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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

BANK OF NEW YORK MELLON,

Plaintiff and Respondent,

v.

EQUITEC WEST, LLC, et al,

Defendants and Appellants.

H040729

(Monterey County

Super. Ct. No. M123316)

**I. INTRODUCTION**

This case alleges a scheme of trust deed elimination through corporate identity theft. Bank of New York Mellon (Bank) currently holds the beneficial interest created by a February 2006 deed of trust securing a loan made by American Brokers Conduit (ABC1), a business name of American Home Mortgage Corporation (AHMC), a New York corporation. Following the bankruptcy of AHMC, a new American Brokers Conduit (ABC2) was incorporated in New York in 2012 allegedly in order “to deceive the Court and the public into crediting its representation that it was a party” to deeds of trust securing loans by ABC1. In four days in December 2012, EquitecWest, LLC (EquitecWest) incorporated, acquired the borrower’s interest in the property, and filed a Monterey County Superior Court action (Case No. M121216) naming ABC2 as the sole defendant and seeking cancellation of the February 2006 deed of trust on the basis that ABC2 did not make the described loan and had no objection to the deed’s cancellation.

In that action, those two parties entered a stipulation resulting in a January 18, 2013 judgment canceling the trust deed.

Plaintiff Bank filed this action in May 2013 to set aside the allegedly collusive stipulated judgment between defendant EquitecWest and defendant ABC2 (collectively defendants) that purported to cancel a deed of trust in which Bank holds a beneficial interest. The complaint stated four causes of action seeking declaratory relief and cancellation of the judgment and compensatory and punitive damages for fraud and abuse of process. Defendants filed a special motion to strike the entire complaint contending that each cause of action arose from defendants exercising their constitutional rights to speak and petition the government. (Code Civ. Proc., § 425.16.)<sup>1</sup> The trial court granted the motion in part, striking the tort causes of action, and implicitly denied defendants' request for attorney fees.

Defendants have appealed from the order, arguing that the trial court should have granted their motion to strike the entire complaint and awarded them attorney fees. We will affirm.

## **II. TRIAL COURT PROCEEDINGS**

### ***A. Pleadings and Supporting Evidence***

The unverified complaint filed in May 2013 alleged that ABC1 loaned Norman Eckersley \$2,177,500, as documented by a promissory note secured by a deed of trust on realty on Saddle Road in Monterey (the property). The trust deed, dated February 22, 2006 and recorded on March 1, 2006, identified ABC1 as the lender, “a Corporation organized and existing under the laws of State [*sic*] of New York” with an address of in Melville, New York, Mortgage Electronic Registration Systems (MERS) as the lender's nominee and beneficiary, and Stewart Title as trustee. At the time of the

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<sup>1</sup> Unspecified section references are to the Code of Civil Procedure.

loan, AHMC was licensed by California's Commissioner of Corporations to do business as a finance lender and broker under four business names, including ABC1.

Nonjudicial foreclosure proceedings were initiated against the property. On March 30, 2011 was recorded a notice of default dated March 17, 2011 in the amount of \$40,406.74 and an election to sell the property under the February 2006 deed of trust. The notice directed the beneficiary to contact American Home Mortgage Servicing in Florida about how to stop the foreclosure. The notice recited that "the Beneficiary has declared and does hereby declare all sums secured" by the deed of trust to be "immediately due and payable" due to the trustor's default. The notice identified the loan beneficiary as MERS, not Bank. The next document recorded on March 30, 2011 after the notice of default was an assignment by MERS dated March 23, 2011 of its beneficial interest in the deed of trust to Bank. The assignment transferred to Bank not only the beneficial interest under the trust deed, but also "the note or notes therein described and secured thereby, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust . . . ." On July 8, 2011, Bank recorded a substitution of trustee dated March 22, 2011 naming as trustee Power Default Services, Inc.

On March 16, 2012, Victor Gess, with a Lafayette, California mailing address, incorporated ABC2 in New York with a mailing address care of Incorp Services, Inc., in Albany, New York. On December 17, 2012, EquitecWest was incorporated in Wyoming.

