No. 20-112

IN THE

Supreme Court of the United States

SHERRY HERNANDEZ,

Petitioner,

v.

PNMAC MORTGAGE OPPORTUNITY FUND INVESTORS, LLC, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Five

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under California law, the California Court of Appeal, Second Appellate District, Division 5 (the "Court of Appeal") properly affirmed the trial court's entry of judgment following its sustaining of Respondents PNMAC Mortgage Opportunity Fund Investors, LLC ("PNMAC") and PennyMac Loan Services, LLC's ("PennyMac," collectively with PNMAC, "Respondents") demurrer to Petitioner Sherry Hernandez's ("Petitioner") third amended complaint ("TAC") asserting one cause of action for wrongful foreclosure without leave to amend, on the grounds that the TAC failed to allege facts sufficient to state a cause of action for Petitioner's sole remaining cause of action for wrongful foreclosure.

The Court of Appeal, in an unpublished, non-precedential decision, held that the TAC presented no valid wrongful foreclosure theory that the subject assignment of deed of trust was void and that Petitioner had not identified any facts justifying leave to file a fourth amended pleading.

2. Whether there is jurisdiction in this Court under 28 U.S.C. § 1257(a), where the Court of Appeal decided the case exclusively under state law, was not asked to resolve any question of federal law, and until Petitioner improperly reframed the issue in her petition ("Petition") as one pertaining to due process concerns under the Fourteenth Amendment, no issue of federal law was ever presented to the California trial or appellate courts, or to the California Supreme Court (which denied discretionary review).

3. Whether Petitioner's assertion of jurisdiction in this Court under 28 U.S.C. § 1257(a) is frivolous, and whether damages or costs should be assessed against

Petitioner and her counsel under Supreme Court Rule 42.2.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the California Court of Appeal, with the exception of defendant MTC Financial, Inc. dba Trustee Corps ("Trustee Corps"). The Court of Appeal affirmed the trial court's judgment of dismissal as to Trustee Corps prior to the filing of the Third Amended Complaint. The State of California is not and never has been a party to this litigation.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Respondents state that Private National Mortgage Acceptance Company, LLC is the parent company of PennyMac Loan Services, LLC and there are no publicly held companies that own 10% of PennyMac Loan Services, LLC. There are no parent corporations or publicly held companies owning 10% or more of PNMAC Mortgage Opportunity Fund Investors, LLC.

RELATED CASES

- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. S259570, Supreme Court of California. Order denying petition for review issued February 29, 2020.
- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. B287048, California Court of Appeal, Second Appellate District, Division 5. Order affirming ruling sustaining demurrer to third amended complaint without leave to amend November 12, 2019.
- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. YC068794, Superior Court of California, County of Los Angeles. Judgment in favor of Respondents following order sustaining demurrer to third amended complaint without leave to amend entered on December 4, 2017.
- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. B258583, California Court of Appeal, Second Appellate District, Division 5. Order reversing ruling sustaining demurrer to the Second Amended Complaint without leave to amend in part, as to wrongful foreclosure cause of action only, on June 27, 2016.
- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. S232151, Supreme Court of California. Order granting petition for review, with directions to the California Court of Appeal, Second Appellate District, Division 5 to reconsider its ruling in light of *Yvanova v. New Century Mortgage Corporation*, 62 Cal.4th 919 (2016), on March 30, 2016.

- *Hernandez v. PNMAC Mortgage Opportunity Investors, et al.*, No. B258583, California Court of Appeal, Second Appellate District, Division 5. Order affirming ruling sustaining demurrer to Second Amended Complaint without leave to amend on December 18, 2015.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

As detailed below, there is no basis for jurisdiction under 28 U.S.C. § 1257(a) because the state court judgment at issue was based entirely on state law, and no federal claim was ever presented to the state courts.

