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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SONI MELGAR,

Plaintiff and Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY et al.,

Defendants and Respondents.

G050257

(Super. Ct. No. 30-2012-00607059)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Soni Melgar, in pro. per., for Plaintiff and Appellant.

Wright, Finlay & Zak, T. Robert Finlay and Lukasz I. Wozniak for
Defendants and Respondents.

Soni Melgar, in propria persona,¹ brought an action against her lender and other financial institutions arising from her 2010 default on a loan of her residence. Melgar maintains the trial court erred in sustaining without leave to amend a demurrer to her third amended complaint (TAC) and summary judgment on the remaining causes of action. We conclude her contentions lack merit, and we affirm the judgment.

I

On May 12, 2005, Melgar executed an adjustable rate note (Note) secured by a deed of trust (DOT), which was recorded against the real property located at 1206 Dorset Lane in Costa Mesa, California. The Note was secured in favor of New Century Mortgage Corporation (New Century). In June 2005, the beneficial interest under the Note and the DOT was transferred to Deutsche Bank National Trust Company (Deutsche), as indenture trustee, and in July 2007, the servicing rights to Melgar's loan were transferred to Carrington Mortgage Services, LLC (CMS). Four years later, in July 2011, Melgar defaulted on the loan.

We take the following facts from the operative TAC in this action. On July 16, 2011, Melgar missed her scheduled mortgage payment and immediately telephoned CMS and stated she had been “cut off financially by her estranged spouse” and divorce attorney represented that she would receive spousal support and a “settlement sufficient to remedy the arrears.” Melgar claimed she was also in the process of “rebooting her licensed private investigation business.” CMS assured her it would “work with her and to not worry.”

¹ Although a self-represented litigant is not excused from complying with the rules governing appropriate pleading practice (see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 [“mere self-representation is not a ground for exceptionally lenient treatment”]), whenever possible, we do not strictly apply technical rules of procedure in a manner that deprives litigants of a hearing. (Cf. *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 432 [“we carefully examine a trial court order finally resolving a lawsuit without permitting the case to proceed to a trial on the merits”].)

On August 5, 2011, Melgar received in the mail notification of an intent to foreclose. On August 19, 2011, Melgar spoke with “Amy,” a CMS representative, who reassured her CMS would work with her. Amy referred Melgar to Ric Frataccia who repeated he would work with Melgar and indicated he could possibly refinance the loan at a lower interest rate. Frataccia stated he would mail Melgar the required paperwork and instructed Melgar to contact him when she received it. Frataccia did not mention any other options or remedies to foreclosure.

Melgar claimed several CMS agents reassured her there was no foreclosure sale pending and to submit the requested documents. Melgar submitted documentation. On January 20, 2012, Melgar called and spoke to “Mike,” a CMS representative, about a “NOTS” she had received. Mike advised Melgar her loan was not being modified or being evaluated for modification. He stated the house would be sold and CMS was not interested in any of the other remedies Melgar suggested. Mike refused to answer questions about the amount of arrearages. He used “abrasive and derogatory language” and rudely hung up on Melgar.

On February 15, 2015, Melgar sent CMS a qualified written request (QWR). Seven days later, on February 22, the property was auctioned and because there was no offer on the minimum bid, “a NOTS was recorded” in favor of Deutsche. On February 23, Melgar received two notices to quit. On February 29, Melgar sent a second copy of her QWR and requested clarification of the two notices to quit.

In early March 2012, Melgar received written confirmation CMS received the QWR. At the end of March 2012, CMS sent Melgar notification it was not the originator of the loan and Deutsche held the note. In April, Deutsche filed an unlawful detainer action against Melgar.

The operative TAC alleges the following causes of action: (1) wrongful foreclosure, (2) fraud, (3) promissory estoppel, (4) violations of California Rosenthal Fair

Debt Collection Practices Act (RFDCPA), (5) violations of the Fair Employment and Housing Act (FEHA), (6) unfair and deceptive business practices UCL (UBP,) (7) negligence, (8) slander of title, (9) intentional infliction of emotional distress (IIED), (10) quiet title, (11) declaratory relief, and (12) breach of oral executed agreement.

CMS and Deutsche demurred to the TAC. The trial court sustained the demurrer without leave to amend as to claims for wrongful foreclosure, violations of the RFDCPA, violations of FEHA, slander of title, quiet title, and declaratory relief. It overruled the demurrer as to the causes of actions for fraud, promissory estoppel, UBP, negligence, IIED, and breach of oral executed contract.