On December 18, 2012, one day after EquitecWest was incorporated, it acquired ownership of the property by a grant deed from Rosemary Eckersley, the widow of the original borrower. On December 20, 2012, EquitecWest filed a complaint in Monterey County Superior Court (Case No. M121216) against ABC2 seeking cancellation of the February 2006 deed of trust as a forgery and to quiet title because ABC2 did not make the loan described in the trust deed. Although the complaint attached and incorporated the trust deed, the complaint did not name as a defendant either the original beneficiary,

the original trustee, or any successor of either one. On January 18, 2013, “Plaintiff CB EQUITIES, LLC” and ABC2 filed a stipulated settlement and judgment that was approved by the Monterey County Superior Court after ABC2 admitted it had “never loaned money with respect to the deed of trust” and had “no objection to this Court’s Judgment expunging, cancelling and nullifying the deed of trust . . . .” The court ordered the cancellation of the February 2006 deed of trust.

After entry of the stipulated judgment, Power Default Services caused a notice of trustee’s sale of the property to be recorded on February 19, 2013. The grant deed from Rosemary Eckersley to EquitecWest was recorded on February 25, 2013. The next document recorded that day was the stipulated judgment between defendants. On April 11, 2013, a corrected grant deed from Rosemary Eckersley to EquitecWest was signed and recorded.

The complaint by Bank requested declaratory relief and cancellation of the stipulated judgment filed on January 18, 2013 and compensatory and punitive damages for fraud and abuse of process.

While the complaint did not request injunctive relief, on June 19, 2013, Bank applied for an order temporarily restraining EquitecWest from selling the property. This application was based a June 7, 2013 letter from Attorney Nikhil Bhatnagar, representing EquitecWest and Robert Jacobsen, a real estate broker and investor, to Power Default Services asserting that the property was in escrow at a price of \$3,000,000. Bhatnagar asked Fidelity National Title Company, the parent company of Power Default Services, to remove a notice that prevented EquitecWest from obtaining title insurance, and asked Power Default Services to rescind the notices of default and trustee’s sale.

On July 1, 2013, EquitecWest filed a demurrer to the complaint. The demurrer was overruled after a hearing on August 2, 2013. On August 2, the court also granted a preliminary injunction restraining EquitecWest from selling the property.

On August 28, ABC2 filed a demurrer. On September 18, Attorney Michael Yesk filed an answer on behalf of EquitecWest. On September 23, Yesk filed a special motion to strike the entire complaint on behalf of EquitecWest and ABC2. The motion asked for attorney fees and costs of \$225. On September 27, the court overruled a demurrer by ABC2 and ABC2 filed an answer three days later.

On October 11, 2013, Bank filed opposition to the special motion. Bank argued in part that the motion was untimely and was based on no evidence. Bank argued that defendants were reraising arguments from their demurrers and ABC2 had admitted in its answer it was incorporated in 2012. To establish the merit of its complaint, Bank relied on the supporting documents and a declaration by its attorney, John Ward, that he had personal knowledge of certain facts alleged in the complaint except for facts stated on information and belief. Defendants responded by filing a corrected memorandum of points and authorities in support of their motion, a reply to the opposition, multiple evidentiary objections to statements in Bank's opposition, and a request to take judicial notice of the entire file in case no. M121216.

***B. The Ruling***

After a hearing on October 25, the court filed an order on November 25, 2013. It declined to rule on defendants' evidentiary objections and request for judicial notice. It denied the motion to strike the equitable causes of action, namely declaratory relief and cancellation of the stipulated judgment, and granted the motion as to the tort causes of action alleging fraud and abuse of process. The order implicitly denied defendants' request for attorney fees.

### III. ANALYSIS<sup>2</sup>

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<sup>2</sup> In a request filed July 1, 2014, Bank asked for judicial notice of 14 documents. In a supplemental request filed May 18, 2015, Bank asked for judicial notice of two more documents. Defendants have objected to Bank's initial request and, on April 16, 2015, asked this court to take judicial notice of the results of a fictitious business name search for Sacramento County by attorney Yesk.

