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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

GEORGE GEHRON et al.,

Plaintiffs and Appellants,

v.

BARRY J. NICHOLAS et al.,

Defendants and Respondents.

E061855

(Super.Ct.No. INC1302638)

OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman,  
Judge. Affirmed.

Bret D. Lewis for Plaintiffs and Appellants.

The Dreyfuss Firm and Lawrence J. Dreyfuss for Defendant and Respondent, T.D.  
Service Company.

No appearance for Defendant and Respondent, Barry J. Nicholas.

No appearance for Defendant and Respondent, Aliso Pacific Realty Advisors.

No appearance for Defendant and Respondent, Barry Fast.

No appearance for Defendant and Respondent, ARP Real Estate 1, LLC.

Plaintiffs and appellants George and Cheryl Gehron and the Gehron Family Trust are property owners who defaulted on a real estate loan. The gravamen of their suit against defendants and respondents Barry J. Nicholas, Aliso Pacific Realty Advisors, Barry Fast, ARP Real Estate 1, LLC (ARP), and T.D. Service Company (T.D)<sup>1</sup> (collectively defendants) is that defects in the securitization or assignment of the loan documents and in the substitution of trustee deprived defendants of the authority to foreclose.<sup>2</sup> Plaintiffs appeal from a judgment dismissing the entire action, entered after the court sustained defendants' demurrers to the first amended complaint (FAC) without leave to amend. We affirm.

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<sup>1</sup> T.D. is the only respondent that filed a respondent's brief.

<sup>2</sup> This appeal arises from the same complaint as another appeal before this court, case No. E060701. The respondents in case No. E060701 are the defendants named in plaintiffs' complaint that are not parties to this appeal, i.e., Bank of America, N.A., for itself and as successor in interest etc., Merrill Lynch Mortgage Investors, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., U.S. Bank, N.A. as successor trustee, etc., First Franklin Financial Corporation and Mortgage Electronic Registration Systems, Inc.

FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

Plaintiffs executed a deed of trust in May 2007 against real property located in Palm Springs. The deed of trust secured a \$370,500 promissory note in favor of Nationpoint. Later in 2007, the loan was pooled with other loans in a securitized investment trust. On March 11, 2009, Home Loan Services, Inc. executed a substitution of trustee which substituted T.D. as the trustee in place of Fidelity National Title Company (Fidelity). T.D. recorded a notice of default and election to sell on March 12, 2009. On April 9, 2009, T.D. recorded the substitution of trustee.

On September 16, 2009, T.D. recorded a notice of trustee's sale. T.D. recorded another notice of trustee's sale on August 10, 2012, giving plaintiffs notice that the sale would be held on September 4, 2012. ARP purchased the property at the trustee's sale, and on September 13, 2012, T.D. recorded a trustee's deed upon sale.

On August 22, 2013, plaintiffs filed the FAC against 17 parties, including defendants. The FAC purports to assert 18 claims: wrongful foreclosure, quiet title, declaratory relief, cancellation of instruments, five claims based on unfair business practices (Bus. & Prof. Code, § 17200), fraudulent concealment, breach of the covenant

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<sup>3</sup> We base our summary of the facts on the complaint and the real property records attached to defendants' requests for judicial notice. (*Etheridge v. Reins Internat. California, Inc.* (2009) 172 Cal.App.4th 908, 914.)

of good faith and fair dealing, conversion, trespass to chattels, and money had and received. Defendants filed demurrers to the claims asserted against them in the FAC.<sup>4</sup>

At the December 23, 2013, hearing on the demurrers,<sup>5</sup> the court held that plaintiffs' reliance on the holding of *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) for the allegation that improprieties in the securitization and assignment of the loan deprived the defendants of authority to foreclose was misplaced. The court stated that "[v]irtually no other court has held that a borrower has standing to [assert such securitization and assignment arguments] because the borrower is not a party to the alleged securitization." It cited several post-*Glaski* cases holding that borrowers lack standing to challenge nonjudicial foreclosure proceedings based on alleged errors in the securitization or assignment of the loan documents.

The court concluded that all of plaintiffs' claims depended on the allegation that defendants lacked authority to initiate foreclosure proceedings based on alleged errors in

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<sup>4</sup> Plaintiffs asserted quiet title, declaratory relief, cancellation of instruments, one of their unfair business practices claims, conversion, and trespass to chattels claims against defendants. Plaintiffs asserted wrongful foreclosure and money had and received claims against T.D. Plaintiffs asserted a trespass claim against Barry J. Nicholas, Aliso Pacific Realty Advisors, Barry Fast, and ARP.

<sup>5</sup> Barry J. Nicholas, Aliso Pacific Realty Advisors, Barry Fast, and ARP jointly filed a demurrer on August 28, 2013. T.D. filed a demurrer on September 30, 2013. The defendants that are not a party to this appeal, but that are parties to the appeal in case No. E060701, jointly filed a demurrer on September 26, 2013. The court ruled on each of these demurrers at the December 23, 2013, hearing.

the assignment of the loan documents. The court therefore ruled that the FAC, in its entirety, failed as a matter of law. The court sustained defendants' demurrers and, on July 13, 2014, issued judgment dismissing the entire action without leave to amend.<sup>6</sup>

## II

### DISCUSSION

#### 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.” (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.)

“ ‘We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court’s stated reasons, if any, supporting its

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<sup>6</sup> Plaintiffs initially appealed the court’s minute order of December 23, 2013. The trial court issued the July 13, 2014, judgment at plaintiffs’ request after this court informed plaintiffs that an appeal would not lie from an unsigned minute order.

ruling; we review the ruling, not its rationale. [Citation.]’ ” (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

B. *The Court Properly Dismissed Plaintiffs’ Claims*

Plaintiffs’ opening brief explicitly addresses only their claims for wrongful foreclosure, quiet title, declaratory relief, cancellation of instruments, conversion, and trespass to chattels. As such, they have waived any claim of error with respect to the dismissal of their other claims, i.e., for unfair business practices, fraudulent concealment, breach of the covenant of good faith and fair dealing, and money had and received. (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 260 [“An appellant’s failure to raise an argument in its opening brief waives the issue on appeal”].)

