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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NORA MASOUD, as Trustee, etc., Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A. et al., Defendant and Respondent.	D075582 (Super. Ct. No. 37-2015-00035457-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Reversed.

Law Office of Charles T. Marshall and Charles T. Marshall, for Plaintiff and Appellant.

Bryan Cave Leighton Paisner, Glenn J. Plattner and Deborah P. Heald for Defendants and Respondents.

This is a wrongful foreclosure case by another name. Plaintiff Nora Masoud appeals a judgment of dismissal after an order sustaining a demurrer to her various title and contract claims in a dispute with multiple banks over their right to sell her house to recover on her delinquent home loan. We reverse because her complaint alleges facts that could support a legal theory of recovery if she were given leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2000, Masoud purchased a home in San Diego with a loan from Washington Mutual Bank, F.A. (WaMu). As with most home loans, hers was secured by a deed of trust and accompanying note giving the holder the right to foreclose if she defaulted on her loan payments. Masoud refinanced in 2001, 2003, and again in July 2005. She alleges sometime later in 2005, WaMu sold her deed of trust to unidentified third parties. In September 2008, as a result of the housing market crash, WaMu failed. The Federal Deposit Insurance Corporation (FDIC) was appointed as its Receiver and sold substantially all of WaMu's assets to JPMorgan Chase Bank, N.A. (Chase) under a Purchase and Assumption Agreement (P&A).

In October 2008, Masoud received a letter from Chase to notify her that WaMu had closed and Chase would begin servicing her loan. In February 2009, Masoud contacted Chase because her mortgage payments were scheduled to reset from a fixed interest rate to an adjustable rate in 2010. Chase informed her she could apply for loan modification, which she spent the remainder of 2009 and 2010 trying to obtain. In 2009, Masoud was counseled by Chase employees that her up-to-date mortgage payments made her ineligible, and she should start defaulting. She followed the advice and in August she

was given a temporary modification—a three-month trial period of reduced payments. She paid the reduced rate for four months. Then in December 2009, Chase informed her she no longer qualified for a loan modification. Throughout 2010, Masoud tried without avail to qualify. In December 2010, Chase sent her two letters definitively denying her applications. By September 2011, she was over $30,000 behind in payments. That month, Chase recorded an assignment of her deed of trust to US Bank along with a notice of default. Two subsequent Substitution of Trustee notices were recorded in 2015; both represented that US Bank was the current beneficiary of the deed of trust.

In July 2015, the trustee issued and recorded a notice of sale for Masoud's house. She filed a lawsuit in superior court in October. It was removed to federal court by defendants, where her federal claims were dismissed, and then sent back to the superior court on her remaining state law claims. In July 2018, Masoud filed her Second Amended Complaint naming Chase, US Bank, and trustees as defendants. Five months later, after sustaining defendants' demurrer without leave to amend, the trial court entered a judgment of dismissal. Masoud's house was the subject of a foreclosure sale in October 2018.[1]

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1 Defendants ask us to take judicial notice of the Trustee's Deed of Sale. Both parties agree the sale took place. We take notice in accordance with Evidence Code section 452. The document identifies Magnum Property Investments LLC as the party that now holds title to the house.

DISCUSSION

When reviewing a judgment of dismissal following an order sustaining demurrer, we "[review] the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory." (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 438.) In doing so, "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." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*).) When a court sustains demurrer without leave to amend, as in this case, we reverse if the complaint can be amended to state a cause of action. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

On appeal, Masoud argues it was improper for the court to sustain the demurrer as to some of her claims—notably, her title claims, contract claims, request for declaratory relief, and allegations of unfair business practices under Business and Professions Code section 17200. After reviewing applicable caselaw and learning that Masoud's house was sold, this court asked for supplemental briefing to assess the impact of the foreclosure sale and certain cases on Masoud's claims.