We deny defendants' request for judicial notice, as it is irrelevant to this litigation about the validity of a deed of trust secured by property in Monterey County whether AHMC filed a fictitious business name statement for ABC1 in Sacramento County.

We grant Bank's requests to take judicial notice of Exhibits 3 (a notice of default recorded on March 30, 2011), 4 (a substitution of trustee recorded on July 8, 2011), 5 (a notice of trustee's sale recorded on February 19, 2013), and 15 (an assignment of a deed of trust recorded on March 30, 2011). (Evid. Code, § 452, subd. (c); *Ragland v. U. S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 194; *Rader v. Thrasher* (1972) 22 Cal.App.3d 883, 889-890.) We also take judicial notice of the Certificate of Incorporation in New York of ABC2 dated March 16, 2012. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1484.) We also take judicial notice of the licenses issued to ABC1 and three other business names of AHMC by California's Commissioner of Corporations in 2004 and 2005 to do business as a finance lender and broker, and also of an October 15, 2007 order by the Commissioner revoking AHMC's license as a residential mortgage lender and loan servicer. (*Fellom v. Adams* (1969) 274 Cal.App.2d 855, 864; cf. *Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 855, fn. 2.) These business license documents are part of Exhibit 10 and are attachments to a declaration by a former counsel for AHMC filed in a Contra Costa County Superior Court action initiated on July 2, 2012 by attorney Yesk against ABC1 to cancel a deed of trust.

With the above-noted exception, we decline Bank's requests to take judicial notice of various documents including court orders purportedly filed in three different actions: the above-referenced Contra Costa County action (Exs. 6, 7, 8, 9, 10, and 11); a San Francisco County Superior Court action initiated on May 20, 2013 against ABC2 to cancel a deed of trust (Exs. 12, 13, 16); and a Delaware Bankruptcy Court proceeding involving AHMC, but not ABC1 (Exh. 2). Bank offers the state action documents mostly as evidence of a conspiracy to defraud that is not alleged in its complaint. The bankruptcy filings lack any official seal, stamp, or signature by a judge or court clerk. (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 914.) We also decline to notice whether American Home Mortgage Holdings, Inc., was an active New York corporation in 2014 (Ex. 1).

(Continued)

### ***A. Standard of Review***

Section 425.16 was enacted in response to “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (*Id.* at subd. (a).) It authorizes “a special motion to strike” “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . .” (*Id.* at subd. (b)(1).) The kinds of acts protected are primarily speaking and writing, including “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law . . . .” (*Id.* at subd. (e)(1).)

A trial court may need to answer two questions in evaluating a special motion to strike. First, has the moving party carried its burden of establishing “that the challenged cause of action is one arising from protected activity?” (*Equilon Enterprise v. Consumer Cause, Inc* (2002) 29 Cal.4th 53, 67 (*Equilon*); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cashman*); *Navellier v. Sletten* (2002) Cal.4th 82, 88 (*Navellier*).) “[A] defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute . . . .” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 (*Flatley*).)

If the defendant makes a sufficient showing, the second question is whether “the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1); *Equilon, supra*, 29 Cal.4th p. 67; *Cashman, supra*, 29 Cal.4th at p. 76; *Navellier, supra*, 29 Cal.4th at p. 88.) “[T]he plaintiff ‘must demonstrate

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Defendants’ objections to judicial notice have been resolved as explained above. In response to defendants’ motion to strike Bank’s appendix, we will disregard the parts of the appendix we find irrelevant.

that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ ” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, superseded by statute on other grounds as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547.) So long as the plaintiff shows a probability of prevailing on any part of its claim, that cause of action should not be stricken. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

Because a section 425.16 motion presents questions of law, on appeal we review the trial court’s ruling de novo. (*Flatley, supra*, 39 Cal.4th 299, 325-326.) This court has observed, “our review is conducted in the same manner as the trial court in considering an anti-SLAPP motion.” (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672; cf. *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573.)

