrywide Home Loans in February 2006, secured by a deed of trust on real property in Yorba Linda, California. Mortgage Electronic Registration Systems, Inc. (MERS, a nonparty to this case) was named as the beneficiary of the deed of trust. A foreclosure sale of the real property has not occurred.

In May 2010, MERS assigned its beneficial interest in the deed of trust to U.S. Bank. In November 2011, U.S. Bank assigned the deed of trust to Bank of America. Another assignment in February 2012, executed by MERS, transferred the deed of trust to Bank of America. In June 2013, Bank of America assigned the deed of trust to

U.S. Bank. In June 2014, U.S. Bank assigned the deed of trust to Nationstar, as attorney in fact for U.S. Bank.[1]

In July 2016, the Singhs filed a lawsuit against U.S. Bank and Nationstar, alleging causes of action for wrongful foreclosure, cancellation and expungement of instruments, and declaratory relief. The Singhs sought cancellation of all five assignments, a declaration that the assignments were void, and a declaration that foreclosure proceedings initiated and commenced by U.S. Bank and Nationstar were wrongful. The complaint sought equitable relief only; the Singhs specifically alleged they were not seeking damages.

Defendants filed a motion for judgment on the pleadings. In their opposition to the motion, the Singhs requested leave to amend, although they did not specify how they would cure any defects in their complaint.

The trial court granted the motion for judgment on the pleadings without leave to amend. Judgment of dismissal was entered, and the Singhs timely filed a notice of appeal.

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[1] In January 2018, Nationstar assigned the deed of trust back to U.S. Bank. Defendants ask this court to take judicial notice of the January 2018 assignment, which was executed and recorded after this appeal was filed, on the ground it is relevant to the appeal because it is part of the chain of title related to the property, and relevant to the Singhs' challenges to the chain of title and the initiation of nonjudicial foreclosure. The Singhs did not file opposition to the request for judicial notice. Recorded instruments are generally proper matters for judicial notice. (Evid. Code, §§ 452, subd. (c), 459; *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337.) However, the assignment is not relevant to any issue we are deciding in this opinion. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194.) Additionally, defendants have not shown exceptional circumstances to justify our taking judicial notice of matters that were not part of the record when the judgment was entered. (*Ibid.*) We therefore deny the request for judicial notice.

DISCUSSION

We review judgment on the pleadings de novo (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777; *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 296-297) and assume the truth of all properly pleaded facts in the Singhs' complaint (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318).

I.

AS A MATTER OF LAW, THE SINGHS CANNOT STATE A CAUSE OF ACTION BEFORE A NONJUDICIAL FORECLOSURE OCCURS.

California law does not permit borrowers to preemptively sue to block a nonjudicial foreclosure of their property. "'California courts have refused to delay the nonjudicial foreclosure process by allowing trustor-debtors to pursue preemptive judicial actions to challenge the right, power, and authority of a foreclosing "beneficiary" or beneficiary's "agent" to initiate and pursue foreclosure.' [Citation.] California's nonjudicial foreclosure scheme has an ""'exhaustive nature,'"" which is intended ""'(1) to provide the [beneficiary-creditor] with a quick, inexpensive and efficient remedy against a defaulting [trustor-debtor]; (2) to protect the [trustor-debtor] 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.] A preemptive action 'seeks to create "the additional requirement" that the foreclosing entity must "demonstrate *in court* that it is authorized to initiate a foreclosure" before the foreclosure can proceed,' a process not contemplated by the nonjudicial foreclosure statutes. [Citation.] The *Jenkins* [*v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497] court distinguished a factual situation involving misconduct in a nonjudicial foreclosure sale, which can provide a basis for a valid postforeclosure cause of action, from the plaintiff's preemptive action, which improperly sought to stop or delay the nonjudicial foreclosure process."

