HUNG TRAN, Plaintiff and Appellant,
v.
SELECT PORTFOLIO SERVICING, INC., et al., Defendants and Respondents.

No. A148740.

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

Filed December 5, 2017.

Appeal from the Alameda County, Superior Court No. RG14749026.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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BRUINIERS, J.

Hung Tran sued his home loan servicer, Select Portfolio Servicing, Inc. (SPS), the trustee of the securitized trust holding his loan, U.S. Bank N.A., a previous purported beneficiary of his deed of trust, J.P. Morgan Chase Bank N.A. (Chase) (collectively respondents), and the successor trustee under his deed of trust, Quality Loan Service Corporation (Quality) to prevent sale of his home through nonjudicial foreclosure. (Civ. Code, § 2924.)[1] Tran contends respondents violated provisions of the California Homeowner's Bill of Rights (HBOR)[2] and they have no authority to foreclose because Chase never had a beneficial interest in his deed of trust. The trial court sustained respondents' demurrers to Tran's second amended complaint (SAC), without leave to amend, and judgments of dismissal were entered. We agree with the trial court that no violation of the HBOR has been alleged and that California's nonjudicial foreclosure statutes do not authorize the kind of preemptive judicial action Tran seeks. Accordingly, we affirm.

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 (*Gomes*).) Because of the exhaustive nature of the nonjudicial foreclosure scheme, appellate courts are reluctant to read in additional requirements. (See *Moeller,* at p. 834; *I. E. Associates,* at p. 288.)

"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); [citations].) Generally speaking, the foreclosure sale extinguishes the borrower's debt; the lender may recover no deficiency. (Code Civ. Proc., § 580d; [citation].)" (*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.) "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. (§ 2924, subd. (a)(1) [notice of default may be filed for record only by `[t]he trustee, mortgagee, or beneficiary']; [citations].)" (*Yvanova,* at p. 927; accord, § 2924, subd. (a)(6).)

II. Factual and Procedural Background[3]

In 1999, Tran purchased real property located at 2632 Middlefield Avenue, Fremont, California (the Property). In 2007, Tran refinanced his home by obtaining a $1,264,000 loan from Washington Mutual Bank, FA (WaMu). The promissory note is not in the record before us, but a copy of a deed of trust on the Property securing the note (Deed of Trust) designates Tran as the "borrower," WaMu as "beneficiary" or "lender," and California Reconveyance Company as "trustee."

Under the Deed of Trust, Tran "irrevocably grant[ed] and convey[ed] [the Property] to Trustee, in trust, with power of sale" in the event he defaulted on the loan. The Deed of Trust also provides that the underlying note, together with the Deed of Trust, could be sold to a new beneficiary without any notice to Tran. Paragraph 24 of the Deed of Trust also provides: "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. . . . [T]he successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law."

In his SAC, Tran alleges WaMu sold the loan in 2007 to LaSalle Bank N.A. as trustee for WaMu Mortgage Pass Through Certificates Series 2007-OA4 (Series 2007-OA4 Trust). Tran also alleges that LaSalle Bank N.A. was dissolved and its interest in the Series 2007-OA4 Trust passed to the certificate holders who then sold his loan on or about April 25, 2007. On September 25, 2008, the Federal Deposit Insurance Corporation (FDIC) placed WaMu in receivership, which led to transfer of all WaMu assets to Chase. Tran alleges WaMu's transfer of the loan to the Series 2007-OA4 Trust occurred at least six months before September 2008. Because WaMu no longer owned the beneficial interest in Tran's Deed of Trust, it had nothing to convey to Chase in 2008, and Chase never became a beneficiary.

Tran defaulted on the loan. On April 11, 2012, Tran obtained a discharge of debts via a Chapter 7 bankruptcy petition. Tran claims this discharge effectively nullified his personal liability for arrearages on the loan, and prevented accrual of late charges or interest payments during the bankruptcy.

On September 7, 2012, Chase, purporting to act as "successor in interest by purchase from the FDIC as Receiver of [WaMu]," recorded, in the official records of Alameda County, an assignment of the Deed of Trust to "U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for [the] Series 2007-OA4 Trust."[4] Also on September 7, 2012, U.S. Bank recorded a substitution of MTC Financial Inc. (doing business as Trustee Corps) as trustee for the Deed of Trust (First Substitution of Trustee).

