HOLLAND v. AVELO MORTGAGE, LLC

GEORGE HOLLAND, JR., Plaintiff and Appellant,

v.

AVELO MORTGAGE, LLC, Defendant and Respondent.

No. A130204.

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

Filed December 13, 2011.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MARCHIANO, P.J.

Plaintiff George Holland, Jr. lost his home in Oakland in a nonjudicial foreclosure sale (Civ. Code, § 2924) after he defaulted on a secured real estate loan. Holland sued Avelo Mortgage, LLC (Avelo), Quality Loan Service Corporation (Quality), and Mortgage Electronic Registration Systems (MERS), and Does 1 through 50, seeking the return of $29,970 in mortgage payments made by him, as well as the retransfer of legal title and possession of the property to him on the ground, among others, that none of the defendants had the authority to foreclose on the property or accept mortgage payments on the loan. The trial court sustained without leave to amend Avelo's demurrer as to nine of plaintiff's 10 causes of action in his second amended complaint. As to the single remaining cause of action for conversion, the court granted Avelo's motion for summary judgment and subsequently entered judgment dismissing plaintiff's suit. Plaintiff timely appealed the summary judgment. We affirm the trial court's order and judgment because the foreclosure was properly carried out within the authority of the loan documents.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2007, Holland purchased a home at 3920 Columbian Drive in Oakland, California (the property) with a loan from New Century Mortgage Corporation (New Century) in the amount of $684,000. The loan was secured by a deed of trust on the property, executed the same day and as part of the same transaction as the loan. New Century was the lender on the deed of trust, Bellflower Escrow was the trustee, Holland was the trustor, and MERS was designated in the deed of trust as the nominee of the lender and the lender's successors and assigns, as well as the beneficiary. Holland was to begin making payments on the loan on March 1, 2007.

In early 2007, the loan was transferred from New Century to Avelo for servicing. By letter dated April 19, 2007, Avelo, acting as loan servicer for New Century, notified Holland of the change in servicers and informed him that he owed $684,075.63.

Subsequently, on August 31, 2007, MERS, the original beneficiary under the deed of trust, acting solely as nominee for New Century, the original lender, transferred its beneficial interest

under the deed of trust to Avelo. However, that assignment was not recorded in the Alameda County Recorder's Office (Recorder's Office) until October 8, 2007. In the meantime, Holland apparently ceased making payments and defaulted on the loan.

Also on August 31, 2007, Quality, acting as either "the original trustee, the duly appointed substituted trustee or acting as agent for the trustee or beneficiary" under the deed of trust, recorded a "Notice of Default and Election to Sell Under Deed of Trust" in the Recorder's Office.

According to Holland, on December 10, 2007, Quality filed a substitution of trustee. Also on December 10, 2007, Quality, acting as trustee, recorded a notice of trustee sale scheduled for December 27, 2007. Ten months later, on October 10, 2008, Quality, acting as trustee, sold the property to Avelo in satisfaction of the debt. On October 24, 2008, the trustee's deed upon sale was recorded.

On December 22, 2009, Holland filed a second amended complaint (the complaint) alleging 10 causes of action: quiet title, declaratory relief to set aside the trustee sale, fraud, negligence, injunction, unfair business practices, civil conspiracy to defraud, conversion, implied covenant of good faith and fair dealing, and predatory lending. The gravamen of Holland's complaint is that MERS was never a true beneficiary of the deed of trust; therefore, MERS was not entitled to receive any payments from plaintiff on the loan. And, since MERS had no interest in the note, it was not entitled to assign the note to Avelo or Quality. As a result, neither Quality nor Avelo had the right to any payments from plaintiff, or the power to record a notice of default, or substitute a trustee, or hold a trustee sale.

On January 5, 2010, Avelo filed a demurrer to the complaint. In support of its demurrer, Avelo requested judicial notice of: (1) The deed of trust from the lender, New Century, to the borrower, George Holland, recorded on January 12, 2007, designating MERS as nominee for lender and its successors and assigns, and as beneficiary under the security instrument; (2) an assignment of the deed of trust from MERS to Avelo, recorded on October 8, 2007; (3) the notice of default and election to sell under the deed of trust issued to Holland by Quality as agent for beneficiary Avelo, recorded August 31, 2007; (4) the notice of trustee's sale, recorded December 10, 2007; (5) the trustee's deed upon sale, recorded October 24, 2008; and (6) a certificate of incorporation for MERS, filed in the state of Delaware on January 7, 1999.[1] Although Holland challenged the demurrer, he did not oppose the request for judicial notice.

