RONALD CUPP, Plaintiff and Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION et al., Defendants and Respondents.

Nos. A148011, A148507.

Court of Appeals of California, First District, Division Five.

Filed August 2, 2017.

Appeal from the Sonoma County, Superior Court No. SCV-255005.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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BRUINIERS, J.

Ronald Cupp lost his home in a nonjudicial foreclosure sale (Civ. Code, § 2924).[1] Proceeding in propria persona, Cupp seeks damages for wrongful foreclosure. He also seeks to set aside the sale on the ground it was void, alleging the parties conducting the sale did not have authority to do so. His first amended complaint (FAC) named Federal National Mortgage Association (Fannie Mae), EverBank, and MTC Financial, Inc. (doing business as Trustee Corps), among others, as defendants.[2] The trial court sustained respondents' demurrers to Cupp's FAC and judgments of dismissal were entered. Cupp contends the trial court erred in sustaining respondents' demurrers without leave to amend. We reverse, in part, the trial court's judgment because we determine Cupp has adequately alleged at least some of his causes of action against Fannie Mae and EverBank.

I. LEGAL BACKGROUND

"California's nonjudicial foreclosure scheme is set forth in . . . sections 2924 through 2924k, which `provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.' (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) `These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.' (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.)" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.) "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.' [Citation.] The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 926 (*Yvanova*).)

"The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. (. . . § 2924, subd. (a)(1).) After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. (§§ 2924, subd. (a)(2), 2924f, subd. (b).) If the sale is not postponed and the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to the highest bidder. (§ 2924g, subd. (a). . . .)" (*Yvanova, supra,* 62 Cal.4th at p. 927, fn. omitted.) "Notably, section 2924,

subdivision (a)(1), permits a notice of default to be filed by the `trustee, mortgagee, or beneficiary, or any of their authorized agents.'" (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440.)

II. FACTUAL AND PROCEDURAL BACKGROUND[3]

In 1989, Cupp and his wife purchased real property located in Santa Rosa, California (the Property). In order to finance the purchase, Cupp obtained a $187,600 loan from Western Federal Savings & Loan Association (WFSLA). The promissory note is not in the record before us, but a copy of a deed of trust on the Property securing the note (the Deed of Trust) designates the Cupps as "borrowers," WFSLA as "beneficiary" or "lender," and La Mesa Title Company as "trustee."

Although the Deed of Trust contains no provision regarding transfer or sale of the lender's beneficial interest, it provides that "[t]he covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower." The Deed of Trust also provides: "Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. . . . Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by applicable law."

In 1993, WFSLA failed, went into receivership, and became Western Federal Savings Bank (WFSB). In 1994, WFSB also became inactive and merged into Home Savings of America, FSB (Home Savings). However, in 1995, Resolution Trust Corporation (RTC), purporting to act as receiver for WFSB, recorded an assignment of the Deed of Trust to Alliance Mortgage Company (Alliance). Cupp alleges this assignment (the 1995 Assignment) was fraudulent and void because WFSB ceased to exist after September 1994 (six months before the 1995 Assignment). He challenges the authority of RTC to act on WFSB's behalf, in assigning the Deed of Trust, and contends the beneficial interest under the Deed of Trust had already passed to Home Savings.

Alliance later merged with EverBank. On August 23, 2012, "EverBank as successor by merger to Everhome Mortgage Company FKA Alliance Mortgage Company" executed a substitution of trustee that purported to substitute Trustee Corps as trustee. The substitution of trustee was recorded, on September 5, 2012.

Cupp defaulted on the loan, and Trustee Corps, purportedly acting as "successor trustee," commenced foreclosure proceedings in September 2012. Specifically, Trustee Corps executed a notice of default and election to sell under deed of trust, which was recorded on September 5, 2012. The notice of default stated Cupp owed "$47,414.10 as of August 31, 2012," an amount which would "increase until [the] account becomes current." The notice also stated Cupp should contact EverBank to "find out the amount [he] must pay, or to arrange for payment to stop the foreclosure." A notice of trustee's sale was recorded, by Trustee Corps, on December 21, 2012, and a trustee's sale was calendared for January 15, 2013.