On September 7, 2012, Trustee Corps recorded a notice of default and election to sell under deed of trust (First Notice of Default). The First Notice of Default stated Tran owed "$221,542.32 as of August 31, 2012" and informed him to contact U.S. Bank, via Trustee Corps, to "find out the amount [he] must pay, or to arrange for payment to stop the foreclosure." On December 14, 2012, Trustee Corps recorded a notice of trustee's sale (First Notice of Sale), which calendared a sale for January 7, 2013. These notices were ultimately rescinded on October 8, 2013.

In the interim, on July 22, 2013, Tran entered into a loan modification agreement with Chase.[5] The modification agreement provides: "The Loan Documents are hereby modified as of August 1, 2013 . . . and all unpaid late charges are waived. [Chase] agrees to suspend any foreclosure activities so long as I comply with the terms of the Loan Documents, as modified by this Agreement. . . . [¶] . . . [¶] The modified principal balance of my Note will include all amounts and arrearages that will be past due (excluding unpaid late charges)." However, Tran alleges the modification did not grant him the benefit of his bankruptcy discharge, in that the total balance due on the loan included interest and late fees accrued while he was in bankruptcy.

Tran also alleges SPS and Chase failed to establish a single point of contact related to the loan modification as is required by HBOR. Instead, two persons identified as "document control officers" for Chase, but employees of SPS, were involved with Tran's loan modification. On January 30, 2014, Katie Allen executed the modification agreement on behalf of "[SPS] as Attorney in Fact" for Chase. Tran alleges Marilyn Christiansen also executed a duplicate modification agreement, in a similar capacity, on November 23, 2013.

On July 3, 2014, U.S. Bank executed a substitution of trustee that substituted Quality as trustee (Second Substitution of Trustee). The Second Substitution of Trustee was recorded on July 17, 2014. Quality then commenced foreclosure proceedings. Specifically, on July 24, 2014, Quality recorded a notice of default and election to sell under deed of trust (Second Notice of Default). The Second Notice of Default states Tran owed $50,184.38 as of July 22, 2014 (an amount Tran claims is erroneous) and that "contact was made with [Tran] to assess [his] financial situation and explore options for [avoiding] foreclosure as required by [section] 2923.55(b)(2)." The Second Notice of Default also stated Tran should contact U.S. Bank, via Quality, to "find out the amount [he] must pay, or to arrange for payment to stop the foreclosure." On November 3, 2014, Quality recorded a notice of trustee's sale (Second Notice of Sale), which calendared a trustee's sale for November 26, 2014. On November 18, 2014, these notices were rescinded.

Tran's Complaint

On November 21, 2014, Tran filed a complaint against Quality, U.S. Bank, SPS, and Chase seeking declaratory relief and damages for wrongful foreclosure, breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the HBOR, and violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.). After at least some of the parties to the action stipulated to halt the sale of the Property, the trial court issued a temporary restraining order.

Focusing on Tran's assertion respondents had violated the terms of Tran's prior bankruptcy discharge, SPS and U.S. Bank removed the case to the United States District Court for the Northern District of California. The district court dismissed Tran's federal cause of action with prejudice. The district court assumed that Tran's state law claims were "related to" his prior bankruptcy proceeding, but nonetheless remanded the case because state law issues predominated and administration of the bankruptcy estate would not be affected by resolution of the state law claims. On return to the superior court, respondents filed demurrers, which the trial court granted with leave to amend. The same result awaited Tran's first amended complaint.

On October 23, 2015, Tran filed the operative complaint, his SAC, which realleged wrongful foreclosure, breach of contract, breach of the implied covenant of good faith and fair dealing, and HBOR causes of action. In his prayer for relief, Tran sought injunctive relief, declaratory relief, and

damages. Tran's wrongful foreclosure cause of action alleges he wrongfully incurred "substantial attorney fees and costs" to enjoin a trustee sale because "[n]either SPS [nor Chase] has the power to order the recordation of a Notice of Default or Notice of Sale" because they do not have any beneficial interest in the Deed of Trust. Tran seeks declaratory relief to establish the identity of the true owner of the loan, to whom he is to make payments, as well as the payment amount. With respect to his HBOR cause of action, Tran alleges he was not contacted regarding alternatives to foreclosure within 30 days before "the Notice of Default" was recorded, nor was he provided a single point of contact.

