

APPENDIX

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SUPREME COURT OF CALIFORNIA

NO. S259570

SHERRY HERNANDEZ

Plaintiff - Appellant

v.

PNMAC MORTGAGE OPPORTUNITY INVESTORS,
LLC, et all

Defendants - Appellees

Petition for Writ of Certiorari from the California Court of
Appeal, Second District, Division Five, No. B287048

Opinion denying review entered February 19, 2020

App-2

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FIVE

SHERRY HERNANDEZ Case No. B287048

Plaintiff - Appellant

V.

Los Angeles County

Super Ct No

YC068794)

PNMAC MORTGAGE OPPORTUNITY

INVESTORS, LLC, et al,

Defendants - Respondents

Opinion filed November 12, 2019

Remittitur dated February 24, 2020

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Hernandez Law Group, Rhonda Hernandez; Imperiale Law Group, James T. Imperiale, for Plaintiff and Appellant.

Blank Rome, Cheryl S. Chang and Jessica A. McElroy, for Defendants and Respondents.

Plaintiff and appellant Sherry Hernandez (plaintiff) sued the parties who foreclosed on her residence, including defendants and respondents PNMAC Opportunity Fund Investors, LLC (PNMAC) and PennyMac Loan Services. In a prior appeal, we held the trial court was right to sustain a

demurrer to all of plaintiff's causes of action as alleged in a second amended complaint, but wrong not to give plaintiff further leave to amend her wrongful foreclosure claim so as to try to state a valid cause of action following the change in law worked by *Yvanova v. New Century Mortgage Corporation* (2016) 62 Cal.4th 919 (*Yvanova*). Plaintiff later filed a third amended complaint presenting a restyled wrongful foreclosure claim and, at the same time, proposed to add various other causes of action and additional defendants. Defendants again demurred, and the trial court found plaintiff still had not sufficiently alleged a viable wrongful foreclosure theory and could not allege additional causes of action or add defendants when we remanded solely to permit amendment of the wrongful foreclosure claim. We now consider whether the court was correct to sustain defendants' most recent demurrer without further leave to amend.

I. BACKGROUND

A. The Pertinent Transactions, As Described by the Operative Complaint and Shown in Documents Subject to Judicial Notice

Plaintiff's husband, Alfredo Hernandez, borrowed \$752,500 from Your-Best-Rate Financial, LLC (Your-Best-Rate), evidenced by his promissory note in that amount (the Note). The Note was secured by a deed of trust on the family's Rancho Palos Verdes home (the Property). Plaintiff, her husband, and her daughter Elizabeth all signed the deed of trust, which includes a provision authorizing sale of the Property in the event of a default on the payments due under the Note. The trust deed also includes a provision by which the deed's signatories acknowledge Mortgage Electronic

Registration Systems, Inc.¹ (MERS)—the named beneficiary under the trust deed and the holder of legal title to the interests granted by the deed’s signatories—had the right, as nominee for the lender and its successors and assigns, to exercise any or all of the interests granted by the signatories, including “the right to foreclose and sell the Property.”

The original lender, Your-Best-Rate, assigned the Note to CitiMortgage, Inc. on the same day it was executed via a first allonge to the Note. A second allonge to the Note indicates “CitiMortgage, Inc. [b]y and through its Attorney in Fact PNMAC Capital Management LLC” endorsed the note in blank, which would operate to assign its interest to whoever actually holds the Note.

On January 18, 2012, PennyMac Loan Services recorded an assignment of the deed of trust on the Property (the Assignment).

By its terms, the Assignment indicates MERS assigned “all beneficial interest” under the trust deed to PNMAC. On its face, the Assignment states it was executed on January 5, 2012, by Todd Graves (Graves), acting in his capacity as an assistant secretary of MERS. The Assignment also bears an attestation by Corina Castillo, a Los Angeles County Notary Public, that Graves personally appeared before her and proved by satisfactory evidence that he executed the Assignment in his “authorized capacity.”

¹“MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender’s ‘nominee,’ having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement.” (Yanova, *supra*, 62 Cal.4th at p. 931, fn. 7.)

The same day the Assignment was recorded, MTC Financial, Inc. dba Trustee Corps (Trustee Corps) recorded a Notice of Default and Election to Sell, stating the Note was in default in the amount of \$55,059.76. Trustee Corps served and recorded a notice of trustee's sale on July 10, 2012, and on April 16, 2013, Trustee Corps conducted the foreclosure sale of the Property. PNMAC purchased the Property for \$695,000, and a Trustee's Deed Upon Sale to that effect was subsequently recorded in the County Recorder's Office.

B. Plaintiff's Lawsuit, the Successful Demurrer, and Our Prior Decision Reversing and Remanding

After the completed foreclosure sale, plaintiff sued PNMAC in Los Angeles Superior Court. Not long thereafter, she filed a first amended complaint, and then a second amended complaint. The second amended complaint asserted four causes of action: (1) "Violation of California Commercial Code—Fraudulent Assignment," (2) Quiet Title, (3) Wrongful Foreclosure, and (4) "cancellation of instrument," specifically attacking the deed of trust, notice of default, and notice of trustee's sale. The gist of the pleading was that defendants had no interest in the trust deed, and thus no right to foreclose on the Property, because MERS never validly assigned the trust deed to PNMAC. Plaintiff alleged no facts, however, that established whether she believed the Assignment was void or merely voidable.

The trial court sustained PNMAC's demurrer to the second amended complaint without leave to amend. In an opinion filed in December 2015, we affirmed. We rested our holding largely on a conclusion that a foreclosure plaintiff does not have standing to challenge an entity's authority to initiate foreclosure proceedings, but we noted this standing issue was then pending before our Supreme Court in

Yvanova. Plaintiff sought review in the Supreme Court on that basis, and the Supreme Court issued an order remanding the matter to us for reconsideration in light of its newly issued Yvanova opinion, which holds “borrowers have standing to challenge [deed of trust] assignments as void, but not as voidable.” (Yvanova, *supra*, 62 Cal.4th at p. 939.)

We vacated our original December 2015 opinion and issued a new opinion reversing the trial court’s judgment of dismissal as to PNMAC. (*Hernandez v. PNMAC Mortg. Opportunity Fund I’nv’rs, LLC* (June 27, 2016, No. B258583) [nonpub. opn.].) We held plaintiff’s second amended complaint did not then state a valid cause of action as to any of the four claims it asserted, including the wrongful foreclosure claim. We also adhered to the prior conclusion, in our December 2015 opinion, that PNMAC’s demurrer was properly sustained without leave to amend as to plaintiff’s causes of action for violation of the Commercial Code, quiet title, and cancellation of instruments. But we held there was a reasonable probability plaintiff could amend her wrongful foreclosure claim to state a valid cause of action consistent with the parameters established in Yvanova, and we “remand[ed] the matter to the trial court to give her that opportunity, which if again contested via demurrer by PNMAC, the trial court will decide on the record before it.” Specifically, we explained plaintiff might be able to plead a valid wrongful foreclosure theory because her briefs indicated “she intends to allege PNMAC was not the true beneficiary because the Assignment was absolutely void—not simply voidable,” which conceivably could also excuse her from the general requirement that a plaintiff seeking to invalidate a foreclosure

sale must allege tender (i.e., actual or offered payment) of the amount due and owing under a promissory note.²

C. The Operative Third Amended Complaint

Back in the trial court, plaintiff filed a third amended complaint in December 2016, which is the operative pleading for purposes of this appeal. The operative complaint alleges a single “Cause of Action for Wrongful Foreclosure based on Void Assignment.” The various paragraphs comprising this cause of action read more like a memorandum of points and authorities than a typical complaint, but as best we can follow, the wrongful foreclosure cause of action alleges the Assignment was “void ab initio” for four reasons.