On April 20, 2010, the court issued its order granting Avelo's request for judicial notice and sustaining the demurrer without leave to amend as to all causes of action except conversion. The court found that the allegations of the complaint were contradicted by the judicially noticed facts. On April 27, 2010, Avelo filed its answer to Holland's conversion cause of action.

On June 1, 2010, Avelo filed a motion for summary judgment or summary adjudication of issues. It again asked for judicial notice of the note (Exhibit 1), deed of trust (Exhibit A), assignment of deed of trust by MERS to Avelo (Exhibit B), notice of default (Exhibit C), notice of trustee's sale (Exhibit D), and trustee's deed upon sale (Exhibit L), among other things.[2] The motion was supported by the original and supplemental declarations of Pamela Kirk, vice-president of, and a custodian of records for, Avelo.

Holland opposed both the motion for summary judgment and the request for judicial notice. Following Avelo's reply to Holland's opposition, on August 18, 2010, the court granted Avelo's motion for summary judgment and subsequently dismissed the action with prejudice as to Avelo.

Holland timely appealed.

DISCUSSION

On appeal, Holland challenges the court's order granting summary judgment and dismissing the action.[3] He argues that the trial court improperly took judicial notice of the truth or validity of the contents of the deed of trust and the assignment of his note from New Century to MERS to Avelo. He also argues that MERS could not lawfully act as both nominee for New Century and as beneficiary regarding the same loan transaction secured by the deed of trust and, as a result, there was a "triable issue of fact inherent in the Deed of Trust regarding MERS' status and authority to assign [Holland's] debt and security instrument to [Avelo]." Finally, Holland argues that a triable issue of fact exists as to whether Avelo was ever entitled to receive Holland's $29,970 in mortgage payments, because Avelo failed to rebut Holland's showing that New Century probably sold his loan within three months of its January 2007 origination, and, therefore, did not own Holland's loan when MERS purported to assign the note to Avelo as of August 31, 2007. For the reasons discussed below, we disagree.

1. The Trial Court Properly Took Judicial Notice of the Note, the Deed of Trust, and the Assignment of the Note in Ruling on Summary Judgment.

"`Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "`"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citations.]'" (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716.) "Matters that may be judicially noticed can support a motion for summary judgment." (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1374 (*Herrera*).)

The trial court's ruling in favor of Avelo on summary judgment was based on recorded documents of which the court took judicial notice over Holland's objection. We review the trial court's ruling on the request for judicial notice for abuse of discretion. (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549.) This court has recently addressed and rejected similar claims regarding judicial notice of recorded documents in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*). We again reject this claim, because we find that the court properly took judicial notice of the instruments that created the relationships between New Century, MERS, and Avelo.

"`"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter."" (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117 (*Poseidon*).) Under Evidence Code section 452, "Judicial notice may be taken of the following matters[:] (d) Records of (1) any court of this state . . . [and;] (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subds. (d) & (h).) As we observed in *Fontenot,* "courts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged. [Citations.] The official act of recordation and the common use of a notary public in the execution of such documents assure their reliability,

and the maintenance of the documents in the recorder's office makes their existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute." (*Fontenot, supra,* 198 Cal.App.4th at pp. 264-265.)

As a general rule, courts do not take judicial notice of the truthfulness and interpretation of a document's contents because they are disputable. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 456-457, fn. 9.) Relying primarily on *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057 (*Mangini*), overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, Holland argues that the court could not take judicial notice of "the *truth* of MERS' designation as beneficiary of the deed of trust or the *validity* of [MERS'] assignment to [Avelo]." However, *Mangini* did not involve the operative facts of the instruments such as those at issue here. In *Mangini,* the court declined to judicially notice the truth of factual matters contained in a report by the United States Surgeon General entitled "Preventing Tobacco Use Among Young People," and another report to the California Department of Health Services entitled "Tobacco Use in California." (*Mangini, supra,* at p. 1063.) Nor would the court judicially notice the truth of matters reported in newspaper articles. (*Id.* at p. 1065.) Concluding that R.J. Reynold's objection was well taken, the *Mangini* court stated: "While courts may notice official acts and public records, `we do not take judicial notice of the truth of all matters stated therein.' [Citations.] `[T]he 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.'" (*Id.* at pp. 1063-1064.) In *Mangini,* the underlying facts associated with or flowing from the reports were highly disputed, and thus, did not qualify for judicial notice under Evidence Code section 452, subdivision (h).