Respondents demurred, arguing that Tran's SAC failed to state a cause of action.[6] Among other things, respondents argued Tran's wrongful foreclosure cause of action failed because it was premature and Tran lacked standing to preemptively challenge respondents' authority to foreclose. Respondents also argued Tran had no HBOR cause of action because the notices of default and notices of sale had been rescinded. Respondents asked the trial court to take judicial notice of certain Alameda County public records, including the Deed of Trust, Chase's 2012 assignment of the Deed of Trust to U.S. Bank, the First Substitution of Trustee, the First Notice of Default, the First Notice of Sale, the First Notice of Rescission, the Second Substitution of Trustee, the Second Notice of Default, the Second Notice of Sale, and the Second Notice of Rescission.[7]

In opposition, Tran stated he had standing to challenge respondents' authority to foreclose because "Tran is uncertain whether his loan is owned by the 2007 trust to which WaMu sold his loan . . . or the 2008 trust [to] which Chase sold the loan after acquiring the assets from the FDIC as Receiver." He pressed no argument with respect to his HBOR cause of action. Although he made a conclusory request for leave to amend, he did not point to 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 Tran lacked standing to challenge respondents' ability to foreclose before any sale occurred. The trial court concluded Tran's HBOR claim was moot because the First and Second Notices of Default had been voluntarily rescinded. Tran filed a premature notice of appeal from the order on June 5, 2016. Thereafter, on September 29, 2016, the trial court

entered a judgment of dismissal in respondents' favor. On October 5, 2016, Tran prepared an amended notice of appeal from the judgment.[8]

On June 9, 2016, Quality recorded another notice of default and election to sell under deed of trust. On December 8, 2016, Quality recorded a third notice of trustee's sale, which calendared a sale for January 3, 2017. We granted Tran's petition for writ of supersedeas and stayed any further action to sell the Property pending resolution of this appeal.

III. Discussion

Although the arguments presented in Tran's opening brief are hardly a model of clarity, he appears to challenge the trial court's demurrer ruling with respect to his wrongful foreclosure, declaratory relief, breach of contract, and HBOR causes of action. Specifically, he contends the trial court erred by resolving factual conflicts and by relying on tender and standing as grounds to sustain the demurrer. However, Tran overlooks that some of these grounds were not relied on by the trial court and fails to address other grounds on which the trial court *did* rely. Accordingly, we begin by addressing Tran's burden as the appellant on 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.) "To establish that he adequately pleaded even one of his causes of action, [the plaintiff] must show that he pleaded facts sufficient to establish every element of that cause of action. [Citation.] 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. . . ." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879-880, italics & fn. omitted.) "[B]ecause it is not a reviewing court's role to construct theories or arguments which would undermine the judgment [citation], we consider only those theories advanced in the appellant's briefs." (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 564.) "The judgment must be affirmed `if any one of the several grounds of demurrer is well taken.'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

"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.) "Because the function of a demurrer is not to test the truth or accuracy of the facts alleged in the complaint, we assume the truth of all properly pleaded factual allegations. [Citation.] Whether the plaintiff will be able to prove these allegations is not relevant; our focus is on the legal sufficiency of the complaint." (*Los Altos Golf & Country Club v. County of Santa Clara, supra*, 165 Cal.App.4th at p. 203, italics omitted.) "We may also take notice of exhibits attached to the complaints. 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.)[9]

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.)

Tran contends the allegations of his SAC were sufficient to state a cause of action for wrongful foreclosure based on his claim that a beneficial interest in the Deed of Trust never passed to Chase. Although his allegations are not entirely clear, Tran's theory appears to be that WaMu assigned his loan to a securitized trust before Chase acquired WaMu's assets, and thus Chase did

not acquire any interest in Tran's loan. He contends that consequently neither Chase nor SPS were authorized to initiate or complete a foreclosure. Relying on *Yvanova, supra*, 62 Cal.4th 919, Tran insists that a borrower, "facing the imminent threat of losing [his] home at a trustee sale," has standing to challenge whether an entity "actually has the power to sell the property." The trial court determined Tran "lacks standing to challenge the claim of [respondents], because he does not allege that the Trustee's Sale has already taken place. [(See *Yvanova*, at pp.] 934-935 [**PLAINTIFF MAY NOT FILE A PREEMPTIVE ACTION SEEKING TO DELAY OR CANCEL TRUSTEE'S SALE**]; and *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813 [same].)]" Respondents agree.

