SCOTUS: Borrower Lacks Standing to Challenge PSA Violations

By Bob Hurt, 4 November 2015

Contents

Introduction

The 2 November 2015 US Supreme Court denial of certiorari in Tran v Bank of New York settled once-and-for-all the spurious assertion that borrowers can challenge putative violations of the Pooling and Servicing Agreement (PSA) creating a securitization trust. Borrowers, encouraged by Glaski v BOA, a California appellate win for the borrower, have claimed that because New York Law voids assignment of a note into a trust after its closing date in the PSA, the assignee has no authority to enforce the note in a foreclosure effort.

This argument boils down to nothing more than a borrower's effort to use quirks in the law to get a "free house" by preventing foreclosure because the borrower did not make timely payments. Bottom line the courts will not allow a borrower to get a free house unless the lender team injured the borrower sufficiently to justify it.

Numerous California courts have deprecated the Glaski opinion, as have other courts across the land. Now the US Supreme Court has flicked its chin at it.

The US 2nd Circuit supported the NY Southern District in its reliance upon the 2nd Circuit's Rajamin v Deutsche Bank opinion that borrowers lack standing to challenge the PSA or any assignment of the note because they

1. Never became a party to the PSA or assignment
2. Did not get injured by the PSA violation or assignment, and
3. Receive no 3rd party benefits from the PSA or assignment.

Now, the SCOTUS has put the KIBOSH forever on the frivolous argument that the borrower can cite irregularities in obeying the PSA and assigning the note as a basis for

stymieing a foreclosure. I have presented full opinions of the relevant cases. READ THEM.

If you want to know how to prove the lender team injured the borrower, and how the borrower can use that proof to win millions in compensatory and punitive damages, visit http://MortgageAttack.com.

Court Opinion Links:

1. Tran v. Bank of New York, Supreme Court of the United States 2 Nov 2015 http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-260.htm
2. Tran v. Bank of New York, Court of Appeals, 2nd Circuit 2015 https://scholar.google.com/scholar_case?case=13250751688791686592
3. Tran v. Bank of New York, Dist. Court, SD New York 2014 https://scholar.google.com/scholar_case?case=8421089202998856475
4. RAJAMIN v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Court of Appeals, 2nd Circuit 2014 https://scholar.google.com/scholar_case?case=13230459673637581146
5. Glaski v. Bank of America, 218 Cal. App. 4th 1079 - Cal: Court of Appeal, 5th Appellate Dist. 2013 https://scholar.google.com/scholar_case?case=8535344425094007526

Tran v BONY, SCOTUS – Certiorari Denied

http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-260.htm

No. 15-260

Title:	Anh Nguyet Tran, et al., Petitioners v. Bank of New York, nka Bank of New York Mellon, et al.
Docketed:	September 2, 2015
Linked with 14A1287	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(14-1224-cv)
Decision Date:	January 30, 2015
Rehearing Denied:	April 3, 2015

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 22 2015	Application (14A1287) to extend the time to file a petition for a writ of certiorari from July 2, 2015 to August 31, 2015, submitted to Justice Ginsburg.
Jun 23 2015	Application (14A1287) granted by Justice Ginsburg extending the time to file until August 31, 2015.
Aug 31 2015	Petition for a writ of certiorari filed. (Response due October 2, 2015)
Sep 24 2015	Waiver of right of respondents U.S. Bank National Association, et al. to respond filed.
Sep 30 2015	Waiver of right of respondent Deutsche Bank National Trust Company, Solely in its Capacity as Trustee to respond filed.
Oct 14 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	Petition DENIED.

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Party name: U.S. Bank National Association, et al.

Tran v BONY, USCCA 2nd Circuit

https://scholar.google.com/scholar_case?case=13250751688791686592

ANH NGUYET TRAN, CHRISTINA T. SOULAMANY, LAI SOMCHANMAVONG, COLLEEN DWYER, ELAINE PHAN, HOA V. NGUYEN, HUAN N. TRAN, HUNG V. NGUYEN, KAY APHAYVONG, KIM-THUY NGUYEN, MIA L. PHAM, MINH A. TRINH, NHIEU TRAN, PATRICIA GUNNESS, PATRICIA S. ADKINS, FKA PATRICIA S. OLSON, PETER DELAMOS, PETER HA, TINA LE, PHOKHAM SOULAMANY, PHETSANOU SOULAMANY, THAI CHRISTIE, SEQUOIA HOLDINGS L.L.C., THUY TRANG NGUYEN, TUY T. HOANG, TUYEN T. THAI, TUYETLAN T. TRAN, UYEN T. THAI, THONG NGO, VAN LE, FKA VAN T. NGUYEN, Plaintiffs-Appellants,
v.
BANK OF NEW YORK, now known as BANK OF NEW YORK MELLON by merger and/or acquisition, DEUTSCHE BANK NATIONAL TRUST COMPANY, HSBC BANK USA, N.A., U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendants-Appellees.[1]

14-1224-cv.

United States Court of Appeals, Second Circuit.

January 30, 2015.

TOMAS ESPINOSA, North Bergen, N.J., Appearing for Appellants.

ERIC R. SHERMAN, Dorsey & Whitney LLP, (Christopher G. Karagheuzoff, on the brief), Minneapolis, Minn., for US **Bank** National Association, as Trustee, Appearing for Appellees.

