

ALLYSON A. MALEK et al., Plaintiffs and Appellants,
v.
JPMORGAN CHASE BANK, N. A. et al., Defendants and Respondents.

[No. H039912.](#)

Court of Appeals of California, Sixth District.

Filed June 9, 2016.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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GROVER, J.

Plaintiffs Allyson A. Malek (Malek), Safwat Malek, and the 21 Mentone Road Trust filed a predatory lending and wrongful foreclosure lawsuit after Malek defaulted on her mortgage payments and faced a nonjudicial foreclosure. The trial court sustained respondents' demurrer without leave to amend. On appeal, plaintiffs argue that they have stated a cause of action challenging the authority of JPMorgan Chase Bank (Chase) and California Reconveyance Company (CRC) to initiate and proceed with the foreclosure because neither entity owned Malek's loan, and because Chase and CRC have not produced the promissory note and a recorded assignment of Malek's loan. They argue that they have stated causes of action for fraud and wrongful foreclosure based on alleged forgery, and they make a general request of this court to review their 12 claims in light of the 2012 Homeowners Bill of Rights.

For the reasons stated below, we conclude that the trial court did not err and that plaintiffs have not shown on appeal that the first amended complaint may be further amended to state any cause of action challenging the loan initiation or the authority to proceed with the foreclosure. We will therefore affirm the judgment.

I. FACTUAL BACKGROUND

Our background summary is drawn from the first amended complaint and incorporated exhibits, and the judicially noticed exhibits supporting respondents' demurrer.¹¹

Malek purchased residential property in Carmel in December 2000. Two years later she obtained a \$1.6 million loan from Washington Mutual Bank (WaMu). The loan's promissory note was secured by a deed of trust against the property that included the power of sale in the event of default. The trust deed named Malek as the borrower, WaMu as the lender and beneficiary, and CRC as the deed trustee. In September 2008, after WaMu failed and was placed in a Federal Deposit Insurance Corporation (FDIC) receivership, Chase acquired WaMu's assets through a Purchase and Assumption Agreement.

In June 2009, CRC signed and had recorded a "Notice of Default and Election to Sell Under Deed of Trust." The notice of default identified CRC as "the duly appointed Trustee under a Deed of Trust dated 11/14/2002, executed by [Malek] as trustor, to secure obligations in favor of [WaMu] as Beneficiary Recorded 11/26/2002[.]" The notice stated that "the present beneficiary . . . has executed and delivered to said Trustee, a written Declaration and Demand for Sale, . . . and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." The notice instructed Malek to contact Chase "[t]o find out the amount you must pay, or to arrange for payment to stop the foreclosure."

Notices of trustee's sale were prepared and recorded by CRC—three in 2010, and one in December 2011. Chase was identified on two of those notices as the loan servicer. None of the noticed sales was held.

In March 2011, Malek transferred the property to the 21 Mentone Road Trust. Malek's husband, Safwat Malek, is the trustee of that trust and resides on the property with Malek.

In September 2012, plaintiffs commenced this action against WaMu, CRC, Chase, J.P. Morgan Chase & Co., Chase Home Finance LLC (collectively, respondents), and Deutsche Bank National Trust Company (Deutsche Bank) to rescind the alleged predatory loan and to enjoin the foreclosure.

II. TRIAL COURT PROCEEDINGS

A. THE FIRST AMENDED COMPLAINT

Plaintiffs alleged that WaMu transferred Malek's promissory note and deed of trust to a pooled mortgage backed securitization trust (the WaMu Mortgage Pass-Through Certificates Series 2003-AR1 Trust), and that trust was sold or assigned to Deutsche Bank as trustee in January 2003. Thus, after January 2003, Deutsche Bank owned the note and the deed of trust, and "[n]one of the Defendants in this action who have attempted to foreclose on the Subject Property was the note holder or a beneficiary of Plaintiffs' loan" when the foreclosure process commenced. Plaintiffs alleged that by issuing and proceeding under the notice of default, defendants falsely represented that they had the right to payment and the right to foreclose. Plaintiffs alleged that defendants failed to record any assignment of Malek's promissory note or deed of trust, and that CRC issued the notices of default and trustee's sale without any showing that Deutsche Bank, as owner of Malek's loan, had authorized CRC to act on its behalf.

