Filed 7/18/18 Medina v. New Penn Financial CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN A. MEDINA, Plaintiff and Appellant, v. NEW PENN FINANCIAL, LLC, et al., Defendants and Respondents.	A151506 (Alameda County Super. Ct. No. RG16834201)

Plaintiff John Medina brought this lawsuit against defendants to stop a nonjudicial foreclosure proceeding initiated against his property.[1] Defendants demurred to the complaint, and the trial court sustained the demurrers without leave to amend on the basis that Medina lacked standing to bring his claims. On appeal, he challenges the order dismissing the case. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In October 2006, Medina obtained a loan secured by a deed of trust encumbering property in Castro Valley. The deed of trust identified MERS as the beneficiary, as a

[1] Defendants are (1) New Penn Financial, LLC, d/b/a Shellpoint Mortgage Servicing (Shellpoint); (2) Bank of America, N.A. (Bank of America); (3) Mortgage Electronic Registration System, Inc. (MERS); and (4) The Bank of New York Mellon, f/k/a The Bank of New York (BNY Mellon), as trustee for the CHL Mortgage Pass-Through Trust 2006-19, Mortgage Pass-Through Certificates, Series 2006-19. Medina also sued MTC Financial, Inc., d/b/a Trustee Corps (MTC), but he later voluntarily dismissed it from the case, and MTC is not a party to this appeal.

nominee for the lender and its successors and assigns. It stated that the "[b]orrower understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of [the interests granted to it from the borrower], including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender." It also stated 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."

In 2015, MERS purported to assign the deed of trust to BNY Mellon by recording an assignment of deed of trust. In early 2016, Shellpoint, as a mortgage servicer[2] for BNY Mellon, recorded a substitution of trustee substituting MTC as a foreclosure trustee. As the trustee, MTC recorded a notice of default and eventually a notice of sale, which set a foreclosure sale date of October 12, 2016.

Shortly before the foreclosure sale was set to take place, Medina filed this lawsuit, asserting five causes of action: (1) wrongful foreclosure; (2) quiet title; (3) violation of Business and Professions Code section 17200 et sequitur (UCL); (4) unjust enrichment; and (5) accounting. Medina later filed an amended complaint in which he asserted the same five claims.

In spring 2017, two demurrers were filed that are relevant to this appeal: one by Bank of America, and one collectively by MERS, BNY Mellon, and Shellpoint. On April 27, the trial court sustained Bank of America's demurrer without leave to amend and entered a tentative ruling sustaining the three remaining defendants' demurrer. On May 4, the court sustained the latter demurrer without leave to amend, stated it would "enter a judgment of dismissal as to the entire action," and dismissed the case.

[2] A mortgage servicer is sometimes hired " 'to administer . . . mortgages by enforcing the mortgage terms and administering the payments.' " (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 930, fn. 5 (*Yvanova*).)

II.
DISCUSSION

A. We Have Jurisdiction to Review the Trial Court's Order Sustaining the Demurrer Filed by MERS, BNY Mellon, and Shellpoint.

We begin by considering, and rejecting, the argument made by MERS, BNY Mellon, and Shellpoint that we lack jurisdiction to review the order sustaining their demurrer. In his notice of appeal, Medina asserted he was appealing from "the orders of [the trial] court issued on or about April 27, 2017," and attached to the notice was an exhibit that included three pages of text appearing to reflect the court's April 27 tentative ruling sustaining the demurrer of MERS, BNY Mellon, and Shellpoint. But even though the notice of appeal does not refer specifically to the May 4 order adopting the tentative ruling, the attached text is essentially a word-for-word recitation of that order. Construing the notice of appeal liberally, as required (Cal. Rules of Court, rule 8.821(a)(2)), we conclude that it sufficiently encompassed the order sustaining these defendants' demurrer.

B. The Standard of Review.

The rules governing our review of the trial court's ruling are well settled. "We review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) In doing so, our only task is to determine whether the complaint states a cause of action. (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 824.) We assume the truth of properly pleaded factual allegations, attachments to the complaint, facts that reasonably can be inferred from those facts expressly pleaded, and matters of which judicial notice can and has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) Still, in considering the complaint's allegations, we are "required to assume the truth of [a] plaintiff's *factual allegations,* not [the plaintiff's] *legal conclusions*." (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810 (*Mendoza*).)

Our review of the trial court's order is limited to issues that have been adequately raised and supported in the appellate briefs. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451,

466, fn. 6; see also *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issues not raised on appeal are waived].)

C. Medina's Contentions on Appeal.

As best we can tell, Medina contends that BNY Mellon, through MTC as its successor trustee, lacked authority to initiate a nonjudicial foreclosure proceeding because it received the deed of trust from MERS through a void assignment.[3] According to Medina, the assignment was void because the underlying mortgage was securitized in an investment trust and various provisions of the trust's governing pooling and servicing agreement (PSA) were violated.[4] He maintains that the PSA was violated because the mortgage was sold "without the contemporaneous endorsement of the underlying Note," the transfer of the loan to the trust was made by an entity other than the "Depositor," and the assignment was made after the "Closing Date of the trust." According to Medina, the PSA violations left MERS "unable to establish an agency relationship with" BNY Mellon, which left BNY Mellon an "invalid beneficiary" unable to convey to MTC the "authority to exercise the power of sale" under the deed of trust. He has not articulated how, should we reject these contentions, he could otherwise amend the complaint to state any viable claim, and we limit our discussion to them.[5] (See *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.)

