TATYANA MIRONOVA, Plaintiff and Appellant,
v.
OCWEN LOAN SERVICING, LLC, et al., Defendants and Respondents.
No. A146064.
Court of Appeals of California, First District, Division One.

Filed December 19, 2016.
Appeal from the Contra Costa County, Superior Court No. MSC14-02339.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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MARGULIES, J

Plaintiff Tatyana Mironova sued several business entities involved in the servicing and securitization of a residential mortgage for wrongful foreclosure and five other, related causes of action. Her claims are premised on the legal theory that defects in the execution of assignments of the note and deed of trust during the securitization of the mortgage rendered those assignments void. As a result, it is alleged, the current owner of the note has no legal authority to initiate a nonjudicial foreclosure proceeding.

The trial court sustained a demurrer without leave to amend. We affirm, concluding Mironova lacks standing to challenge the allegedly defective transfers because, as a matter of law, they are merely voidable by the participants, rather than void.

I. BACKGROUND

Mironova sued five defendants in December 2014, alleging causes of action for wrongful foreclosure, quiet title, violation of Civil Code section 2924.17, violation of Business and Professions Code section 17200, unjust enrichment, and for an accounting. The complaint alleged Mironova entered into a promissory note and deed of trust in connection with a residence in Walnut Creek. At some point, the original lender sold the note to a "mortgage-backed securities trust" (the investment trust), the current holder of the note. According to the complaint, the

transfer to the investment trust occurred by sale of the note, first, to the sponsor of the securitization, which then sold the note to defendant Deutsche Bank National Trust Company (Deutsche Bank), the trustee for the investment trust. These sales were alleged to be made without "the required intervening assignment of Plaintiff's Deed of Trust and endorsement of the Note," in violation of the agreements governing the investment trust. The complaint also alleged unauthorized conduct by defendant Mortgage Electronic Registration Systems, Inc. (MERS). According to Mironova, the various irregularities in the handling of her note and deed of trust rendered the transfers void. Eventually, a notice of default was recorded in connection with the note, although no foreclosure sale is alleged to have occurred. Deutsche Bank and defendant Bank of America demurred to the complaint, raising a variety of objections. The trial court sustained the demurrer without leave to amend, holding, among other grounds, (1) Mironova's claims were barred by the doctrine of estoppel because she failed to disclose these causes of action in connection with a personal bankruptcy filing, (2) Mironova lacked standing to challenge the foreclosure on the basis of flaws in the chain of title, and (3) Mironova's claim for wrongful foreclosure failed because she did not allege that a trustee's sale had occurred. The demurrer of defendants Ocwen Loan Servicing, LLC and MERS was similarly sustained without leave to amend.

II. DISCUSSION

Mironova contends the trial court erred in sustaining the demurrers or, alternatively, should have granted her leave to amend. Defendants raise the same objections argued in the trial court, contending (1) Mironova's claims are barred because she failed to disclose them in bankruptcy court, (2) Mironova is barred from bringing a preemptive challenge to a nonjudicial foreclosure proceeding, and (3) she lacks standing to challenge defects in the transfers of the note and deed of trust. We find it unnecessary to reach the first two issues because we agree with the last contention, which is dispositive of her claims.

"A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons."

(*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81 (*Siliga*), disapproved on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.)

The legal context for the primary issues on appeal was established by the Supreme Court's recent decision in *Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th 919 (*Yvanova*), which featured similar allegations of wrongful foreclosure. As *Yvanova* explained the factual background for such claims, a deed of trust securing a promissory note has three parties: the borrower (the trustor), the lender (the beneficiary), and the trustee. (*Id.* at p. 926.) The trustee is not a true trustee and has no fiduciary obligations; its function is to act as an agent for the lender in initiating the foreclosure process in the event of default by the borrower. **AS A NEGOTIABLE INSTRUMENT, THE NOTE MAY BE TRANSFERRED WITHOUT THE APPROVAL OF, OR EVEN NOTICE TO, THE BORROWER.** However, if the borrower defaults, only the current owner of the note has the authority to direct the trustee to undertake foreclosure proceedings. The initiation of nonjudicial foreclosure by a person without the legal authority to do so subjects that person and the trustee to liability for wrongful foreclosure. (*Id.* at pp. 927-929.)