First, the operative complaint alleges the Assignment is void because the trust deed itself is “void ab initio.” Plaintiff presents a convoluted theory for why the trust deed is purportedly void that she does not reprise in her briefs seeking reversal in this appeal. Second, the complaint alleges the Assignment was executed at the request of the lender, Your-Best-Rate, and Your-Best-Rate “could not have exercised authority with respect to the Assignment inasmuch as [Your-]Best-Rate was dissolved by its state of incorporation” years before the Assignment was made. Third, the complaint “challenges the capacity and authority in which

² We elaborated: “[O]ur reading of the operative complaint along with the additional facts plaintiff now represents she can plead establishes a reasonable possibility plaintiff can go beyond mere allegations and present a specific wrongful foreclosure theory on which she intends to rely, namely, that the person who ostensibly executed the Assignment, Graves, in fact had no authority to act on MERS’s behalf; or if he did, he did not in fact execute the Assignment because the notary, Castillo, who has since apparently been convicted (not just indicted) for misuse of her notary seal falsely verified his signature; and that just months before the Assignment was ostensibly executed there were competing claimants on the beneficial interest in the Note.”

Todd Graves executed the assignment.” The sole basis of this challenge, as alleged, is that “Todd Graves has executed voluminous documents with numerous different titles on behalf of multiple entities,” including PNMAC and MERS. Fourth, and finally, the complaint alleges “[m]any of the instruments Todd Graves executed, including the Assignment of which [p]laintiff complains, were notarized by the notary . . . Corina Castillo,” who was under criminal investigation and allegedly pled guilty to “a few felony counts” of notary fraud in an unrelated state court case.

Plaintiff’s operative complaint also includes other assertions and information (allegations would not be the right word) apart from the Assignment-related averments. The complaint asserts the trustee’s sale of the property was “void ab initio” because the authority exercised by the trustee was “derived from void instruments.” The complaint includes a series of paragraphs with the goal of establishing “[p]laintiff was ready and willing to establish a positive relationship with the defendants.” The complaint “brings to the court’s attention other acts of the [d]efendants, named and unnamed, in furtherance of their pursuit to prevail in this matter.” And in perhaps its oddest feature, the complaint itself states plaintiff requires leave to amend it to “allege and substantiate” a “litany of additional causes of action” and “to identify by name several of the unnamed DOES in the interest of justice.”

D. Subsequent Trial Court Proceedings and the Ruling Sustaining a Demurrer Without Further Leave to Amend

Not long after plaintiff filed the operative complaint, plaintiff filed a motion for leave to amend the operative complaint. Plaintiff asked to make certain minor revisions, to

add six new causes of action that had not been alleged in any of her four prior complaints, and to name nine new defendants in place of unspecified Does. Defendants opposed giving plaintiff leave to further amend and the trial court denied the motion, finding it moot because the “request for amendment is not within the scope of the Court of Appeal[’s] ruling which allowed for amendment solely as to the cause of action for Wrongful Foreclosure and solely against [PNMAC].”³ The court ordered defendants to file a responsive pleading to plaintiff’s operative complaint within 30 days.

Defendants⁴ demurred to the operative complaint on the grounds that plaintiff’s wrongful foreclosure claim, even as again amended, did not “state facts sufficient to constitute a cause of action, and is uncertain, unintelligible, and ambiguous.” Defendants argued the wrongful foreclosure cause of action failed because plaintiff had not alleged she tendered the amount due under the Note, nor had she sufficiently alleged a valid basis to excuse her from tendering that amount. Defendants further argued (1) plaintiff had not alleged sufficient facts to support her “bald allegation” that the Assignment is void because Graves lacked capacity or authority to sign the document, and (2) plaintiff’s allegations concerning asserted impropriety by notary Castillo did not establish any link to what occurred in her case. Defendants additionally asked the court to deny any request for further leave to amend, explaining “[p]laintiff’s theory of the case—that the individual [i.e., Graves] who signed the

³ The court also struck the lines of text in the operative complaint that requested leave to amend.

⁴ Plaintiff’s operative complaint named “PennyMac Loan Services, LLC” as one of the named defendants.

[A]ssignment . . . signed documents on behalf of other entities— does not support any basis for liability against [PNMAC].”

The trial court sustained defendants’ demurrer without leave to amend. The court believed our opinion remanding the matter “provided clear guidance regarding what facts were required to state a claim for wrongful foreclosure,” namely, factual allegations that Graves had no authority to act on MERS’s behalf or, even if he did, he did not actually sign the Assignment and Castillo falsely notarized a signature as his. The trial court concluded the operative complaint failed to plead such facts, explaining the operative complaint’s allegation that Graves had executed documents for other entities did not establish he had no authority to execute the Assignment for MERS and there was no allegation in the operative complaint that Castillo falsely verified Graves’s signature on the Assignment. The trial court further found the operative complaint continued to seek to unwind the foreclosure sale of the Property, which meant “the tender rule” was applicable and plaintiff had not sufficiently alleged a void assignment that would excuse her from tendering the amount due under the Note.

The trial court thereafter entered a judgment of dismissal, from which plaintiff now appeals.

II. DISCUSSION

We confront two questions in this appeal, one old and one new. First, the old: we decide, now for the third time, whether plaintiff has alleged facts to state a proper wrongful foreclosure claim and, if not, whether she has identified facts that she should be given further leave to allege. The short answer is a double no—the operative complaint presents no valid theory that the Assignment is void and plaintiff has not

presented sufficient justification for getting a fifth bite at the apple. Second, the new plaintiff argues she should be permitted to assert seven heretofore unpled causes of action and to name two additional defendants. It is too late for all that. We previously affirmed the sustained demurrer as to all causes of action and remanded solely to give plaintiff an opportunity to amend the wrongful foreclosure cause of action in light of Yvanova. Plaintiff had that opportunity, it was unsuccessful, and she is entitled to nothing more now.

A. Standard of Review

“For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[].) To determine whether the trial court should, in sustaining the demurrer, have granted plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint’s legal defect or defects. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081[].)” (Yvanova, *supra*, 62 Cal.4th at p. 924, fn. omitted.) Sustaining a demurrer without leave to amend is proper “if either (a) the facts and the nature of the claims are clear and no liability exists, or (b) it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim.” (*Cantu v. Resolution Tr. Corp.* (1992) 4 Cal.App.4th 857, 889-890 (*Cantu*).)

B. Plaintiff Has Not Stated a Cause of Action for Wrongful Foreclosure, nor Has She Shown She Can Fix the Problem

A claim for wrongful foreclosure lies where “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 104.)

In this case, the first and third of these elements coincide: plaintiff’s wrongful foreclosure claim is predicated on the theory that the foreclosure was illegal because the Assignment is void (meaning PNMAC lacked valid authority to institute foreclosure proceedings), and prior cases have held a foreclosure arising from a void instrument provides an excuse for the ordinarily applicable rule that a wrongful foreclosure plaintiff must allege tender, i.e., that she has paid or offered to pay the amount in arrears (see, e.g., *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1100 (*Glaski*); see also *Yvanova*, *supra*, 62 Cal.4th at p. 929, fn. 4). So the key issue is whether the operative complaint alleges facts that, if true, would establish the Assignment is void (not merely voidable). It does not—as to any of the alleged theories the operative complaint proffers.