STATEMENT OF THE CASE

A full statement of the factual and procedural history of the case is set forth in the decision of the Court of Appeal and is not included here for purposes of judicial economy. *See* Respondents' Appendix ("Resp. App.") at 3a-10a.[1]

Pursuant to their obligation under Supreme Court Rule 15.2 to address any misstatement of fact or law in the Petition, Respondents identify the following misleading statements or omissions:

- Contrary to the statements at pages 3-4 of the Petition describing the completed nonjudicial foreclosure sale of the subject property ("Property"), the sale was not wrongful, was not based on a void assignment of deed of trust, and Petitioner was in default at the time of the foreclosure sale. *See* Resp. App. at 2a-5a. Furthermore, Respondents did not create a "system to accomplish the wrongful foreclosure by concealing the identity of owner [*sic*] of the claimed debt." Pet., 4. Rather, the Property was sold pursuant to the power of sale contained

[1] Respondents cite to their own Appendix because Petitioner's Appendix is unnumbered and it appears that the documents within Petitioner's Appendix were retyped or reproduced by Petitioner in some manner, rather than being exact reproductions of the documents as entered by the courts below. To confirm the integrity of the cited documents, all citations herein are to Respondents' Appendix.

within the subject deed of trust following Petitioner's default on the loan.

- The Petition wrongly asserts that Petitioner raised a federal claim in the courts below, including the California Supreme Court, and that fraud was an issue on appeal. The Court of Appeal considered whether the trial court correctly sustained Respondents' demurrer to Petitioner's sole remaining cause of action for wrongful foreclosure without leave to amend, as pled in the TAC. Resp. App. at 3a.
- The Petition wrongly characterizes the background and history of the Mortgage Electronic Registration System ("MERS"). Petition, at 5-7. For example, Petitioner inaccurately asserts that MERS "supplanted the existing real property statutes, in every state" and that the MERS creates documents "for the sole purpose of foreclosing on real property." *Id.* at 6.
- At pages 7 through 9, the Petition inaccurately describes the nonjudicial foreclosure of the Property, including Petitioner's history of payments on the subject loan, that PNMAC did not have a beneficial interest in the subject loan at the time the notice of default was recorded, and that the United States Bankruptcy Court forced Respondents to create an allonge to the note. The Court of Appeal accurately detailed the history of the nonjudicial foreclosure proceedings pertaining to the Property in its ruling. *See* Resp. App. at 3a-5a.
- At pages 9 through 10, Petitioner continues her inaccurate description of the nonjudicial foreclosure sale of the Property, including suggesting

that the notary who witnessed the assignment of the deed of trust to PNMAC did so fraudulently, and claiming that the Property was sold without notice to Petitioner. Regarding the notary, the Court of Appeal explained that, even if the notary pled guilty in 2014 to fraudulently notarizing documents, "these allegations have no bearing on what happened here." Resp. App. at 15a. The Court of Appeal further confirmed that on January 18, 2012, PennyMac recorded an assignment of the deed of trust and MTC Financial, Inc. dba Trustee Corps ("Trustee Corps") recorded the notice of default on July 10, 2012, Trustee Corps served and recorded a notice of trustee's sale, and Trustee Corps conducted the foreclosure sale of the Property on April 16, 2013. *Id.* at 3a-5a.

- Petitioner's misleading statements continue at pages 10 through 13 of the Petition. At page 11, Petitioner mischaracterizes the holding in *Yvanova v. New Century Mortgage Corp.*, 62 Cal. 4th 919, 924 (2016) (*Yvanova*), wherein the Supreme Court of California held "only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment."
- At page 12, Petitioner's summary of what the exhibits attached to the TAC allegedly show does not comport with reality; the exhibits do not show that the assignment of deed of trust was void, that the loan was not in default at the time of assignment, that PNMAC did not hold a

beneficial interest in the loan, that the trustee's sale was void, or that Respondents "committed fraud on the court." Further on page 12, the trial court did not violate the "law of the case doctrine" by granting Respondents' request for judicial notice filed in support of their demurrer to the TAC, nor did it violate the "express instructions of the Court of Appeal in doing so," and, again, Respondents did not commit fraud on the court.

- At pages 12 to 13, it is unclear exactly what Petitioner is claiming, but to the extent she is claiming that the loan was transferred to an entity other than PNMAC, Petitioner is wrong.

Furthermore, and crucial to the jurisdictional and sanctions issues, Petitioner's Statement of the Case willfully violates Supreme Court Rule 14.1(g)(i). The Statement of the Case fails to include a:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; . . . specific reference to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

These required matters are not set forth in the Petition's Statement of the Case because they do not exist, and there is no basis for this Court's jurisdiction.