In *Yvanova*, our Supreme Court held a borrower has standing to assert a wrongful foreclosure action after a trustee's sale has taken place, based on allegations an assignment was void, and not merely voidable at the request of the parties to the assignment. (*Yvanova, supra*, 62 Cal.4th at p. 923.) 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. 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, as a third party, 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.** [Citations.] [¶] . . . [¶] [I]**f the borrower defaults on the loan, ONLY THE CURRENT BENEFICIARY MAY DIRECT THE TRUSTEE TO**

UNDERTAKE THE NONJUDICIAL FORECLOSURE PROCESS." (*Yvanova, supra,* 62 Cal.4th 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," and the borrower would have standing to sue for wrongful foreclosure after 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 to the extent "they held borrowers lack standing to challenge an assignment of the deed of trust as void." (*Id.* at p. 939, fn. 13; see *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*); *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; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256.)

However, 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. ***We do not hold* or suggest that a borrower may attempt to *preempt* a *threatened* nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. 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.)

Despite this explicit limitation, Tran reads *Yvanova* as suggesting his allegations are sufficient to survive demurrer because Chase and SPS "are acting as bounty hunters seeking to sell Tran's home in satisfaction of the [Series 2007-OA4] Trust's possible claim." He asserts, "[t]his is the precise conduct condemned by . . . *Yvanova*." We are unpersuaded. Not only did the *Yvanova* court couch its holding in very narrow terms, but Tran also overlooks the line of authority rejecting preemptive lawsuits, like his, which merely challenge trustee sales that have not yet taken place. (See *Jenkins, supra,* 216 Cal.App.4th at pp. 511-512, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13; *Gomes, supra,* 192 Cal.App.4th at p. 1155; *Saterbak, supra,* 245 Cal.App.4th at p. 813 (*Saterbak*).) We conclude this authority survives *Yvanova*. (*Yvanova, supra,* 62 Cal.4th at p. 924; *Saterbak,* at p. 813.)

In *Saterbak, supra,* 245 Cal.App.4th 808, a borrower defaulted on her mortgage, and then attempted to cancel an assignment and obtain declaratory relief after a notice of trustee's sale was recorded, but before the sale occurred. She alleged an assignment of her loan to a securitized trust was invalid because it was untimely under the terms of the trust's pooling and servicing agreement. (*Id.* at pp. 811-812, & fn. 1, 814.) The *Saterbak* court distinguished *Yvanova* on two grounds. First, ***YVANOVA*'S HOLDING ONLY APPLIES TO CASES WHERE THE TRUSTEE'S SALE HAS BEEN COMPLETED.** (*Saterbak,* at p. 815; see *Yvanova, supra,* 62 Cal.4th at pp. 934-935.) Second, *Saterbak* also distinguished *Yvanova* because the allegation of a transfer that was untimely under the securitization agreement suggested an assignment that was merely voidable, not void. (*Saterbak,* at p. 815.)

Tran asserts *Saterbak* provides "no reasoned basis" for its preforeclosure distinction. To the contrary, the *Saterbak* court explicitly observed: "The crux of [the borrower's] argument is that she may bring a preemptive action to determine whether the [securitized] trust may initiate a nonjudicial foreclosure. . . . However, **California courts do not allow such preemptive suits because they `would result in the impermissible interjection of the**

courts into a *nonjudicial* scheme enacted by the California Legislature.' (*Jenkins*[,*supra*,] 216 Cal.App.4th [at p.] 513 . . .; see *Gomes*[, *supra*,] 192 Cal.App.4th [at p.] 1156 **[`California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure.'].) As the court reasoned in *Gomes*: `[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.**' (*Gomes*, at p. 1154, fn. 5.)" (*Saterbak, supra*, 245 Cal.App.4th at pp. 814-815, italics added & fn. omitted.)

The instant case is similarly an action that seeks to preempt foreclosure by merely alleging the initiating party may lack the authority to do so. *Saterbak*, *Jenkins*, and *Gomes* persuasively convey why a borrower, like Tran, should not be able to delay the nonjudicial foreclosure process for years while not making his or her mortgage payments.