Masoud's operative complaint advances broad allegations spanning more than 150 pages. At times it describes her injuries; it also wanders into recitations of the myriad evils that precipitated the housing market crash and the Great Recession of 2008. From what this court can glean, Masoud claims she was victimized by banks (WaMu or Chase, depending on the allegation) that (1) baited her into her 2005 loan, (2) fraudulently

executed the loan paperwork, (3) held itself out as her lender but hid the true source of the funds, (4) sold her deed of trust to unknown third parties without her knowledge, (5) improperly securitized the deed of trust on the secondary market, (6) fraudulently claimed the right to service her loan and accepted payments to which it was not entitled, (7) illegitimately assigned new trustees on her deed of trust, (8) sold her deed of trust despite never holding it, and (9) induced her to default. Some of her factual contentions appear contradictory.

The bulk of these grievances pertain to the five foreclosure-related causes of action Masoud asks us to review: quiet title, slander of title, cancellation of instruments, violations of Business and Professions Code section 17200, and declaratory relief. But we will first briefly discuss her contract claims because they are more simply dealt with.

A. *Contract Claims*

Masoud's contract claims stem from Chase's decision not to modify her loan after she completed the three trial modification payments. As Masoud tells it, her performance of the trial terms entitled her to a permanent modification, and Chase's withholding it was a breach of contract.[2] The trail court sustained demurrer because it determined the trial payment plan was merely an offer and Masoud's claims were time-barred. We need not consider if her successful completion of the trial period created an enforceable promise

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2 Specifically, Masoud puts forth three contract theories: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) quasi-contract/unjust enrichment.

because the statute of limitations had definitely lapsed. Written contract claims must be brought within four years of the breach, which occurred (if at all) in December 2009 when Chase informed Masoud they would not give her a permanent modification despite her compliance with the trial payments. (Code of Civ. Proc., § 337.) She did not file suit until October 2015, well past the time allotted for such claims.

B. *Title Claims*

Masoud's title claims are somewhat muddled, but they are based on four alleged defects: (1) her loan application was forged and postdated, (2) her deed of trust and note contained false representations as to the lender, (3) her deed of trust was not properly securitized, and (4) Chase never obtained her deed of trust because WaMu sold it in 2005, before Chase assumed the failed bank's assets.

The first two factual allegations are fraud claims in the form of title claims. Fraud claims are subject to a three-year statute of limitations. (Code of Civ. Proc., § 338, subd. (d).) The trial court sustained demurrer to all of Masoud's fraud claims, which originated in either 2005 (as to her loan) or 2009 (as to the denial of her loan modification). The operative complaint represents that she began investigating the securitization and ownership of her deed of trust in late 2010 and possessed information on which she bases her allegations by late 2011. Masoud did not bring her suit until 2015, well after her opportunity to plead fraud lapsed. While Masoud does not technically revive her fraud claims for our review, she continues to rely on allegations of fraud to support her title claims. We accordingly conclude her fraud-base theories were untimely raised.

As to the third category, securitization generally does not serve as grounds for a borrower to attack a party's right to foreclose. (*McGough v. Wells Fargo Bank*, *N.A.* (N.D. Cal., June 18, 2012, No. C12-0050 TEH) 2012 U.S.Dist.Lexis 84327, *11 .) An exception to this rule occurs if a borrower alleges that securitization failed (meaning a defect in the process rendered the transaction void) because in such a case the borrower is challenging the chain of ownership.[3] (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1083.) Masoud alleges that, if the deed of trust was transferred at all, the transaction occurred in violation of the pooling and servicing agreement. But this alone does not render a transaction void. We agree with the trial court that Masoud's operative complaint fails to explain why she believes it is void.[4]

