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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANOSUYA DATTA, Plaintiff and Appellant, v. FIDELITY NATIONAL TITLE COMPANY, Defendant and Respondent.	B283800 (Los Angeles County Super. Ct. No. LC102407)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank J. Johnson, Judge. Affirmed.

Law Office of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Fidelity National Law Group and Kevin R. Broersma for Defendant and Respondent.

SUMMARY

The trial court granted an unopposed summary judgment motion by defendant Fidelity National Title Company on plaintiff Anosuya Datta's claim of wrongful foreclosure. Plaintiff sought reconsideration (treated by the trial court as a motion for a new trial). Plaintiff contended "new or different facts and circumstances" showed defendant had no authority to conduct the trustee's sale of plaintiff's home, because of an alleged defect in the chain of assignment of the deed of trust – a defect that came to plaintiff's attention after the summary judgment hearing. The trial court denied the new trial motion.

On appeal, plaintiff renews her contention that defendant had no power to foreclose. She asserts defendant was acting as the agent for a beneficiary (Bank of America, N.A.) that lacked the authority to foreclose. Bank of America owned plaintiff's loan under a 2011 assignment authorized by Mortgage Electronic Registration Systems (MERS) as nominee for the lender under the July 2005 deed of trust. Plaintiff asserts MERS's appointment as nominee in the 2005 deed of trust was "void" because MERS was not qualified to do business in California until 2010. From this, plaintiff concludes MERS's assignment of the deed of trust to Bank of America in 2011 was void.

We conclude the trial court's denial of plaintiff's new trial motion was proper for any of three reasons. First, plaintiff's complaint did not allege the theory that MERS's assignment to Bank of America was void as a basis for its wrongful foreclosure claim. Second, the alleged defect in the MERS assignment was not "[n]ewly discovered evidence" that plaintiff could not have discovered before the summary judgment hearing. (Code Civ. Proc., § 657, subd. 4.) Third, there is in any event no merit to

plaintiff's contention that the MERS assignment to Bank of America was void. Accordingly, we affirm the judgment.

FACTS

We need not recite the entire history of the foreclosure proceedings that led to this appeal, since most of it is irrelevant to the only issue plaintiff raises: her claim the MERS assignment to Bank of America in 2011 was void. Following is a brief summary, to be supplemented as necessary in our legal discussion.

Plaintiff and her husband (who died in 2013) purchased the property at issue in 1993.

In July 2005, plaintiff's husband (as trustee of a revocable living trust) obtained a $500,000 mortgage loan from Countrywide Bank, and executed a deed of trust in the lender's favor. (This was a second loan on the property.) The deed of trust provided that MERS "is the 'Beneficiary' under this Deed of Trust and is acting solely as a nominee for Countrywide Bank."

By early 2011, plaintiff's husband had fallen behind on his payments.

On August 22, 2011, MERS assigned the 2005 deed of trust to Bank of America, and the assignment was recorded on September 29, 2011. Also on August 22, 2011, Bank of America executed a "substitution of trustee," substituting defendant as trustee under the 2005 deed of trust. The substitution of trustee was not recorded until February 10, 2012.

On September 29, 2011, defendant executed (and on September 30, 2011, recorded) a notice of default and election to sell, as "Agent for the Beneficiary."

On January 7, 2013, defendant issued a notice of trustee's sale.

On April 8, 2013, after several postponements, the property was sold at a trustee's sale.

In December 2014, plaintiff filed this lawsuit, asserting a wrongful foreclosure claim against defendant and other claims against Bank of America and several other parties. (The other claims and parties are not a part of this appeal.)

The operative third amended complaint, filed in January 2016, alleged the foreclosure sale was improperly held because of a defective notice of default, misrepresentations by the loan servicer in connection with loan modification discussions, lack of proper notice of the trustee's sale, failure to postpone or cancel the sale pursuant to an oral agreement with the loan servicer and other similar defects. The complaint alleged the loan servicer (as attorney in fact for Bank of America) "purportedly substituted [defendant] as Trustee" on August 22, 2011; the substitution was recorded six months later; and defendant executed the September 29, 2011 notice of default "without yet having had its Substitution of Trustee . . . recorded."

The complaint did not allege that MERS had no authority to assign the 2005 deed of trust to Bank of America, or that defendant had no authority to act as trustee after the substitution was recorded. The only mention of MERS in the complaint was to identify MERS as nominee for Countrywide.