Scott H. Kaiser, Bryan Cave LLP, (Christine B. Cesare, Nafiz Cekirge, on the brief),**New York**, N.Y., for the **Bank** of **New York** Mellon, as Trustee.

Brian S. McGrath, Hogan Lovells US LLP, (Allison J. Schoenthal, Lisa J. Fried, on the brief), **New York**, N.Y, for HSBC **Bank** USA National Association, as Trustee, and Wells Fargo **Bank** National Association, as Trustee.

BERNARD J. GARBUTT III, Morgan, Lewis & Bockius LLP, **New York**, N.Y., for Deutsche **Bank** National Trust Company, Solely in its Capacity as Trustee.

Present: PIERRE N. LEVAL, ROSEMARY S. POOLER, DENNY CHIN, Circuit Judges.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiffs-Appellants appeal from the March 26, 2014 judgment of the United States District Court for the Southern District of **New York** (Patterson, *J.*) granting the motion to dismiss of Defendants-Appellees on the basis that Plaintiffs lacked standing to bring any claim based on alleged breaches of Pooling and Servicing Agreements to which they were neither parties nor intended third-party beneficiaries. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"We review the district court's grant of a motion to dismiss *de novo,* but may affirm on any basis supported by the record." *Coulter v. Morgan Stanley & Co.,* 753 F.3d 361, 366 (2d Cir. 2014). We accept the factual allegations in plaintiffs' complaint as true for purposes of reviewing the district court's dismissal for failure to state a claim, or for lack of standing, to the extent that the dismissal was based on the pleadings. *Rajamin v. Deutsche **Bank** Nat'l Trust Co.,* 757 F.3d 79, 81 (2d Cir. 2014).

Here, Plaintiffs do not identify any basis for distinguishing their claim from the claim at issue in *Rajamin,* where this Court recently held that mortgagors, who were not trust beneficiaries, lacked constitutional and prudential standing to bring an action based on trustee conduct that allegedly contravened the trust instrument. *Id.* at 88. Rather, Plaintiffs request that we both reverse the district court and overrule, overturn, or modify our decision in *Rajamin* because Plaintiffs assert that those decisions improperly construed **New York** Estates, Powers, and Trusts Law § 7-2.4. It is well established that we are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court."*United States v. Wilkerson,* 361 F.3d 717, 732 (2d Cir. 2004). We therefore decline the invitation to revisit this Court's sound reasoning in *Rajamin.*

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

Tran v. BONY, SD NY

https://scholar.google.com/scholar_case?case=8421089202998856475

ANH NGUYET TRAN, et al., Plaintiffs,
v.
BANK OF NEW YORK, et al., Defendants.

No. 13 Civ. 580 (RPP).

United States District Court, S.D. New York.

March 24, 2014.

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OPINION & ORDER

ROBERT P. PATTERSON, Jr., District Judge.

On April 15, 2013, an Amended Complaint[1] was filed by thirty-eight individuals and one limited liability company[2]—(collectively, the "Plaintiffs")—against trustees **Bank** of**New York** (now known as **Bank** of **New York** Mellon), Deutsche **Bank** National Trust Company, HSBC **Bank** USA National Association, U.S. **Bank** National Association, and Wells Fargo **Bank** National Association (the "Trustee Defendants"), as well as thirty-seven separate trusts[3] (the "Trust Defendants") (collectively, the "Defendants"). (Am. Compl. ¶¶ 1-4.)

In their Amended Complaint, the Plaintiffs allege that the Defendants violated the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and that they conspired to violate Federal RICO, 18 U.S.C. § 1962(d). (Id. ¶¶ 35-54.) Finally, the Plaintiffs seek to enjoin the Defendants from foreclosing on any of the properties of Plaintiffs in this pending action. (Id. ¶¶ 55-59.)

On August 2, 2013, the Trustee Defendants filed a joint motion to dismiss the Amended Complaint, or, in the alternative, to sever the Plaintiffs. (Defs.' Mem. of Law in Supp. of Joint Mot. to Dismiss the Compl. or to Sever Pls. ("Defs.' Mot."), ECF No. 40.) This motion was filed by the Trustee Defendants on their own behalves and on behalf of the Trust Defendants.[4] (Id. at 3.) On September 5, 2013, the Plaintiffs opposed the motion to dismiss. (Pls.' Br. in Opp'n to Defs.' Mot. ("Pls.' Opp'n"), ECF No. 45.) The Trustee Defendants filed a reply on October 7, 2013. (Reply Mem. of Law in Supp. of Joint Mot. to Dismiss or to Sever ("Defs.' Reply"), ECF No. 48.) Oral argument was held on this motion on November 5, 2013. (Tr. of Nov. 5, 2013 Hr'g ("Tr. 11/5/13").)

I. BACKGROUND

The Plaintiffs are thirty-eight individuals and one limited liability company who own or owned residential real properties that have been the subject of foreclosure proceedings. (Am. Compl. ¶ 1.) The Plaintiffs mortgaged their properties at varying times between 2004 and 2007. (Id., Ex. 1.) The Trustee Defendants are trustees of residential mortgage-backed securities ("RMBS") trusts created under **New York** law for the purpose of pooling residential mortgage loans, including the Plaintiffs' mortgage loans, and issuing residential mortgage-backed securities to investors. (Defs.' Mot. at 2.) The Plaintiffs' mortgages were pooled and securitized at varying times between 2005 and 2007. (Am. Compl., Ex. 1.) The Trust Defendants are the RMBS trusts in which Plaintiffs allege that their mortgage loans are held. (Id. ¶¶ 2, 5.)