A trustee's deed upon sale was recorded on April 24, 2013. The deed shows the trustee's sale took place on April 4, 2013, and that Fannie Mae purchased the Property for $167,508.40. The deed also recites that Fannie Mae was the foreclosing beneficiary under the Deed of Trust. However, the recorded documents show that EverBank executed an assignment of the Deed of Trust, transferring the beneficial interest under the Deed of Trust from EverBank to Fannie Mae, on April 16, 2013—12 days *after* the sale.

Cupp's Action

Although Cupp's original complaint is not included in the record, he apparently filed a complaint in February 2014, seeking damages and an order setting aside the trustee's sale. Respondents filed demurrers, which the trial court granted with leave to amend.

On August 28, 2015, Cupp filed his FAC, which realleged five of the original seven causes of action: (1) "Fraud and Negligent Misrepresentation"; (2) "Fraud and Lack of Standing"; (3) "Wrongful Foreclosure and Breach of Contract"; (4) "Violation of Business and Professions Code § 17200" (the Unfair Competition Law; hereafter UCL); and (5) "Quiet Title." All causes of action in his FAC focus on the 1995 Assignment, which Cupp alleges was "void" and "fraudulent" because "there were no authorized officers available from [WFSLA] (after [its] closing) who had authority to properly assign any rights, title or interest" and because beneficial interest in the Deed of Trust had already passed to Home Savings. According to Cupp, "[Alliance] did not and could not acquire a beneficial interest by the fraudulent [1995 Assignment]." Accordingly, neither EverBank nor Fannie Mae ever acquired a beneficial interest in the Property. Therefore, in his view, the substitution of trustee, notice of default, notice of trustee sale, and the trustee sale itself were all "void and of no legal effect" because each was not initiated by the correct party.

Respondents demurred, arguing that Cupp's FAC failed to state a cause of action.[4] Among other things, respondents argued Cupp's causes of action failed because Cupp had not alleged tender, because he had no standing to challenge the 1995 Assignment, and because Trustee Corps' recording of foreclosure documents was privileged. Both Cupp and Trustee Corps asked the trial court to take judicial notice of certain Sonoma County public records, including the Deed of Trust, the 1995 Assignment, the notice of default, the notice of trustee's sale, and the trustee's deed upon sale.[5]

In opposition, Cupp restated his allegations that respondents' foreclosure was fraudulent and wrongful because of the purportedly void 1995 Assignment. He also maintained he had sufficiently alleged tender or the requirement was excused. Although he made conclusory requests for leave to amend, he did not assert any specific facts he could allege if given an additional opportunity.

The trial court sustained the demurrers without leave to amend, agreeing with respondents that Cupp's allegations continued to be insufficient to show tender or standing. On February 17, 2016, the trial court entered a judgment of dismissal in Fannie Mae's and EverBank's favor. On April 18, 2016, the trial court entered a judgment of dismissal in Trustee Corps' favor. Cupp filed a timely notice of appeal from each judgment. We ordered the two appeals consolidated.

III. DISCUSSION

We begin by reiterating settled rules of appellate review, often unfamiliar to pro se litigants. In the procedural posture of the instant appeal, "[the appellant] has the burden to show either that the demurrer was sustained erroneously or that the court abused its discretion in sustaining the demurrer without leave to amend." (*Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1434-1435.) To establish that he adequately pleaded even one of his causes of action, the plaintiff must show he pleaded facts sufficient to establish every element of that cause of action. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) "Thus, if the defendants negate any essential element of a particular cause of action, this court should sustain the demurrer to that cause of action. [Citation.] As a consequence, [the plaintiff] bears the burden of overcoming all of the legal grounds on which the trial court sustained the demurrers. . . ." (*Id.* at p. 880, italics & fn. omitted.)