Next, CMS and Deutsche filed motions for summary judgment, or in the alternative, for summary adjudication of issues. The court granted the summary judgment and on July 14, 2014, entered a judgment in favor of CMS and Deutsche. Melgar challenges the demurrer and summary judgment rulings.

II

A. *Home Affordable Mortgage Program (HAMP)*

“As authorized by Congress, the United States Department of the Treasury implemented the [HAMP] to help homeowners avoid foreclosure during the housing market crisis of 2008. ‘The goal of HAMP is to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels, without discharging any of the underlying debt.’ [Citation.]” (*West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 786 (*West*).

The program was best explained in *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 556-557 (*Wigod*). “In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act, P.L. 110-343, 122 Stat. 3765. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required

the Secretary of the Treasury, among many other duties and powers, to ‘implement a plan that seeks to maximize assistance for homeowners and . . . encourage the servicers of the underlying mortgages . . . to take advantage of . . . available programs to minimize foreclosures’ 12 U.S.C. § 5219(a). Congress also granted the Secretary the authority to ‘use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.’ [Citation.] [¶] Pursuant to this authority, in February 2009 the Secretary set aside up to \$50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure. The Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program. In exchange, servicers would receive a \$1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers ‘shall perform the loan modification . . . described in . . . the Program guidelines and procedures issued by the Treasury . . . and . . . any supplemental documentation, instructions, bulletins, letters, directives, or other communications . . . issued by the Treasury.’ In such supplemental guidelines, Treasury directed servicers to determine each borrower’s eligibility for a modification by following what amounted to a three-step process:

“First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower’s primary residence; the mortgage payments were more than 31 percent of the borrower’s monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than \$729,750.

“Second, the servicer calculated a modification using a ‘waterfall’ method, applying enumerated changes in a specified order until the borrower’s monthly mortgage payment ratio dropped ‘as close as possible to 31 percent.’

“Third, the servicer applied a Net Present Value (NPV) test to assess whether the modified mortgage’s value to the servicer would be greater than the return on the mortgage if unmodified. The NPV test is ‘essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.’ [Citation.] If the NPV result was negative—that is, the value of the modified mortgage would be lower than the servicer’s expected return after foreclosure—the servicer was not obliged to offer a modification. If the NPV was positive, however, the Treasury directives said that ‘the servicer MUST offer the modification.’ Supplemental Directive 09-01.” (*Wigod, supra*, 673 F.3d at pp. 556-557, fn. omitted.)

The details of the HAMP program have been revised many times. “The most recent compilation of program requirements for non-GSE mortgagees and servicers is the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages (4.3), dated September 16, 2013 (hereinafter cited as MHA Handbook 4.3) available on-line at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_43.pdf. A table listing several dozen “supplemental directives” to implement HAMP can be found at pages 17-20 of the MHA Handbook 4.3.” (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 13:180, p. 13-667, fn. 5.)

HAMP “does not provide an individualized remedy that can be enforced affirmatively by homeowners whose lenders do not offer a palatable modification option; rather, these federal programs operate by providing incentives to institutions and do not mandate legal compliance with a specific loan-by-loan standard for obligatory modifications.” (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 13:180, p. 13-667, fn. omitted.) However, a homeowner may acquire enforceable contractual rights by entering into a trial loan modification contemplated by HAMP, and “the processes and standards provided by these programs are relevant in determining contract rights that exist or may arise from negotiations between a borrower and lenders. In addition, even if

the federal program does not provide a cause of action, the lender's conduct in negotiating and contracting with borrower is subject to state law remedies." (*Ibid.*, fns. omitted.)

In the *Wigod* case, the court clarified HAMP "does not preempt or otherwise displace state law causes of action. The court also recognized a borrower may assert state law claims, such as breach of contract, based directly on a TPP agreement because the borrower is in direct privity with the lender or loan servicer. [Citation.]" (*West, supra*, 214 Cal.App.4th at p. 788.) In her briefing, Melgar clarifies she is not attempting to allege "a HAMP private cause of action" (original capitalization omitted), but rather relies on HAMP violations to support her state causes of action.