With that background, the *Yvanova* court considered whether a borrower who alleges that a transfer in the chain of title of the promissory note was legally void has standing to bring an action for wrongful foreclosure. In finding standing, the court began with the premise that if an assignment in the chain of title of the note is void, the assignment has no legal effect. As a result, neither that assignee, nor any subsequent transferee of the note, actually acquires title to the note, which is required to confer legal authority to initiate foreclosure. Any foreclosure initiated by such an assignee or transferee is therefore necessarily wrongful, since the person or entity initiating the foreclosure lacks the legal authority to do so. Because the borrower is the victim of a wrongful foreclosure, the borrower has standing to challenge the void assignment. (*Yvanova, supra*, 62 Cal.4th at p. 935.) As important as the issue it decided, however, are the issues left unaddressed by *Yvanova*. First, the court discussed decisions of the Court of Appeal holding that a borrower whose home has been threatened with foreclosure, but has not yet been subject to a trustee's sale, cannot bring a preemptive action to challenge the proposed foreclosure, based on an allegedly void assignment. (*Yvanova, supra*, 62 Cal.4th at p. 933.) The court declined to rule on the propriety of these decisions, expressly noting that the issue of preemptive actions "is not within the scope of our review, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*." (*Id.* at p. 934.)

Second, *Yvanova* did not address whether, as a matter of law, the allegedly void assignment pleaded by the plaintiff actually was void, as opposed to merely voidable. This distinction is crucial because, as the court noted, its rationale for standing depends entirely on the void, rather than voidable, nature of the transfer: "**When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself."** (*Yvanova, supra*, 62 Cal.4th at p. 936.) Accordingly, ***Yvanova* expressly recognized, without holding, that a borrower may well lack standing to challenge a foreclosure premised on an assignment that, while ineffective, is voidable rather than void.** (*Id.* at p. 939.)

The second issue left open by *Yvanova* has since been conclusively resolved against Mironova. As explained in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1084 (*Glaski*), the legality of the various transactions involved in mortgage securitization are generally governed, under the terms of the instruments, by the law of New York State.[1] The pertinent New York statute, Estates, Powers and Trusts Law section 7-2.4, states: "`If the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.'" (*Glaski*, at p. 1096, fn. omitted.) In reading the statutory language literally and holding that defective transfers are rendered void by this statute, *Glaski* followed the decision of a New York State trial court in *Wells Fargo Bank, N.A. v. Erobobo* (N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A) [2013 WL 1831799] (*Erobobo I*), which held that transfers in contravention of a trust are void. (*Glaski*, at p. 1097.)

The opposite conclusion was reached in the more recent decision, *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252. As *Yhudai* explained, "**AFTER *GLASKI* WAS DECIDED, A NEW YORK INTERMEDIATE APPELLATE COURT REVERSED *EROBOBO I.*** (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y.App.Div. 2015) 127 A.D.3d 1176, 1178 (*Erobobo II*).) In rejecting the trial court's view of New York law, the higher court explained that the borrower in that case, **`AS A MORTGAGOR WHOSE LOAN IS OWNED BY A TRUST, DOES NOT HAVE STANDING TO CHALLENGE THE [MORTGAGE ASSIGNEE'S] POSSESSION OR STATUS AS ASSIGNEE**

OF THE NOTE AND MORTGAGE BASED ON PURPORTED NONCOMPLIANCE WITH CERTAIN PROVISIONS OF THE [TRUST'S PSA].' [Citation.] . . . [¶] . . . [¶] The rejection of *Erobobo I* is based on sound reasoning. **Under New York law, unauthorized acts by trustees may generally be approved, or ratified, by the trust beneficiaries. [Citations.] Under *Erobobo I*, however, a stranger to the trust would have standing to assert that the unauthorized transaction is void, thereby giving `the stranger . . . the power to interfere with the beneficiaries' right of ratification.' [Citation.] The stranger's right (under *Erobobo I*) to declare a transaction void would thus conflict directly with the beneficiaries' right to ratify the transaction. This conflict is avoided by rejecting *Erobobo I*: Because a trust beneficiary under New York law `retains the authority to ratify a trustee's *ultra vires* act, such as a late transfer[,] . . . the act . . . must not be void; it must merely be voidable.'" (*Id.* at pp. 1258-1259.) Since the reversal of *Erobobo I, Yhudai* notes, a host of courts have followed *Erobobo II* in finding defective transactions to be voidable, rather than void. (*Yhudai,* at p. 1258.) Under the logic of *Yvanova,* "An assignment that is merely *voidable* . . . does not support a wrongful foreclosure action."** (*Yhudai*, at p. 1256; see similarly *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*) [same].)[2] Most recently, after a comprehensive review of the relevant case law, *Mendoza v. JPMorgan Chase Bank, N.A.* (Dec. 13, 2016, C071882) ___ Cal.App.5th ___ [2016 Cal.App. Lexis 1083] followed *Yhudai* in concluding that a homeowner in Mironova's position lacked standing to raise these issues in an action for wrongful foreclosure, in the process rejecting a number of new arguments not raised here. (*Mendoza*, at pp. ___-___ [2016 Cal.App. Lexis 1083 at pp.*18-*33].) We find no basis to disagree with this expanding weight of authority.