The operative complaint alleges the Assignment is void because it was “purportedly” executed at the request of Your-Best-Rate even though the company had been “dissolved by its state of incorporation in 2010.” But the Assignment itself, which the trial court judicially noticed and which we do as well, does not indicate it was executed at the behest of Your-Best-Rate. Rather, it states the “undersigned” grants, assigns, and transfers the loan to PNMAC—where the “undersigned” is MERS, “acting solely as nominee for Lender, [Your-Best-

Rate], its successors and/or assigns.” By failing to acknowledge or grapple with the reference to the successors or assigns of Your-Best-Rate, the allegation in the complaint does not suffice to establish the trust deed was transferred without authority—especially when, as we have already explained, Your-Best-Rate assigned the Note to CitiMortgage, Inc. on the same day it was executed via a first allonge to the Note and the trust deed necessarily accompanied that assignment. (See, e.g., Yvanova, *supra*, 62 Cal.4th at p. 927 [“The deed of trust . . . is inseparable from the note it secures, and follows it even without a separate assignment”].) Furthermore, even if plaintiff were right that Your-Best-Rate retained the Note and trust deed when Your-Best-Rate was allegedly dissolved, there is persuasive authority that MERS still would have the power to execute the Assignment in that circumstance. (See, e.g., *L'Amoreaux v. Wells Fargo Bank, N.A.* (5th Cir. 2014) 755 F.3d 748, 750 [“Although [the lender] had ceased to exist at the time of the assignment, the Deed of Trust explicitly contemplates MERS’s continuing to act as nominee for [the lender’s] ‘successors and assigns’”]; *Ghuman v. Wells Fargo Bank, N.A. (E.D. Cal. 2013)* 989 F.Supp.2d 994, 1002-1003.) This alleged theory of voidness therefore fails.

Next, the operative complaint alleges the Assignment is void on its face because plaintiff “challenges the capacity and authority in which . . . Graves executed” it. This is merely a contention or conclusory allegation of law entitled to no weight in a demurrer analysis. (Yvanova, *supra*, 62 Cal.4th at p. 924.) What plaintiff needs are well-pleaded facts, and the operative complaint offers only this: “Graves has executed voluminous documents with numerous different titles on behalf of multiple entities, including but not limited to”

documents as attorney-in-fact for PNMAC and as Assistant Secretary of MERS.

That is not enough. The allegation that Graves executed other documents in other capacities (largely similar to the capacity in which he executed the Assignment here) does not establish a factual predicate that he had no authority to execute the Assignment. No facts are alleged that would suggest the capacities in which Graves signed the other documents are somehow inconsistent with his authority to simultaneously act for MERS in connection with the Assignment. (See generally *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040 [“MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. [Citation.] As a result, most of the actions taken in MERS’s own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans”].) Moreover, of all the other documents bearing Graves’s signature that plaintiff attaches to her complaint, none were executed on the same day as the Assignment. There is thus not even a factual predicate to conclude he acted in more than one capacity simultaneously.

Plaintiff’s opening brief suggests she can cure her deficient factual allegations concerning Graves by adding a single sentence to the complaint: ““Graves was not authorized to execute the Assignment, PennyMac’s permission notwithstanding; PennyMac did not have authority to so direct.”” This still does not fix the problem, for two reasons. First, this proposed addition is still just a contention or conclusion of law. (See, e.g., *Glaski, supra*, 218 Cal.App.4th at p. 1094; *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 8 [“General and indefinite

assertions of liability are not sufficient compliance with the rules of pleading Facts, not conclusions, must be pleaded”].) Second, the proposed addition—in tension with the existing allegations—concedes Graves did have authority to execute the Assignment but for some unspecified reason the authority conferred was insufficient. Still missing are alleged facts as to why it was insufficient, and plaintiff has recited no facts she would add to the complaint if given further leave to amend that would remedy the deficiency. (*Cantu, supra*, 4 Cal.App.4th at p.890 [to meet the burden to show a possibility of amendment “a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action”].)

Finally, the operative complaint alleges the Assignment is void because “[m]any of the instruments . . . Graves executed, including the Assignment of which [p]laintiff complains, were notarized by the notary now familiar in this case . . . Castillo,” who was under criminal investigation at the time and, as alleged, later pled guilty in 2014 to fraudulently notarizing documents. Even assumed true, these allegations have no bearing on what happened here. Plaintiff still has not alleged facts that would suggest Castillo’s criminal conduct extended to this case such that she falsely verified a document Graves did not in fact sign. Plaintiff makes no showing in her briefs on appeal that she could allege facts to remedy the deficiency—the most she is able to muster is a passing, conclusory assertion that the Assignment “was acknowledged by a notary public who knew or should have known it was false; they [i.e., Graves and Castillo] had been coworkers for some time.” Again, that knew-or-should-have-known assertion is not a well-pleaded factual allegation on which liability may be had.

C. The Trial Court Correctly Denied Further Leave to Amend to Add New Causes of Action and Defendants, Which Would Be Beyond the Scope of Our Remand

Only a sliver of plaintiff's case remained after our last opinion remanding this case to the trial court. We held the trial court correctly sustained demurrers to all of plaintiff's causes of action and we affirmed denial of leave to amend as to all but the wrongful foreclosure cause of action. We remanded the case to the trial court solely because we believed there was a reasonable possibility plaintiff could plead a valid cause of action for wrongful foreclosure against PNMAC and we concluded she "should have an additional opportunity to amend her complaint to state a valid wrongful foreclosure claim."

Plaintiff got just what we ordered, but as we have just explained, she failed in her fourth attempt to state a valid cause of action. In the trial court, she asked for yet another opportunity to amend to add never-before-asserted causes of action and new defendants, which the trial court denied. She now makes the same request on appeal. Specifically, she argues she should be given leave to assert causes of action for (1) promissory estoppel, (2) a violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200), (3) intentional interference with prospective economic advantage, (4 and 5) negligent "and/or" intentional infliction of emotional distress, (6) "fraudulent deceit," (7) "vicarious responsibility of the willful torts committed by Graves and Castillo," and (8) "violating the statute governing out of state affidavits" (Civ. Code, § 2015.5). She also proposes to add CitiMortgage, Inc. and MERS in place of Doe defendants, claiming she was not previously aware of facts giving rise to a cause of action against them.

We will not order granting of leave to amend the operative complaint in any respect. Four times plaintiff failed to allege a valid cause of action, and these repeated failures are reason to conclude the trial court did not err in denying further leave to amend. (*Ruinello v. Murray* (1951) 36 Cal.2d 687, 690 [“Although the deficiencies in plaintiff’s complaints were raised in defendant’s demurrers, after three attempts he has not overcome them. The trial court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend”]; see also *Johnson v. Ehrgott* (1934) 1 Cal.2d 136, 138 [“[T]here must be a limit to the number of amended complaints”]; *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 918; *Cantu*, *supra*, 4 Cal.App.4th at p. 890 [“A trial court does not abuse its discretion when it sustains a demurrer without leave to amend if . . . it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim”]; *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967.)