### ***B. Probability of Prevailing on the Merits***

Defendants argue that there is not a probability that Bank will prevail on the merits, because Bank cannot demonstrate that it is a holder of the beneficial interest under the trust deed without proving possession of the promissory note secured by the deed.

#### **1. Bank’s Standing to Sue**

Defendants’ primary claim of error on appeal is that Bank cannot establish any likelihood of prevailing absent a demonstration that Bank is either the holder of the promissory note or is otherwise entitled to enforce it. Bank is required by the Civil Code, the Uniform Commercial Code, and common law to prove it is the current beneficiary of the loan.

##### **a. The Lender’s Existence**

Defendants contend that Bank must prove the existence of the lender that made the loan resulting in Bank’s beneficial interest. Defendants correctly point out that Bank’s complaint expressed some uncertainty about the corporate status of ABC1. However, we

have taken judicial notice that ABC1 was a business name of AHMC and was licensed to act as a finance lender in California by the Corporations Commissioner. While the trust deed identified the lender ABC1 as a “Corporation organized and existing under the laws of State [*sic*] of New York,” we regard this as adequate shorthand for “American Home Mortgage Corp., a corporation organized and existing under the laws of the State of New York, doing business as” ABC1. Defendants have provided no evidence raising a doubt that ABC1 made the loan documented in the trust deed and promissory note attached to the complaint.

#### **b. The Terms of the Security Agreement**

Defendants argue that Bank “has the burden of proving it is the loan beneficiary.” (Emphasis omitted.)

Documents such as a note and deed of trust relating to the same matter between the same parties and made as parts of one transaction should be read together. (Civ. Code, § 1642; *Trinity County Bank v. Haas* (1907) 151 Cal. 553, 555-556.) The promissory note attached to the complaint in this case named ABC1 as the “Lender” and stated, “The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder’.” The note provided that the borrower would be in default if the borrower did not make regular monthly payments. “If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount.” The note recited that it was a “uniform secured note” (capitalization omitted) and provided: “In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the ‘Security Instrument’), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That

Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note.”

The recorded deed of trust described itself as the security instrument. The deed provided in part: “The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, [the property].” “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”

Section 20 of the deed further provided that “[t]he 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.” Section 13 provided, “The covenants and agreements of this Security Instrument shall bind . . . and benefit the successors and assigns of Lender.” Section 22 of the deed provided that, following the borrower’s breach of the security instrument, “Lender” may notify the borrower of the default and give the borrower time to cure the default, after which “Lender” may invoke the power to accelerate the sums due and notify the trustee of its election to sell the property at public auction.

“[T]he power of sale exercised by the trustee in nonjudicial foreclosure is created by contract, not by statute.” (*Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 281.) The trust deed named MERS the beneficiary as lender’s nominee and authorized MERS to exercise all of the lender’s rights under the deed, including the right to foreclose if

necessary. It follows that MERS was authorized to transfer the note and deed of trust by assignment. Nothing in the note or deed of trust limited how MERS could transfer the beneficial interest created by the deed.

Defendants assert, “it has been adjudicated that MERS is a mere record keeper ‘that tracks the transfer of ownership interests and servicing rights in mortgage loans’ and doesn’t function as a note holder, or person otherwise entitled to enforce a note,” citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149. In fact, the cited decision says the opposite. “[A]nother court pointed out that ‘[u]nder the mortgage contract, MERS has the legal right to foreclose on the debtor’s property . . . . MERS is the owner and holder of the note as nominee for the lender, and thus MERS can enforce the note on the lender’s behalf.’” (*Id.* at p. 1158.)

