

DAVIS M. DeBARD, Plaintiff and Appellant,
v.
US BANK N.A., as Trustee, etc., Defendant and Respondent.
[No. E063640.](#)
Court of Appeals of California, Fourth District, Division Two.

Filed November 15, 2016.

APPEAL from the Superior Court of San Bernardino County, Super.Ct. No. CIVDS1406285, Bryan Foster, Judge. Affirmed.

Law Offices of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Magdalena D. Kozinska for Defendant and Respondent.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

OPINION

CODRINGTON, J.

I

INTRODUCTION

Plaintiff and appellant Davis M. DeBard appeals from a judgment of dismissal, entered after the trial court sustained without leave to amend the demurrer of defendant U.S. Bank^[1] to the first amended complaint (FAC). In its introduction to [*Yvanova v. New Century Mortg. Corp.* \(2016\) 62 Cal.4th 919, 923](#), the California Supreme Court described the catastrophic consequences of the home mortgage crisis: "The collapse in 2008 of the housing bubble and its accompanying system of home loan securitization led, among other consequences, to a great national wave of loan defaults and foreclosures. One key legal issue arising out of the collapse was whether and

how defaulting homeowners could challenge the validity of the chain of assignments involved in securitization of their loans. We granted review in this case to decide one aspect of that question: whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." In the present appeal, DeBard is a borrower on a home loan who is in default on his payments. DeBard's lawsuit is not for wrongful foreclosure but seeks only to challenge the assignment of his loan. However, as we discuss, the record on appeal demonstrates a chain of assignments that has no defects rendering the assignments void. Based on our independent review, we find that defendant U.S. Bank is the beneficiary of record by assignment of a trust deed. For that reason, we affirm the judgment and, in a related appeal, E064933, affirm the award of attorney's fees to U.S. Bank.

II

STANDARD OF REVIEW

"On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' [Citation.] We may consider matters that are properly judicially noticed. [Citation.]" ([*Saterbak v. JPMorgan Chase Bank, N.A.* \(2016\) 245 Cal.App.4th 808, 813.](#))

"To determine whether the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. ([*Schifando v. City of Los Angeles* \(2003\) 31 Cal.4th 1074, 1081.](#))" (*Yvanova v. New Century Mortg. Corp. supra*, 62 Cal.App.4th at p. 924.)

III

FACTUAL AND PROCEDURAL BACKGROUND

A. Prelitigation Facts

We base our recitation of the facts on the allegations of the FAC and the matters judicially noticeable. In 2006, Debard borrowed \$432,000 from a lender, Ownit Mortgage Solutions, Inc. (Ownit Mortgage). The new loan was secured by a trust deed recorded on March 21, 2006. As stated in the 2006 trust deed, MERS^[2] was the nominee for the lender and the lender's successors and assigns.

On June 18, 2009, MERS recorded an assignment of the beneficial interest in the 2006 note and trust deed to Bank of America, as trustee for the Ownit Trust. On December 27, 2013, a second assignment was recorded, replacing Bank of America with U.S. Bank, as trustee of the Ownit Trust. In other words, between 2006 and 2013, the beneficial interest in the note and trust deed was transferred by MERS from Ownit Mortgage to Bank of America, as trustee for the Ownit Trust, and from Bank of America to U.S. Bank, as trustee for the Ownit Trust.

Meanwhile, on June 23, 2010, a Home Affordable Modification Agreement was recorded modifying the subject loan, referencing the 2006 trust deed and identifying MERS as the lender (the HAMP Modification). On March 10, 2014, a Notice of Default (NOD) was recorded against the property, listing the amount in default as \$21,116.03. According to both parties, no foreclosure proceedings are pending.

B. The FAC

DeBard filed his original complaint in May 2014. The court sustained defendant's demurrer to the original complaint.

DeBard filed his FAC in December 2014. DeBard asserts that his only cause of action is for cancellation and expungement of a void assignment of the 2006 trust deed. He expressly alleges he is not challenging a foreclosure sale, a trustee's sale, or a pooling and services agreement (PSA) related to a securitized trust.