Each of the Plaintiffs' RMBS trusts was formed pursuant to a Pooling Service Agreement ("PSA"), which is a contract that governs a RMBS trust. (Id. ¶ 5.) Generally, parties to a PSA include a "depositor", who conveys the loans to the RMBS trustee in return for the certificates, the RMBS trustee (here, the Trustee Defendants), who owns and holds mortgage loans in trust for investors who buy certificates backed by the pooled mortgage loans, and a "servicer", who sees to administrative tasks involving the individual mortgage loans, such as monthly payment collection and, in cases of default, foreclosure.[5] (Defs.'s Mot. at 3 (citing Trust for the Certificate Holders of the Merrill Lynch Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp., 556 F.3d 100, 104-05 (2d Cir. 2009) (describing the role of the PSA in the mortgage securitization process)).) A PSA governs the creation of the trust, the date of closing the trust, the date of the trust's formation, and what trustee actions are valid and invalid under the trust. (Am. Compl. ¶ 17.) In particular, each PSA provides for delivery of trust assets (consisting principally of promissory notes and mortgages) to the trustee in a particular manner on or before a specified closing date. (Id. ¶18.)

The parties agree that the PSAs follow a general template, and, at the Court's request, the Plaintiffs submitted a representative PSA, the PSA of Plaintiff Elaine D. Phan.[6](Pls.' Letter of Nov. 6, 2013 ("Pls.' 11/6/13 Letter"), Ex. 3.) Section 2.01 of that PSA provides for the delivery of "the Mortgage File for each Mortgage Loan listed in the Mortgage Loan Schedule" within thirty days of the closing date of May 27, 2005. (Pls.' 11/6/13 Letter Ex.3, at I-6, I-31.) Section 2.02 provides that the Trustee will deliver a certification form by the closing date, certifying its acceptance of the Mortgage Files, to

the Depositor, the Master Servicer, and Countrywide, the seller of the Countrywide Mortgage Loans to the Depositor. (Id. at I-7, II-5.)

The Plaintiffs' Amended Complaint alleges that the Defendants breached the PSAs, and that these breaches prevented the Trustee Defendants from acquiring ownership of the Plaintiffs' mortgage loans. Specifically, the Amended Complaint alleges that, in violation of Sections 2.01 and 2.02 of the PSAs, "[t]he delivery of the trust funds to each defendant...was never completed on the date of closing or at any other date permitted under the PSA." (Am. Compl. ¶¶ 18, 20.) The Plaintiffs also assert that other "conditions for acquisition of the loan by the trust," prescribed by the PSAs, were never met by the Defendants. (Id. ¶ 31.)

The Plaintiffs allege that the Defendants "each knew that each of them did not own" the Plaintiffs' mortgage loans and knew that they "never had standing to enforce the loans." (Id. ¶ 21.) The Defendants "fraudulently represented that the conditions [required by the PSA for the Defendants to acquire ownership of the mortgage loans] were met and/or concealed the fact that they were not met," (id. ¶ 31), and that based on these fraudulent representations, the Defendants "collected from the Plaintiffs payment of the mortgage[s] and enforced the mortgage payments, wrongfully foreclosing on the corresponding listed Plaintiffs or sought to foreclose on their properties." (Id. ¶ 14.)

In doing so, the Defendants acted in concert "among themselves and with other[s] such as the servicers of the loans, [and] the [D]efendants' attorneys who sought to enforce the loans." (Id. ¶ 34.) The Defendants "have known of the systematic violations, exemplif[ied] above for years, and in like manner had engaged in this pattern of racketeering for years." (Id.)

The Plaintiffs allege that the Defendants' wrongful collection efforts constitute violations of Federal RICO, 18 U.S.C. § 1962, and that the Defendants conspired to violate Federal RICO, 18 U.S.C. § 1962(d); and, finally, the Plaintiffs demand that the Defendants be enjoined from foreclosing on any of the properties of Plaintiffs in this pending action. (Id. ¶¶ 35-59.)

In their motion to dismiss, the Trustee Defendants argue: (1) that the Plaintiffs lack standing to maintain claims based on alleged breaches of the PSAs; (2) that the Amended Complaint fails to sufficiently allege a RICO violation by any Defendant; (3) that the Amended Complaint fails to allege a conspiracy to commit a RICO violation; (4) that the substantive RICO count and the conspiracy count are time-barred; (5) that the third count fails to identify a substantive claim for relief, and (6) that the all of the Plaintiffs are misjoined in this action. (Defs.' Mot. at 1-2.)

II. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently "raise a right to relief above the speculative level."Twombly, 550 U.S. at 555.

The United States Supreme Court has recognized limits on the class of persons who have standing to invoke the federal courts' decisional and remedial powers. Specifically, the Court has held that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). In ruling on a motion to dismiss for want of standing, the trial court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Id. at 501. Only if the plaintiff's standing does not appear from all materials of the record may the complaint be dismissed for want of standing. Id. at 502.