There is no specification of when the purported "due process" question was presented for decision, because it was not.

There is no specification of how the federal question was presented or how it was resolved by the state courts, because it was not.

There is no specific reference to the record to show the federal question was timely and properly raised below, because it was not.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

1. The judgment of the Court of Appeal was based entirely on California substantive law. Consequently, there is no basis for jurisdiction in this court under 18 U.S.C. § 1257(a).

The trial court issued a judgment in favor of Respondents after Respondents' demurrer to the TAC was sustained without leave to amend as to Petitioner's sole remaining cause of action for wrongful foreclosure, a claim arising under state law. The trial court's ruling on the demurrer confirmed that the TAC failed to allege sufficient facts to address either of the two areas identified by the Court of Appeal in its unpublished June 27, 2016 opinion in this action, in which it reversed the trial court's order sustaining Respondents' demurrer to the Second Amended Complaint without leave to amend following *Yvanova* and remanded the case back to the trial court to permit Petitioner a final opportunity to plead a wrongful foreclosure claim against Respondents. Resp. App. at 19a-23a. Specifically, the trial court confirmed that Petitioner had failed to allege: (1) that the individual who ostensibly executed the assignment of the subject deed of trust had no authority to act on MERS's behalf

or, if he did, he did not in fact execute the assignment, and (2) sufficient facts that would come within one of the recognized exceptions to California's tender rule. *Id.*

On appeal from the adverse judgment following the demurrer ruling, Petitioner challenged the judgment solely on California state law grounds. Resp. App. at 10a-18a. In relevant part, Petitioner asked the Court of Appeal to reverse on the basis that she had adequately pled a void assignment of deed of trust pursuant to California law. Resp. App. at 12a-16a. Petitioner further argued that she had properly pled an exception to California's tender rule, which requires a party attacking a completed nonjudicial foreclosure sale to first tender the amount due on the loan. Resp. App. at 12a.

Responding to Petitioner's contentions, Respondents countered that the trial court properly ruled that Petitioner's wrongful foreclosure cause of action failed because the TAC failed to allege that the sale of the Property was illegal, fraudulent, or willfully oppressive pursuant to California law and that Petitioner lacked standing to assert her claim because she failed to tender the amount due under the loan, yet sought to unwind the completed sale. Resp. App. at 9a-10a.

The Court of Appeal, in an unpublished opinion, agreed with Respondents on all fronts. Resp. App. at 2a-18a. Applying California law, it held that "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." Resp. App. at 10a-11a. Regarding MERS and executor of the assignment, the Court of Appeal further confirmed that "[n]o facts are alleged that would suggest the capacities in which [the executor of

the assignment of the deed of trust] signed the other documents are somehow inconsistent with his authority to simultaneously act for MERS in connection with the Assignment." Resp. App. at 14a. Accordingly, the Court of Appeal affirmed the judgment for Respondents. Resp. App. at 18a.

Petitioner sought discretionary review in the California Supreme Court. Resp. App. at 1a. Again, no federal issue was raised. *Id.* Rather, Petitioner attempted to distort the issues of the case into a challenge to MERS's authority to assign deeds of trust in general, even though such argument was not the focus of Petitioner's argument to the Court of Appeal. For the first time, Petitioner asked the California Supreme Court to consider the validity of the MERS system as a whole. The California Supreme Court denied review without substantive comment. *Id.*

Under Section 1257(a) and this Court's case law it is clear that there is no basis for this Court's jurisdiction unless the final judgment of the state court is based on a dispositive question of federal law. Certiorari jurisdiction is not available when the state court judgment is based entirely on state law. Indeed, there is no jurisdiction even where there has been a decision on the basis of both federal and state law, if the state law determination is an independent and adequate ground for the judgment. *See*, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Petitioner cannot maintain a good faith argument that the judgment below was based on any question of federal law. Moreover, even if there were some federal issue lurking somewhere in the record, it could not conceivably have affected the judgment. As discussed above, the Court of Appeal squarely decided this case on the basis of California common law: the failure

to allege that a nonjudicial foreclosure sale was illegal, wrongful, or willfully oppressive. This readily qualifies as independent and adequate state grounds. Indeed, Petitioner argued, in seeking California Supreme Court review, that this holding was wrong, as a matter of California law, but never argued that it was inadequate, if correct, to support the remedy of complete reversal.