Although the arguments presented in Cupp's opening brief are hardly a model of clarity, he appears to challenge the trial court's ruling with respect to his wrongful foreclosure, UCL, and quiet title causes of action. Specifically, he contends the trial court erred in sustaining respondents' demurrers on two grounds only—standing and tender.[6] Broadly construed, Cupp contends the allegations of his FAC were sufficient to state causes of action for wrongful foreclosure, UCL, and quiet title, based on his claim that the Deed of Trust was never validly assigned to Alliance, EverBank, or Fannie Mae. He contends that consequently none of the respondents were authorized to initiate or complete a foreclosure. Respondents, on the other hand, insist the trial court did not err because Cupp's allegations of a void assignment are merely conclusory, the 1995 Assignment was at most voidable, and Cupp's prejudice and tender allegations are insufficient. Trustee Corps also maintains the FAC failed to allege facts sufficient to overcome its qualified privilege under section 2924, subdivision (d).

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) We are "not bound by the trial court's construction of the complaint." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958.) Rather, we independently evaluate the complaint, construing it liberally. (*Ibid.; Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[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. [Citation.] 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." (*Yvanova, supra,* 62 Cal.4th at p. 924, fn. omitted.) "We may also take notice of exhibits attached to the complaint. If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447, superseded by statute on other grounds as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521.

"It is equally true, however, that the taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom. [Citations.] . . . `A demurrer is simply not the appropriate procedure for determining the truth of disputed facts,' [citation], judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.) "[T]he `demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint. This principle means that if the pleading sufficiently states a cause of action the demurrer cannot be granted on the basis of a showing of extrinsic matters by inference from attached exhibits, affidavits or otherwise except those matters which are subject to judicial notice.'" (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864.)

To meet his burden to show abuse of discretion in denial of leave to amend, "a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Cantu v. Resolution Trust Corp., supra,* 4 Cal.App.4th at p. 890.) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.)

A. *Wrongful Foreclosure*

The elements of a tort cause of action 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.'" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) Grounds satisfying the first element include: when the trustee did not have the power to foreclose, when the borrower did not default, and when the deed of trust is void. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104-105.) "A foreclosure initiated by one with no authority to do so is wrongful" and satisfies the first element. (*Yvanova, supra,* 62 Cal.4th at p. 929.)

1. *Standing*

Relying on authority that has since been disapproved by our Supreme Court, in *Yvanova, supra,* 62 Cal.4th 919, the trial court determined Cupp lacked standing to challenge the 1995 Assignment since he was not a party to the assignment itself.[7] In *Yvanova,* our Supreme Court held the borrower on a home loan has standing to assert a wrongful foreclosure action based on allegations an assignment was void, and not merely voidable at the request of the parties to the assignment. (*Id.* at p. 923.) Thus, in contending the trial court erred in concluding his FAC failed to allege standing for wrongful foreclosure, Cupp repeatedly cites *Yvanova.*

In *Yvanova,* the borrower executed a deed of trust in favor of the lender, New Century Mortgage Corporation. The lender later filed for bankruptcy and its assets were transferred to a liquidation trust. (*Yvanova, supra,* 62 Cal.4th at p. 924.) Despite its earlier dissolution, the lender executed a purported assignment of the deed of trust to Deutsche Bank, as trustee for a Morgan Stanley investment trust. (*Id.* at pp. 924-925.) The borrower alleged, in her quiet title action, that this purported assignment was void for two reasons: "New Century's assets had previously, in 2008, been transferred to a bankruptcy trustee; and the Morgan Stanley investment trust had closed to new loans [almost five years before the purported assignment]." (*Id.* at p. 925.) The trial court sustained the defendants' demurrer without leave to amend, concluding the borrower could not state a quiet title cause of action because, inter alia, she did not allege tender. The Court of Appeal also concluded the borrower could not amend to plead wrongful foreclosure because she lacked standing to challenge the purportedly void assignment. (*Id.* at p. 926.)