Plaintiff was represented by counsel when the third amended complaint was filed, but the court granted counsel's motion to be relieved on October 14, 2016.

On December 30, 2016, defendant served plaintiff with its summary judgment motion. Defendant presented evidence that it executed the notice of default recorded on September 30, 2011 as agent for the beneficiary, "not yet as trustee," and pointed out

it could record the notice of default as an authorized agent. Defendant further presented what it described as a "mountain of evidence" demonstrating that it followed the letter of the law in connection with the foreclosure proceedings.

On March 7, 2017, plaintiff contacted defendant to request a continuance of the March 24, 2017 hearing date for the summary judgment motion, because she intended to retain counsel in the coming days. The opposition was due on March 10, 2017. As of March 10, 2017, plaintiff's new counsel took primary responsibility for prosecuting the case on plaintiff's behalf.

Plaintiff filed no opposition to defendant's motion for summary judgment. The hearing was held on March 24, 2017, and counsel for plaintiff appeared at the hearing. The trial court granted the motion, and on March 28, 2017, entered judgment in favor of defendant.

On April 10, 2017, plaintiff filed a motion for reconsideration. She contended a defect existed in the chain of assignment of the 2005 deed of trust, and she did not receive proper statutory notice of the motion. Both of those facts "[came] to the attention of plaintiff since the March 24, 2017 hearing." (Plaintiff does not raise the notice claim on appeal.)

Plaintiff made substantially the same argument we described at the outset: that MERS was not registered to do business in California in 2005, when it was named as the beneficiary's nominee in the deed of trust, and therefore "could not accept appointment as the nominee" and "was legally unable to take title as nominee of Countrywide." Consequently, MERS "was not authorized to assign the Deed of Trust to Bank of America six years later." Without a valid assignment, the argument continued, Bank of America had no legal authority to

substitute defendant as trustee, making the foreclosure defendant conducted wrongful.

Plaintiff explained that "[a]fter learning of the Court's ruling" granting defendant summary judgment, she "learned of and contacted a forensic document examiner" (Pamela Zander), who reviewed the documents leading up to the foreclosure and gave her the information on MERS. This occurred "[s]ometime after March 24, 2017." Until then, plaintiff "was not cognizant that the corporate status of MERS was even a subject that should be inquired into or that could have any impact" on her case.

Defendant's opposition contended, among other things, that plaintiff presented no new or different facts that could not have been discovered during the more than two years the lawsuit had been pending, and that plaintiff could not "interject a new assignment defect theory that is beyond the scope of the pleadings." After a hearing at which the trial court "turned the motion into a motion for new trial," defendant filed further opposition papers and plaintiff filed a reply.

At a hearing on June 6, 2017, the court denied plaintiff's motion for a new trial.

Plaintiff filed a timely notice of appeal.

DISCUSSION

An order granting summary judgment may be challenged by a motion for a new trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858.) The new trial motion "may assert that the summary judgment should be reversed because there is '[n]ewly discovered evidence' (Code Civ. Proc., § 657, subd. 4)." (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1505 (*Doe*).)

Appellate review of an order granting summary judgment is de novo. To the extent a new trial order "relies on the resolution of a question of law," review is likewise de novo. (*Doe, supra,* 160 Cal.App.4th at p. 1505.) "In our review of [an] order *denying* a new trial, as distinguished from an order *granting* a new trial," we review "the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.)

The trial court did not err in denying plaintiff's new trial motion.

1. The MERS Theory

A plaintiff may not oppose summary judgment by raising a theory not pleaded. Here, that is exactly what plaintiff sought to do with its "newly discovered evidence" that MERS was not authorized to do business in California in 2005.

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265; see *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 ["A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion."]; see also Edmon

& Karnow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) § 10:51.1, p. 10-22; § 10:257, p. 10-118.)

Here, plaintiff has never sought to amend the operative complaint with her new factual assertion about MERS, or with her new legal theory that the assignment to Bank of America was void. Plaintiff nonetheless contends defendant "had to prove the assignment was valid because it claimed in its motion for summary judgment it had the authority to foreclose," and "[defendant] also had that burden because it had to rebut [plaintiff's] allegation in the [complaint] it lacked the power to foreclose."