III. ANALYSIS

A. The Plaintiffs Do Not Have Standing to Assert Claims Based on Breaches of the PSAs

The Plaintiffs' Amended Complaint is predicated upon alleged breaches of the PSAs which, the Plaintiffs allege, made the assignment of their mortgage loans by the original lending institution to the Trustee Defendants invalid. (Am. Compl. ¶¶ 14, 21.) With full knowledge of the invalidity of this transfer, the Trustee Defendants allegedly "concealed" from the Plaintiffs the fact that they did not validly own the mortgage loans and sought to foreclose on certain of the Plaintiffs' properties, in violation of RICO and as part of a conspiracy to violate RICO. (Id. ¶¶ 35-54.) In their motion, the Trustee Defendants argue that the Plaintiffs are neither parties to nor third-party beneficiaries of the PSAs, and therefore lack standing to assert claims based on breaches of those agreements. (Defs.' Mot. at 5.) This argument has merit. Even construing the Amended Complaint in favor of the Plaintiffs, the Plaintiffs' standing to bring this action is lacking based on a careful review of the entire record. Therefore, the Amended Complaint must be dismissed.

The PSAs here are to be interpreted under the **New York** Estates, Powers, and Trusts Law ("EPTL"). (Pls.' 11/6/13 Letter, Ex. 3 § 10.03 (**New York** law governs the interpretation of the PSA); Pls.' Opp'n at 10; Defs.' Reply at 2.) **New York** courts interpreting the EPTL consistently hold that litigants who are not beneficiaries of a trust lack standing to enforce the trust's terms or to challenge the actions of the trustee. SeeIn re Estate of McManus, 390 N.E.2d 773, 774 (N.Y. 1979) (individuals "not beneficially interested" in a trust lack standing to challenge the trustee's actions); Cashman v. Petrie, 201 N.E.2d 24, 26 (N.Y. 1964) ("A person who might incidentally benefit from the performance of a trust but is not a beneficiary thereof cannot maintain a suit to enforce the trust or to

enjoin a breach."); Naversen v. Gaillard, 831 N.Y.S.2d 258, 259 (N.Y. App. Div. 2007) ("The Supreme Court properly determined that since the defendants were not beneficiaries of the G. Everett Gaillard Revocable Trust, they lacked standing to challenge the actions of the plaintiff as its trustee.").

The Amended Complaint does not allege that the Plaintiffs were parties to the PSAs, (see generally Am. Compl. ¶¶ 1-59), and the representative PSA provided by the Plaintiffs for the Court's review does not include any provision indicative of a party status for borrowers or mortgagors. (See generally Pls.' 11/6/13 Letter Ex.3.) Though the Second Circuit has not ruled directly on this issue, district courts in this Circuit and elsewhere have generally held that "a nonparty to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense unless the non-party is an intended (not merely incidental) third-party beneficiary of the PSA."[7] Rajamin v. Deutsche **Bank**Nat. Trust Co., No. 10 Civ. 7531 (LTS), 2013 WL 1285160, at *3 (S.D.N.Y. Mar. 28, 2013) (citing, inter alia, Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC, 717 F. Supp. 2d 724, 736-37 (E.D. Mich. 2010) ("For over a century, state and federal courts around the country have [held] that a litigant who is not a party to an assignment lacks standing to challenge that assignment."), aff'd, 399 F. App'x 97 (6th Cir. 2010)); see also Karamath v. U.S. **Bank**, N.A., No. 11 Civ. 1557 (RML), 2012 WL 4327613, at *7 (E.D.N.Y. Aug. 29, 2012) (mortgagor "is not a party to the PSA or to the Assignment of Mortgage, and is not a third-party beneficiary or either, and therefore has no standing to challenge the validity of that agreement or the assignment") adopted by No. 11 Civ. 1557 (NGG), 2012 WL 4327502 (E.D.N.Y. Sep. 20, 2012). These cases have further held that for a party to be considered a third-party beneficiary to a PSA, the intent to render a non-party a third-party beneficiary must be clear from the face of the PSA. Rajamin, 2013 WL 1285160, at *3 (internal citations omitted).

In an effort to establish their standing in the face of this case law, the Plaintiffs argue that the breaches of the PSAs, specifically, the transfers of ownership after the closing dates specified in the PSAs, rendered the conveyances void under Section 7-2.4 of the EPTL. (Pls.' Opp'n at 9.) That section provides that "if the trust is expressed in the 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." EPTL § 7-2.4. The Plaintiffs argue first that the conveyances are void under EPTL § 7-2.4, and, second, that because the conveyances are void under that section, they have standing, even as non-parties, to challenge the assignments. (Pls.' Opp'n at 7.)

First, though some courts have held that non-compliance with the terms of a PSA renders an assignment void under EPTL § 7-2.4, the weight of the case law holds that such an assignment is merely voidable, and therefore outside the scope of that section. A void contract is "invalid or unlawful from its inception," while a voidable contract "is one where one or more of the parties have the power, by the manifestation of an election to do so, to avoid the legal relations created by the contract." 17A C.J.S. Contracts § 169. The Plaintiffs cite two cases that found that acceptance of the

note and mortgage by a trustee after the closing date of the PSA renders an assignment void under EPTL § 7-2.4. Wells Fargo **Bank**, N.A. v. Erobobo, No. 31648/2009, 2013 WL 1831799 (N.Y. Sup. Ct. Apr. 29, 2013); Glaski v. **Bank** of America, Nat'l Ass'n, 218 Cal. Rptr. 3d 449 (Cal. Ct. App. 2013) (relying on Erobobo).