Tran points out that a lower federal court, in an unreported decision, has predicted that the California Supreme Court will eventually extend the *Yvanova* holding to cases involving borrowers seeking to prevent trustee sales from occurring when they have a specific factual basis for alleging the foreclosing bank lacks authority to foreclose. (*Lundy v. Selene Finance*, LP (N.D.Cal., Mar. 17, 2016, No. 15-cv-05676-JST) 2016 U.S.Dist. Lexis 35547, *3-*4, *31-*39 (*Lundy*).)[10] The *Lundy* court reasoned: "*Jenkins* and its progeny clearly impose some kind of bar on pre-foreclosure challenges to the foreclosing entity's alleged lack of authority, and do so because of those challenges' `preemptive' effect on California's nonjudicial foreclosure scheme. *What is less clear is whether that bar is limited to only those challenges that lack any `specific factual basis' in support.* [¶] . . . [T]his Court does conclude that if the California Supreme Court decides to adopt *Jenkins*'s bar to pre-foreclosure challenges, it will limit that bar only to claims that lack any "specific factual basis," as in *Gomes*. . . . [¶] But extending the bar further to reach all pre-foreclosure challenges would not comport with either *Gomes* and similar cases or the reasoning of *Yvanova*. Imposing such a bar would mean that even if a plaintiff offers plausible support for the claim that the entity foreclosing on her property lacks any authority to do so, that plaintiff would nevertheless have to sit by idly until

an allegedly improper foreclosure sale was completed before bringing her otherwise valid challenge in court." (*Lundy*, at *37-*39, italics omitted.)

We need not decide if *Lundy* was correctly decided, despite its failure to consider *Saterbak, supra*, 245 Cal.App.4th 808, which was decided only one day before. Even if a borrower can pursue preforeclosure relief when he or she "identifie[s] a specific factual basis for alleging that the foreclosure was not initiated by the correct party" (*Gomes, supra*, 192 Cal.App.4th at p. 1156, italics omitted), Tran's allegations would not come within such an exception. In his SAC, Tran contends the Series 2007-OA4 Trust sold his loan in 2007 and that, other than knowing the owner is *not* Chase, he has no information about the current owner of his note and Deed of Trust. However, in his opening brief, he now concedes the Series 2007-OA4 Trust holds the beneficial interest under his Deed of Trust. He asserts "strangers to the loan—*Chase* . . . and *SPS*—initiated the foreclosure proceedings without approval from this Trust that actually owns the debt."[11] However, these assertions are flatly contradicted by the allegations of the SAC and the judicially noticeable documents, which show that *Trustee Corps* and *Quality* initiated foreclosure on behalf of *U.S. Bank*, in its capacity "as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for [the] Series 2007-OA4 Trust."

Although we may not assume that factual matters stated within the judicially noticed documents are true when they are hearsay and reasonably subject to dispute (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375), the recitation that U.S. Bank is the successor in interest to Bank of America, who was the successor via merger with LaSalle Bank, does not appear to be the subject of any actual dispute. (Cf. *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 ["[w]hile judicial notice could be properly taken of the existence of [a] declaration, it could not be taken of the facts of compliance asserted in the declaration, at least where [the borrower] has alleged and argued that the declaration is false and the facts asserted in the declaration are reasonably subject to dispute" (italics omitted)]; *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-376 [facts disclosed in a deposition and not disputed could be considered in ruling on a demurrer].) Speculation that the interest in Tran's loan *may* have passed from the certificate holders to some unknown third party is surely insufficient to establish the kind of exception for preemptive suits anticipated by *Lundy*. (*Lundy, supra*, 2016 U.S.Dist.

Lexis 35547, *37-*39.) On the record before us, there is no "plausible support" or "specific factual basis" for Tran's allegation foreclosure was not initiated by the correct party.

Sciarratta v. U.S. Bank National Assn. (2016) 247 Cal.App.4th 552 (*Sciarratta*) is also of no assistance to Tran. In that case, the Fourth District Court of Appeal considered a nonjudicial foreclosure sale that had already been 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 would be void, not merely voidable, and the borrower had standing to challenge a purportedly void assignment. (*Id.* at pp. 563-564.)

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, italics added.) However, *Sciarratta* simply does not address the ability of a borrower to state a preforeclosure cause of action based on speculation.