B. Demurrer Challenge Forfeited

In this case, the trial court sustained the demurrer without leave to amend six causes of action. The claims for wrongful foreclosure, slander of title, and quiet title were premised on the argument CMS and Deutsche lacked standing to foreclose. The claim for violations of the RFDCPA was based on the alleged promise to evaluate Melgar for a HAMP modification and not proceed with foreclosure. The claim for violations of FEHA was premised on the contention CMS and Deutsche discriminated against Melgar. The claim for declaratory relief restated claims made in the other causes of action.

In her opening brief, Melgar begins by providing a long list of issues and questions for appeal, but none relate specifically to the court's ruling on the demurrer. In the next section of her brief, Melgar mentions she is seeking appellate review of the court's orders granting summary judgment and "select causes of action on demurrer causes." Melgar also mentions in her briefing the standard for reviewing orders sustaining demurrers and motions for summary judgments. She observes the court's rulings were erroneous. Yet, nowhere in her briefing does Melgar *explain why* the court's ruling on the demurrer was incorrect. Indeed, Melgar does not contend or explain

why the court was wrong and the pleadings stated facts sufficient to constitute a cause of action.

We recognize that generally in reviewing a demurrer order, “[W]e independently evaluate the pleading, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context.” (*Milligan v. Golden Gate Bridge Highway & Transportation Dist.* (2004) 120 Cal.App.4th 1, 5-6.) However, it was Melgar’s responsibility to support claims of error with meaningful argument and citation to authority. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) “When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases without any discussion of their application to the present case results in forfeiture. [Citations.] We are not required to examine undeveloped claims or to supply arguments for the litigants. (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984-985; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [it is not the court’s function to serve as the appellant’s backup counsel].)” (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

B. Summary Judgment Ruling Affirmed

The trial court granted summary judgment on the ground it was undisputed Melgar “did not make any effort to tender the amounts due on the loan, which tender is a prerequisite to setting aside a trustee’s sale and any causes of action ‘implicitly integrated’ with the alleged irregular sale. The [c]ourt finds that all of the causes of action in the TAC pertain to the alleged wrongful sale of the property, and therefore[,] fail for lack of tender.” In its written order, the court summarized all of Melgar’s arguments regarding HAMP and tender. It ruled, “Although [Melgar] argues that the [tender] was satisfied by her submission [of] the loan modification application to [CMS on December 8 and 23 in 2011] . . . the [c]ourt finds that such submission did not satisfy

the tender rule.” In addition, the court explained, “[T]he causes of action for fraud, promissory estoppel, unfair and deceptive business practices, negligence, [IIED], and breach of oral executed contract, which causes of action remain at issue in the TAC, are ‘implicitly integrated’ with the allegations of an irregular sale and all of [Melgar’s] damages result from the loss of property via the foreclosure sale. [Citation].”

On appeal, Melgar argues the trial court erroneously relied on the tender rule as a reason to grant summary judgment. She asserts tender was not required for the following reasons: (1) it would be against federal and California public policy and legislative intent; (2) HAMP forbids tender; (3) tender would chill access to the legal system by borrowers; (4) requiring tender is inequitable in this case; and (5) the foreclosing entity’s actions were void. She is wrong.

“It is settled that an action to set aside a trustee’s sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security. [Citations.] This rule is premised upon the equitable maxim that a court of equity will not order that a useless act be performed. ‘Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention.’ [Citation.]” (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579 (*Arnolds*).

Courts have held the tender rule applies to any cause of action “‘implicitly integrated’” with an irregular, and thus, voidable foreclosure sale. (*Arnolds, supra*, 158 Cal.App.3d at p. 579; *Karlsen v. American Savings and Loan Assn.* (1971) 15 Cal.App.3d 112, 121 [cause of action for breach of oral agreement to postpone trustee’s sale was implicitly integrated with the voidable sale and therefore subject to the tender rule].) “A cause of action ‘implicitly integrated’ with the irregular sale fails unless the trustor can allege and establish a valid tender. [Citation.]” (*Arnolds, supra*,

158 Cal.App.3d at p. 579.)

All of Melgar's causes of action expressly sought to unwind the foreclosure sale. Her claims for wrongful foreclosure, slander of title, quiet action, and declaratory relief alleged the sale was void and requested cancellation of the sale as a remedy. Her claims for promissory estoppel and UBP sought a court order requiring CMS to evaluate a HAMP modification, which as a practical matter also served to set the sale aside. Although some of these causes of action did not survive the demurrer, the remaining claims were implicitly integrated with the wrongful foreclosure allegations. Melgar does not dispute the court's conclusion her causes of actions were "implicitly integrated" with her goal proving wrongful foreclosure and setting aside the sale of her home. Thus, we need not analyze further the trial court's determination the tender rule applied to all of Melgar's remaining causes of action. In dispute is whether the tender rule should not apply because it falls within one of the legally recognized exceptions to the rule.