Just as important, all of plaintiff’s proposed amendments are beyond the scope of our remand order, which was limited to giving plaintiff a further chance to amend her wrongful foreclosure claim in light of *Ivanova*. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 860 [“when an appellate court remands a matter with directions governing the proceedings on remand, ‘those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void’”].) The trial court correctly rejected—and we reject—plaintiff’s proposal to essentially start this litigation again from scratch with an entirely new complaint and a new set of defendants. Plaintiff

has been given well more than a fair opportunity to correct any defect and it is time this lawsuit comes to an end.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.

App.-3

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, SOUTHWEST DISTRICT

SHERRY HERNANDEZ	Case No. YC068794
Plaintiff	Assigned for all
v.	purposes to Honorable
	Ramona G. See, Dept. M
PNMAC MORTGAGE	JUDGMENT OF
OPPORTUNITY	DISMISSAL WITH
FUND INVESTORS, LLC,	PREJUDICE
AKA PNMAC MORTGAGE	
OPPORTUNITY FUND	
INVESTORS, LP; PENNYMAC	
LOAN SERVICES, LLC, and	
Does 1-20, inclusive,	
Defendants	

Entered December 4, 2017⁵

**TO ALL PARTIES AND TO THEIR RESPECTIVE
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on October 23, 2017, the Honorable Ramona G. See of Department M of the above-

⁵ The Original Judgment entered December 4, 2017 was a judgment of dismissal *without* prejudice. On January 14, 2018 an order *nunc pro tunc* was entered to correct the original judgment to a dismissal *with* prejudice. This rendition is from the Original judgment of December 4, 2017 reflecting the correction.

entitled Court, located at 825 Maple Ave., Torrance, CA 90803, issued a minute order sustaining the demurrer (“Demurrer”) filed by defendants PNMAC Mortgage Opportunity Fund Investors, LLC, erroneously sued as “PNMAC Opportunity Fund Investors, LP” (“PNMAC”) and PennyMac Loan Services, LLC (PennyMac Loan,” collectively with PNMAC “PennyMac”) without leave to amend as to Plaintiff Sherry Hernandez’s (“Plaintiff”) remaining cause of action for wrongful foreclosure n her Third Amended Complaint (“TAC”).

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. PennyMac’s Demurrer to the TAC is SUSTAINED in its entirety and against Plaintiff, dismissing the action against PennyMac with prejudice,
2. Judgment of dismissal is entered in favor of PennyMac and against Plaintiff, dismissing the action against PennyMac with prejudice; and
3. Plaintiff is to recover nothing from PennyMac.

JUDGMENT IS HEREBY ENTERED in favor of PennyMac, dismissing it from this action with prejudice.

IT IS SO ORDERED.

DATED: December 4, 2017

/s/ Ramona See

Judge of the Superior Court

App-4

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FIVE

SHERRY HERNANDEZ Case No. B258583
Plaintiff and Appellant (Los Angeles County
v. Super. Ct. No. YC068794)
PNMAC MORTGAGE OPPORTUNITY
INVESTORS, LLC, et al.,
Defendants and Respondents

Opinion filed June 27, 2016

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed in part, reversed in part, and remanded.

Sherry Hernandez, in pro. per.; Law Office of David W. Seal and David W. Seal for Plaintiff and Appellant.

Blank Rome, Todd A. Bock, Shawnda M. Grady, Jessica A. McElroy, and Cheryl S. Chang, for Defendant and Respondent PNMAC Mortgage Opportunity Fund Investors, LLC.

Burke, Williams & Sorensen, Richard J. Reynolds and Joseph P. Buchman, for Defendant and Respondent MTC Financial, Inc. dba Trustee Corps.

Plaintiff Sherry Hernandez (plaintiff) sued the parties responsible for foreclosing on her residence. She alleged there were defects in the assignment of the deed of trust on the property such that the entity that initiated the foreclosure sale did so without proper authority. The trial court sustained demurrers to plaintiff's complaint and entered a judgment of dismissal. We issued an opinion affirming the judgment, which noted that our resolution of the appeal involved an issue that was then pending before our Supreme Court: whether a borrower has standing to challenge an allegedly defective assignment of a trust deed by way of a cause of action for wrongful foreclosure.

Several months later, the Supreme Court issued its decision in *Yvanova v. New Century Mortgage Corporation* (2016) 62 Cal.4th 919 (Yvanova) and held—contrary to our earlier resolution of the issue, and disapproving three Court of Appeal decisions on which we relied—a borrower does have standing to challenge assignments that are allegedly void (but not merely *voidable*). The Supreme Court granted review of our prior decision and remanded the case to us with directions to vacate our opinion and reconsider the matter in light of *Yvanova*. We do so now, concluding plaintiff should have an additional opportunity to amend her complaint to state a valid wrongful foreclosure claim, having never had the chance to do so consistent with the principles our Supreme Court has now identified in *Yvanova*.

I. BACKGROUND

Plaintiff's husband, Alfredo Hernandez, borrowed \$752,500 from Your-Best-Rate Financial, LLC, evidenced by his promissory note in that amount (the Note). The Note

was secured by a deed of trust on the family's Rancho Palos Verdes home (the Property). The express terms of the trust deed defined the "borrower" to be "Alfredo Hernandez and [plaintiff], husband and wife and Elizabeth Hernandez, a single woman." The deed of trust defined the term "Note" to mean "the promissory note signed by Borrower," i.e., the \$752,500 note signed on January 18, 2008. Plaintiff, her husband, and her daughter Elizabeth all signed the deed of trust, which included a provision authorizing sale of the Property in the event of a default on the payments due under the Note.

The original lender, Your-Best-Rate Financial, LLC, assigned the Note to CitiMortgage, Inc. on the same day it was executed via a first allonge to the Note. A copy of the Note included in the appellate record, which we will later describe in more detail, also includes a second attached allonge that indicates "CitiMortgage, Inc. [b]y and through its Attorney in Fact PNMAC Capital Management LLC" endorsed the note in blank, which would operate to assign its interest to whoever holds the Note.

On January 18, 2012, PennyMac Loan Services recorded an assignment of the deed of trust on the Property (the Assignment). By its terms, the Assignment indicates Mortgage Electronic Registration Systems, Inc. (MERS),⁶ the nominee "for Lender and Lender's successors and assigns" under the deed of trust, assigned "all beneficial

⁶ "MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender's 'nominee,' having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement." (Yanova, *supra*, 62 Cal.4th at p. 931, fn. 7.)

interest" under the trust deed to PNMAC Opportunity Fund Investors, LLC (PNMAC). On its face, the Assignment indicates it was executed on January 5, 2012, by Todd Graves (Graves), acting in his capacity as an assistant secretary of MERS. The Assignment also bears an attestation by Corina Castillo, a Los Angeles County Notary Public, that Graves personally appeared before her and proved by satisfactory evidence that he executed the Assignment. The same day the Assignment was recorded, MTC Financial, Inc. dba Trustee Corps (Trustee Corps)⁷ recorded a Notice of Default and Election to Sell, stating the Note was in default in the amount of \$55,059.76. Trustee Corps served and recorded a notice of trustee's sale on July 10, 2012, which scheduled the foreclosure sale to take place on August 6, 2012.