B. *Declaratory Relief Cause of Action*

Tran's declaratory relief "cause of action" is essentially duplicative of his first—for wrongful foreclosure. It fails for the same reasons previously stated. (See *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 820.) By failing to adequately brief the issue, Tran has forfeited his separate claim for a declaration establishing the amount owed on his loan. (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"]; *Brown,* at p. 282.)

C. *Breach of Contract Cause of Action*

Tran's breach of contract cause of action is premised on the theory that respondents breached the terms of the Deed of Trust by seeking to recover, via the lien against the Property, the interest and late fees Tran contends were discharged by his bankruptcy. He also alleges respondents breached paragraph 24 of the Deed of Trust, which governs substitution of trustees. In sustaining respondents' demurrers to this cause of action, the trial court explained: "[Tran] did not allege any conduct or omission by [U.S. Bank or Chase] that resulted in the breach of any agreement with him, and in fact, [Tran] alleges that [U.S. Bank or Chase are] likely not [parties] to any agreement at all. [Tran] did make factual allegations supporting a plausible claim against [SPS]. However, even if [respondents] owed [Tran] a contractual duty regarding the appropriate appointment of a Substitute Trustee and the calculation of interest and/or fees if he files for bankruptcy, the Court concludes that [Tran] seeks judicial interruption of the nonjudicial foreclosure process that is clearly prohibited by law. See [*Yvanova*,]*supra*, 62 Cal.4th at [pp.] 934-935; and *Gomes*[, *supra*,] 192 Cal.App.4th [at pp.] 1154-1155."

Tran raises no argument in his opening brief that addresses the trial court's reasoning and instead spends the better part of two pages explaining why a ground raised in respondents' demurrers, but not relied on by the trial court (Tran's default), does not bar his breach of contract claim. (See *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1279 ["`prohibiting the borrower who has breached from bringing an action to enforce the conditions precedent in a deed of trust would nullify such conditions," making the "mere fact of the borrower's breach alone . . . the only condition precedent to foreclosure'"].) By not addressing the trial court's reasoning, Tran has forfeited any argument that reasoning was erroneous. "`"Although our review of a [demurrer] is de novo, it is limited to issues [that] have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned."'" (*Id.* at p. 1282.) We do not address the cause of action further.

D. *HBOR Cause of Action*

Finally, Tran contends he stated a valid cause of action for HBOR violations. In his SAC, Tran alleges HBOR was violated because he was not contacted regarding alternatives to foreclosure within 30 days before "the

Notice of Default" was recorded, nor was he provided a single point of contact. (See §§ 2923.55, subd. (c) [requiring mortgage servicers attach to notice of default a declaration that the servicer has contacted the borrower to assess the borrower's financial situation and to explore option to avoid foreclosure], 2923.7, subd. (a) ["[u]pon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact"].) On appeal, he adds an argument that the HBOR's protections against "dual tracking" were violated. (See §§ 2923.6, subd. (c) **["[i]f a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, trustee, mortgagee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending"], 2924.18 [same].)** The trial court concluded Tran's HBOR claims were moot because the Second Notice of Default had been voluntarily rescinded. Tran does not respond on this point.

The trial court did not err in concluding rescission of the Second Notice of Default mooted Tran's cause of action. **Under the HBOR, if the claimant's home has not yet been sold, his only available remedy is injunctive relief**. He may not obtain damages. (*Galindo v. BSI Financial Services* (N.D.Cal., Mar. 17, 2017, No. 17-CV-00021-LHK) 2017 U.S.Dist. Lexis 39079, *10; *McKinley v. CitiMortgage, Inc.* (E.D.Cal., June 14, 2016, No. 2:13-cv-01057-TLN-CKD) 2016 U.S.Dist. Lexis 77413, *10; §§ 2924.12, subd. (a)(1) **["[i]f a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation"**], 2924.12, subd. (b) [**"*After a trustee's deed upon sale has been recorded*, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages . . . resulting from a material violation . . . *where the violation was not corrected* and remedied prior to the recordation of the trustee's deed upon sale" (italics added)], 2924.12, subd. (c) ["[a] mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of a trustee's deed upon sale"];.)** Because Tran's property has not been sold, he is not entitled to recover damages. Furthermore, he cannot obtain injunctive relief because the Second Notice of Default and Second Notice of Sale have already been rescinded.