Holland also relies on *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1389, footnote 13 (*Noreen G.*), and *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094 (*C.R.*), but they also involved disputable facts. *Noreen G., supra,* at page 1396, footnote 13, involved a request to take judicial notice of the contents of a newspaper article. In *C.R., supra,* at pages 1103-1104, the Court of Appeal agreed that the trial court could take judicial notice of "three Department of Health Services annual licenses which state the medical center was operated by an entity entitled AMI/HTI Tarzana Encino Joint Venture from January 1, 2004, through December 31, 2006," but found that even so, the judicially noticed facts did not "permit the demurrer to be sustained." (*Id.* at p. 1103.)[4]

By contrast, the deed of trust and assignment of interest at issue here are the legally operative documents that actually created the relationships which Holland disputes exist. MERS is the beneficiary of the deed of trust because the deed of trust at issue designates MERS as beneficiary in the document itself. As this court held in *Fontenot,* "MERS's status as beneficiary was not the type of fact that is generally an improper subject of judicial notice under *Mangini,* since its status was not a matter of fact existing apart from the document itself. Rather, MERS was the beneficiary under the deed of trust because, as a legally operative document, the deed of trust designated MERS as the beneficiary. Given this designation, MERS's status was not reasonably subject to dispute." (*Fontenot, supra,* 198 Cal.App.4th at p. 266.)

Similarly, the assignment of the note and deed of trust from MERS to Avelo shows that MERS transferred all beneficial interest from itself, as the original beneficiary, to Avelo, as its successor and assign. This fact does not exist apart from the document itself, and its recordation

renders its "existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute." (*Fontenot, supra,* 198 Cal.App.4th at p. 265.)

Herrera, supra, 196 Cal.App.4th 1366, illustrates the difference between disputable facts recited in recorded documents which are not properly noticeable, and operative facts in recorded documents that do not exist apart from the document itself. There, the plaintiffs purchased a property at a foreclosure sale in 2008. (*Id.* at p. 1369.) In 2009, the California Reconveyance Company (CRC) recorded a notice of default and election to sell under deed of trust, a notice of trustee's sale, and a trustee's deed upon sale, to show that the property had been conveyed to Deutche Bank National Trust Company (Deutche Bank), the foreclosing beneficiary. In support of its motion for summary judgment, Deutche Bank sought to show that it was the beneficiary and that CRC was the trustee by having the court judicially notice an assignment of deed of trust and a substitution of trustee, both recorded in 2009, that purported to show that Deutche Bank was the beneficiary under a 2003 deed of trust and, as such, had the power to substitute CRC as trustee. (*Id.* at pp. 1370, 1371-1372.) However, neither document established that Deutche Bank was the beneficiary under a 2003 deed of trust. The assignment recited only that JP Morgan Chase Bank, successor in interest to Washington Mutual Bank, successor in interest to Long Beach Mortgage Company, assigned all beneficial interest under the 2003 deed of trust to Deutche Bank. (*Id.* at p. 1371.) The Court of Appeal concluded: "The recitation that JP Morgan Chase Bank is the successor in interest to Long Beach Mortgage Company, through Washington Mutual is hearsay. Defendants offered no evidence to establish that JP Morgan Chase Bank had the beneficial interest under the 2003 deed of trust to assign to [Deutche] Bank. The truthfulness of the contents of the assignment of deed of trust remains subject to dispute [citation], and plaintiffs dispute the truthfulness of the contents of all of the recorded documents." (*Id.* at p. 1375.)