The sale was postponed when an automatic stay took effect upon the filing of a bankruptcy petition by Elizabeth Hernandez, plaintiff's co-trustor under the deed of trust. During the trial court proceedings in this case, both PNMAC and Trustee Corps asked the court to take judicial notice of certain documents filed during the bankruptcy proceedings. Among the documents was the bankruptcy court's tentative ruling on PNMAC's motion for relief from the automatic bankruptcy stay. In its tentative ruling, the bankruptcy court questioned PNMAC's interest in the Note and gave the parties additional time to provide evidence that PNMAC was entitled to enforce the terms of the Note. Also among the documents was a March 13, 2013, supplemental declaration from Rita Garcia, a Bankruptcy Manager for PNMAC's authorized agent. The declaration attached a copy of the Note with the second allonge purporting to show the Note had

⁷ Trustee Corps was named the substitute trustee on February 14, 2012, and the Substitution of Trustee was recorded on July 10, 2012.

been endorsed in blank by CitiMortgage. (See, *ante*, at p. 3.) The Garcia declaration asserted “[PNMAC] has possession and control of the original Note with attached Allonges. As a result, [PNMAC] is the real party in interest.”

Once PNMAC submitted the Garcia declaration with the Note and two attached allonges, the bankruptcy court ruled PNMAC had standing to seek relief from the automatic stay. Specifically, the bankruptcy court held PNMAC’s submission of the Note, trust deed, and the Assignment was sufficient to establish it had “a colorable claim” in the Property.⁸ The Bankruptcy Court accordingly lifted the automatic stay on April 15, 2013.

On April 16, 2013, Trustee Corps conducted the foreclosure sale of the Property. PNMAC purchased the Property for \$695,000, and a Trustee’s Deed Upon Sale to that effect was subsequently recorded in the County Recorder’s Office.

In the meantime, plaintiff had filed a lawsuit against defendants PNMAC and Trustee Corps in Los Angeles Superior Court. She filed a first amended complaint after the foreclosure sale, and later a second amended complaint (the operative complaint) on December 2, 2013. The operative complaint asserts four causes of action: (1) “Violation of California Commercial Code—Fraudulent Assignment,” (2) Quiet Title, (3) Wrongful Foreclosure, and (4) “cancellation of instrument,” specifically, the deed of trust, notice of default, and notice of trustee’s sale.

⁸ The bankruptcy court explained: “Movant also attache[d] a copy of the Note with allonges to the Supplemental Declaration. One of the allonges . . . was not [previously] submitted with the Motion, and appears to be an endorsement in blank by CitiMortgage, Inc. (‘Citimortgage’).”

The overall gist of the operative complaint is fairly summed up by a sentence in one of its general allegations: "This action arises out of the wrongful conduct of the defendants as concerns a fraudulent assignment of deed of trust and a wrongful foreclosure on the . . . Property." (Operative Complaint ¶ 7.) The theory of the operative complaint, as taken from the general allegations and portions of the allegations set forth in connection with the designated causes of action, is that PNMAC had no interest in the trust deed, and thus no right to foreclose on the Property, because MERS never in fact assigned the trust deed to PNMAC. Instead, plaintiff alleges Graves (whose signature ostensibly appears on the Assignment) "is not, nor has he ever been" a representative of MERS. (Operative Complaint ¶ 25.) In the same vein, plaintiff further alleges the notary that verified Graves signed the Assignment "is or was an employee of one or more of [defendants]" and that she "has been indicted and is currently being prosecuted in Los Angeles California for criminal misuse of her notary seal." (Operative Complaint ¶¶ 25, 39.) Plaintiff further alleges, on information and belief, that defendants have no beneficial interest in the Note, and that the "Note was never assigned, sold, transferred or otherwise conveyed to Defendants." (Operative Complaint ¶¶ 13, 15.)

Significantly, the Operative Complaint contains somewhat contradictory allegations concerning the validity of the trust deed and the notice documents associated with the foreclosure process. In the portion of her complaint pertaining to the cause of action for cancellation of instruments, plaintiff requests entry of judgment "declaring the Assignment of Deed of Trust, Notice of Default and Election to Sell and Notice of Trustee Sale, to be void ab initio." (Operative Complaint ¶ 55.) Just six paragraphs later,

however, plaintiff states she “is the person against whom the instruments are void or *voidable*,” and she is therefore entitled to relief. (Operative Complaint ¶ 61 [emphasis added].) As to her cause of action for wrongful foreclosure, plaintiff does allege “[t]here has been no valid assignment of any deed of trust” (Operative Complaint ¶ 39), but she makes no assertion as to whether the Assignment was void, or merely voidable. Rather, she states only that she seeks money damages and an order declaring the deed recorded upon completion of the foreclosure sale void. (Operative Complaint ¶¶ 47, 48.)

As they had in response to each of her two prior complaints, PNMAC and Trustee Corps demurred to the operative complaint. They contended all of plaintiff’s causes of action failed because she had not unconditionally tendered the amounts due under the Note, and because the comprehensive statutory framework for nonjudicial foreclosures precluded her from stating a valid cause of action. As to the wrongful foreclosure and Commercial Code causes of action in particular, PNMAC asserted plaintiff could not “seek judicial review as to whether the entity that initiated the non-judicial foreclosure proceedings was authorized to do so.” In a written ruling issued after the trial court took the matter under submission, the court granted defendants’ request for judicial notice of the trust deed, Assignment, and other documents recorded in the Los Angeles County Recorder’s Office, as well as the documents concerning Elizabeth Hernandez’s bankruptcy proceeding. The court sustained the demurrers filed by defendants as to all four causes of action without leave to amend. The trial court reasoned the complaint failed to allege that plaintiff unconditionally tendered the amount of indebtedness, or facts to establish that tender was not

required; the complaint failed to sufficiently allege that plaintiff suffered prejudice by reason of the foreclosure; and the allegation that the document assigning the trust deed contained an improper signature was insufficient, absent prejudice, to state a cause of action. The court elaborated on the concept of prejudice, explaining plaintiff had not asserted she or her husband attempted to pay the outstanding debt and thus, in the court's view, "the victim of the alleged improper execution of the Deed of Trust and improper notarization would be the lender which would have been entitled to foreclose, not the Plaintiff."

The trial court entered a judgment of dismissal, and plaintiff timely appealed. In an opinion filed on December 18, 2015, we affirmed the judgment. We rested our holding largely on our conclusion that a foreclosure plaintiff does not have standing to challenge an entity's authority to initiate foreclosure proceedings based on an allegedly defective assignment. We noted, however, that the standing issue we resolved against plaintiff was pending before our Supreme Court in Yvanova. Plaintiff sought review in the Supreme Court on that basis, and the Supreme Court issued an order remanding the matter to us for reconsideration in light of its newly issued Yvanova opinion.

II. DISCUSSION

Plaintiff filed the operative complaint in December 2013, long before our Supreme Court decided Yvanova. As it is now pled, the complaint does not adequately state a valid cause of action, and plaintiff in her supplemental briefing after remand does not seriously contend otherwise. Rather, the focus of the parties' dispute is now whether there is a reasonable possibility plaintiff could state a valid cause of action for wrongful foreclosure post-Yvanova. In particular,

plaintiff contends that although the operative complaint “contained an erroneously labeled, and perhaps inartfully[] drafted first cause of action,” the gist of the complaint was that plaintiff “was arguing she had the right to question the foreclosure due to a void assignment of the Deed of Trust.” Plaintiff argues there is a reasonable probability she can plead facts stating a valid claim for wrongful foreclosure consistent with the parameters established in *Yvanova* and urges us to remand the case to the trial court so she may have an opportunity to do so. Owing to the significant change in controlling authority, and seeing no basis to conclude at this stage that a wrongful foreclosure claim against PNMAC would be doomed, we agree she should have that opportunity. As to Trustee Corps, however, a wrongful foreclosure claim is doomed, as we shall explain. We therefore affirm the judgment of dismissal solely as to that party.