Plaintiffs alleged that the notices of trustee's sale were defective because they were signed by a known CRC "robo-signer," and because the signatures on the notices did not match. Plaintiffs alleged that defendants had "acted in concert" to notice the trustee's sales and then cancel them without notice "as part of a ruthless psychological warfare . . . to drive Plaintiffs into desperation so that they will simply give up trying to keep possession of their property, thereby letting Defendants start the whole cycle of their fraudulent scheme on another unsuspecting mortgagor."

The first amended complaint alleged 12 causes of action against all defendants. The fifth cause of action (cancellation of deed of trust) and the eighth cause of action (violation of Civil Code section 1572) alleged fraudulent lending practices by WaMu. The first cause of action (breach of security instrument), the second cause of action (wrongful foreclosure and violation of Civil Code section 2924), the fourth cause of action (violation of Civil Code section 2932.5), the sixth cause of action (cancellation of notice of default and notices of trustee's sale based on fraud), and the 11th cause of action (slander of title) challenged initiation of the nonjudicial foreclosure. The third cause of action (fraudulent and negligent misrepresentation) alleged fraud in both the loan origination and foreclosure processes, and the seventh cause of action (violation of Business and Professions Code section 17200) alleged unfair business practices. The ninth cause of action (injunctive relief), the 10th cause of action (declaratory relief), and the 12th cause of action (quiet title) sought remedies for defendants' alleged unlawful conduct.

B. THE DEMURRER

In demurring to the first amended complaint, respondents claimed that Chase acquired its interest in Malek's loan through its 2008 acquisition of WaMu, referring to language in the Purchase and Assumption Agreement providing that Chase obtained "all rights, title, and interest" to WaMu's assets, and that Chase specifically purchased "all mortgage servicing rights and obligations" of WaMu. Respondents argued that plaintiffs had not alleged sufficient facts to establish a sale or assignment of Malek's loan to a securitization trust. Respondents argued that CRC had the authority to record the notice of default and notices of trustee's sale under Civil Code section 2924, subdivision (a)(1) as the named trustee in the deed of trust. They argued that no defendant was required to record an assignment from WaMu or be in physical possession of the promissory note.

Respondents asserted that (1) the first amended complaint made no allegations against JPMorgan Chase & Co. (Chase's parent company), (2) the FDIC as WaMu's receiver, not Chase, was liable for claims related to WaMu's lending activity, (3) the fraudulent inducement claims were time-barred, (4) the fraud-based claims were not pleaded with particularity, (5) plaintiffs failed to show malice to support the slander claim or injury to support the unfair business practices claim, and (6) plaintiffs failed to state facts sufficient to support any contractual breach of the deed of trust's acceleration clause. In support of the demurrer, respondents requested judicial notice of several documents, including the deed of trust, notice of default, a December 2011 notice of trustee sale, and the Purchase and Assumption Agreement between Chase and the FDIC as receiver for WaMu.

Opposing the demurrer, plaintiffs argued that the Uniform Commercial Code required a foreclosing entity to be in possession of the promissory note, and that Chase had no interest in Malek's promissory note because it was sold to Deutsche Bank and because there was no recorded assignment to Chase. Plaintiffs argued that their claims for fraud, slander, Business and Professions Code section 17200 violations, and declaratory and injunctive relief alleged facts sufficient to withstand the demurrer.