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[3] Most deeds of trust securing home loans are securitized—sold to pools or trusts that pay investors in accordance with the risk profile they take on. It is not unusual for a borrower to be unaware of which entity holds their deed of trust because they often continue to make payments to their original lender, who acts as their loan servicer after securitization. Because individual deeds of trust are bundled as investment products and can be sold more than once, the chain of assignment that determines their ownership can be complex. During the financial crisis, mass defaults on home loans led to a proliferation of borrower lawsuits that required courts to determine when a borrower-plaintiff could challenge an entity's possession of their deed of trust (and thus the right to foreclose) by pleading deficiencies in the securitization process. (See *Yvanova*, *supra*, 62 Cal.4th at p. 923.) Courts then had to decide if particular securitization defects rendered a transaction void or merely voidable, a critical distinction for determining if a borrower-plaintiff had standing to sue on these grounds. (*Id*. at pp. 926–943.)

[4] Whether a violation of a trust's pooling and servicing agreement renders a transaction void or merely voidable depends on state law. (See *Saterbak v. JPMorgan Chase Bank*, *N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*).) Masoud does not allege facts about the trust or its governing law to support her assertion the assignment was void.

But Masoud's final basis for her title claims—that WaMu sold her deed of trust to unknown third parties three years before Chase assumed its assets—cannot be so easily dismissed. In sustaining the demurrer, the trial court relied on the P&A agreement between Chase and the FDIC to conclude that Chase obtained the rights to Masoud's deed of trust. But the legal meaning of the P&A is that Chase obtained whatever assets WaMu possessed as of September 2008. It does not exhaustively list what assets those were. The P&A agreement sheds no light on whether WaMu sold the Masoud deed of trust in 2005. Assuming (as we must at this stage) that the allegations of the operative complaint are true, it would mean that Chase was never WaMu's successor in interest as to Masoud's deed of trust and that at most, it attempted to transfer an asset it never owned to US Bank in 2011. As a result, according to Masoud, a party with no legitimate claim to her deed of trust foreclosed on her house.

This is precisely the kind of injury envisioned in *Yvanova*, which held that a borrower has standing to challenge a foreclosure sale ordered by a party with no authority to do so. (*Yvanova*, *supra*, 62 Cal.4th at p. 943.) This court has further clarified that the protections of *Yvanova* apply only in the postforeclosure context—exactly the position Masoud now finds herself in. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815.) And on at least one occasion, this court has applied *Yvanova* in reversing a judgment of dismissal after a sustained demurrer when a borrower alleged her deed of trust was sold twice by the same party, rendering the second sale void and the foreclosure that followed unlawful. (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 565.) In that case, the homeowner alleged that her deed of trust (which Chase obtained from

WaMu) was assigned by Chase to Deutsche Bank—and then assigned again a few months later by Chase to Bank of America, which ultimately foreclosed on her house. (*Id*. at pp. 557–558.) She pleaded wrongful foreclosure on the basis that Bank of America had no interest in her deed of trust since it was previously assigned to Deutsche Bank. In finding the homeowner alleged sufficient facts to sustain a wrongful foreclosure claim, this court noted that a contrary result would undermine the holding of *Yvanova*. (*Sciarratta*, at pp. 566–567.)

Our decision in *Sciarratta* dictates that Masoud should be permitted leave to amend her complaint to allege a wrongful foreclosure claim consistent with *Yvanova* and *Saterbak*. Masoud's factual pleadings are sufficiently similar in this regard. In particular, her allegation that her deed of trust was sold by WaMu in 2005, and thus could not have been transferred to Chase in 2008, appears to be the basis for a claim under *Yvanova.*[5] Although Masoud's operative complaint was framed as purported contract and title claims, we believe it is more properly characterized as a wrongful foreclosure action.

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5 We are mindful of the opposite outcome in another case with some similarities to this one, where the appellate court upheld a judgment of dismissal after characterizing as "speculative" the plaintiff-borrower's claim that Chase never held his deed of trust. (*Gillies v. JPMorgan Chase Bank*, N.A. (2017) 7 Cal.App.5th 907, 913.) Plaintiff had alleged the note and deed of trust were " 'almost certainly sold to a third party.' " (*Ibid*.) We find it a critical difference that here Masoud specifically alleges her deed of trust *was* sold in 2005, three years before the P&A agreement.