Plaintiffs’ wrongful foreclosure, quiet title, declaratory relief, conversion, and trespass to chattels claims against defendants are based on an allegation that purported flaws in the chain of title to the note and the deed of trust rendered the assignments void and that the substitution of trustee (whereby T.D. replaced Fidelity) was invalid under Civil Code section 2934a. Plaintiffs argue that, because the assignments and substitution were invalid, defendants lacked authority to foreclose on the property.

California courts have held that a borrower lacks standing to challenge an assignment absent a showing of prejudice. (E.g., *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 85-86 (*Siliga*) [“Absent any

prejudice, [the plaintiffs] have no standing to complain about any alleged lack of authority [to initiate foreclosure proceedings]”).) A borrower has no claim based on imperfections in the foreclosure process (such as allegedly improper substitutions of trustee) unless the borrower can demonstrate the imperfection caused prejudice. (See, e.g., *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.) A transaction that merely substitutes one creditor for another or one company to process the foreclosure proceedings for another, “without changing [a plaintiff’s] obligation under the note,” does not cause the plaintiff prejudice if [plaintiff] “effectively concedes [plaintiff] was in default” and “does not allege that the transfer . . . interfered in any manner with [plaintiff’s] payment of the note.” (*Ibid.*)

Here, plaintiffs were not prejudiced by the alleged improper assignments or substitution of trustee because they did not tender payment or allege a valid excuse for not tendering.<sup>7</sup> (See, e.g., *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1508 ] [Fourth Dist., Div. Two] [plaintiff has no claim to challenge an allegedly improper substitution of trustee where plaintiff did not “tender payment and cure the default” and therefore suffered no prejudice].) Because plaintiffs cannot demonstrate prejudice, their claims against defendants for quiet title, declaratory relief,

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<sup>7</sup> The excuse for failing to tender alleged in the FAC is that defendants lacked the authority to foreclose based on the alleged improper assignments and substitution of trustee.

conversion, and trespass to chattels fail as a matter of law, and the trial court properly dismissed them. Additionally, we note that even if plaintiffs had not waived any challenge to the dismissal of their unfair business practices, fraudulent concealment, breach of the covenant of good faith and fair dealing, and money had and received claims, those claims also fail as a matter of law because they too are based on the alleged improper assignments and invalid substitution of trustee.

In arguing that their claims should not have been dismissed, plaintiffs rely on *Glaski*. In *Glaski*, the court determined the borrower had standing to attack a void assignment to which it was not a party. (*Glaski, supra*, 218 Cal.App.4th at p. 1095.) With the exception of *Glaski*, California cases hold that a borrower lacks standing in postforeclosure actions to challenge an assignment absent a showing of prejudice. (E.g., *Siliga, supra*, 219 Cal.App.4th at p. 86.) We are not aware of any California case that has followed *Glaski* on the issue of a borrower's right to challenge a foreclosure based on an allegedly improper assignment.<sup>8</sup> Unless and until the California Supreme Court requires

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<sup>8</sup> We doubt that *Glaski* was correctly decided. (See *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1529 [“It is true that we typically follow the decisions of other appellate districts or divisions, but only if we lack good reason to disagree”].) Among other things, *Glaski* relies on federal case law interpreting the law of other jurisdictions. (*Glaski, supra*, 218 Cal.App.4th at pp. 1094-1095.)

us to do otherwise, we will follow what we view to be the better reasoned authority of cases like *Siliga*.<sup>9</sup>

With regard to the conversion and trespass to chattels claims, plaintiffs' opening brief asserts that defendants have committed an unauthorized use of their personal property. Plaintiffs do not explain, legally or logically, how defendants have committed an unauthorized use of their personal property. Similarly conclusory is plaintiffs' assertion, supported by no argument or citation to the record, that "the trial court seemed to apply a summary judgment standard to Appellants' FAC." Because "we may disregard conclusory arguments that are not supported by *pertinent* legal authority or fail to disclose [appellant's] reasoning," we do not address these arguments. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287, italics added.)

C. *Plaintiffs Have Not Met Their Burden Regarding Amendment*

When a court sustains a demurrer without leave to amend, the plaintiff has the burden of proving how an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) If the plaintiff does not demonstrate on appeal "how he can amend his complaint, and how that amendment will change the legal effect of his pleading," we must presume plaintiff has stated his allegations "as strongly and as

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<sup>9</sup> The California Supreme Court has granted review of several cases in which the Court of Appeal had rejected *Glaski*—the lead case is *Yvanova v. New Century Mortgage Corp.* (2014) 226 Cal.App.4th 495, review granted August 27, 2014, S218973.

favorably as all the facts known to him would permit.” (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 902.)

Plaintiffs propose adding two new allegations to their complaint: (1) that the notice of default states that First American Title Company signed as agent for [T.D] and (2) that the substitution of trustee form is signed by Home Loan Services, Inc. We are already aware of these facts as they are contained in the real property records judicially noticed during the demurrer proceedings. Because these facts do not cure the fatal defect in plaintiffs’ claims—the failure to demonstrate prejudice from the alleged improper assignments and substitution of trustee—plaintiffs have not shown that they can amend their complaint to state their claims sufficiently.

### III

#### DISPOSITION

The judgment dismissing plaintiffs’ claims is affirmed. Defendants shall recover their costs on appeal.

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CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

KING  
J.