Here, the 2007 deed of trust recites that New Century was the lender and MERS was the nominee of the lender's successors and assigns, as well as the beneficiary under that very deed of trust. Patricia Kirk's declaration established, and plaintiff acknowledged in his second amended complaint, that at some point soon after it was originated, the loan was transferred or assigned from New Century to Avelo as servicer of the loan, and an April 19, 2007 letter from Avelo to Holland, authenticated by Kirk's supplemental declaration, notified Holland of that change. On August 31, 2007—well before the trustee's sale of the property—MERS, the original beneficiary and nominee of the original lender, assigned the note and deed of trust to Avelo. That assignment was recorded some six weeks later, but more than a year before the property was sold. Thus, unlike the situation in *Herrera, supra,* 196 Cal.App.4th 1366, in this case the judicially noticed documents established the entire chain of title from New Century to MERS to Avelo. Moreover, here, as in *Fontenot, supra,* 198 Cal.App.4th 256, the facts of which the trial court took judicial notice arose from the legal effect of the documents, rather than from any statements of fact recited within them.

Poseidon, supra, 152 Cal.App.4th at pages 1117-1118, and *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388 (*McElroy*), are in accord. In *Poseidon,* the Court of Appeal found it was proper for the trial court to take judicial notice of the dates, parties, and legally operative language of a series of recorded documents, when that language was clear, but also found it would have been improper for the court to have taken judicial notice of the truth of various factual representations made in the documents. (*Poseidon, supra,* at pp. 1117-1118.) In *McElroy,* the Court of Appeal took judicial notice of the recordation date and the amount stated as owing in a notice of default under a deed of trust, for the purpose of showing that the plaintiffs had notice of the amount claimed to be owing and the opportunity to cure a defective tender.

(*McElroy, supra,* at p. 394.)

We conclude here, as we did in *Fontenot,* that "[t]aken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot, supra,* 198 Cal.App.4th at p. 265.) In our view, the court did not abuse its discretion in taking judicial notice of the deed of trust and assignment here.[5]

2. There Is No Ambiguity in the Deed of Trust Regarding MERS' Status and Authority as Beneficiary or Nominee for the Beneficiary.

The deed of trust in this case contained the following language: "`MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. . . . [¶] The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. . . . [¶] . . . [¶] [B]orrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Holland argues that "even if the trial court properly accepted the truth of MERS' status as described in the Deed of Trust on judicial notice . . . [i]t defies common sense that MERS could be both principal (the beneficiary) and agent for the principal (`nominee' for the beneficiary) regarding the single and only transaction secured by the Deed of Trust." We recently rejected a similar claim with respect to the identical language in *Fontenot.* (*Fontenot, supra,* 198 Cal.App.4th at pp. 262-263.) As we explained there: "[P] laintiff contends the deed of trust was ambiguous because it designated MERS as both the `"nominee for the beneficiary"' and as the `beneficiary.' An entity cannot be, plaintiff argues, both an agent and a principal. The record does not support the claimed ambiguity. Contrary to plaintiff's assertion, the deed of trust did *not* designate MERS as both beneficiary of the deed of trust and nominee for the beneficiary; rather, it states that MERS is the beneficiary, acting as a nominee for the lender. There is nothing inconsistent in MERS's being designated both as the beneficiary and as a nominee, i.e., agent, for the lender. The legal implication of the designation is that MERS may exercise the rights and obligations of a beneficiary of the deed of trust, a role ordinarily afforded the lender, but it will exercise those rights and obligations only as an agent for the lender, not for its own interests. Other statements in the deed of trust regarding the role of MERS are consistent with this interpretation, and there is nothing ambiguous or unusual about the legal arrangement." (*Id.* at pp. 272-273, original italics.) Accordingly, we find that MERS' dual status as nominee and beneficiary created no ambiguity or trial issue with regard to MERS' status, and the judicially noticed documents, in conjunction with the original and supplemental declarations of Pamela Kirk, Avelo's vice-president and a custodian of its records, sufficiently established that Avelo had the right to receive mortgage payments from Holland, first as the duly substituted servicer of the note, and later as the assignee of the note and deed of trust.[6]

3. Avelo Proved Its Right to Receive Payments Under the Note and Deed of Trust.

Next, plaintiff argues that Avelo failed to meet its burden of proving that it was entitled to receive the $29,970 in payments he made to Avelo under the deed of trust and promissory note because: (1) the deed of trust was a pre-printed and standardized form contract that he was required to sign as a condition of obtaining the loan from New Century as a "take it or leave it" proposition, which he had no opportunity to negotiate and which failed to explain the scope of MERS' authority as New Century's nominee; (2) he presented evidence that New Century "sold or likely sold" his loan within three months of its January 5, 2007 origination. Therefore, he argues, he should have been allowed the opportunity to prove at trial that New Century no longer owned the note as of August 31, 2007, and had no interest to assign to MERS as nominee for New Century.