On review, our Supreme Court observed that the trustee of a deed of trust "acts merely as an agent for the borrower-trustor and lender-beneficiary" and, under section 2924, subdivision (a)(1), may initiate nonjudicial foreclosure "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." (*Yvanova, supra,* 62 Cal.4th at p. 927.) "[I]f the borrower defaults on the loan, only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process." (*Id.* at pp. 927-928.) However, the court also recognized that promissory notes and deeds of trust are negotiable instruments that may be sold by a lender without any notice to the borrower and "that a borrower can generally raise no objection to the assignment of the note and deed of trust." (*Id.* at p. 927.) The *Yvanova* court concluded: "If a purported assignment necessary to the chain by which the foreclosing entity claims that power 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 the borrower would have standing to sue for wrongful foreclosure in the case of such an unauthorized sale. (*Id.* at p. 935.) The court reasoned that a contrary ruling would completely deprive California borrowers whose loans are secured by a deed of trust of any means to assert their legal protections. (*Ibid.*) The court also explained: "It is no mere `procedural nicety,' from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so. . . . **[¶]** 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." (*Id.* at p. 938.) "A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity's hands. No more is required for standing to sue." (*Id.* at p. 939.) The court disapproved a line of Court of Appeal decisions that had reached contrary conclusions. (*Yvanova,* at p. 939, fn. 13; see *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495 (*Herrera*); *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*).)

The *Yvanova* court emphasized that its holding was narrow: "We hold 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. . . . *Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void* or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants' arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (*Yvanova, supra,* 62 Cal.4th at p. 924, italics added.) The court reiterated: "In deciding the limited question

on review, we are concerned only with prejudice *in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort.*" (*Id.* at p. 937, italics added.)

Cupp asserts that, under *Yvanova,* his allegations are sufficient to survive demurrer. We agree. Cupp alleges EverBank and Trustee Corps had no authority to foreclose because the 1995 Assignment was void. Although we must accept the truth of Cupp's factual allegations when reviewing the ruling on a demurrer, we are not required to accept the truth of his allegation the assignment was void; this is a *legal conclusion.* (See *Yvanova, supra,* 62 Cal.4th at p. 925.) The question is whether he has gone beyond boilerplate language and satisfied his burden to affirmatively plead facts demonstrating any impropriety in the assignment. (*Fontenot, supra,* 198 Cal.App.4th at p. 270, disapproved on other grounds in *Yvanova,* at p. 939, fn. 13.) To allege a wrongful foreclosure cause of action on this ground, a borrower must do "more than simply stat[e] that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, a plaintiff asserting this theory *must allege facts that show* the defendant who invoked the power of sale was not the true beneficiary." (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094, italics added.)

Although Cupp's FAC is inartfully drafted, when read as a whole and broadly construed, it states a viable cause of action. Cupp alleges that WSFB's assets, including its interest in the Deed of Trust, had passed to Home Savings before the 1995 Assignment was made and that, by the time of the 1995 Assignment to Alliance, there was nothing left to assign. According to Cupp, Alliance never received any interest in the Deed of Trust and, therefore, EverBank had no authority to foreclose or to substitute Trustee Corps as trustee. We accept the truth of these allegations, which are not contradicted by judicially noticeable facts.

Respondents would have us disregard Cupp's allegations as contradicted by the Sonoma County public records. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 36, 38, 47-48 [challenge to signatory's authority to make assignment properly disregarded when a clear chain of title can be traced, through judicially noticeable recorded documents, from the original lender to the foreclosing entity].) The trial court appears to have agreed with respondents' contention they could conclusively establish that RTC *did* hold the beneficial interest at the time of the 1995 Assignment. In its preamble, the 1995 Assignment recites that, in June 1993, the Office of Thrift Supervision appointed RTC as receiver for WFSL. It further recites that, in September 1994, the Office of Thrift Supervision replaced the conservator of WFSB with RTC. Finally, the preamble states that RTC, as receiver for WFSB, "is the current beneficiary under the Deed of Trust."

The trial court could properly take notice of the fact the 1995 Assignment was recorded, the date of its execution, the parties to the transaction, and its legal effect if that effect is undisputed and clear from the face of the document. (See *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1055; *Fontenot, supra,* 198 Cal.App.4th at pp. 264-265.) However, contrary to respondents' repeated assertion, we cannot take judicial notice of the truth of hearsay recitations of fact contained within the 1995 Assignment. (See *Yvanova, supra,* 62 Cal.4th at p. 924, fn. 1; *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1369, 1375 [trial court improperly took judicial notice of truth of hearsay recitation, within assignment, that a particular entity held beneficial interest under deed of trust before its assignment]; *Intengan,* at pp. 1055, 1057; *Fontenot,* at p. 265.) Cupp clearly disputes the notion that RTC held the beneficial interest at the time of the 1995 Assignment. We conclude the trial court erred in taking judicial notice that RTC held the beneficial interest in the Deed of Trust at the time of the 1995 Assignment.[8]