And because it includes a critical factual allegation that could be the basis for a proper wrongful foreclosure claim, she should be given leave to amend on that theory.[6]

Defendants contend this wrongful foreclosure theory—and Masoud's allegation that WaMu transferred the deed of trust in 2005—is inconsistent with judicially noticeable documents and thus can be rejected. But other than the original 2005 deed of trust that references WaMu as the lender, the judicially noticeable documents are all from 2008 or later. They shed no light on whether WaMu, after funding the loan in 2005, assigned the beneficial interest to another party or other parties later that same year such that it had no interest to transfer in 2008.

For the first time at oral argument, defendants appeared to argue that even if WaMu sold the beneficial interest in 2005 (so that there was no asset to transfer to Chase as part of the 2008 P&A agreement), it nonetheless retained rights as the servicer on the loan.[7] They suggest these servicing rights transferred to Chase in 2008 such that Chase was entitled to foreclose in its capacity as the loan servicer regardless of which entity

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6 Once she has done so, the trial court may consider to what extent Masoud might plead any of her remaining title claims as derivative causes of action attached to her wrongful foreclosure claim against the appropriate parties. The same reasoning applies to her derivative claims for declaratory relief and violations of Business and Professions Code section 17200.

7 Defendants mentioned but never relied on Chase's status as the loan servicer in the respondents' brief. Rather, they argued that Chase acquired the deed of trust from WaMu and later transferred it to US Bank. In responding to the court's request for supplemental briefing, defendants mentioned Chase as loan servicer in asserting that Masoud failed to allege the unidentified beneficiary did not direct the servicer and trustee to commence foreclosure.

held the beneficial interest. As a general rule, parties are required to make all substantive arguments in their principal appellate brief, and a contention raised for the first time during oral argument will not be considered. (See *People v. Thompson* (2010) 49 Cal.4th 79, 110, fn. 13; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356, fn. 6.) Moreover, even if we could entertain the argument we would reject it. The complaint alleges that US Bank claims to hold the beneficial interest and the right to foreclose, which is fully consistent with defendants' representations in their brief as well as the judicially noticeable documents in the record. The issue is not Chase's role as the loan servicer, but the proper identification "of the party enforcing [the] debt." (*Yvanova*, *supra*, 62 Cal.4th at p. 937.) *Yvanova* makes clear that "[t]he borrower owes money not to the world at large but to a particular person or institution, and *only the person or institution entitled to payment may enforce the debt by foreclosing on the security*." (*Id.* at p. 938, italics added.) Here, Masoud has alleged that US Bank wrongly claimed to be the entity to which the deed of trust had been assigned. (*Ibid.* [borrower "is obligated to pay the debt . . . only to a person or entity that has actually been assigned the debt"].) At this point it remains a factual question as to which persons or entities held the beneficial interest in the deed of trust at the time of the foreclosure. That Chase may have inherited servicing rights or responsibilities from WaMu does not erase Masoud's injury if a party with no beneficial interest in her loan directed foreclosure on her house.

Finally, defendants urge us to deny Masoud the opportunity to amend because the trial court refused to grant leave and she had earlier opportunities to assert this claim. But in reviewing a judgment of dismissal after a sustained demurrer, we look for any

facts in the complaint sufficient to state a cause of action under any possible legal theory—whether that theory was articulated in the trial court, raised for the first time on appeal, or suggested for the first time by the appellate court. (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1244–1245.) Liberality in permitting amendment of pleadings, even where there have been earlier opportunities, is required by this state's well-established public policy favoring resolution of cases on their merits wherever possible. (See, e.g., *Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158.)

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to grant leave to amend consistent with this opinion. Appellant shall recover her costs.

DATO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

IRION, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this

05/26/2020

KEVIN J. LANE, CLERK

By Jonathan Newton Deputy Clerk