After hearing argument, the trial court entered an order on May 17, 2013 granting respondents' request for judicial notice and sustaining the demurrer without leave to amend. That order did not provide the basis for the trial court's decision. Plaintiffs have appealed. We deem the May 17, 2013 order to incorporate a dismissal of the action against respondents, making it an appealable judgment. ([*Kendall v. Ernest Pestana, Inc.* \(1985\) 40 Cal.3d 488, 493, fn. 3.](#)) We interpret plaintiffs' notice of appeal as applying to that dismissal. (*Ibid.*)^[21]

III. DISCUSSION

A. STANDARD OF REVIEW

A general demurrer is proper when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) We review a judgment of dismissal based on a sustained demurrer de novo. ([Cansino v. Bank of America \(2014\) 224 Cal.App.4th 1462, 1468 \(Cansino\)](#).) We will reverse the judgment of dismissal if the allegations of the complaint state a cause of action "under any legal theory." ([Doan v. State Farm General Ins. Co. \(2011\) 195 Cal.App.4th 1082, 1091](#).) We assume the truth of all facts alleged in the complaint unless those facts are contradicted by judicially noticeable materials. (*Cansino*, at p. 1468.) We do not consider conclusory factual or legal allegations contained in the complaint. (*Ibid.*)

If, as here, the trial court sustained the demurrer without leave to amend, "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. [Citation.]" ([Schifando v. City of Los Angeles \(2003\) 31 Cal.4th 1074, 1081](#).)

B. LEGAL BACKDROP

"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." ([Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919, 926 \(Yvanova\)](#).) "A nonjudicial foreclosure sale is a `quick, inexpensive[,] and efficient remedy against **a defaulting debtor/trustor**.' [Citation.] To preserve this remedy for beneficiaries while protecting the rights of borrowers, `sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale in a deed of trust.'" ([Brown v. Deutsche Bank National Trust Co. \(2016\) ___ Cal.App.4th ___, 201 Cal.Rptr.3d 892, 895](#).)

The nonjudicial foreclosure process commences with the beneficiary declaring a default and making a demand on the trustee to commence foreclosure. ([Kachlon v. Markowitz \(2008\) 168 Cal.App.4th 316, 334](#).) Then "[t]he trustee, mortgagee, or beneficiary, **or any of their authorized agents**" file in the county

recorder's office a notice of default indentifying the property and the borrower. (Civil Code, § 2924, subd. (a)(1)(A).)^[31] The notice of default must include "[a] statement setting forth the nature **of each breach** actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default." (§ 2924, subd. (a)(1)(C).)

In [*Gomes v. Countrywide Home Loans, Inc.* \(2011\) 192 Cal.App.4th 1149 \(*Gomes*\)](#), the court concluded that a borrower did not have the right to bring a preemptive lawsuit to determine whether an entity had the authority to foreclose. (*Id.* at p. 1156.) The *Gomes* court explained that challenge is inconsistent with the comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures, and is disallowed as "fundamentally undermin[ing] the nonjudicial nature of the process and introduc[ing] the possibility of lawsuits filed solely for the purpose of **delaying valid foreclosures.**" (*Id.* at p. 1155.) In denying the borrower's leave to amend the complaint, the *Gomes* court distinguished federal cases in which borrowers had pleaded a specific factual basis to support the allegation that the foreclosing entity lacked authority to proceed with the foreclosure. (*Id.* at p. 1158.)

In *Yvanova*, the California Supreme Court recently held that a borrower has standing to sue for wrongful foreclosure based on allegations that a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void. ([*Yvanova, supra*, 62 Cal.4th at pp. 923-924.](#)) Rejecting the argument that the borrower, as a nonparty to the assignment, lacked standing to challenge the assignment's validity, the *Yvanova* court explained that "only the original beneficiary [to the deed of trust], **its assignee or an agent** of one of these has the authority to instruct the trustee to initiate and complete a nonjudicial foreclosure sale," (*id.* at p. 929) and "[i]f 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 [citation], the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." (*Id.* at p. 935.) The borrower has "her own interest in limiting foreclosure on her property to those with legal authority to order a foreclosure sale," and her loss of ownership to a home in an allegedly illegal trustee's sale is an injury "sufficiently concrete and personal to provide standing." (*Id.* at p. 937.) **The *Yvanova* court explained that its ruling was narrow, and expressly left unanswered the question "of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward."** (*Id.* at p.