These assertions are meritless. Defendant's burden was to show that plaintiff could not establish the factual allegations upon which plaintiff's claim of lack of authority was based. Those allegations were that the notice of default was issued before defendant's appointment as trustee, and other claims of notice defects. Defendant established that plaintiff could not prove those claims, and plaintiff does not contend otherwise. Defendant was not required "to prove the assignment was valid" as against a theory plaintiff did not assert in its complaint. It was required to produce evidence showing the claims plaintiff *did* assert as to defendant's authority to foreclose could not be proved. This it did.[1]

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[1] Plaintiff contends defendant "raised the issue of its authority to foreclose in its own motion." Plaintiff cites defendant's separate statement describing the assignment to Bank of America, identification of the loan servicer for Bank of America, identification of the division of defendant that acts as a title company trustee in connection with foreclosure proceedings, the date of the first contact by the loan servicer concerning commencement of foreclosure proceedings, and defendant's

Plaintiff contends her complaint "suggests" defendant's appointment as trustee was defective, because paragraph 15 identified MERS as nominee of the lender, and paragraph 21 stated that on August 22, 2011, the loan servicer (another defendant that acted as attorney in fact for Bank of America) "purportedly substituted [defendant] as Trustee." It is not enough to "suggest[]" an unalleged defect. And while the word "purportedly" may imply that something is wrong, the complaint must allege what that is. The very next sentence of the complaint (along with plaintiff's typeface emphasis) indicates the defect asserted is that the substitution was not filed until **"[*s*]*ix (6) months later*."** In any case, the allegations plaintiff identifies are entirely insufficient to even "suggest[]" the theory plaintiff now seeks to assert with her claim of newly discovered evidence.[2]

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recording of the notice of default as the lender's authorized agent. This evidence was responsive to the allegations in the complaint.

[2] Plaintiff cites *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, claiming it stands for the proposition that "a trial court could consider a new issue if the party moving for summary judgment did not claim it was misled." Plaintiff miscites this complicated case (which involves an insurance claim, denial of a summary judgment motion, grant of a motion for judgment after completion of the plaintiff's evidence, and a plaintiff who declined the court's suggestion it amend the complaint to allege an assignment of a second insurer's claims against defendant). (*Id.* at pp. 1084-1085, 1091.) The court said – and *not* in the context of the summary judgment denial – that "unless defendant could show it was misled or would be prejudiced by plaintiff's failure to allege the assignment, the trial court would have probably abused its

2. The Claim of Newly Discovered Evidence

Plaintiff contends that she explained in her declarations "why she did not uncover this evidence earlier." Her explanation, however – that she did not learn about MERS until after the summary judgment hearing; she was representing herself from October 14, 2016 to March 10, 2017; and she was a layperson with no reason to suspect that MERS was not authorized to do business in California or that this could render the foreclosure wrongful – is insufficient.[3]

"A party moving for a new trial on the ground of newly discovered evidence must show that he could not, with reasonable diligence, have discovered or produced the evidence at the trial." (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 730-731; *id.* at pp. 727-728 [trial court may

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discretion if it denied recovery solely on this ground." (*Id.* at p. 1091.) The case has no factual or legal pertinence to this appeal (except for the general point that the pleadings establish the scope of an action, and parties cannot introduce evidence about issues outside the pleadings). (*Ibid.*)

[3] Plaintiff's reply declaration stated she "stumbled upon Pamela Zander's [plaintiff's forensic loan examiner's] name while doing an internet search soon after the hearing on [defendant's] summary judgment motion. I contacted her, and she informed me about MERS not being authorized to do business in California, and the consequences of that, and other cases involving this issue." Plaintiff then "quickly arranged a conversation among her, me, and my new attorney, Steven Shuman, to inform him about these new facts, but I was also not able to do that until after the hearing on [defendant's] summary judgment motion."

grant a new trial "if the moving party shows the evidence is newly discovered, reasonable diligence was used to find it, and the new evidence is material to the moving party's case"].)

In this case, the evidence of MERS's corporate status was available when this case began in 2014 (when plaintiff *was* represented by counsel), and plaintiff does not suggest any attempt to hide MERS's business status. The fact that neither plaintiff nor her previous counsel investigated the status of entities in the "foreclosure chain" until after judgment was entered against her does not demonstrate the reasonable diligence required for granting a new trial motion. Nothing prevented them from making that investigation on a timely basis. Nor does plaintiff offer any legal authorities to support her claim that the circumstances she cites are sufficient to support a claim of newly discovered evidence.