A. Standard of Review

We review de novo the trial court’s order sustaining the demurrers and we determine whether the operative complaint states a valid cause of action. (*Brown v. Deutsche Bank National Trust Company* 204 Cal.App.4th 433.) “[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) To determine whether the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint’s legal defect or defects.

(*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)” (*Yanova, supra*, 62 Cal.4th at p. 924 [footnote omitted].)

B. The Operative Complaint Does Not Now State a Valid Cause of Action

1. Claims other than wrongful foreclosure

We adhere to our prior opinion’s resolution of plaintiff’s appeal as to the first, second, and fourth causes of action in the operative complaint, for violation of the Commercial Code, quiet title, and cancellation of instruments, respectively. As the trial court concluded, the Commercial Code has no application in the realm of nonjudicial foreclosure. (*Debrunner v. Deutsche Bank Nat. Trust Co* (2012) 204 Cal.App.4th 433, 441.) In addition, “[i]t is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured,” which plaintiff has not done. (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; accord, *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86 [citing additional cases].) And as to the cause of action for cancellation of instruments, plaintiff has alleged no facts which would support cancellation of the Note or deed of trust because she does not dispute the validity of those documents; she challenges only the validity of the trust deed’s transfer by way of the Assignment.

2. The wrongful foreclosure cause of action

The elements of a claim for wrongful foreclosure are “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a

power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.)

In our prior opinion, we relied on three Court of Appeal decisions that held a plaintiff who does not dispute obligations owed under a promissory note or deed of trust cannot demonstrate prejudice from an allegedly defective assignment because the assignment merely substitutes one party for another without changing the underlying obligations; the true victim of the defective assignment in such circumstances, so the argument goes, is the lender not the plaintiff. (*Hernandez v. PNMAC Mortgage Opportunity Fund Investors, LLC, et al.* (Dec. 18, 2015, B258583 [nonpub. opinion, citing *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75; *Herrera v. Federal Nat. Mortg. Assn.* (2012) 205 Cal.App.4th 1495; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256].) There was another Court of Appeal decision holding to the contrary, *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, but at the time it occupied, as one court has described it, “a lonely minority position on one side of a split in the California courts.” (*Lundy v. Selene Finance, LP* (N.D. Cal. Mar. 17, 2016, No. 15CV05676JST) 2016 WL 1059423.)

The *Yvanova* decision changed that, siding with *Glaski* and marking a sharp shift in the pre-existing legal landscape. In *Yvanova*, our Supreme Court resolved what it described as the narrow question on which it granted review: “whether the borrower on a home loan secured by a deed of trust may base

an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." (Yvanova, *supra*, 62 Cal.4th at p. 923.) The court held "an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure." (*Id.* at p. 924.) Although the court rejected the financial institution defendants' argument that the plaintiff had no standing to bring a wrongful foreclosure claim based on an allegedly defective assignment, the court's opinion did include language disclaiming any intent to resolve questions concerning the substantive elements of the wrongful foreclosure tort or the factual showing needed to meet those elements. (*Ibid.*)

In her supplemental briefing, plaintiff essentially concedes the complaint, including the wrongful foreclosure cause of action, does not now state a valid claim. She acknowledges portions of the complaint are "perhaps inartfully[] drafted" and she recognizes "[a] favorable ruling at this stage will still mean the borrower must file a complaint that makes sufficient allegations." We agree, for her alternative usage of void or voidable, and the allegations made specifically in connection with her wrongful foreclosure claim, leaves her theory of liability unclear, and unclear in a manner that makes all the difference under Yvanova. But the conclusion the complaint is not sufficient as it stands does not end our inquiry; rather, plaintiff devotes nearly the entirety of her supplemental briefing to making the case that she deserves an opportunity to amend the complaint to state a wrongful foreclosure claim with the benefit of our Supreme Court's guidance in *Yvanova*.

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*C. Plaintiff Is Entitled to An Additional Opportunity
to Allege a Valid Cause of Action for Wrongful
Foreclosure against PNMAC*

When addressing whether leave to amend a complaint was erroneously denied, a plaintiff “must show in what manner he can amend [the] complaint and how that amendment will change the legal effect of [the] pleading.” (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, internal citations omitted.) We decide whether there is a reasonable possibility the defect or defects in the complaint can be cured by an amendment; if so, the court has abused its discretion and we reverse. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

As we have said, the *Yvanova* decision represented a significant shift from preexisting case law, and in light of *Yvanova*, we hold there is a reasonable possibility plaintiff can amend to state a valid cause of action for wrongful foreclosure.⁹ Taken together, portions of the existing operative complaint and plaintiff’s supplemental briefing in this court are sufficient indication she intends to allege PNMAC was not the true beneficiary because the Assignment was absolutely void—not simply voidable.¹⁰ (*Yvanova*, *supra*, 62 Cal.4th at p. 935 [“If a purported assignment necessary to the chain by which the foreclosing entity claims that power [to complete a nonjudicial foreclosure] is absolutely void, meaning of no legal force or

⁹ This shift is also why we do not fault plaintiff for articulating only now how she would amend the complaint in an effort to state a valid wrongful foreclosure cause of action.

¹⁰ While a void contract is one without legal effect that binds no one and is a mere nullity, a voidable contract is one that the parties thereto may declare void but is not void in itself. (*Yvanova*, *supra*, 62 Cal.4th at pp. 929-930.)

effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure".) PNMAC, however, counter that mere allegations an Assignment is defective and thereby void are insufficient; to plead wrongful foreclosure a plaintiff must identify facts establishing how the Assignment is void. We agree that a plaintiff does not state a valid cause of action solely by including boilerplate language in a complaint asserting an assignment is void. (*Glaski v. Bank of America*, supra, 218 Cal.App.4th at p. 1094.) But our reading of the operative complaint along with the additional facts plaintiff now represents she can plead establishes a reasonable possibility plaintiff can go beyond mere allegations and present a specific wrongful foreclosure theory on which she intends to rely, namely, that the person who ostensibly executed the Assignment, Graves, in fact had no authority to act on MERS's behalf; or if he did, he did not in fact execute the Assignment because the notary, Castillo, who has since apparently been convicted (not just indicted) for misuse of her notary seal falsely verified his signature; and that just months before the Assignment was ostensibly executed there were competing claimants on the beneficial interest in the Note.

PNMAC, however, has what appears at first blush to be a forceful counterargument. PNMAC claims, relying on the Garcia declaration that was among the bankruptcy documents the trial court judicially noticed, that it was the holder of the Note at the time foreclosure proceedings were instituted. If PNMAC could properly and conclusively establish at this stage of the proceedings that it did hold the Note at the

relevant time, that would be dispositive and preclude a wrongful foreclosure cause of action because a deed of trust automatically transfers with the Note it secures—even without a separate assignment. (Civ. Code, § 2936; *Yanova, supra*, 62 Cal.4th at p. 927 [“The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment”].)