Thus, the key question before us is whether Cupp has alleged a void or merely voidable transaction. *Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment void, rather than voidable. (*Yvanova, supra,* 62 Cal.4th at pp. 942-943.) Cupp contends the 1995 Assignment was void because there was no interest left to assign. Respondents, on the other hand, contend the 1995 Assignment was, "at worst, merely voidable." "A void contract is without legal effect. (Rest.2d Contracts, § 7, com. a, p. 20.) `It binds no one and is a mere nullity.' [Citation.] . . . [¶] A voidable transaction, in contrast, `is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.' (Rest.2d Contracts, § 7, p. 20.) . . . Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties." (*Yvanova,* at pp. 929-930.) "When an assignment is merely

voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Id.* at p. 936.)

In arguing the 1995 Assignment was merely voidable, Fannie Mae and EverBank rely on *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813 (*Saterbak*). In that case, a borrower attempted to cancel an assignment and obtain declaratory relief before a foreclosure. She alleged an assignment of her loan to a securitized trust was void because it was untimely under the terms of the trust's pooling and servicing agreement. (*Id.* at pp. 811, 814.) Because the weight of New York authority unanimously held that such transfers are merely voidable, not void, the *Saterbak* court distinguished *Yvanova* and concluded the borrower had no standing to challenge the assignment.[9] (*Id.* at p. 815.)

Saterbak is of little assistance because Cupp does not allege the assignment was irregular merely because it was untimely under the terms of a pooling and servicing agreement. He alleges the 1995 Assignment was void because RTC had no interest to assign. In *Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552 (*Sciarratta*), the Fourth District Court of Appeal considered a nonjudicial foreclosure sale conducted by an entity the borrower alleged was *not* the beneficiary of record. Specifically, the borrower alleged a successor of the original lender made two successive assignments of the same deed of trust and that it was the second purported beneficiary who foreclosed (despite receiving nothing under the second assignment). The recorded chain of title did not contradict these allegations. (*Id.* at pp. 556-557, 564.) Assuming the truth of the plaintiff's allegations, the second assignment was deemed void, not merely voidable, and the borrower had standing to challenge a void assignment. (*Id.* at pp. 563-564.)

We agree with the *Sciarratta* court that a borrower in such a situation alleges a void transaction and thus does not lack standing to bring a wrongful foreclosure claim. Accepting, as we must, Cupp's allegation that RTC held no interest in the Deed of Trust at the time of the 1995 Assignment, we conclude Cupp alleged a void assignment. Cupp "has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Yvanova, supra,* 62 Cal.4th at p. 939.)

2. *Prejudice*

This brings us to the prejudice element of Cupp's wrongful foreclosure cause of action. Fannie Mae and EverBank contend Cupp cannot show prejudice because he concedes default and does not allege, and apparently cannot allege, that the "true" beneficiary would have refrained from foreclosing. Before *Yvanova,* the majority view was that borrowers in a similar situation could not assert wrongful foreclosure because they could not demonstrate prejudice from the alleged wrongful assignment. (*Siliga v. Mortgage Electronic Registration Systems, Inc., supra,* 219 Cal.App.4th at pp. 82-83, 85; *Jenkins v. JPMorgan Chase Bank, N.A., supra,* 216 Cal.App.4th at p. 515 ["the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note"]; *Herrera, supra,* 205 Cal.App.4th at p. 1508 ["`[i]f MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note'"]; *Fontenot, supra,* 198 Cal.App.4th at p. 272 ["[e]ven if [the purported beneficiary] lacked authority to transfer the note [to the foreclosing entity], it is difficult to conceive how [the borrower] was prejudiced"].)