*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (Fontenot) (disapproved on another ground by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4<sup>th</sup> 919, 939, fn. 13 (*Yvanova*)) more directly rejected the same argument. It involved a challenge by a borrower to a completed nonjudicial foreclosure. (*Id.* at pp. 260-261.) In part, the borrower challenged an assignment of the deed of trust by MERS, the nominal deed beneficiary, to HSBC Bank claiming that “MERS lacked the authority to assign the note because it was merely a nominee of the lender and had no interest in the note.” (*Id.* at p. 270.) The appellate court rejected this argument, noting “that MERS was acting as nominee for the lender, which *did* possess an assignable interest.” (*Ibid.*)

Defendants contend “the plain wording of the deed of trust gives the power of sale only to the holder of the note or the person otherwise entitled to enforce the note.” (Emphasis omitted.) They cite no provision in the deed referring to the holder of the

note.<sup>3</sup> We acknowledge that only the lender or a successor of the lender is entitled to declare a default, accelerate the balance, and elect to exercise the power of sale, but we see no requirement in the note or deed of trust that the lender's successor must have physical possession of the note in order to exercise the power of sale or otherwise enforce the lender's rights. We would be surprised to see such a self-imposed restriction in security instruments drafted by lenders to protect their investments. If there is any such restriction, it does not arise from the original security agreement.

**c. The Uniform Commercial Code**

Defendants also claim that the possession requirement comes from Article 3 of the Uniform Commercial Code. Defendants acknowledge the inapplicability of Article 9, which generally governs secured transactions. They also acknowledge that this court has indicated that the Uniform Commercial Code is inapplicable to nonjudicial foreclosures in *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*).

*Debrunner, supra*, 204 Cal.App.4th 433 considered a junior lienholder's contention that the validity of an assignment of the senior deed of trust was governed by Uniform Commercial Code provisions for transfer of negotiable instruments. *Debrunner* recognized that nonjudicial foreclosure proceedings in California "are governed by [Civil Code] sections 2924 through 2924k" and that many federal courts had concluded that those statutes "do not require that the note be in the possession of the party initiating the foreclosure." (*Debrunner, supra*, 204 Cal.App.4th at p. 440.) The court was unconvinced that the Civil Code sections were displaced by the Commercial Code. (*Id.* at p. 441.)

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<sup>3</sup> The trust deed's only references to the holder of the note appear in section 5 and require the borrower to assign rights to the proceeds of property insurance to the holder of the note.

A promissory note fits the definition of a negotiable instrument, though it is secured. Commercial Code section 3104<sup>4</sup> defines the characteristics of a negotiable instrument, including “(a) . . . an unconditional promise . . . to pay a fixed amount of money” that “(3) . . . may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to . . . realize on or dispose of collateral” and provides that “(e) [a]n instrument is a ‘note’ if it is a promise and is a ‘draft’ if it is an order.” (Cal. U. Com. Code, § 3104.) “Unconditional promise” is defined in Commercial Code section 3106, which includes “(b) A promise or order is not made conditional (1) by reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration . . . .” (Cal. U. Com. Code, § 3106.) “A reference to another writing does not of itself make the promise or order conditional.” (*Id.* at subd. (a).) In other words, it does not impair negotiability to provide collateral as security for repayment of a loan and to authorize accelerating the payments and selling the collateral in a referenced, separate document.

Division 3 of the Commercial Code describes how to transfer possession of a negotiable instrument. (Cal. U. Com. Code, §§ 3201, subd. (b) [“if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.”]; 3203, subd. (b) [“Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument”].) The statute contemplates partial transfers, providing, “If a transfer purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this division and has only the rights of a partial assignee.” (Cal. U. Com. Code, § 3203, subd. (d).)

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<sup>4</sup> We will refer to California’s version of the Uniform Commercial Code as the “Commercial Code” to distinguish it from the national version.

The Commercial Code also describes how to enforce a negotiable instrument and who is entitled to enforce it. Producing a negotiable instrument makes enforcement easier, but it is not a prerequisite. “[A] plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under Section 3301” if the validity of the signatures is either admitted or proved under Commercial Code section 3308, subdivision (a) “unless the defendant proves a defense or claim of recoupment.” (Cal. U. Com. Code, § 3308, subd. (b).) “Once signatures are proved or admitted a holder, by mere production of the instrument, proves ‘entitlement to enforce the instrument’ because under Section 3-301 a holder is a person entitled to enforce the instrument. Any other person in possession of an instrument may recover only if that person has the rights of a holder. Section 3-301. That person must prove a transfer giving that person such rights under Section 3-203(b) or that such rights were obtained by subrogation or succession.” (2 West’s U. Laws. Ann. (2004) UCC com. 2 to § 3-308, p. 180.)