On appeal from the trial court’s demurrer ruling, however, we are not in a position to accept PNMAC’s counterargument for two reasons. First, the operative complaint alleges (and it appears plaintiff would persist in the allegation) that PNMAC was not the holder of the Note. In many situations courts may take judicial notice of the existence and facial contents of publicly recorded documents and certain documents filed in other judicial proceedings notwithstanding contrary allegations leveled in a complaint. (*Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th at pp. 264-265 [court may take judicial notice of facts that cannot reasonably be controverted].) The question of who the holder of a note is, however, is disputable (at least in this case), and we will not assume the truth of facts asserted in the Garcia declaration to disregard the complaint’s contrary allegations. (*Yanova, supra*, 62 Cal.4th at p. 924, fn. 1 [taking judicial notice of a recorded deed of trust and other documents but “not of disputed or disputable facts stated therein”].) Further, even if it were proper to take judicial notice of the truth of the facts to which Garcia attested in her declaration, there is nothing in the declaration or on the second allonge to the Note itself—which is undated

—that establishes when PNMAC came to be its holder.¹¹ Without a basis to conclude PNMAC was the holder at the time it instituted foreclosure proceedings, we are convinced there remains a reasonable possibility plaintiff can state a proper wrongful foreclosure claim.

In our prior opinion, we also held the operative complaint failed for insufficient allegations concerning the prejudice element of a wrongful foreclosure claim because she did not dispute that her husband had ceased making payments on the Note and there was no allegation, nor reason to believe, that *CitiMortgage* (the holder of the Note prior to the asserted fraudulent Assignment) would not have proceeded with foreclosure. To support our conclusion on that point, we relied on *Siliga v. Mortgage Electronic Registration Systems*, *supra*, 219 Cal.App.4th 75. PNMAC contends there is no reasonable probability plaintiff could amend her complaint to state a wrongful foreclosure claim for this same reason.

We believe our prior prejudice rationale no longer holds. *Siliga* is one of the cases *Iyanova* has now expressly disapproved to the extent it held borrowers lack standing to challenge an assignment of the deed of trust as void. (*Iyanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.) Moreover, more than once in its opinion, our Supreme Court casts doubt on the rationale on which we relied to conclude there was an insufficient allegation of prejudice. (Id. at p. 941 [“Without discussing *Glaski*, the *Siliga* court also held the borrower plaintiffs failed to show any prejudice from, and therefore

¹¹ Not only is the second allonge to the Note undated, it is executed on CitiMortgage’s behalf “[b]y and through its Attorney in Fact PNMAC Capital Management LLC.” The parties have not pointed to a document in the record before us memorializing an agreement by CitiMortgage to have PNMAC Capital Management LLC act as its attorney in fact.

lacked standing to challenge, the assignment of their deed of trust to the foreclosing entity. . . . As already explained, this prejudice analysis misses the mark in the wrongful foreclosure context. When a property has been sold at a trustee's sale at the direction of an entity with no legal authority to do so, the borrower has suffered a cognizable injury"; see also, e.g., *id.* at p. 938 ["The logic of defendants' no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an 'odd result' indeed"] (emphasis omitted).) To be sure, *Yvanova* does state its holding is narrow, and it does disclaim any intent to address the substantive elements of the wrongful foreclosure tort. But we cannot reconcile our prior lack-of-prejudice holding—that plaintiff failed to allege another entity would not have foreclosed—with *Yvanova*'s statements indicating no such allegation is necessary to state a wrongful foreclosure claim. (See *Sciarratta v. U.S. Bank National Association* 247 Cal.App.4th 552 [202 Cal.Rptr.3d 219, 221-222] ["[W]e conclude that a homeowner who has been foreclosed on by one with no right to do so—by those facts alone—sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure"].) In addition, and in any event, "[w]hatever merit [a] rule [requiring proof the true beneficiary would not have foreclosed] would have" on the ultimate question of liability (*Yvanova, supra*, 62 Cal.4th at pp. 938-939), a plaintiff who states a cause of action consistent with *Yvanova* is entitled to an opportunity to show through discovery that the proper party to foreclose would not have foreclosed, or at least would not have instituted

foreclosure proceedings as quickly as the actual foreclosing party in fact did.

PNMAC additionally argues plaintiff cannot carry her burden to show a reasonable possibility of amending to state a valid wrongful foreclosure claim because she cannot plead tender, i.e., that she paid or offered to pay the amount due under the Note. *Yvanova*, while expressly reserving decision on the question of whether tender is required to set aside a foreclosure sale based on a claim of wrongful foreclosure, did cite cases holding there are exceptions to the tender rule. (*Yvanova, supra*, 62 Cal.4th at p. 929, fn. 4 [citing cases and explaining “[t]ender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so”]; see also, e.g., *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280-1281 [citing cases]; *Barriouuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F.Supp.2d 964, 969.) We believe there is a reasonable possibility plaintiff can plead sufficient facts in a Third Amended Complaint to state a cause of action that would come within one of the recognized exceptions—particularly if, as plaintiff now contends, the complaint “would be nothing more than an action for money damages,” rather than an attempt to unwind the completed foreclosure sale.

Next, PNMAC asserts plaintiff cannot state a valid wrongful foreclosure claim because she did not sign the Note and *Yvanova* is framed only in terms of what a “borrower” may allege. This argument fails because plaintiff is named in the trust deed, which she signed, as a “borrower” on the Note. We are convinced *Yvanova* did not use the term borrower in any more technical or restrictive sense than that.

Finally, we emphasize we do not hold plaintiff necessarily has a valid cause of action for wrongful foreclosure against PNMAC. Rather, consistent with the well established standard we apply at this stage of the proceedings, we hold only that there is reasonable possibility that she will be able to plead such a claim. We therefore remand the matter to the trial court to give her that opportunity, which if again contested via demurrer by PNMAC, the trial court will decide on the record before it.

D. Even in Light of Ivanova, the Trial Court Correctly Sustained Trustee Corps' Demurrer Without Leave to Amend

“A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. ‘The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.’ (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) . . . [¶] . . . [¶] The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary. (*Biancalana v. T.D. Service Co.*, *supra*, 56 Cal.4th at p. 819; *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 677.) While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity’s agent. (Civ. Code, § 2924, subd.

(a)(1) [notice of default may be filed for record only by ‘[t]he trustee, mortgagee, or beneficiary’]; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334 [when borrower defaults on the debt, ‘the beneficiary may declare a default and make a demand on the trustee to commence foreclosure’]; *Santens v. Los Angeles Finance Co.* (1949) 91 Cal.App.2d 197, 202 [only a person entitled to enforce the note can foreclose on the deed of trust].)” (*Yanova*, *supra*, 62 Cal.4th at pp. 926-927.)

We have held it is reasonably possible plaintiff can state a valid wrongful foreclosure cause of action against PNMAC, and we remand to give her that opportunity. She is not entitled, however, to leave to amend as to Trustee Corps because we are convinced there is no reasonable possibility she could state a valid wrongful foreclosure cause of action against that entity.