We do not agree with Melgar's insistence the "HAMP directives" forbid tender. To support her argument, Melgar improperly relies on a statement contained in the MHA Handbook. Specifically, in the handbook's discussion of factors impacting HAMP eligibility, it provides there shall be no "up-front contribution." It explains, "The servicer may not require a borrower to make any 'good faith' payment or up-front cash contribution to be considered for HAMP." In the same section, the MHA Handbook also provides the servicer cannot require a borrower to waive legal rights as a condition of HAMP and a borrower can be in active litigation and still be eligible for HAMP.

Melgar equates an up-front cash contribution as being the same thing as tender. It is not. Tender requires an ability to pay the full amount due on the loan. A cash contribution or "good faith payment" need not be the full amount owed on the loan. In the context of a borrower seeking HAMP assistance, the handbook simply states the servicer cannot charge a fee to be considered for the program. The MHA Handbook does not eliminate the equitable principle of tender. And in any event, the MHA Handbook

merely contains guidelines related to HAMP modifications and these guidelines have no legally binding effect nor eliminate the legal requirement of tender. Stated another way, the MHA Handbook's guidelines are not codified rules of law.² Finally, we note Melgar admitted she did not raise any individual actions under HAMP, and there was no evidence Melgar was asked to make any payment before her HAMP application would be considered.

Second, Melgar argues that requiring her to satisfy the tender rule would be inequitable and, therefore, against public policy. She maintains the concept of tender is contrary to the legislative intent because it chills access to the legal system. In essence, Melgar is saying the circumstances of this case should be treated as an exception to the tender rule. She cites several cases discussing exceptions to the tender requirement.

“Our review of the case law discloses four exceptions [to the tender rule]. [¶] First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. [Citations.] [¶] Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or set off against the beneficiary. In such cases, it is deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. [Citation.] [¶] Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale. (*Humboldt Sav. Bank v. McCleverty* (1911) 161 Cal. 285, 291, (*Humboldt*)). . . . [¶] Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face. [Citation.]” (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113.)

There is no evidence to support application of the first exception. Although Melgar alleged she disputed the default amount set forth in the notice of default, she did

² This answers Melgar's contention the Legislature intended to eliminate the tender rule anytime a borrower seeks assistance through the HAMP program.

not dispute the existence or validity of the underlying debt. The second exception is also inapplicable because there was no evidence Melgar had a counter claim or set off that was greater than or equal to the amount owed to the bank.

With respect to the third exception, Melgar cites to *Humboldt, supra*, 161 Cal. at page 291, to support her argument the circumstances of her case are extremely inequitable, eliminating the requirement of tender. In *Humboldt*, defendant's deceased husband borrowed \$55,300 from the bank secured by two pieces of property. Defendant had a \$5,000 homestead on one of the properties. (*Id.* at p. 287.) When defendant's husband defaulted on the debt, the bank foreclosed on both properties. The court rejected the bank's argument that defendant had to tender the entire debt as a condition precedent to having the sale set aside. "Under the circumstances disclosed by this record, the defendant would be subjected to very evident injustice and hardship if her right to attack the sale were made dependent upon an offer by her to pay the whole debt. The debt was not hers, and she was not liable for any part of it. Her only interest was in the homestead property, which, with other land, was held as security for [defendant's husband's] note. The property which she was seeking to save from the effect of the sale was worth, according to the finding of the court, \$5,000, while the property in which she had no interest was worth over \$57,000." (*Id.* at p. 291.)