However, the *Yvanova* court specifically disapproved this line of authority, "to the extent they held borrowers lack *standing* to challenge an assignment of the deed of trust as void." (*Yvanova, supra,* 62 Cal.4th at p. 934, fn. 13, italics added.) Despite the *Yvanova* court's emphasis on the narrowness of its holding, it strains logic to suggest its rationale has no application to the prejudice element of wrongful foreclosure. If "only the person or institution entitled to payment may enforce the debt by foreclosing" and "[i]t is no mere `procedural nicety' . . . to insist that only those with authority to foreclose on a borrower be permitted to do so" (*Yvanova, supra,* 62 Cal.4th at p. 938), it is no great leap to conclude the borrower need not allege any harm beyond that caused by the wrongful foreclosure itself. (*Sciarratta, supra,* 247

Cal.App.4th at p. 565.) Otherwise, we are left with the "`odd result'" identified by the *Yvanova* court—a homeowner has no recourse when a stranger to the debt declares a default and orders a trustee's sale. (*Yvanova,* at p. 938; see *Sciarratta,* at p. 566 ["[a] contrary rule would lead to a legally untenable situation—i.e., that anyone can foreclose on a homeowner because someone has the right to foreclose"].)

Sciarratta answered the prejudice question left open by *Yvanova* and held 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." (*Sciarratta, supra,* 247 Cal.App.4th at p. 555.) The *Sciarratta* court criticized *Herrera* and *Fontenot*'s narrow focus on a particular type of injury—a foreclosure that would not have otherwise happened. (*Id.* at p. 567.) "The critical issue is not the plaintiff's ability to pay, but rather whether the defendant's conduct resulted in the plaintiff's harm; i.e., a foreclosure that was wrongful because it was initiated by a person or entity having no legal right to do so; i.e., holding void title." (*Id.* at p. 566.) Cupp too has alleged that his home was wrongfully foreclosed on by entities having no legal right to do so and that he suffered damages as a result. Thus, he has sufficiently alleged prejudice.

3. *Tender*

In sustaining the respondents' demurrers, the trial court also focused on the tender requirement, concluding that Cupp's wrongful foreclosure cause of action failed because he did not adequately allege tender. In his FAC, Cupp alleges he tendered the full amount due by sending EverHome, on October 3, 2011, a financing statement. In the alternative, Cupp suggests the tender requirement does not apply because the trustee's deed of sale was void, as foreclosure was initiated by entities having no valid power to do so.

"As a general rule, a plaintiff may not challenge the propriety of a foreclosure on his or her property without offering to repay what he or she borrowed against the property." (*Intengan v. BAC Home Loans Servicing LP, supra,* 214 Cal.App.4th at p. 1053.) "[A] defaulted borrower who seeks to set aside a trustee's sale is required to do equity before the court will exercise its equitable powers. [Citation.] Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. [Citation.] `The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].'" (*Lona v. Citibank, N.A., supra,* 202 Cal.App.4th at p. 112.)

However, "[t]ender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property." (*Glaski v. Bank of America, supra,* 218 Cal.App.4th at p. 1100; *Lona v. Citibank, N.A., supra,* 202 Cal.App.4th at p. 113; *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877-878; accord, *Yvanova, supra,* 62 Cal.4th at p. 929, fn. 4.) The *Sciarratta* court also held a plaintiff is excused from the tender requirement when he alleges the foreclosing entity lacked authority to foreclose. (*Sciarratta, supra,* 247 Cal.App.4th at p. 565, fn. 10.) Under this authority, Cupp adequately alleged an exception to the tender requirement. The trial court erred in sustaining EverBank's demurrer to Cupp's cause of action for wrongful foreclosure.[10]

4. *Privilege Under Section 2924, subdivision (d)*

With respect to Trustee Corps, who recorded the foreclosure documents and conducted the trustee's sale, we agree this cause of action (and the derivative UCL cause of action) is barred by section 2924, subdivision (d). That subdivision of the statute provides that the mailing, publication, and delivery of foreclosure notices are privileged communications within the meaning of section 47. The statute provides a qualified privilege against all tort claims (except malicious prosecution), unless the plaintiff alleges malice. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333-334, 343.) Cupp's conclusory allegations that all three respondents acted together to record "fraudulent[]"

foreclosure documents are insufficient to allege Trustee Corps acted with malice. Cupp's briefing offers no suggestion as to how he could plead *facts* sufficient to state a claim against Trustee Corps. Therefore, we affirm the trial court's order sustaining the demurrer without leave to amend, for wrongful foreclosure, as to Trustee Corps.