The Commercial Code differentiates among the holder of an instrument as defined in Commercial Code section 1201, subdivision (b)(21)(A), a holder in due course as defined in Commercial Code section 3302, a nonholder in possession of an instrument, and a person not in possession. Commercial Code section 3301 states: “‘Person entitled to enforce’ an instrument means (a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the [destroyed, lost, or missing] instrument pursuant to Section 3309 or [a person with a dishonored instrument that was paid or accepted by mistake]. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument . . . .”

Thus, Division 3 of the Commercial Code contemplates that the successor of the original holder of a negotiable instrument may enforce the instrument when the instrument is in possession of an agent of the successor or even when the instrument has

been lost, destroyed, or misplaced. (See *In re Veal* (Bankr. 9th Cir. 2011) 450 B.R. 897, 910 [Article 3 of the Uniform Commercial Code does “not absolutely require physical possession of a negotiable instrument in order to enforce its terms.”].) California’s Uniform Commercial Code does not require Bank to produce or possess the promissory note in order to resolve a dispute with the property owner about whether Bank has a secured interest in the property.

#### **d. Validity of the Assignment**

Bank has alleged that its status as beneficiary of the February 2006 deed of trust is a matter of record due to the assignment by MERS of the beneficial interest and also of its interest in the promissory note recorded on March 30, 2011. Whether or not an assignment of a deed of trust must be in writing and recorded, in this case a written assignment to Bank was recorded. We have taken judicial notice of a certified copy of an assignment bearing the stamp of the Monterey County Recorder, which includes the name and title of the County Recorder, the time and date of filing, the document number, and a bar code, and also a signature of an individual on behalf of MERS acknowledged by a notary public in Florida.

Defendants rely on *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, contending that Bank is required to prove the authority of the person who signed the assignment on behalf of MERS. *Cockerell* states, “In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue [citation], but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee.” (*Id.* at p. 292.) We note the plaintiffs in that case were required to make more than a prima facie showing, as it did not involve a special motion to strike.

The plaintiffs on appeal in *Cockerell* “contended that the court erred in finding that [they] were not the owners of the third trust deed and note by virtue of assignment.

This is, essentially, a contention that the evidence is insufficient to support the findings of the court in this respect.” (*Cockerell, supra*, 42 Cal.2d at p. 289.) In evidence was a promissory note payable to “‘Crestmore Co., a Limited partnership’” that was endorsed on the reverse side by an assignment to the plaintiffs by “‘P. H. Wierman’” on behalf of Crestmore Co. (*Id.* at pp. 289-290.) The same individual, on behalf of Crestmore Co., also signed a plain sheet of paper asserting that the plaintiffs were the beneficiaries of an assignment of the third deed of trust. (*Id.* at p. 290.) One plaintiff testified that the signature was that of “Paul Wierman . . . a member of the Crestmore Company . . . .” (*Id.* at pp. 290-291.) The Supreme Court observed that there was no competent evidence of the nature of the assignor company or of the authority of “P. H. Wierman” to bind that company. (*Id.* at p. 292.)

Relying on *Fontenot, supra*, 198 Cal.App.4th 256, Bank responds that defendants “may not challenge the assignment of the Loan to” Bank. *Fontenot* has subsequently been disapproved by *Yvanova, supra*, 62 Cal.4th 919, 939, footnote 13, about whether a borrower has standing to challenge the assignment of a deed of trust.

“An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff’s case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff’s claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim.” (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 906.) A plaintiff can successfully resist a special motion to strike by a prima facie showing of facts that would warrant a judgment if accepted. The plaintiff is not required to produce conclusive evidence of each element of its case to defeat a special motion to strike, particularly when the defendant presents no contrary evidence.