However, those cases run counter to better-reasoned cases, which apply the rule that a beneficiary can ratify a trustee's ultra vires act. See Mooney v. Madden, 597 N.Y.S.2d 775, 776 (N.Y. App. Div. 1993) ("A trustee may bind the trust to an otherwise invalid act or agreement which is outside the scope of the trustee's power when the beneficiary or beneficiaries consent or ratify the trustee's ultra vires act or agreement."); Washburn v. Ranier, 149 A.D. 800, 803 (N.Y. App. Div. 1912) (same); 106 N.Y. Jur. 2d Trusts § 431 ("the trustee may bind trust to an otherwise invalid act or agreement which is outside the scope of the trustee's power when beneficiary consents to or ratifies the trustee's ultra vires act or agreement"). Where an act can be ratified, it is voidable rather than void. See Hackett v. Hackett, No. 3338/2008, 2012 WL669525, at *20 (N.Y. Sup. Ct. Feb. 21, 2012) ("A void contract cannot be ratified; it binds no one and is a nullity. However, an agreement that is merely voidable by one party leaves both parties at liberty to ratify the transaction and insist upon its performance.") (internal citation omitted). Notably, trust beneficiaries need not actually ratify the act to render an act voidable and therefore outside the scope of EPTL § 7-2.4, rather, the fact that trust beneficiaries could ratify such an act is sufficient to render it voidable. **Bank** of America Nat'l Ass'n v. Bassman FBT, LLC, 981 N.E.2d 1, 9 (Ill. App. Ct. 2012).

Applied to the context of alleged non-compliance with the terms of a PSA, courts considering EPTL § 7-2.4 have held that "even if it is true that the Notes were transferred to the trust in violation of the trust's terms [after the closing date of the trust], that transaction could be ratified by the beneficiaries of the trust and is therefore merely voidable." Omrazeti v. Aurora **Bank** FSB, No. SA:12-CV-00730-DAE, 2013 WL 3242520, at *7 (W.D. Tex. June 25, 2013); see also Calderon, 941 F.Supp.2d at 766(same); Bassman, 981 N.E.2d at 944 ("Hence, numerous cases, including several that specifically reference 7-2.4...indicate that under various circumstances a trustee's ultra vires acts are not void."). Following this case law, even assuming that the transfer of Plaintiffs' mortgages to their respective trusts violated the terms of their respective PSAs, the afterthe-deadline transactions would merely be voidable at the election of one or more of the parties—not void.

Furthermore, even if the allegedly untimely conveyances were to be considered void under EPTL § 7-2.4, district courts in the Second Circuit have found that that section does not provide standing to mortgagors to challenge the conveyances. In Karamath, the plaintiff-mortgagor alleged that the trustee defendant had no legal or equitable interest in her loan because the assignment of the note was invalid, and the transfer was void under the EPTL. Karamath, 2012 WL 4327613, at *7. The Eastern District nevertheless held that because the plaintiff was not a party to the PSA or to the Assignment of Mortgage, and was not a third-party beneficiary of either, she therefore had no standing to challenge the validity of that agreement or the assignment.[8] Id.; see also Rajamin, 2013 WL 1285160, at *3 ("Plaintiffs have not alleged any facts that would support plausibly a claim that

they are intended third-party beneficiaries of the PSAs. Thus, Plaintiffs lack standing to challenge Defendants' alleged ownership of the Notes and [Deeds of Trust] or authority to foreclose based on non-compliance with the PSAs.").

Finally, the Plaintiffs argue that whether or not they are intended third-party beneficiaries of the PSAs is a "fact-laden issue" that cannot be determined within the context of the Defendants' motion to dismiss. (Pls.' Opp'n at 19.) However, Plaintiffs bear the burden to plead facts showing their intended third-party beneficiary status.Premium Mortg. Corp. v. Equifax, Inc., 583 F.3d 103, 108 (2d Cir. 2009); Rajamin, 2013 WL 1285160, at *3. The Plaintiffs do not make any such factual allegations in the Amended Complaint. (See generally Am. Compl. ¶¶ 1-59.) Moreover, the Plaintiffs can only attain status as intended third-party beneficiaries if the PSAs themselves "clearly evidence[] an intent to permit enforcement" by them. Premium Mortg, 583 F.3d at 108(quoting Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 485 N.E.2d 208, 212 (N.Y. 1985)). The Plaintiffs point to no such provisions, and the Court's independent search has discovered none. (See generally Pls.' 11/6/13 Letter Ex.3.) While the Plaintiffs' Opposition argues that the PSAs place duties upon mortgage loan servicers to safeguard the Plaintiffs' properties from such perils as physical destruction and tax forfeiture, (Pls.' Opp'n at 19-20), the Plaintiffs fail to explain how such provisions would be intended to benefit them, as opposed to the RMBS certificateholders, for whom the Plaintiffs' properties constitute collateral securing their investment. Accordingly, the Plaintiffs have failed to allege that they are intended third-party beneficiaries of the PSAs, and they therefore lack standing to bring claims based on alleged breaches of those agreements.