3. The Claim the Assignment Was Void

In any event, we see no merit in plaintiff's claim that, because MERS was not qualified to do business in California in 2005, MERS's appointment as the lender's nominee in the deed of trust "was void," and "all foreclosure proceedings rested on this void appointment." Plaintiff offers no pertinent legal support for that claim, and the law is to the contrary.[4]

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[4] The appellate briefs discuss plaintiff's claim in the trial court that MERS was suspended from doing business in California in 2005 (rather than merely not qualified), and defendant's evidence that the suspended corporation was a different entity that had misappropriated the name of the "real" MERS. This point is irrelevant to this appeal, since plaintiff contends (as she did in the trial court) that in any event the "real" MERS was not qualified to do business in California in 2005.

Of course, a foreign corporation must obtain a certificate of qualification in order to transact intrastate business in California. (Corp. Code, § 2105, subd. (a) ["A foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification."]; *The Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App.4th 1119, 1132 (*Capital Gold Group*).) But the failure to do so does not, as plaintiff suggests, mean that the business transacted is therefore "void." That much is plain from both the Corporations Code and case law.

The purpose of the certificate requirement for foreign corporations " 'is to facilitate service of process and to protect against state tax evasion.' " (*Capital Gold Group, supra,* 176 Cal.App.4th at p. 1132.) The qualification statute " 'assures responsible and fair dealing by foreign corporations and equalizes the regulation of foreign and domestic corporations.' " (*Ibid.*)

The Corporations Code uses several means to enforce the qualification requirements, including penalties, a prohibition against maintaining an action in California courts *until* the foreign corporation qualifies to do business, and misdemeanor liability. (Corp. Code, §§ 2203, 2258.) The point of the " 'lawsuit suspension' " enforcement mechanism is " 'to encourage qualification, rather than to penalize the failure to qualify earlier.' " (*Capital Gold Group, supra,* 176 Cal.App.4th at p. 1132, quoting *United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1741 (*United Medical Management*).) Thus, a foreign corporation that transacts intrastate business in California without qualifying to do so cannot maintain an action "upon any intrastate business so transacted . . . *until* it has complied with the provisions [of section 2105]" and paid penalties

and taxes. (§ 2203, subd. (c), italics added; *Capital Gold Group,* at p. 1132.)

Thus, it is apparent that a foreign corporation's actions are not "void" solely because the corporation did not comply with the qualification requirements. Case law has long made this explicit: "A nonqualified corporation subject to a misdemeanor prosecution and on conviction to a heavy fine for doing business without complying with the law, is permitted to qualify, be restored to full legal competency *and have its prior transactions given full effect*." (*Tucker v. Cave Springs Mining Corp.* (1934) 139 Cal.App. 213, 217, italics added; *United Medical Management, supra*, 49 Cal.App.4th at p. 1741, quoting *Tucker*.)[5]

In short, assuming MERS was transacting intrastate business in 2005 when it was designated the lender's nominee, that point is irrelevant. It is undisputed that MERS *was*

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[5] Plaintiff does not address these cases. She simply asserts that "a contract that benefits a non-registered foreign corporation should be void," and erroneously cites *Palm Valley Homeowners Assn., Inc. v. Design MTC* (2000) 85 Cal.App.4th 553 for "[a]n analogous rule." Plaintiff describes *Palm Valley* as stating that, if corporations that are "suspended in California for failing to pay taxes" enter into contracts, "those contracts are void." *Palm Valley* says nothing of the sort. Indeed, neither the word "contract" nor the word "void" appears anywhere in the case. *Palm Valley* merely states that a suspended corporation "may transact no business of any kind" (*Palm Valley*, at p. 560, citing Corp. Code, § 2205, subd. (c)), and holds that "a corporation suspended under the Corporations Code, like a corporation suspended for nonpayment of taxes, is well and truly suspended, and disabled from participating in any litigation activities." (*Id.* at p. 561.)

qualified to do business in California in 2011, when it assigned the lender's beneficial interest in the deed of trust to Bank of America. Plaintiff has cited no authority and produced no evidence suggesting any legal basis for finding the 2011 assignment void.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.