The *Humboldt* case is not factually analogous to the one before us. Melgar had an interest in the entire property and was responsible for the entire loan amount. And Melgar failed to prove her situation was equally inequitable as the wife's in *Humboldt*. The gravamen of Melgar's complaint is she submitted HAMP documents seeking a loan modification that the bank failed to consider or properly evaluate. An argument could be made that it would be inequitable to impose the tender rule if it could be shown Melgar submitted adequate documentation to support a loan modification to halt foreclosure proceedings, and the bank had no valid excuse for not evaluating or agreeing to a loan modification. However, to invoke the inequity exception to tender, Melgar would need to

establish she would have qualified for a loan modification if her paperwork had been considered. It is not enough to assert the paperwork was not evaluated. Melgar could not be relieved from the tender rule if she would not have qualified under HAMP for a loan modification.

On appeal, Melgar does not assert there is evidence the loan modification paperwork she actually submitted would have resulted in a loan modification agreement and prevented the foreclosure sale. Contrary to Melgar's contention, we are not concerned that application of the tender rule in this case will chill access to the legal system and the HAMP program for other borrowers who can demonstrate they would have qualified for a loan modification.

We are also not persuaded by Melgar's alternative assertion on appeal that tender of the full debt owed "would unjustly enrich CMS and REMIC as it was not expecting payment in full for another 27 or more years." There is no dispute Melgar defaulted on the loan and under the terms of the loan CMS and REMIC could reasonably expect payment of owed money or receive the proceeds via a foreclosure sale of the property securing the debt.

The fourth exception to the tender rule is inapt because there was no evidence suggesting the trustee's deed was void on its face. Melgar suggests there is a fifth exception, i.e., when the borrower obtained a loan modification. As we will explain, this scenario actually falls within the fourth exception. Melgar's supporting citation, *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062 (*Chavez*), discusses the nature of the fourth exception. In that case, the court held a homeowner was not required to allege tender in a case concerning the bank's breach of a modification agreement. In reversing the trial court's order sustaining the demurrer to the homeowner's wrongful foreclosure cause of action, the appellate court held, "[The homeowner] sufficiently alleged an exception to the tender rule that the foreclosure sale *was void* because [the bank] lacked a contractual basis to exercise the power of sale as

[the homeowner's] original loan had been modified under the Modification Agreement and [the homeowner] fully performed under the Modification Agreement until [the bank] breached the agreement by refusing payment. (*Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 710, 711-712 [trustee's sale invalid where 'the trustor and beneficiary entered into an agreement to cure the default']; *Bisno v. Sax* (1959) 175 Cal.App.2d 714, 724 ['Speaking generally, the acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such preexisting delinquency. The same is true of a tender which has been made and rejected.'].) Because [the homeowner] sufficiently alleged a recognized exception to the tender rule, the trial court erred by sustaining the demurrer to her wrongful foreclosure cause of action." (*Chavez, supra*, 219 Cal.App.4th at p. 1063, italics added.)

The *Chavez* case is not analogous to the one before us because the parties did not have a loan modification agreement. And there is no other evidence suggesting the trustee lacked authority to proceed with the foreclosure.

Melgar argues tender was not required because she challenged CMS and REMIC's authority to foreclose due to improper securitization of her loan. This court recently determined in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*) that securitization issues do not affect the validity of a foreclosure sale. In that case, the homeowner attempted to state a cause of action based on a dispute about whether there was an improper transfer of the promissory note during the securitization process. We held, "[E]ven if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note on Mar. 23, 2007) occurred, the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. 'Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely

substituted one creditor for another, without changing her obligations under the note.’ [Citation.] As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [the homeowner] lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions. (See *In re Correia* (Bankr. 1st Cir. 2011) 452 B.R. 319, 324-325 [debtors lacked standing to raise violations of pooling and service agreement].) [¶] Furthermore, even if any subsequent transfers of the promissory note were invalid, [the homeowner] is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees. [The homeowner,] however, may not assume the theoretical claims of hypothetical transferors and transferees for the purposes of showing a ‘controversy of concrete actuality.’ [Citation.] Consequently, we conclude [the homeowner’s] first cause of action lacks merit for the independent reason she cannot show the existence of an actual, present controversy between herself and defendants. [Citations.]” (*Jenkins, supra*, 216 Cal.App.4th at pp. 514-515.)