B. *UCL Cause of Action*

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice" (Bus. & Prof. Code, § 17200), but it also requires Cupp to plead a causal link between his economic injury and the unfair or unlawful acts allegedly committed by respondents. (*Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1279.) Because Cupp's UCL cause of action is derivative of his wrongful foreclosure cause of action, we conclude his allegations are sufficient to state a UCL cause of action against Fannie Mae and EverBank.

C. *Quiet Title*

"The purpose of a quiet title action is to finally settle and determine the parties' conflicting claims to the property and to obtain a declaration of the interest of each party." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 298; accord, Code Civ. Proc., § 760.020, subd. (a).) A quiet title cause of action has two elements: (1) "the plaintiff is the owner and in possession of the land," and (2) "the defendant claims an interest therein adverse to [the plaintiff]." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 740; accord, Code Civ. Proc., § 761.020; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802.) Furthermore, a borrower cannot quiet his title against a secured lender without paying the debt. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86.) Here, however, Cupp alleges that Fannie Mae and EverBank are not the secured lenders.

The trial court sustained respondents' demurrers to the quiet title cause of action on the same tender ground we have already rejected. Cupp has adequately alleged facts showing Fannie Mae and EverBank claim adverse interests in the Property. However, because Cupp has alleged no facts showing Trustee Corps has asserted any interest in the Property adverse to Cupp, he cannot state a cause of action for quiet title against it.

IV. DISPOSITION

The judgment in favor of Fannie Mae and EverBank is reversed. The case is remanded to the trial court with directions to overrule Fannie Mae's and EverBank's demurrer to the wrongful foreclosure, quiet title, and UCL causes of action. In all other respects, the judgment is affirmed. Cupp shall recover his costs on appeal.

JONES, P. J. and NEEDHAM, J., concurs.

[1] Undesignated statutory references are to the Civil Code.

[2] Fannie Mae, EverBank, and Trustee Corps are hereinafter referred to collectively as respondents.

[3] The material facts are derived from the allegations of Cupp's FAC, its exhibits, and matters we may judicially notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

[4] In fact, one demurrer was filed on behalf of Fannie Mae and EverBank and a separate demurrer was filed on behalf of Trustee Corps.

[5] The trial court did not explicitly rule on Cupp's or Trustee Corps' request for judicial notice, but we, like the parties, rely on many of those public records as matters properly judicially noticed. (See *Yvanova, supra,* 62 Cal.4th at p. 924, fn. 1 [existence and facial contents of recorded documents were properly noticed by trial court under Evid. Code §§ 452, subds. (c) and (h), 453].)

[6] Cupp has abandoned his fraud causes of action. In granting respondents' demurrers with respect to his two fraud causes of action, the trial court ruled that Cupp's conclusory allegations fell short of the specificity required by the applicable pleading standard. Cupp does not challenge this aspect of the trial court's ruling and thus, he has forfeited any claim that he alleged fraud with the

requisite specificity. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issues not raised in appellant's brief may be deemed forfeited]; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1255, fn. 3; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279-280 [appellate review "is limited to issues that have been adequately raised and supported in the appellate briefs"]; *id.* at p. 282.)

[7] *Yvanova, supra,* 62 Cal.4th 919 was decided after Fannie Mae and EverBank's demurrer was sustained without leave to amend, but before the hearing on Trustee Corps' demurrer. Cupp cited *Yvanova* at the latter hearing. Trustee Corps' counsel responded: "[E]ven assuming [Cupp] has standing to challenge wrongful foreclosure, he hasn't alleged the elements of the cause of action for that."

[8] We do not mean to suggest that Cupp will ultimately be able to prove RTC did not hold the beneficial interest at the time of the 1995 Assignment. We hold only that his allegations are sufficient to overcome demurrer.

[9] *Saterbak* also distinguished *Yvanova* on the ground its holding only applies to postforeclosure cases. (*Saterbak, supra,* 245 Cal.App.4th at p. 815; see *Yvanova, supra,* 62 Cal.4th at pp. 934-935.)

[10] Cupp does not name Fannie Mae as a defendant in his wrongful foreclosure cause of action.