934.)⁴¹ Because we conclude that plaintiffs cannot support their lack of authority allegations, we do not need to address whether or under what circumstances a proper lack of authority showing could support a cause of action challenging the initiation of foreclosure.

C. PLAINTIFFS' CHALLENGE TO THE AUTHORITY OF CHASE AND CRC TO INITIATE FORECLOSURE

Plaintiffs argue that they have stated a cause of action to challenge the authority of Chase and CRC to foreclosure "by setting forth allegations of fact that [Chase] and CRC were not the proper parties to foreclosure." Plaintiffs press that Chase and CRC "wrongfully chose to foreclose . . . under the guise of the true holder" based on allegations, supported by a forensic title search of the Carmel property, that WaMu sold Malek's loan to Deutsche Bank in 2003. In addition, they argue that by failing to record any assignments of the deed of trust, "[n]one of the Defendants in this action who have attempted to foreclose on the Subject Property was the note holder or a beneficiary of [Malek's] loan at the time of the initiation of the foreclosure process." As we will explain, plaintiffs' allegations do not support any legal challenge to the instant foreclosure process.

1. Chase's Authority to Initiate Foreclosure

Plaintiffs have alleged no specific acts by Chase to support their unlawful authority argument. The exhibits supporting the first amended complaint establish Chase as Malek's loan servicer, even if Malek's loan had been placed in the 2003 securitization trust. Chase was identified on the notice of default as the entity to contact to arrange for payment to stop the foreclosure, and the notices of trustee's sale identified Chase as the loan servicer. Plaintiffs' forensic title report shows the master servicer for the loans pooled in the 2003 securitization trust as Washington Mutual Mortgage Securities Corporation, and plaintiffs do not dispute that those servicing rights were transferred to Chase in the 2008 Purchase and Assumption Agreement.

Thus, assuming that plaintiffs sufficiently pleaded that WaMu sold or assigned Malek's loan to Deutsche Bank, plaintiffs have failed to allege facts showing that Chase, as the *servicer* of Malek's loan, exceeded its authority in the instant foreclosure.

2. CRC's Authority to Initiate Foreclosure

Assuming the first amended complaint alleged sufficient facts to establish a sale or assignment of Malek's loan to Deutsche Bank, **plaintiffs have failed to establish that CRC lacked authority to initiate the foreclosure. According to the notice of default, CRC was exercising its authority as trustee under the 2002 deed of trust and at the direction of "the present beneficiary." Plaintiffs alleged no facts that CRC was not the trustee under the deed of trust or that the present beneficiary had not executed and delivered to CRC a declaration and demand for sale, as stated in the notice of default.** Thus, plaintiffs have failed to show that CRC lacked the authority to file the notice of default under section 2924, subdivision (a)(1) and proceed with a noticed trustee's sale.

3. Recordation of Ownership Transfer Under Section 2932.5 is not Required for an Assignee to Foreclose

Plaintiffs argue that Chase and CRC lacked authority to foreclose because there is no recorded assignment of Malek's note or deed of trust "to anyone entitled to enforce the note or foreclose on the Subject Property." Plaintiffs assert that a successor-in-interest to Malek's loan cannot proceed with foreclosure without having recorded the transfer in ownership under section 2932.5.^[5] Plaintiffs' impression that section 2932.5 applies to any transfer of interest in Malek's loan is incorrect. For over a century, **California and federal courts have taken the consistent position that SECTION 2932.5 DOES NOT REQUIRE RECORDING AN ASSIGNMENT OF A NOTE SECURED BY A DEED OF TRUST BEFORE AN ASSIGNEE CAN EXERCISE THE POWER OF SALE.** (*Stockwell v. Barnum* (1908) 7 Cal.App. 413, 417; *Calvo v. HSBC Bank USA, N. A.* (2011) 199 Cal.App.4th 118, 123; *Haynes v. EMC Mortg. Corp.* (2012) 205 Cal.App.4th 329, 336.) Thus, the foreclosure here is not deficient based on the absence of any recorded assignment of Malek's loan.