Melgar argues *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, a case published after *Jenkins*, supports her argument that a borrower may challenge a nonjudicial foreclosure based on allegations that one or more transfers in the chain of title of a trust deed was void. She recognizes the *Glaski* ruling is currently before our Supreme Court in its review of *Yvanova v. New Century Mortgage* (2014) 226 Cal.App.4th 495, 502, review granted August 27, 2014, S218973. In *Glaski*, the court concluded noncompliance with the terms of a pooling and servicing agreement would render an assignment void and then it adopted the majority rule in Texas that an

obligor may resist foreclosure on any ground that renders an assignment in the chain of title void. (*Glaski, supra*, 218 Cal.App.4th at p. 1095, see *Reinagel v. Deutsche Bank Nat'l Trust Co.* (5th Cir. 2013) 722 F.3d 700, 705.) No other California court or federal court has followed *Glaski* on this issue. Several have clearly refused to follow its reasoning. As discussed above, our opinion in the *Jenkins* case directly conflicts with the holding of *Glaski*, which we are not bound to follow. We will continue to follow our reasoning in *Jenkins* and decline to follow *Glaski*.

C. Melgar's Request for a Continuance

Melgar requested a continuance in her opposition to the motion for summary judgment. On appeal, she argues the trial court abused its discretion in denying her request because CMS altered, destroyed, or hid an audio recording of a conversation taking place on January 30, 2012. This is the totality of her legal argument. She supports this claim with a single record citation, which is a response to CMS's separate statement of undisputed facts.

In her response, Melgar objected to CMS's undisputed fact that it spoke with Melgar on January 30, 2012. Melgar disputed this fact on the following basis: "Unintelligible. Unclear what it is offered to prove. No cohesive argument. Seems to say [Melgar's] claims are true." Melgar added that CMS "produced selective, unauthenticated, possibly altered and/or edited voice recordings of conversations" but there was no voice recording of the January 30 conversation. Melgar cited her deposition in which she recalled that on January 30 she was told she was being denied HAMP benefits, CMS would not entertain any foreclosure alternatives, and her house was going to the bank.

The trial court did not expressly deny the request for a continuance, but in granting the summary judgment motion, we find the court implicitly denied the request. We conclude the court did not err because Melgar did not comply with the requirements of Code of Civil Procedure section 437c, subdivision (h). That provision provides, "If it

appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.” (Code Civ. Proc., § 437c, subd. (h).)

“It is not enough to ask for a continuance at the time of oral argument or in opposing points and authorities. The statute requires that the opposition be accompanied by affidavits or declarations showing facts to justify opposition may exist . . . [Citations.] ¶¶ . . . The purpose of the declarations required by [Code of Civil Procedure section 437c, subdivision (h)] is to inform the court of outstanding discovery necessary to resist the summary judgment motion: ‘To be entitled to a continuance, the party opposing the motion for summary judgment must show that its proposed discovery would have led to facts essential to justify opposition.’ [Scott v. CIBA Vision Corp. (1995) 38 [Cal.App.]4th 307, 325-326, (internal quotes omitted)—declaration not excused by outstanding discovery order requiring production of documents sought].” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶¶ 10:207.10 & 10:207.11.) “The trial court need not grant a continuance where the proposed discovery is focused on matters beyond the scope of the dispositive issues framed by the pleadings. [Citation.] The decision whether to grant a continuance is within the discretion of the trial court. [Citation.]” (Ace American Ins. Co. v. Walker (2004) 121 Cal.App.4th 1017, 1023.)

Consequently, “The nonmoving party seeking a continuance ‘MUST SHOW: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]’ [Citation.]” (Frazee v. Seely (2002) 95 Cal.App.4th 627, 633, capitalization added.) Melgar’s supporting declaration did not contain any of the required information. Instead, Melgar declared she requested the audio recording at

her deposition on December 19, 2013, and by e-mail on March 13 and 18, 2014. Melgar stated CMS responded by saying all the recordings had been produced and “any threat to compel would be improper and vigorously opposed.”

Melgar did not explain why she did not make a motion to compel production of the missing recording or why she believed the recording existed. More importantly, Melgar’s declaration did not explain why the information in the requested documents was essential to opposing the motion or why additional time was needed. (See *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270.) In light of our conclusion the court properly applied the tender rule, we conclude the purportedly missing information about CMS’s failure to evaluate her application under HAMP would not have changed this outcome. As mentioned earlier, Melgar would have needed to produce evidence she would have in fact qualified for a loan modification, making application of the tender rule inequitable. As decided earlier, the tender rule applied and, therefore, we affirm the court’s decision to grant the summary judgment motion.

III

The judgment is affirmed. Respondents shall recover their costs on appeal.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.