Instead, the FAC seeks cancellation of the December 2013 assignment on two grounds: (1) the December 2013 assignment was "the product of a "Robo-Signor and fraudulently executed" and also (2) "effectuated into a `Securitized Trust'. . . years after said Trust had factually and legally `Closed' by its very own definition." More particularly, DeBard alleges, without any factual foundation, that Joel Pires was not authorized to execute

the December 2013 assignment and that the notary committed fraud by notarizing the assignment in the wrong state. Additionally, DeBard alleges the December 2013 assignment was void because it was executed and recorded after June 26, 2006, the closing date of the Ownit Trust. The latter is entirely inconsistent with defendant's contention he is not challenging the Ownit Trust's PSA.

In spite of DeBard's additional claim that he is not challenging a foreclosure, the FAC further alleges that DeBard is "threatened with the loss" of the property which is "at risk" of being "wrongfully sold, transferred and/or assigned." The lower court sustained the demurrer to the FAC without leave to amend and entered a judgment of dismissal.

IV

DISCUSSION

DeBard argues that the recent *Yvanova* case confirms that he has standing to challenge the December 2013 assignment of the beneficial interest in the 2006 trust deed. We disagree.

In *Yvanova*, the California Supreme Court considered the question: "[U]nder what circumstances, if any, may the borrower challenge a nonjudicial foreclosure on the ground that the foreclosing party is not a valid assignee of the original lender? Put another way, does the borrower have standing to challenge the validity of an assignment to which he or she was not a party?" (*Yvanova v. New Century Mortg. Corp.*, *supra*, 62 Cal.4th at p. 928.)

Alternatively stated: "The question is whether and when a wrongful foreclosure plaintiff may challenge the authority of one who claims it by assignment." (*Id.* at p. 929.) **The *Yvanova* court expressly did 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."** (*Id.* at p. 924.)

In spite of DeBard's allegation that his property is at risk of being wrongfully sold, *Yvanova* is not directly applicable. Although DeBard tries to characterize it differently, it is indisputable that this matter is a preforeclosure dispute in which DeBard seeks preemptive declaratory relief in the form of cancellation of an instrument. *Yvanova* only addresses the

viability a cause of action for wrongful foreclosure, not preemptive suits. Nevertheless, we hold DeBard has not alleged and cannot allege a void assignment as the court describes in *Yvanova*.

Yvanova concluded that a borrower has standing to challenge an assignment as void but not voidable. **A voidable transaction is one that is subject to ratification by the parties.** A void transaction has no legal effect. (*Yvanova v. New Century Mortg. Corp.*, *supra*, 62 Cal.4th at pp. 929-930.) As *Yvanova* states more fully: "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure. [Citation.]" (*Id.* at p. 935.)

As an example of a void transaction—although not a void assignment—*Yvanova* cited *Little v. CFS Service Corp.* (1987) 188 Cal.App.3d 1354, 1362, in which the court held a foreclosure sale and the subsequent trustee's deed of sale was void because of lack of notice: "Because notice of the [foreclosure] sale was not given to the trustor, junior lienor, and judgment creditor, each of whom had substantial potential claims to the property, as required by the deed of trust and by statute, and because the conclusive presumption regarding the giving of proper notice did not arise as the trustee's deed of sale was never prepared, executed and delivered to the plaintiffs, we hold that the purported sale is void." In the present case, in which there is no pending foreclosure, DeBard cannot claim the assignment of the beneficial interest was void because of lack of notice of a foreclosure sale.

Another example of a void transaction cited by *Yvanova* is one that is fraudulent, illegal, or against public policy. (*First Nat. Bank of L.A. v. Maxwell* (1899) 123 Cal. 360, 371 [**conveyance made in fraud of creditors**]; *Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 644 [conveyance executed under duress, menace, and undue influence].) The record before us, however, illustrates a standard progression of events during regularly-conducted foreclosure proceedings.¹³¹ Beneficiaries often transfer their interests. Here, although the beneficial interest in DeBard's trust deed was twice transferred by assignment in 2009 and 2013, sufficient facts are not alleged to show the transfers were fraudulent, illegal, violated public policy, or were procured by duress, menace or undue influence.