---

[3] Medina's appellate brief is substantially deficient. It is confusing, rambling, and disorganized; lacks citations to the record; refers to parties that have no apparent connection with the litigation; mentions, without a coherent explanation, seemingly irrelevant legal doctrines; and often repeats passages, sometimes word-for-word. Although defendants pointed out many of these shortcomings, Medina declined to file a reply brief in which he could have addressed them.

[4] "A securitized investment trust is created by pooling [mortgages] into a trust and selling to investors the right to receive the mortgage interest and principal payments. [Citation.] Terms of the trust and the rights and obligations of the parties are set forth in a [PSA]." (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1254, fn. 2 (*Yhudai*).)

[5] Medina asserts in passing that the trial court erred by taking judicial notice of certain documents, but he has forfeited this claim because he "fails to support it with

D. Medina Lacks Standing to Bring His Claims.

We turn to consider whether Medina has standing to challenge the nonjudicial foreclosure on the basis that the assignment of the deed of trust to BNY Mellon was void, and we agree with the trial court's ruling that he does not. The burden to establish standing to challenge a nonjudicial foreclosure lies with the plaintiff. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813-814 (*Saterbak*).) To demonstrate standing, Medina must allege facts showing that he had a " 'beneficial interest [in the assignment] that is concrete and actual, and not conjectural or hypothetical.' " (*Ibid.*)

The law governing borrowers' standing to challenge nonjudicial foreclosures has received considerable judicial attention in recent years. An issue that was settled in 2016 by our state Supreme Court is that borrowers have standing to allege that their mortgaged property was sold in a nonjudicial foreclosure proceeding initiated by an entity that received its ostensible authority through a void assignment. (*Yvanova, supra*, 62 Cal.4th at p. 924.) But *Yvanova* left two issues unresolved that bear on this appeal. The first is whether borrowers have standing to challenge, as Medina does here, a nonjudicial foreclosure proceeding *before* the property is sold (a preemptive action). (*Id.* at p. 933.) The second is what constitutes a void, rather than a voidable, assignment. Although the Supreme Court determined that a borrower's standing extends to challenging a void assignment, the Court "express[ed] no opinion" on what facts might demonstrate one. (*Id.* at pp. 931, 943.)

Cases decided after *Yvanova* have addressed these two issues. As to the first one, some courts have indicated that borrowers simply cannot bring a preemptive action given the exclusivity of the nonjudicial foreclosure process. (See, e.g., *Saterbak, supra*, 245 Cal.App.4th at pp. 814-815; see also *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 159 [under 2013 Homeowner's Bill of Rights, "a plaintiff may not seek to enjoin a foreclosure based on a claim that the foreclosing party lacked the

---

reasoned argument and citations to authority." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

necessary authority to foreclose"].) Other courts, including this one, have suggested that borrowers may have standing to bring a preemptive action in certain circumstances. (See *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 281 ["[a]lthough *Yvanova* limited its holding to the post-sale context, its determination that borrowers have standing *after* a foreclosure sale to allege that the assignment of a deed of trust was void raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations *before* the sale"]; *Lundy v Selene Finance, LP* (N.D. Cal. Mar. 17, 2016, No. 15-cv-05676-JST) 2016 WL 1059423, at *11-13 [predicting that if California Supreme Court bars preemptive actions, bar will apply only to claims that lack "specific factual basis"].)

Here, we need not resolve whether borrowers ever have standing to bring a preemptive action because even assuming they sometimes do, Medina cannot allege that the assignment of the deed of trust from MERS to BNY Mellon was void based on violations of the PSA. As to the second issue *Yvanova* left open, "an overwhelming majority of New York, California, and federal courts" have concluded that under New York law, which governed the PSA at issue,[6] "defects in the securitization of loans can be ratified by the beneficiaries of the trusts established to hold the mortgage-backed securities and, as a result, the assignments are voidable." (*Mendoza, supra*, 6 Cal.App.5th at pp. 804-805; see, e.g., *Yhudai, supra*, 1 Cal.App.5th at pp. 1257-1260; *Saterbak, supra*, 245 Cal.App.4th at p. 815; *In re Turner* (9th Cir. 2017) 859 F.3d 1145, 1149.) Medina was not a party to the PSA, and he had no beneficial interest in the parties' compliance with its terms. The beneficiary of the securitized trust, not Medina, had a beneficial interest, and it had the power to ratify PSA violations. (See *Mendoza*, at p. 811.) Thus, any violations of the PSA were voidable, and as the borrower, Medina

[6] Although a copy of the PSA was not attached to the complaint and is not a part of our record, Medina averred in the first amended complaint that "the PSA . . . may be viewed in its entirety at www.secinfo.com/drjtj.v6U5.d.htm." Under section 10.03 of that PSA, New York law is the governing law.

lacks standing to seek recourse for them or use them as a basis to claim that the subsequent assignment of the deed of trust was void. (See *id.* at p. 817.) The trial court properly sustained defendants' demurrers.

III.
DISPOSITION

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

_____

Humes, P.J.

We concur:

_____

Margulies, J.

_____

Banke, J.

Medina v. New Penn Financial, LLC, et al. A151506