The trial court did not err in sustaining respondents' demurrers without leave to amend.[12]

IV. Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal. This court's order dated February 23, 2017, staying any and all further action to sell the Property, shall dissolve upon issuance of the remittitur.

SIMONS, Acting P. J., and NEEDHAM, J., concurs.

[1] Undesignated statutory references are to the Civil Code. Quality, as successor trustee, filed a declaration of nonmonetary status, stating its belief it was named as a defendant solely in its capacity as trustee and its agreement to be bound by whatever order or judgment the trial court might enter. (§ 2924*l*, subds. (a), (b).) It appears no party objected to the declaration and, thus, Quality did not participate further in the litigation and is not a party to the appeal. (§ 2924*l*, subd. (d).)

[2] Sections 2920.5, 2923.4-2923.7, 2924, 2924.9-2924.12, 2924.15, 2924.17-2924.20. (See *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

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

[4] U.S. Bank N.A. in its capacity as trustee to the Series 2007-OA4 Trust is hereafter referred to as U.S. Bank.

[5] In the loan modification agreement, which is attached as an exhibit to Tran's SAC, Chase is designated as the "[l]ender." However, the loan modification was offered by SPS, as servicer. We do not read the hearsay designation within the loan modification agreement for its truth. Both Tran and respondents (including Chase) agree Chase did not own the loan at this point

[6] One demurrer was filed on behalf of SPS and U.S. Bank, and a separate demurrer was filed on behalf of Chase.

[7] The trial court granted both Tran's and respondents' requests for judicial notice. We 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 properly noticed by trial court under Evid. Code §§ 452, subds. (c) and (h), 453].)

[8] **An order sustaining a demurrer is not appealable until a judgment of dismissal is entered.** (*Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202; Code Civ. Proc., § 904.1, subd. (a)(1).) Tran's initial notice of

appeal was premature, as the judgment was not entered until September 2016. Furthermore, the record does not make clear that Tran in fact filed his amended notice of appeal. Nevertheless, we may construe the initial appeal as taken from the subsequent judgment. (*Los Altos Golf & Country Club,* at p. 202; Cal. Rules of Court, rule 8.104(d)(2).)

[9] Tran suggests the trial court erred by resolving factual conflicts and by not taking judicial notice of the Form 10-K Annual Report for 2007, filed with the Securities and Exchange Commission (SEC), by the Series 2007-OA4 Trust. However, Tran's contention is without factual support in the record. The Form 10-K is attached to his SAC, the trial court granted both Tran's and respondents' requests for judicial notice without limitation, and the trial court did not sustain respondents' demurrer to his wrongful foreclosure cause of action on a basis that required resolution of a conflict in the evidence. We note the Form 10-K does not support Tran's assertion his loan was sold by certificate holders of the Series 2007-OA4 Trust on April 25, 2007.

[10] **"`Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority.'"** (*Gomes, supra,* 192 Cal.App.4th at p. 1155, fn. 6; accord, Cal. Rules of Court, rule 8.1115; *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990, fn. 4.)

[11] At oral argument, Tran's counsel attempted to backtrack from concessions made in his SAC and opening brief. At this point, Tran cannot change his theory of the case and rely on hearsay statements in the 2013 loan modification agreement to establish a dispute regarding ownership of his loan. (See *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151 ["[i]f a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations"].)

[12] Tran has abandoned his claim for breach of the implied covenant of good faith and fair dealing. (See *Tiernan v. Trustees of Cal. State University & Colleges, supra,* 33 Cal.3d at p. 216, fn. 4 [issues not raised in appellant's brief may be deemed forfeited].) In his opening brief, Tran also raises two new arguments. He contends he can state causes of action for violation of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. § 2601 et seq.) and the Truth in Lending Act (TILA) (15 U.S.C. § 1641, subd. (g)). We could deem the issues forfeited. (See *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1300 & fn. 2 [issue not clearly raised on appeal will not be addressed on the merits]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellate court may deny claim on appeal that is unsupported by legal argument].) In any event, the RESPA claim fails because, despite arguing respondents failed to provide a proper response to a "qualified written request," Tran has failed to identify any written request he ever submitted, much less when and to whom it was sent. (12 U.S.C. § 2605, subd. (e).) With respect to TILA, Tran previously represented to the Northern District that he

would "waive all Truth in Lending claims" in order to return the cause to state court. Tran is judicially estopped from raising a TILA cause of action now. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182-183.)