For the foregoing reasons, the Plaintiffs have no standing to bring any claim based on alleged breaches of the PSAs, and, because the theory underlying the Plaintiffs' claims is untenable, any amendment of the Amended Complaint would be futile. See Foman v. Davis, 371 U.S. 178, 182 (1962). Therefore, the Amended Complaint is dismissed with prejudice in its entirety. Furthermore, because the standing issue is dispositive, this Court need not reach the other issues raised in the motion to dismiss or the issue of severance.

IV. CONCLUSION

For the reasons discussed herein, the Defendants' joint motion to dismiss the Amended Complaint is GRANTED. The Clerk of the Court is ordered to close this case.

IT IS SO ORDERED.

[1] The original Complaint in this action was filed on January 25, 2013. (Compl., ECF No. 1.) Before serving any Defendant, the Plaintiffs filed their Amended Complaint on April 15, 2013. (Am. Compl., ECF No. 2.) It is the Amended Complaint that is operative here and that the Defendants seek to dismiss.

[2] **Anh Nguyet Tran**, Christina T. Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V. Nguyen, Huan N. **Tran**, Hung V. Nguyen, Kay Aphayvong, Kim-Thuy Nguyen, Mai L. Pham, Minh A. Trinh, My-Hanh Huynh, Nhieu V. **Tran**, Patricia Gunness, Patricia S. Adkins, Peter Delamos, Peter Ha, Tina Le, Phokham Soulamany, Phetsanou Soulamany, Sarah M. Young, Suong Ngoc Nguyen, Long Le, Thai Christie, Thiem Ngo, Thuan T. **Tran**, Thu Lam **Tran**, Thuy-Trang

Nguyen, Tri Thien Nguyen, Tuy T. Hoang, Thomas T. Hoang, Tuyen T. Thai, Tuyetlan T. **Tran**, Uyen T. Thai, Thong Ngo, Van Le, Vu Dinh, and Sequoia Holdings LLC. (Am. Compl. ¶ 1.)

[3] American Home Mortgage Assets (AHMA 2006-1), Securitized Asset Backed Receivables (SABR 2005-HE1), Impac Secured Assets Corp (IMSA 2006-5), Countrywide Alternative Loan Trust (CWALT 2005-17), CHL Mortgage Pass-Through Trust (CWHL 2007-HYB2), Alternative Loan Trust (CWALT 2006-OA6), RALI Series 2006-QS8 Trust (RALI 2006-QS8), CHL Mortgage Pass-Through Trust (CWHL 2005-HYB6), Citigroup Mortgage Loan Trust (CMLTI 2007-6), IXIS Real Estate Capital Trust (IXIS 2006-HE3), Lehman Mortgage Trust (LMT 2007-6), Merrill Lynch Mortgage Investors Trust (MLMI 2006-HE6), CWALT, Inc., Alternative Loan Trust (CWALT 2005-58), Opteum Mortgage Acceptance Corp. (OMAC 2005-1), GSAA Home Equity Trust (GSAA 2006-12), CHL Mortgage Pass-Through Trust (CWHL 2007-HY6), Citigroup Mortgage Loan Trust (CMLTI 2005-11), Fremont Home Loan Trust (FHLT 2005-1), Merrill Lynch Alternative Note Asset Trust (MANA 2007-A2), First Franklin Mortgage Loan Trust (FFML 2005-FF9), First Franklin Mortgage Loan Trust (FFML 2007-FF2), First Franklin Mortgage Loan Trust (FFML 2007-FFC), CHL Mortgage Pass-Through Trust (CWL 2005-11), CHL Mortgage Pass-Through Trust (CWHL 2007-3), CWHEQ Home Equity Loan Trust (CWL 2007-S2), Bear Stearns ALT-A Trust Series (BALTA 2005-4), Structured Adj. Rate Mtg. Loan Trust (SARM 2008-8XS), Lehman XS Trust Mgt. Pass-Through Cert. (LXS 2005-2), GreenPoint Mortgage Funding Trust (GPMF 2005-AR4), Alternative Loan Trust (CWALT 2006-OA19), Banc of America Funding (BAFC 2006-6), CWALT, Inc., Alternative Loan Trust (CWALT-2005-22T1), Bear Stearns ALT-A Trust (BALTA 2006-3), CHL Mortgage Pass-Through Trust (CWHL 2006-HYB5), CSMC Mortgage-Backed Trust (CSMC 2006-5), Alternative Loan Trust (CWALT 2006-29T1), and GSAMP Trust (GSAMP 2006-HE1). (Am. Compl. ¶¶ 3-4.)

[4] Trustee Defendants argue on behalf of the Trust Defendants because, under **New York** law, a trust is not a person that can sue or be sued, and litigation involving a trust must be brought by or against the trustee in its capacity as such. (Defs.' Mot. at 3 (citing Kirschbaum v. Elizabeth Ortman Trust, No. 03-24492, 2004 WL 1372542, at *2, 3 (N.Y. Sup. Ct. Mar. 10, 2004) (trustees "as legal owners of the trust estate generally sue and are sued in their own capacity" because the trust itself lacks capacity to act)).)

[5] Although Plaintiffs' claims are based on the premise that it is the Trustee Defendants that collect their mortgage loan payments and execute foreclosure proceedings, that premise is factually incorrect. The mortgage loan servicers "will collect the debt service payments on the loans and distribute the same to the investors" and "are responsible for enforcing the terms of a defaulted securitized loan. This responsibility may include...foreclosing on the property." Talcott Franklin & Thomas Nealon III, Mort. & Asset Based Sec. Litig. Handbook, §§ 5:111-5:112 (2013).