Instead, DeBard offers conclusory allegations that the beneficial interest was not validly transferred because of "Robo-signing" and because the assignment occurred after June 26, 2006, the closing date for the Ownit Trust. DeBard "must set forth factual allegations that sufficiently state all required elements of [a] cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]" ([*Rakestraw v. California Physicians' Service* \(2000\) 81 Cal.App.4th 39, 43-44.](#))

Although DeBard may allege it was a voidable transaction, he does not effectively allege the assignment of the beneficial interest was void, i.e., **illegal, fraudulent, against public policy, or procured by duress, menace or undue influence.** His allegations of "notary fraud" are contradicted by the document of assignment, **which shows a Florida notary properly executing a notarization in Florida.**

To the extent that DeBard contends the assignment was void because it did not comply with the terms of the Ownit Trust, his arguments were expressly disregarded in [*Yvanova v. New Century Mortg. Corp., supra*, 62 Cal.4th at pages 931 and 942](#), and rejected in [*Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at pages 814-817](#). **Like the *Saterbak* plaintiff, DeBard alleges the trust deed was not assigned until years after the closing date of the trust. The *Saterbak* court found no standing for plaintiff's claims.** (*Saterbak*, at p. 814.)^[4]

Saterbak recognized *Yvanova* holds that a borrower has standing to sue on a void, rather than voidable, assignment. ([*Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 815.](#)) *Saterbak* further explained the subject assignment was voidable, not void: **"*Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely voidable. [Citation.] We conclude such an assignment is merely voidable."** (*Ibid.*, citing [*Rajamin v. Deutsche Bank National Trust Co.* \(2d Cir. 2014\) 757 F.3d 79, 88-89](#) [**"AN UNAUTHORIZED ACT BY THE TRUSTEE IS NOT VOID BUT MERELY VOIDABLE BY THE BENEFICIARY."**])

Hence, DeBard cannot allege the assignment of the beneficial interest in his trust deed was void. This is particularly true because, again like the *Saterbak* plaintiff, DeBard signed a note and trust deed agreeing the obligation could

be sold without prior notice and subject to judicial foreclosure: "**The authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust.**" (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13.)" (*Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 816.) Similarly, DeBard cannot challenge as void the December 2013 assignment of his loan. (*Ibid.*)^[5]

The case of *Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 556, does not apply because it involved a nonjudicial foreclosure, which was admittedly conducted by the wrong party who was not the beneficiary of record. Here, the chain of title from MERS to Bank of America to U.S. Bank has been established by the recorded documents. U.S. Bank is the beneficiary of record under the 2006 trust deed although it has not commenced foreclosure proceedings beyond filing an NOD.

We also reject DeBard's reliance on the Homeowners' Bill of Rights (HBOR) to confer standing. Because U.S. Bank is the beneficiary of record under the 2006 trust deed, **Civil Code sections 2924, subdivision (a)(6), 2924.12, and 2924.17, subdivision (d), do not limit its rights to enforce the 2006 trust deed.**

V

DISPOSITION

DeBard cannot allege a void assignment as grounds to challenge defendant's status as the beneficiary of the 2006 trust deed. We affirm the judgment. In the interests of justice, we order the parties to bear their own costs on appeal. RAMIREZ, P. J. and McKINSTER, J., concurs.

[1] U.S. Bank National Association, as trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-4 (Ownit Trust).

[2] "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a

deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as "nominee" for the lender, and granted the authority to exercise legal rights of the lender.' [Citation.]" ([*Saterbak v. JPMorgan Chase Bank, N.A., supra*, 245 Cal.App.4th at p. 816, fn. 6.](#))

[3] [*Brown v. Deutsche Bank National Trust Company* \(2016\) 247 Cal.App.4th 275, 280.](#) describes the California nonjudicial foreclosure process, which provides a quick, inexpensive, and efficient remedy against a defaulting debtor, protects the debtor from a wrongful loss, and assures a final sale to a bona fide purchaser. ([*Moeller v. Lien* \(1994\) 25 Cal.App.4th 822, 830](#); [*Gomes v. Countrywide Home Loans, Inc.* \(2011\) 192 Cal.App.4th 1149, 1154.](#))

[4] The *Saterbak* plaintiff also claimed the assignments of the trust deed were invalidly "robo-signed" or a forgery.

[5] At oral argument, Debard tried to raise a new argument about the assignability of the promissory note. Any such argument has been waived.