(*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 741-742; see *Jenkins v. JPMorgan Chase Bank, N.A., supra*, 216 Cal.App.4th at pp. 509-513; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154 (*Gomes*); see also *Petrovich v. Ocwen Loan Servicing, LLC* (9th Cir. 2017) 716 Fed. Appx. 614, 616 [California law bars wrongful foreclosure claim filed before nonjudicial foreclosure occurred]; *Fathi v. JPMorgan Chase Bank, N.A.* (9th Cir. 2016) 671 Fed. Appx. 990 [borrower "lacked standing to bring a preemptive suit to challenge Chase's authority to foreclose"]; *Bryant v. JPMorgan Chase Bank, N.A.* (9th Cir. 2016) 671 Fed. Appx. 985, 986 [borrower lacked standing to bring preemptive suit to challenge lender's authority to foreclose]; *Demarest v. HSBC Bank USA, N.A.* (C.D. Cal., Aug. 8, 2017, No. CV-16-05088) 2017 U.S.Dist. Lexis 211092, p. *9 ["By now it is well-understood that California law does not permit a borrower to bring a suit to preemptively challenge an entity's authority to foreclose"].)

In the face of this clear rule of law, the Singhs rely on *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), to support their argument that they could bring a preemptive case against a nonjudicial foreclosure based on the alleged invalidity of the assignments of the deed of trust. In that case, the California Supreme Court held that, following the completion of a nonjudicial foreclosure sale, the borrower on a home loan secured by a deed of trust could bring an action for wrongful foreclosure based on an allegation that the assignment of the note and deed of trust to the foreclosing party was void. (*Id.* at p. 923.)

The court in *Yvanova* made clear, however, that its opinion did not permit such a lawsuit before a nonjudicial foreclosure had taken place. "Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. *We do not hold or suggest that a borrower may attempt to*

preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Yvanova, supra,* 62 Cal.4th at p. 924, italics added.)

Subsequent cases have held that *Yvanova*'s holding that a borrower has standing to sue for wrongful foreclosure applies only in "the post-foreclosure context," and does not permit a preemptive wrongful foreclosure action. (E.g., *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815; *Yagman v. Nationstar Mortgage, LLC* (9th Cir. 2017) 699 Fed. Appx. 634, 635.)

The Singhs rely on *Gomes, supra,* 192 Cal.App.4th at page 1156, contending that the Court of Appeal held "that a plaintiff can use a pre-foreclosure suit to stop a foreclosure sale if his complaint 'identified a *specific factual basis* for alleging the foreclosure was not initiated by the correct party.'" The Singhs have misstated the holding of the case. In *Gomes*, the Court of Appeal affirmed the trial court's order sustaining a demurrer to the plaintiff's cause of action for wrongful initiation of foreclosure, in part, because such a cause of action was not permitted by California's nonjudicial foreclosure statutes. (*Id.* at p. 1154.) On appeal, the plaintiff cited three federal district court cases he claimed permitted a borrower to challenge the initiation of foreclosure proceedings. (*Id.* at p. 1155.) The Court of Appeal concluded that the cases were neither controlling nor on point because they did not apply California's nonjudicial foreclosure law. (*Id.* at pp. 1155-1156.)

The Singhs also rely on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*). *Glaski*'s interpretation of New York law has been rejected (*Wells Fargo Bank, N.A. v. Erobobo* (2015) 127 A.D.3d 1176 [reversing decision on which *Glaski* relied]), and its holding has been roundly criticized (*Turner v. Wells Fargo Bank NA* (9th Cir. 2017) 859 F.3d 1145, 1149; *Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 90; *In re Sandri* (Bankr. N.D. Cal. 2013) 501 B.R. 369, 374-375.) We need not weigh in on that front, however, because *Glaski* involved a

postforeclosure lawsuit, and therefore is not on point here. Indeed, *Glaski* distinguishes *Gomes* on the basis that *Gomes* is a preforeclosure case. (*Glaski, supra,* at p. 1098.)

In their reply brief on appeal, the Singhs cite Civil Code section 2924.12, a part of the California Homeowner's Bill of Rights. That statute permits preforeclosure injunction actions against certain statutory violations. (Civ. Code, § 2924.12, subd. (a).) Because the statute authorizes such preemptive lawsuits for specified statutory violations—none of which could be asserted by the Singhs in this case—we are persuaded that no other preforeclosure injunctions are permitted.

The motion for judgment on the pleadings was properly granted.

II.

THE SINGHS CANNOT STATE A CAUSE OF ACTION BASED ON THE ALLEGED SPLITTING OF THE PROMISSORY NOTE FROM THE DEED OF TRUST.