Again, we rejected a similar argument in *Fontenot.* There, plaintiff argued (in the context of sustained demurrers), that defendants bore the burden of proving that a proper assignment occurred, and they lacked evidence sufficient to prove a valid assignment. As we explained, "the claim fails because MERS did not bear the burden of proving a valid assignment. The nonjudicial foreclosure statutes are a `comprehensive' scheme designed `(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citation.] As a result, a nonjudicial foreclosure sale is presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut this presumption. [Citations.] Given the presumption of regularity, if plaintiff contended the sale was invalid because [the assignee] had no authority to conduct the sale, the burden rested with plaintiff affirmatively to plead facts demonstrating the impropriety." (*Fontenot, supra,* 198 Cal.App.4th at pp. 269-270; see also *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155-1156.)

Here, the chain of title evidenced by the recorded documents judicially noticed by the court, together with Patricia Kirk's declarations and other exhibits, established that MERS had a beneficial interest in the note under the deed of trust as New Century's beneficiary and nominee; that initially, the loan was transferred from New Century to Avelo for *servicing,* and as servicer, Avelo had the right to collect payments from plaintiff; that subsequently, on August 31, 2007, MERS, as nominee for New Century, assigned all beneficial interest in the deed of trust to Avelo and, on the same date, Avelo recorded a notice of default naming Quality, its agent, as the successor servicer of the loan. Plaintiff's reliance on the declaration of Monika L. McCarthy, New Century's senior vice-president, in support of New Century's bankruptcy petition, is misplaced. Her declaration states that "[New Century] typically sell[s] a mortgage loan for a profit shortly after originating it, generally within one to three months." It does not state that plaintiff's loan was sold. It does not refer to plaintiff's loan, at all. On the other hand, as we observed in *Fontenot,* "[p]laintiff rests [his] argument on the documents in the public record, but assignments of debt, as opposed to assignments of the security interest incident to the debt, are commonly not recorded. The lender could readily have assigned the promissory note to [another lender] in an unrecorded document that was not disclosed to plaintiff." (*Fontenot, supra,* 198 Cal.App.4th at p. 272.) We conclude that the record developed here on the summary judgment motion left no unresolved questions as to MERS' authority to assign its beneficial interest to Avelo.

CONCLUSION

The trial court properly granted defendant Avelo's motion for summary judgment.

DISPOSITION

The judgment is affirmed.

Margulies, J. and Banke, J., concurs.

Footnotes

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1. Avelo also requested judicial notice of three federal district court opinions.

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2. Avelo requested judicial notice of various documents related to Holland's bankruptcy proceedings.

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3. In his opening brief, Holland does not challenge the court's order sustaining the demurrer. In his reply brief, he argues that this court has the discretion to review the trial court's order sustaining the demurrer. Assuming we have such discretion, we decline to exercise it under the circumstances of this case.

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4. *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42, 54-55, at footnote 6 (*Abernathy*), does appear to support Holland's position. In that case, the court declined to take judicial notice of "various deeds, judgments and indentures evidencing the conveyance history" of a particular lot because that would require "accepting the truth of the facts stated therein." (*Id.* at p. 54.) However, as we noted in *Fontenot,* where we declined to follow it, *Abernathy* is contrary to the weight of California law, its holding is conclusory, and its exact reasoning is unclear. (*Fontenot, supra,* 198 Cal.App.4th at p. 266, fn. 6.) We likewise decline to follow it here.

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5. In light of our determination that the trial court could properly take judicial notice of the documents at issue, and deduce therefrom that MERS is New Century's designated beneficiary, we need not and do not address Holland's subsidiary argument that "the conclusive presumption codified in Evidence Code Section 622 had no application to Appellant's contention against Respondent that MERS was not the beneficiary under the Deed of Trust."

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6. Here, as in *Fontenot,* plaintiff argues for the first time in his reply brief that MERS failed to demonstrate it had the authority to foreclose because it did not show the foreclosure was "`necessary to comply with law or custom,'" as provided in the deed of trust. Because this argument was not raised in the opening brief, we deem it waived, as we did in *Fontenot.* (*Fontenot, supra,* 198 Cal.App.4th at p. 273, fn. 12.)

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