[6] PSAs are filed publicly with the Securities and Exchange Commission as part of the securitization process. Thus, the Phan PSA is also properly the subject of the Court's review as a publicly-available document filed with the Securities and Exchange Commission. See Kramer v. Time Warner, Inc., 937 F.2d 767, 773-74 (2d Cir. 1991)(Court considering motion to dismiss may rely on documents required to be filed with the Securities and Exchange Commission).

[7] In so holding, the Court in Rajamin stated that it was joining "the weight of the case law around the country."Rajamin, 2013 WL 1285160, at *3. Indeed, many federal courts, including several federal appellate courts, have held that a plaintiff-borrower lacks standing to bring any claim that is based upon alleged noncompliance with a PSA or the assignment of the plaintiff's mortgage loans. See, e.g., Robinson v. Select Portfolio Servicing, Inc., 522 F. App'x 309, 312 (6th Cir. 2013) (under Michigan law, plaintiffs/mortgagors lacked standing to allege unfair practices against RMBS trustee challenging the assignment of their mortgage based on alleged noncompliance with a PSA because they were not parties to, or third-party beneficiaries of, the assignment or the PSA);Karnatcheva v. JPMorgan Chase **Bank**, N.A., 704 F.3d 545, 547 (8th Cir. 2013) ("Under Minnesota law, mortgagors do not have standing to request declaratory judgments regarding trust agreements relating to mortgage-backed securities because the mortgagors are not parties to or beneficiaries of the agreements."). See also Calderon v. **Bank** of America N.A., 941 F.Supp.2d 753, 766 (W.D. Tex. 2013) (holding that the plaintiffs did not have standing to challenge an after-the-deadline-transfer of a mortgage loan in violation of a PSA because the transfer would merely be voidable at the election of the parties to the PSA, not void); Abruzzo v. PNC **Bank**, N.A., No. 4:11-CV-735-Y, 2012 WL 3200871, *2 (N.D. Tex. July 30, 2012) (holding that the plaintiffs did not have standing to challenge the assignment of their mortgage on the ground that the assignment violated a PSA because the plaintiffs were not parties to the PSA); In re Correia, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (finding that debtors lacked standing to challenge the chain of title under a PSA because they could not show that they were a party to the contract); In re Almeida, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009)(same); Dauenhauer v. **Bank**of **New York** Mellon, No. 3:12-cv-01026, 2013 WL 2359602, *5 (M.D. Tenn. May 28, 2013) (collecting cases);Preciado v. Wells Fargo Home Mortg., No. 13-00382 LB, 2013 WL 1899929, *5 (N.D. Cal. May 7, 2013)("The weight of persuasive authority in this district is that a plaintiff has no standing to challenge foreclosure based on a loan's having been securitized."); Lester v. J.P. Morgan Chase **Bank**, No. C 12-05491 LB, 2013 WL 3146790, *6 (N.D. Cal. June 18, 2013) (same); Clark v. Lender Processing Services, Inc., 949 F.Supp.2d 763, 771 (N.D. Ohio 2013) (Plaintiffs lack standing to assert any claim based on allegedly faulty assignments of the notes and mortgages into the PSAs because Plaintiffs are not parties to the agreements).

[8] The foreclosure proceedings of the Plaintiffs are not a part of the record, so it is unclear whether the Plaintiffs have raised this issue in their underlying foreclosure proceedings, but Karamath additionally held that the proper time to raise the issue

of ownership of the note is at the underlying foreclosure action, and mortgagors who do not raise it at that time waive their right to challenge the validity of the assignment. See Karamath, 2012 WL 4327613, at *7 ("To the extent plaintiff is arguing that [the trustee defendant] lacks standing to foreclose on the mortgage, that is an affirmative defense that plaintiff waived when she failed to assert it in the foreclosure action."). Because the Trustee Defendants have not raised this argument, this Court does not consider whether the Plaintiffs waived any right to argue that the assignment of their mortgages were invalid.

Rajamin v Deutsche Bank National Trust Company

https://scholar.google.com/scholar_case?case=13230459673637581146

DAVID RAJAMIN, EDITH GONZALEZ LARIOS, JESUS VALDEZ, MAURICE NUNEZ, ELIAS ESTRADA, IRMA ESTRADA, THERESA DOTY, ROBERT BASEL, LARRY MYRON KEGEL, on behalf of themselves and a class of similarly situated individuals, Plaintiffs-Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, individually and as Trustee of FFMLT TRUST 2005-FF8; FFMLT TRUST 2006-FF3; FFML TRUST 2006-FF11; and FFMLT TRUST 2006-FF13, New York common law trusts, Defendants-Appellees.[*]

Docket No. 13-1614.

United States Court of Appeals, Second Circuit.

Argued: November 20, 2013.
Decided: June 30, 2014.

JAMES B. SHEINBAUM, New York, New York (Borstein & Sheinbaum, New York, New York; Lawrence H. Nagler, Nagler & Associates, Los Angeles, California; Law Office of Henry Bushkin, Los Angeles, California, on the brief), for Plaintiffs-Appellants.

BERNARD J. GARBUTT III, New York, New York (Michael S. Kraut, Morgan, Lewis & Bockius, New York, New York, on the brief), for Defendants-Appellees.