While the capacity of the signer on behalf of MERS may not be clear from the face of the assignment, Bank has produced prima facie, though not conclusive, evidence that it is the assignee of the beneficial interest in the deed of trust. The assignment bears

a certificate of acknowledgment of the signature on behalf of MERS by a notary public in Florida. A “certificate of acknowledgement” of a writing that meets the requirements of the Civil Code “is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed.” (Evid. Code, § 1451.) “Any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made.” (Civ. Code, § 1189, subd. (b).) In Florida, “[a] notary public is authorized to take the acknowledgments of deeds and other instruments of writing for record, as fully as other officers of this state.” (Florida Stat. Ann., § 117.04.)

We conclude that Bank has made a prima facie showing of its probability of prevailing on its claim of extrinsic fraud by producing the following evidence. The original loan to Norman Eckersley was made by ABC1 and was secured by property in Monterey County. ABC1 was then a business name of a licensed finance lender, AHMC. ABC1 designated MERS as the nominal beneficiary and MERS later assigned the beneficial interest to Bank. The borrower’s interest apparently passed to Norman’s wife Rosemary upon his death and then to defendant EquitecWest one day after its incorporation. If the borrower or the borrower’s successor defaults in making loan payments, Bank as the current beneficiary of the trust deed would be authorized to declare the default and elect to conduct a nonjudicial foreclosure. However, the deed of trust that is the source of Bank’s security interest has been canceled by a judgment in an action that did not involve Bank and did involve a stipulation between EquitecWest and ABC2, an entity that readily admitted it was not a party to the loan. Defendants have produced no evidence defeating Bank’s showing as a matter of law. Instead, they simply argue that Bank has not presented enough evidence yet.

### **e. Evidence of Default**

Defendants claim that Bank cannot establish standing to sue without providing evidence that the promissory note is in default. They misunderstand the nature of this action.

Bank has requested declaratory relief and cancellation of a judgment in a prior action resulting from a stipulation between defendants. The judgment canceled a deed of trust that is the source of Bank's beneficial interest in the property. EquitecWest is the current property owner. Bank and EquitecWest have competing claims of title to the property, as EquitecWest defends the stipulated judgment.

We understand an action to quiet title as essentially a special form of declaratory relief as to the nature of parties' competing claims to title. A quiet title claim has one essential element, that two or more parties are making adverse claims to the title of the same property. (§§ 760.020, subd. (a); 761.020, subd. (c).) The remedy provided by California's quiet title statute is cumulative and not exclusive. (§ 760.030, subd. (a).) Civil Code section 3412, on which Bank relies, authorizes cancellation of a written instrument if "there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable . . . ." The validity of Bank's security interest in the property does not depend upon whether the borrower or the borrower's successor is in default. This is not an action seeking judicial foreclosure nor an action seeking to enjoin a nonjudicial foreclosure. Proof of default is unnecessary.

### ***C. Denial of Attorney Fees***

Defendants claim an attorney fee award was mandatory because they prevailed on part of their special motion to strike. In the trial court they requested \$225 in attorney fees and costs. Their request was implicitly denied when the court's ruling failing to mention it.

Section 425.16 subdivision (c)(1) provides in relevant part: "[I]n any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be

entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

While defendants may not be liable in tort for compensatory and punitive damages, they remain potentially liable for any incidental damages resulting from clouding Bank's title if Bank succeeds in proving its claims. Under these circumstances, we find no abuse of discretion in the trial court implicitly denying defendants' request for attorney fees. *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 218; *Moran v. Endres* (2006) 135 Cal.App.4th 952, 955.)

#### ***D. Frivolity of Appeal***

In a half page of argument, Bank contends the appeal should be dismissed as frivolous. After all, defendants "concede their actions are illegal as a matter of law." We see no such concession. If Bank truly regarded the appeal as frivolous, we doubt it would have requested judicial notice of 16 exhibits it did not produce in the trial court. "An appeal that is simply without merit is *not* by definition frivolous . . . ." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) This request itself verges on frivolous.

### **IV. DISPOSITION**

The orders partly denying the special motion to strike and denying attorney fees to defendants are affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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MÁRQUEZ, J.

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