The Petition should be denied for want of jurisdiction.

2. Even if the Petition could somehow be interpreted to present a federal issue capable of supporting certiorari jurisdiction, the Petition must be denied because Petitioner did not present the purported due process argument to the state courts below. With few exceptions not applicable here, this Court will not consider questions raised for the first time in this Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *see also Webb v. Webb*, 451 U.S. 493, 501 (1981) ("there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law").

Petitioner did not present any federal issue to the Court of Appeal. Indeed, there is no mention of the words "due process," "Fourteenth Amendment," "Constitution," or "federal question" any where in Petitioner's Opening Brief filed in the Court of Appeal on or about December 5, 2018 or Petitioner's Petition

for Review filed in the Supreme Court of the State of California on or about December 22, 2019.

To the extent Petitioner is attempting to create a federal question based on her purported challenge to the MERS system, this argument was not made to the Court of Appeal and, in any event, does not constitute an important federal question. *See* Resp. App. at 2a-18a. The Court of Appeal did not issue any ruling pertaining to the MERS system itself because Petitioner never presented this argument to the Court of Appeal. *Id.* While Petitioner did suggest that the originating lender could not assign the deed of trust following its dissolution, the Court of Appeal confirmed that MERS would still have the power to execute the assignment in such a circumstance. *See* Resp. App. at 13a. In short, Petitioner did not present the purported due process or MERS arguments to the state courts below and the California state courts did not decide an important federal question in any way, let alone in a way that would conflict with the decision of a state court of last resort or of a United States court of appeal. *See* Supreme Court Rule 10.

The presentment rule serves the important interest of comity, because " 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (citing *Webb*, 451 U.S. at 500). Accordingly, the rule affords states courts the opportunity to consider the constitutionality of proposed changes that could potentially obviate any challenges to state court action in federal court. *Id.* The presentment rule is also in the best interests of judicial economy, as it "not only avoids unnecessary adjudication in this Court by allowing state courts to resolve

issues on state-law grounds, but also assists us in [the Court's] deliberations by promoting the creation of an adequate factual and legal record." *Id.* at 90-91.

The Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams*, 520 U.S. at 86.)

Accordingly, there is no basis for exercise of this Court's jurisdiction in this case. The Petition should be denied.

3. This Court has long recognized that frivolous efforts to invoke nonexistent jurisdiction may warrant sanctions. *See* Former Supreme Court Rule 17, 5 U.S. (1 Cranch) xviii (1803). This authority is currently found in Supreme Court Rule 42.2, authorizing the award of "just damages" and single or double costs for the filing of a frivolous petition.

As outlined above, there is no good faith basis to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), the independent and adequate state ground doctrine, and the presentation requirement. Despite the lack of any jurisdictional basis, Petitioner filed the Petition, which obliged Respondents to oppose it, and apprise the Court of Petitioner's numerous inaccurate statements. The opposition was necessary given that Petitioner willfully violated the requirements of Rule 14.1(g)(i), in an attempt to mask the jurisdictional deficiency. Given the clarity of the California state law bases for the Court of Appeal's judgment, the lack of any presentation of a federal claim to the state courts, and Petitioner's willful ignorance of the well settled case law that bars jurisdiction under these

circumstances, Respondents respectfully request that this Court award just damages or costs to Respondents based on Petitioner's filing of a frivolous petition.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied, and the Court should enter an order allowing Respondents to recover damages, or single, or double costs under Rule 42.2 against Petitioner and her counsel.

Respectfully submitted,

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October 2, 2020

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

En Banc

[Filed: February 19, 2020]

S259570

SHERRY HERNANDEZ,

Plaintiff and Appellant,

v.

PNMAC MORTGAGE OPPORTUNITY INVESTORS, LLC *et al.*,

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Five – No. B287048

The request to appear as counsel pro hac vice is granted.

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

[Filed: November 12, 2019]

B287048
(Los Angeles County Super. Ct. No. YC068794)

SHERRY HERNANDEZ,

Plaintiff and Appellant,

v.