It is undisputed that Trustee Corps instituted foreclosure proceedings by recording a notice of default and a notice of sale. But given the circumscribed role of a trustee in foreclosure proceedings, merely alleging that Trustee Corps took these actions at PNMAC’s behest is not a sufficient basis on which wrongful foreclosure liability can be predicated. The apparent basis for the operative complaint’s assertion of a wrongful foreclosure cause of action against Trustee Corps were allegations that PNMAC and Trustee Corps, labeled by plaintiff the “conspiring defendants,” joined together in some unspecified manner to form a “conspiracy” and perpetrate “actual fraud” in the assignment of the trust deed. (Operative Complaint ¶¶ 8, 25, 26, 40.) These, however, are mere conclusory allegations insufficient to allege conspiracy. (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419; *Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d

509, 521; see also *Kachlon v. Markowitz, supra*, 168 Cal.App.4th at pp. 333, 343 [actions taken by a foreclosure trustee privileged under Civil Code, §§ 47 & 2924, subd. (d) unless malicious].) Plaintiff's supplemental briefing offers nothing as to how she could plead facts sufficient to state a claim against Trustee Corps specifically, and no viable path for a wrongful foreclosure cause of action against that entity is otherwise apparent. We therefore uphold the trial court's decision to sustain the demurrer without leave to amend as to Trustee Corps.

DISPOSITION

The judgment of dismissal is affirmed as to defendant Trustee Corps. The judgment of dismissal is reversed as to defendant PNMAC and the matter remanded for further proceedings consistent with this opinion. Defendant Trustee Corps shall recover its costs on appeal. Plaintiff and defendant PNMAC shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.¹²

¹² Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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PennyMac letter dated March 17, 2011
addressed to borrower



Loan Administration
P.O.Box 514387
Los Angeles, CA 90051-4387
(866) 545-9070
fax (866) 577-7205
www.pennymacusa.com

ALFREDO HERNANDEZ
27612 TARRASA DR
RCH PALOS VRD CA 90275-1011

Notice Date: March 17, 2011
Account Number: 2004975196
Property Address:
27612 TARRASA DR
RANCHO PALOS VERDES CA 90275

NOTICE OF ASSIGNMENT, SALE, OR TRANSFER OF OWNERSHIP OF MORTGAGE LOAN

In this Notice, the terms "we," "us" or "our" mean the new Creditor identified below. This Notice is provided by us or on our behalf.

Federal law requires that borrowers receive a written notice whenever ownership of a loan secured by their principal dwelling is assigned, sold or transferred (collectively "transferred") to a new creditor. You are receiving this Notice because your prior creditor transferred your loan (described above) to PNMAC Mortgage Opportunity Fund Investors, LLC. You may contact your prior creditor, or the servicer of your loan, if you want to confirm these transfers.

It is important that you understand the difference between the creditor and the servicer of your loan. The creditor owns your loan. The servicer collects your mortgage payments, sends you billing statements, and provides the day-to-day administration of your loan as a contractor on the creditor's behalf.

Note: The servicing of your loan is expected to change on March 25, 2011 and you will receive a separate notice with additional information. Until you receive this notice, please continue to send your loan payments to CitiMortgage, Inc. – do not send your loan payments to any other servicer until directed to do so in such notice. If you have any questions regarding your loan or the servicing of your loan you should first contact the servicer at the servicer's mailing address or telephone number set forth directly below. The servicer is generally authorized to handle most inquiries and requests. In the limited circumstances where the servicer does not have independent authority to act, the servicer will gather relevant information from you and consult with parties, including us, about your request and communicate a decision to you.

1. Servicer's Name: CitiMortgage, Inc.
Servicer's Toll Free Telephone Number: (800) 283-7918
2. Date Your Loan was Transferred to PNMAC Mortgage Opportunity Fund Investors, LLC:
February 25, 2010
3. New Creditors Name: PNMAC Mortgage Opportunity Fund Investors, LLC
New Creditor's Mailing Address: 27001 Agoura Rd
(Not for payments)
New Creditor's Toll Free Telephone Number: (866) 545-9070
4. The transfer of your loan to us is recorded on our books and records but has not been publicly recorded. Ownership of your loan may also be recorded on the registry of Mortgage Electronic Registrations Systems, Inc., at 1818 Library Street, Suite 300 Reston, VA 20190.

App-6

PennyMac letter dated April 5, 2011
addressed to borrower



April 5, 2011

Loan Administration
P.O. Box 514387
Los Angeles, CA 90051-4387
(866) 545-9070
fax (866) 577-7205
www.pennymacusa.com

ALFREDO HERNANDEZ
27612 TARRASA DR
RCH PALOS VRD, CA 90275-1011

CORRECTION TO NOTICE OF ASSIGNMENT, SALE, OR TRANSFER OF OWNERSHIP OF MORTGAGE LOAN

Re: Loan Number: 2004975196
 27612 TARRASA DRIVE
 RANCHO PALOS VERDES, CA 90275

Dear ALFREDO HERNANDEZ:

You recently received a letter dated March 17, 2011 notifying you that the ownership of a loan secured by your principal dwelling is assigned, sold or transferred to a new creditor.

This letter indicated that the date your loan transferred was February 25, 2010. The correct date is February 25, 2011.

If you have additional questions please call our Customer Service Department at (866) 545-9070. Our office hours are 7:00 AM to 6:00 PM, Monday through Friday and 7:00 AM to 11:00 AM, Saturday PST.

Sincerely,

Michael Whitfield
Director, Loan Administration

This is an attempt to collect a debt and any information obtained will be used for that purpose.

App-7

PennyMac letter dated August 28, 2012
addressed to borrower



P.O. Box 514387
Los Angeles, CA 90051-4387.

APP-7

**Notification of Assignment,
Sale or Transfer of Your
Mortgage Loan**

August 28, 2012

ALFREDO HERNANDEZ

27612 TARRASA DR
RCH PALOS VRD CA 90275

Re: Loan Number: 1000032423
27612 TARRASA DR RANCHO PALOS VERDES CA 90275

Dear ALFREDO HERNANDEZ:

The purpose of this notice is to inform you that your mortgage loan referenced above was sold to PNMAC Mortgage Opportunity Fund Investors, LLC on August 02, 2012. Your loan servicer continues to be PennyMac Loan Services LLC (PennyMac). PNMAC Mortgage Opportunity Fund Investors, LLC does not service your loan. Please note, this letter does not require any action to be taken on your part but is simply a courtesy notification of the assignment, sale or transfer of your mortgage loan. Below is your servicer's contact information should you have any questions or concerns about your loan.

The transfer of mortgage loans is a standard part of the mortgage business for many of the nation's mortgage lenders. The transfer of your mortgage loan to PNMAC Mortgage Opportunity Fund Investors, LLC does not affect any terms or conditions of the Mortgage/Deed of Trust or Note. The transfer of ownership of your mortgage loan has not been publicly recorded.

It is important that you send your monthly loan payments directly to your servicer. Please do not send payments to PNMAC Mortgage Opportunity Fund Investors, LLC as they may be returned to you, which could result in late charges and your account becoming past due. All correspondence and inquiries concerning your mortgage loan also should be addressed to your servicer. We rely on the mortgage servicer to manage your mortgage on our behalf and work directly with you. Your servicer has authority to act on our behalf with regard to the administration of your mortgage loan and respond to any questions about your loan.

Servicer: PennyMac Loan Services, 6101 Condor Drive Moorpark CA 93021

Address for sending payments: P.O. Box 30597 Los Angeles CA 90030

Toll-free telephone number for inquiries: 8666013518

Website: www.PennyMacUSA.com

If you have questions regarding this notice, you may contact PNMAC Mortgage Opportunity Fund Investors, LLC at 6101 Condor Drive Moorpark CA 93021, 8182247442.