4. Plaintiffs' Authorities are Distinguishable

Plaintiffs rely on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) and *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F.Supp.2d 964 (*Barrionuevo*) to argue that they have pleaded a cause of action to challenge the foreclosure process here. In *Glaski*, a post-foreclosure lawsuit, the borrower's loan was purportedly transferred into a securitized trust held by a trustee bank, the entity directing the deed trustee to initiate foreclosure. (*Glaski*, at pp. 1085-1086.) In reversing a judgment sustaining a demurrer, the *Glaski* court concluded that the borrower had stated a claim for wrongful foreclosure by alleging that the note and deed of trust had never been validly assigned to the securitized trust; the

assignment was therefore void and the trustee bank, not being the true beneficiary to the deed of trust, had no authority to invoke the power of sale. (*Id.* at p. 1097.) The reasoning in *Glaski* was adopted by the *Yvanova* court to conclude that a borrower has standing to challenge a nonjudicial foreclosure resulting in the loss of her home on the grounds that the foreclosing entity was not a valid assignee of the original lender. ([*Yvanova, supra, 62 Cal.4th at p. 935.*](#))

In contrast to *Glaski* and *Yvanova* where the courts addressed a successor beneficiary's authority to initiate foreclosure, *Barrionuevo* involved a foreclosure by the original beneficiary after the borrowers' loan was allegedly securitized and sold. The borrowers in *Barrionuevo* executed a deed of trust to secure a home loan, naming WaMu as the lender and beneficiary, and conveying title and power of sale to CRC. ([*Barrionuevo, supra, 885 F.Supp.2d at p. 966.*](#)) As in this case, the borrowers sued Chase (as WaMu's successor) and CRC to enjoin a foreclosure after CRC had issued a notice of default. (*Id.* at pp. 966-967.) And just as here, the borrowers in *Barrionuevo* alleged that Chase lacked authority to foreclose because the loan had been securitized and sold by WaMu before Chase acquired the failed bank in 2008. (*Id.* at p. 967.) In the district court's view, the borrowers had stated a claim that Chase was not the true present beneficiary to the deed of trust and thus lacked authority to direct CRC to initiate the foreclosure. (*Id.* at p. 974.)

Glaski, Yvanova, and Barrionuevo are inapposite, however, **because in those cases the borrower had alleged specific facts showing that the foreclosing entity was not the true beneficiary to the trust deed (due to alleged void assignments in *Glaski* and *Yvanova* and an alleged valid assignment in *Barrionuevo*) and thus lacked authority to initiate the foreclosure. In contrast, plaintiffs here have failed to allege facts showing that the present beneficiary or its agent did not declare default and direct CRC to commence foreclosure, or that Chase acted beyond its authority as the servicer of Malek's loan.**

5. Summation

Assuming that a preemptive action challenging a nonjudicial foreclosure can be brought based on specifically alleged facts that the wrong party has initiated foreclosure, plaintiffs have failed to make that showing. Plaintiffs alleged that Deutsche Bank owned their loan as of 2003, but they have not alleged facts showing that Chase, as the master servicer of the securitized Deutsche Bank loans, exceeded its authority as loan servicer, even assuming Chase acted as the present foreclosing beneficiary who declared default and directed CRC to foreclose on the Carmel property. Plaintiffs also have not alleged that CRC is not the deed trustee.

STRIPPED OF ITS RHETORIC, PLAINTIFFS' CLAIM IS NOTHING MORE THAN A LAWSUIT TO HAVE CHASE AND CRC PROVE THEIR AUTHORITY TO INITIATE AND PROCEED WITH THE NONJUDICIAL FORECLOSURE. THE CLAIM IS SPECULATIVE AND NOT RECOGNIZED UNDER CALIFORNIA LAW. (*Gomes, supra*, 192 Cal.App.4th at pp. 1155-1156.)^[6]