PNMAC MORTGAGE OPPORTUNITY INVESTORS, LLC *et al.*,

Defendants and Respondents.

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."

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[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." *(Yvanova, 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 proceed-

ings, 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 Inv'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-BestRate, 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

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[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."

before the Assignment was made. Third, the complaint "challenges the capacity and authority in which 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 opera-

tive 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.

Defendants[4] 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

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[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.

[i.e., Graves] who signed the [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

co-workers 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 *Yvanova*. (*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.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 10/23/17			DEPT. M
HONORABLE RAMONA G. SEE	JUDGE	S. ROSARIO	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM	C. MORALES	
			ELECTRONIC RECORDING MONITOR
M. FONDON, C.A.	Deputy Sheriff	NONE	Reporter

8:30 am YC068794

SHERRY HERNANDEZ

VS

PNMAC MORTGAGE OPPORTUNITY FUND INVENTORS, LLC, ET AL

Plaintiff Counsel — NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

PNMAC MORTGAGE OPPORTUNITY FUND INVESTORS, LLC AND PENNYMAC LOAN SERVICES, LLC'S DEMURRER TO THIRD AMENDED COMPLAINT

RULING ON SUBMITTED MATTER

The Court, having taken above matter under submission on September 26, 2017, now makes its ruling as follows:

Defendant PNMAC Mortgage Opportunity Fund Investors, LLC and PennyMac Loan Services, LLC's Demurrer to Third Amended Complaint is sustained without leave to amend as to the remaining cause of action for Wrongful Foreclosure on the grounds that the Court finds Plaintiff's Third Amended Complaint ("TAC") fails to allege sufficient facts to address either of the two' areas identified by the Court of Appeal in its opinion in this action.

The elements of a wrongful foreclosure cause of action 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." See Lona v. Citibank, N.A. (2011) 202 Cal. App. 4th 89, 104. The Yvanova court held that a home loan borrower has standing to claim a nonjudicial foreclosure was wrongful because an assignment was not merely voidable but void. Yvanova, 62 Cal. 4th at 942-43.

The Court of Appeal's June 27, 2016 decision provided clear guidance regarding what facts were required to state a claim for wrongful foreclosure. The Court of Appeal identified two specific areas: (1) "the person who ostensibly executed the Assignment, [Todd] 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, [Corina] Castillo, who has since apparently been convicted (not just indicted) for misuse of her notary seal falsely verified his signature; and just months before the Assignment was ostensibly executed there were competing claimants on the beneficial interest in the Note"; and (2) "sufficient facts . . . that would come within one of the recognized exceptions [to the tender rule] - 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." See Defendant's Request for Judicial Notice, Exhibit H, at pp. 12, 15. In the portions of the TAC where Todd Graves ("Graves") is mentioned, Plaintiff has two lines of allegations: (1) Graves "executed voluminous documents with numerous different titles on behalf of multiple entities"; and (2) Graves executed many instruments notarized by Corina Castillo ("Castillo"), who was involved in fraudulent notary scams in other matters. See TAC, ¶¶ 1.F.3, 4. With regard to the first line of allegations, the Third Amended Complaint only alleges that Graves executed numerous documents as "Attorney-in-fact for PNMAC Mortgage Company, LLC; Attorney-in-fact for Citimortgage, Inc.; Director of Customer Contact for PennyMac Loan Services, LLC" and as "Assistant Secretary of MERS, as nominee for various entities, such as PNMAC Mortgage Company, LLC; Citimortgage, Inc.; PMC Bancorp, BankersWest Funding Corporation; FMF Capital, LLC; SBMC Mortgage, MortgageIt, Inc.; Magnus Financial Corporation; and absurdly, solely for MERS." The Court finds the Third Amended Complaint fails to allege how the aforementioned facts establish that Graves had no authority to act on MERS's behalf. The

Court notes that the Opposition also falls to provide authority demonstrating how the aforementioned facts support the contention that Graves had no authority to execute the assignment. As to the second line of allegations regarding Corina Castillo, the Third Amended Complaint does not allege that Castillo falsely verified Graves's signature. The Court notes that the Third Amended Complaint only describes Castillo's involvement in fraudulent notary scams in other matters, without alleging how those other matters are in any way connected to the instant case. See TAC, at ¶ 1.F.4.a.-d. While Castillo's prior criminal, activity as a notary casts a dark cloud over her character and professionals conduct, such questions are beyond the purview of a demurrer.