Under *Yhudai*, *Saterbak*, and similar decisions, the various defects Mironova alleges resulted in transfers that were merely voidable, rather than void. **In the absence of an allegation that the parties to one or more of the transactions did, in fact, elect to avoid them, she cannot demonstrate that the entity which initiated the nonjudicial foreclosure lacked the legal authority to do so. Without such a demonstration, there is no legal basis for claiming the foreclosure is wrongful.**

The argument in Mironova's opening brief illustrates her problem. The brief describes three transfers of the note and deed of trust, recounting the transferee and transferor of each, concluding with the transfer to the trust. The brief claims, as alleged in the complaint, that each transfer occurred "without the required effective assignment of the [deed of trust] and endorsement of the underlying original Note."

Further, it is claimed, the recorder's office does not reflect any assignment of the deed of trust to the investment trust prior to its closing date, which is alleged to be "a material breach of the binding securitization agreements," and the note was not assigned to the securitization trust until after the contractually set closing date for the trust, another violation of the securitization agreement. Accordingly, Mironova contends, the "present beneficiary and secured lender in Plaintiff's mortgage loan is UNASSIGNED, UNDOCUMENTED and UNKNOWN to date [as no one can reverse time to the closing date of the securitization trust. . . .]." Contrary to the contention, however, the present beneficiary can be identified as Deutsche Bank in its role as trustee of the investment trust; Mironova's own description of the various transactions concedes as much. Her true claim is not that the current beneficiary cannot be identified, but rather that the parties to the various transactions conducted them in violation of agreements to which Mironova is not a party. Assuming this to be true, as we must, it does not, standing on its own, affect the validity of the threatened foreclosure. Because, **under New York law, these flaws merely made the transactions voidable at the option of the parties involved in the transactions, the flaws only affected the legal authority of the present holder of the note to declare a default and pursue the foreclosure remedy if one of those parties has elected to avoid one or more of the transactions. In the absence of such avoidance, the allegations do not give rise to any claim by Mironova.**[3]

The preceding arguments relate to Mironova's cause of action for wrongful foreclosure, which is the centerpiece of her action. The complaint contains five other causes of action as well. While Mironova's opening brief does mention these causes of action in its discussion of judicial estoppel, the trial court sustained the demurrer with respect to each of these causes of action on other grounds as well. Mironova's opening brief neither mentions these other grounds nor demonstrates how the trial court erred with respect to them. Nor does the opening brief demonstrate why these causes of action are premised on legal theories that would not suffer from the flaw discussed above. She has therefore waived any objection to the trial court's sustaining of the demurrer with respect to those causes of action. (E.g., *Coleman v. Medtronic, Inc.* (2014) 223 Cal.App.4th 413, 421, fn. 2.)[4] Finally, Mironova contends the trial court erred in sustaining the demurrer without leave to amend. "`If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the

burden of proving that an amendment would cure the defect.'" (*Saterbak, supra,* 245 Cal.App.4th at p. 813.)

Mironova cites no facts that would cure the flaws in her pleading. Rather, she contends that because the relevant law has changed since the trial court sustained the demurrer, her pleading is now legally satisfactory. For the reasons stated above, we do not agree. Because Mironova does not cite any particular facts to be pleaded that would overcome the legal deficiencies in her pleading, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

III. DISPOSITION

The judgment of the trial court is affirmed. Defendants may recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)
Humes, P.J. and Banke, J., concurs.

[1] A survey of the many cases addressing this issue demonstrates that virtually all such documents invoke New York law. Mironova's counsel conceded at argument that the documents involved in the securitization alleged in this action were similarly governed by New York law.
[2] Although *Yhudai* was decided after the close of briefing in this case, the *Erobobo I* decision, the sole support for the *Glaski* decision on which Mironova relies, was reversed in 2015, several months prior to the filing of Mironova's opening brief. Further, the flawed reasoning of *Erobobo I* was discussed over a year before the filing of Mironova's brief in *Rajamin v. Deutsche Bank National Trust Co.* (2d Cir. 2014) 757 F.3d 79 at page 90. Finally, the holding of *Yhudai* was rendered in a more summary manner in *Saterbak, supra,* 245 Cal.App.4th at page 815, filed four months prior to Mironova's reply brief. She therefore had ample reason to anticipate the conclusion reached in *Yhudai* and address it in her briefs.
[3] Mironova's complaint also contains allegations about the purported lack of authority of MERS to conduct various transactions. The same arguments have been repeatedly rejected in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1157; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at page 939, footnote 13; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1505, disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at page 939, footnote 13; and *Siliga, supra,* 219 Cal.App.4th at pages 83-84. Because Mironova's opening brief does not argue the MERS issues, we do not address her allegations specifically.
[4] We are not, in any event, persuaded that the other causes of action state a claim. Each of them, at bottom, is premised on the same lack of authority due to defective transfers as the wrongful foreclosure claim. All depend upon demonstrating that one or more transfers in the chain of title was void, and all fail if those transfers are merely voidable. For the reasons discussed above, we conclude the transactions are merely voidable.