D. POSSESSION OF THE PROMISSORY NOTE

Plaintiffs argue that CRC and Chase lacked authority to foreclose without possessing the underlying promissory note. That argument has been rejected by this court in *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*). In *Debrunner*, we reasoned that the nonjudicial foreclosure statutes "set forth `a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.'" (*Id.* at p. 440.) Further, section 2924, subdivision (a)(1), which permits a notice of default to be filed by the "trustee, mortgagee, or beneficiary, **or any of their authorized agents,**" **DOES NOT MANDATE PHYSICAL POSSESSION OF THE UNDERLYING PROMISSORY NOTE FOR THE INITIATION OF FORECLOSURE TO BE VALID.** (*Debrunner*, at p. 440.) Because the comprehensive statutory framework governing nonjudicial foreclosure sales was intended to be exhaustive, and **"nothing in the applicable statutes [] precludes foreclosure when the foreclosing party does not possess the original promissory note,"** the *Debrunner* court concluded that any California Uniform Commercial Code possession requirement did not **"displace the detailed, specific, and comprehensive set of legislative procedures the Legislature has established for nonjudicial foreclosures."** (*Id.* at pp. 440, 441.)

Plaintiffs urge us to depart from *Debrunner* based on out-of-state authorities and legal scholarship. The out-of-state cases are unavailing, as they do not analyze or apply California law.^[7] Plaintiffs' reference to the Arizona Legislature's efforts to require non-originating foreclosure lenders to produce a full chain of title to verify ownership is equally unavailing. Nor is the cited article helpful to plaintiffs. Indeed, it acknowledges that **"California statutes do not allow the wrong party to foreclose,"** and that federal district courts have concluded that **production of the promissory note is not required to effectuate a nonjudicial foreclosure in California.** (Whaley, *Mortgage Foreclosures, Promissory Notes, and the Uniform Commercial Code* (2012) 39 W. St. U. L.Rev. 313, 330 & fn. 45.)

E. THE VALIDITY OF THE ALLEGED ASSIGNMENT TO DEUTSCHE BANK

Plaintiffs argue that the assignment of Malek's loan to Deutsche Bank was void because the transfer did not comply with New York State law or the express terms of the pooling and servicing agreement. According to plaintiffs, "as a result of the securitization process, Appellees' fraudulent use of MERS and failures to record assignments of the Deed of Trust, ` [n]one of the Defendants in this action who have attempted to foreclose on the Subject Property was the note holder or a beneficiary of [Malek's] loan at the time of the initiation of the foreclosure process.' "But plaintiffs fail to show how those arguments support any cause of action pleaded in the first amended complaint against Chase or CRC.^[8] As we have already noted, any challenge to the validity of the alleged securitization and assignment of Malek's deed of trust to Deutsche Bank only undermines plaintiffs' argument that Chase or CRC lacked authority to initiate the foreclosure. As respondents correctly observe, "by asserting that any attempted assignment of the Loan was void, Appellants, in fact, admitted that the interest remained with [WaMu] prior to Chase's undisputed purchase and assumption of all [WaMu] assets, and thus that either CRC, as trustee, or Chase, as beneficiary, had authority to record a notice of default under Section 2924(a)(1)."

F. THE FORGERY ALLEGATION

Plaintiffs argue that they have stated a cause of action for fraud and wrongful foreclosure based on alleged forged signatures on the three 2010 notices of trustee's sale. Plaintiffs alleged that the signatures of a CRC vice-president were forged because they appeared different on the three documents. **The causes of action for fraud and wrongful foreclosure cannot be sustained based on those alleged signature irregularities. CRC did not proceed with any of the noticed sales, and plaintiffs fail to show any JUSTIFIABLE RELIANCE OR DAMAGE resulting from any signature irregularity.**