With regard to the second area identified by the Court of Appeal, the Third Amended Complaint is also deficient. The Court of Appeal stated that Plaintiff must allege sufficient facts to show that she falls within one of the recognized exceptions to the tender rule and concluded that Plaintiff had a reasonable possibility to do so "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." See Defendant's Request for Judicial Notice, Exhibit H, at p. 15. The recognized exceptions to the requirement to tender the debt are: 1) the borrower attacks the validity of the debt (e.g., based on fraud); 2) the borrower has a counter-claim or set-off against the beneficiary sufficient to cover the amount due; 3) it would be inequitable as to a party not liable for the debt; and 4) the trustee's deed is void on its face, apart from equitable principals (e.g., trustee lacked power to convey property). Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 85, 112-13; Shuster v. BAC Home Loans

Servicing, LP (2012) 211 Cal.App.4th 505, 512. The Court finds the Third Amended Complaint does not limit Plaintiff's action to money damages, but prays for "an order overturning the sale of the Subject Property in accordance with existing law." See TAC, Prayer, at ¶ 1.d. Further, Plaintiff's only allegation that she is excused from the tender rule is that she has alleged facts showing a void assignment, however, this Court already found supra that Plaintiff fails to allege sufficient facts showing that Graves lacked the authority to execute the assignment or that his signature was falsely verified, thereby rendering the assignment void to fall within this exception to the tender rule. Id. at ¶ 1.F.3., 4; see also Defendant's Request for Judicial Notice, Exhibit H at p. 10.

Defendants' Request for Judicial Notice is granted. See Evidence Code § 452(d), (h). Plaintiff's Objections to the Defendants' Request for Judicial Notice are overruled.

Plaintiff's Request for Judicial Notice is denied as to the letter from Monique Blakeley from the L.A. County Recorder's Office and a tentative ruling dated February 12, 2013. See Evidence Code § 452(h). Plaintiff's Request for Judicial Notice is granted as to all other documents. See Evidence Code § 452(d), (h).

Clerk is ordered to give notice of this ruling.

MINUTES ENTERED
10/23/17
COUNTY CLERK

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the October 23, 2017 Minute Order upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Torrance, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: October 23, 2017

Sherri R, Carter, Executive Officer/Clerk

By:_____
S. Rosario

BLANK ROME LLP
2029 CENTURY PARK EAST
6TH FLOOR
LOS ANGELES, CA 90067

RHONDA HERNANDEZ, ESQ.
P.O. BOX 16924
GALVESTONE, TX 77552

MINUTES ENTERED
10/23/17
COUNTY CLERK

APPENDIX D

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

[Filed June 27, 2016]

B258583
(Los Angeles County Super. Ct. No. YC068794)

SHERRY HERNANDEZ,

Plaintiff and Appellant,

v.

PNMAC MORTGAGE OPPORTUNITY FUND INVESTORS, LLC, et. al.,

Defendants and Respondents.

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. Boock, 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),[1] the nominee "for Lender and

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[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." (*Yvanova*, *supra*, 62 Cal.4th at p. 931, fn. 7.)

Lender's successors and assigns" under the deed of trust, assigned "all beneficial 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)[2] 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

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

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 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.[3] 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)

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[3] 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')."

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.

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.)" (*Yvanova*, *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*.

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.[4] 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.[5] (*Yvanova*,

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[4] 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.

[5] While a void contract is one without legal effect that binds no one and is a mere nullity, a void*able* contract is one that the

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 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, counters 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

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parties thereto may declare void but is not void in itself. (*Yvanova*, *supra*, 62 Cal.4th at pp. 929-930.)

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; *Yvanova*, *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. (*Yvanova*, *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.[6] 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 *Yvanova* has now expressly disapproved to the extent it held borrowers lack standing to challenge an assignment of the deed of trust as void. (*Yvanova*, *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 allega-

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[6] 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.

tion 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 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]; *Barrionuevo 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 Yvanova*, 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].)" (*Yvanova*, *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.*

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