The Singhs argue that the last assignment of the deed of trust—from U.S. Bank to Nationstar in June 2014—was void because it did not simultaneously transfer the promissory note. The Singhs rely on the holding of *Yvanova* that "because in a nonjudicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure." (*Yvanova, supra,* 62 Cal.4th at p. 923.)

This argument has been rejected by many courts. "California's statutory nonjudicial foreclosure scheme [citations] does not require that the foreclosing party have a beneficial interest in or physical possession of the note." (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511; see *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-441; *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1044; *Dolan v. Bank of Am., N.A.* (S.D.Cal., Sep. 28, 2015, No. 14CV2920) 2015 U.S.Dist. Lexis 130588, p. *11; *Lane v.*

Vitek Real Estate Industries Group (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1098-1099.) "Given the exhaustive nature of the nonjudicial foreclosure scheme, we decline to read additional requirements into the nonjudicial foreclosure statute requiring the note and the deed of trust to be held by the same party." (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1004.)

The Singhs' entire complaint is based on the allegation that the assignment of the deed of trust without the note voids that assignment, and defendants therefore had no authority to foreclose on the property. Because that allegation does not support a cause of action, the motion for judgment on the pleadings was properly granted.

III.

SHOULD THE SINGHS BE PERMITTED TO AMEND THEIR COMPLAINT?

At oral argument on appeal, the Singhs' counsel acknowledged that the trial court correctly granted the motion for judgment on the pleadings, but contended that leave to amend should be granted. We find no merit to the argument that leave to amend should be granted.

We review the denial of leave to amend after granting a motion for judgment on the pleadings for abuse of discretion. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) "[W]hen [a demurrer] 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." (*Ibid.*) The Singhs bear the burden of proving the proposed amendment would cure the complaint's defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The Singhs argue on appeal that they can amend their complaint to allege a claim for violation of the federal Fair Debt Collection Practices Act, title 15 of the United States Code, section 1692f(6), which provides: "A debt collector may not use unfair or

unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: [¶] . . . [¶] (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—[¶] (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; [¶] (B) there is no present intention to take possession of the property; or [¶] (C) the property is exempt by law from such dispossession or disablement."

In *Randall v. Ditech Financial, LLC* (2018) 23 Cal.App.5th 804, 808, the plaintiff filed his complaint the day a nonjudicial foreclosure sale was scheduled. A demurrer to the complaint was sustained without leave to amend. (*Ibid.*) "For the first time on appeal, Randall contends he can amend his complaint to also state an actionable claim under section 1692f(6) of the [Fair Debt Collection Practices Act] for Ditech's nonjudicial foreclosure activity. Section 1692f prohibits '[t]aking or threatening to take any non-judicial action to effect dispossession or disablement of property' when the debt collector has no intention of taking possession of the property, or holds 'no present right to possession of the property claimed as collateral through an enforceable security interest.' [Citation.] Mortgage loan servicers, as enforcers of security interests, fall within the definition of '"debt collectors"' for the purposes of section 1692f(6). [Citations.] Since Randall has demonstrated he can allege Ditech refused to halt its nonjudicial foreclosure activity until well after he reinstated his loan and then only after he filed the instant action, he has demonstrated he can amend his complaint to state an actionable claim under section 1692f(6) and the court should permit him an opportunity to do so." (*Id.* at p. 811.)

The Singhs contend defendants engaged in unfair or unconscionable debt collection by initiating nonjudicial foreclosure against the Singhs without having a present right to possession of the property because defendants did not then have an enforceable security interest. The only proposed amendment of "unfair or

unconscionable means" rests on the alleged failure to have possession of the promissory note. As explained *ante*, splitting the note and the deed of trust does not prevent nonjudicial foreclosure on the deed.

The Singhs also contend on appeal they could amend their complaint to assert a cause of action under the California Homeowner's Bill of Rights. As noted *ante*, preforeclosure injunctions are not permitted other than for specified statutory violations (none of which are or could be alleged by the Singhs). Further, as acknowledged by the Singhs' counsel in oral argument on appeal, any new cause of action would be based on the splitting of the note and the deed of trust which, as discussed *ante*, does not support a cause of action against defendants.

Therefore, we conclude there is no reasonable possibility that the Singhs could remedy the defects in their complaint through amendment. The trial court did not err in granting the motion for judgment on the pleadings without leave to amend, and there have been no meritorious amendments proposed on appeal.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P.J.

THOMPSON, J.