G. LEGISLATIVE REFORM

Plaintiffs argue that the 2012 Homeowner's Bill of Rights (Sen. Bill No. 900 (2011-2012 Reg. Sess.); Assem. Bill No. 278 (2011-2012 Reg. Sess.)), specifically section 2924.4, subdivision (a) (providing that borrowers be considered for alternatives to foreclosure such as loan modifications as part of the nonjudicial foreclosure process) and section 2920.5, subdivision (b) (defining "Foreclosure prevention alternative" as "a first lien loan modification or another available loss

mitigation option"), support their claims regarding "predatory practices during the loan modification process." But the first amended complaint makes no allegations that Malek sought a loan modification, much less any allegations regarding predatory practices involving her loan. **THE HOMEOWNER'S BILL OF RIGHTS DOES NOT APPLY RETROACTIVELY** ([Ram v. OneWest Bank, FSB \(2015\) 234 Cal.App.4th 1, 21, fn. 2](#)), and has no bearing on the claims alleged in the first amended complaint.

H. LEAVE TO AMEND

Plaintiffs did not seek leave to amend in the trial court. Nor do they ask this court for leave to amend, or otherwise "show in what manner [they] can amend [their] complaint and how that amendment will change the legal effect of [their] pleading." ([Goodman v. Kennedy \(1976\) 18 Cal.3d 335, 349.](#)) Accordingly, the trial court did not err by sustaining the demurrer without leave to amend. ([Schifando v. City of Los Angeles, supra, 31 Cal.4th at p. 1081.](#))

IV. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

Bamattre-Manoukian, Acting P.J. and Márquez, J., concurs.

[1] We grant plaintiffs' motion for judicial notice of the exhibits attached to the first amended complaint misfiled in Monterey County Superior Court case No. M115524. Those exhibits include grant deeds related to Malek's property, the promissory note, deed of trust, notice of default, three notices of trustee's sale, and excerpts from a forensic property title report. Those exhibits were incorporated into the first amended complaint, and plaintiffs relied on them without objection to oppose the demurrer. Respondents were served with the exhibits and also referred to them in their demurrer. We will consider the exhibits as if they had been properly filed with the first amended complaint.

[2] Because plaintiffs elected to proceed without a reporter's transcript on appeal, under California Rules of Court, rule 8.130(a)(4) the trial court rejected respondents' request to have the demurrer hearing transcript prepared for inclusion in the appellate record.

[3] Undesignated statutory references are to the Civil Code.

[4] In [Saterbak v. JPMorgan Chase Bank, N.A. \(2016\) 245 Cal.App.4th 808](#), the court distinguished *Yvanova* as applying only in the post-foreclosure context, and concluded that a **BORROWER LACKED STANDING TO BRING A PREEMPTIVE ACTION CHALLENGING THE VALIDITY OF A DEED OF TRUST ASSIGNMENT BECAUSE SUCH CHALLENGE "WOULD RESULT IN THE IMPERMISSIBLE INTERJECTION OF THE COURTS INTO A NONJUDICIAL SCHEME ENACTED BY THE CALIFORNIA LEGISLATURE."** (*Id.* at p. 815.) After granting review in [Keshtgar v. U.S.](#)

[Bank \(2014\) 226 Cal.App.4th 1201](#), a case rejecting a preforeclosure challenge based on alleged deficiencies in a deed of trust assignment, the Supreme Court transferred the matter to the court of appeal for reconsideration in light of *Yvanova*. (*Keshtgar v. U.S. Bank, N.A.* (2016) 201 Cal.Rptr.3d 253.)

[5] Section 2932.5 provides, "Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded."

[6] Because we conclude that plaintiffs have failed to state a claim challenging the authority of CRC and Chase, it is unnecessary for us to decide whether plaintiffs have established standing to enjoin foreclosure without having tendered the outstanding debt owed.

[7] Plaintiffs cite [*U. S. Bank N.A. v. Ibanez* \(Mass. 2011\) 941 N.E.2d 40](#), [*JPMorgan Chase Bank, N. A. v. Murray* \(Pa. Super. Ct. 2013\) 63 A.3d 1258](#), and an unreported disposition from a New York State trial court.

[8] Plaintiffs' claims against Deutsche Bank were not encompassed by the trial court's judgment sustaining respondents' demurrer, and we do not address the sufficiency of the complaint as to Deutsche Bank in this opinion.