Before: KEARSE, JACOBS, and B.D. PARKER, Circuit Judges.

KEARSE, Circuit Judge:

Plaintiffs David Rajamin et al., who mortgaged their homes in 2005 or 2006, appeal from a judgment of the United States District Court for the Southern District of New York, Laura Taylor Swain, Judge, dismissing their claims against four trusts (the "Defendant Trusts") to which their loans and mortgages were assigned in transactions involving the mortgagee bank, and against those trusts' trustee, defendant Deutsche Bank National Trust Company ("Deutsche Bank" or the "Trustee"). Plaintiffs sought, on behalf of themselves and others similarly situated (the alleged "Class Members"), monetary and equitable relief and a judgment declaring that defendants do not own plaintiffs' loans and mortgages, on the ground, inter alia, that parties to the assignment agreements failed to comply with certain terms of those agreements. No class action was certified. The district court, finding that plaintiffs were neither parties to nor third-party beneficiaries of the assignment agreements, and hence lacked standing to pursue these claims, granted defendants' motion to

dismiss the complaint for failure to state a claim. On appeal, plaintiffs contend that they plausibly asserted standing and asserted plausible claims for relief. For the reasons that follow, we conclude that the facts alleged by plaintiffs do not give them standing to pursue the claims they asserted, and we affirm the judgment of dismissal.

I. BACKGROUND

We accept the factual allegations in plaintiffs' Third Amended Complaint (or "Complaint")—which incorporated certain factual assertions, declarations, and attached exhibits submitted by defendants at earlier stages of this action—as true for purposes of reviewing the district court's dismissal for failure to state a claim on which relief can be granted, see, e.g., Rothstein v. UBS AG, 708 F.3d 82, 90 (2d Cir. 2013),or for lack of standing, to the extent that the dismissal was based on the pleadings, see, e.g., id.; Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 594 (2d Cir. 1993). The principal factual allegations were as follows.

A. The Third Amended Complaint

Plaintiffs are five individuals and two married couples who had homes in California and who, in 2005 or 2006, borrowed sums ranging from $240,000 to $1,008,000, totaling $3,776,000, from a bank called First Franklin, a division of National City Bank of Indiana ("First Franklin"). Each plaintiff executed a promissory note secured by a deed of trust on the home—"equivalent to a mortgage" under California law, Monterey S.P. Partnership v. W.L. Bangham, Inc., 49 Cal.3d 454, 461, 777 P.2d 623, 627 (1989)—in favor of First Franklin.

The notes signed by plaintiffs stated that plaintiffs "promise[d] to pay [the stated amounts of principal, plus interest] to the order of" First Franklin (Third Amended Complaint ¶ 25 (emphasis added)). See generally U.C.C. §§ 3-104, 3-109 (2002) (a note "payable to order" is a type of negotiable instrument). The deeds of trust signed by plaintiffs, samples of which were attached to the Complaint, provided in part, in sections titled "UNIFORM COVENANTS," that the parties agreed that

[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument. ...

(Third Amended Complaint Exhibit E ¶ 20; id. Exhibit G ¶ 20.)

Deutsche Bank is the trustee of the four Defendant Trusts, which were created under the laws of New York. (See Third Amended Complaint ¶¶ 12, 13.) The Defendant Trusts—whose names begin with "First Franklin Mortgage Loan Trust" or the initials "FFMLT"—maintain that they were created in

connection with securitization transactions involving mortgage loans originated by First Franklin between January 1, 2004, and January 1, 2007. (See id. ¶ 11.) See generally BlackRock Financial Management Inc. v. Segregated Account of Ambac Assurance Corp., 673 F.3d 169, 173 (2d Cir. 2012) (Residential mortgage loans, rather than being retained by the original mortgagee, may be pooled and sold "into trusts created to receive the stream of interest and principal payments from the mortgage borrowers. The right to receive trust income is parceled into certificates and sold to investors, called certificateholders. The trustee hires a mortgage servicer to administer the mortgages by enforcing the mortgage terms and administering the payments. The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are set forth in a Pooling and Servicing Agreement. ...")

The Complaint alleged that defendants claim to have purchased plaintiffs' loans and mortgages, through intermediaries, from First Franklin (see Third Amended Complaint ¶ 28) and to have "the right to collect and receive payment on [plaintiffs'] loans ... pursuant to written agreements" (id. ¶¶ 30-31). Each securitization transaction involved written agreements (the "assignment agreements"), one of which was called a Pooling and Servicing Agreement ("PSA"). The PSAs, which by their terms are to be governed by New York law (see id. ¶ 29), "provided, inter alia, for the formation of the relevant Trust, the conveyance of a pool of mortgages to [Deutsche Bank],[ ]as trustee, the issuance of mortgage-backed securities representing interests in the pooled loans, and the servicing of the pooled loans by a loan servicer" (id. ¶ 28 (internal quotation marks omitted)). Defendants claim that in each such transaction, First Franklin sold a pool of mortgage loans "to a sponsor ... which, at closing, sold the loans through its affiliate, a depositor ..., to a trust." (Id. ¶ 63 (internal quotation marks omitted).) Thus, the intention of the parties to the sales and securitization transactions was that Deutsche Bank would become, "as Trustee, ... the legal owner and holder of [the] Notes and [deeds of trust]" originated by First Franklin (id. ¶ 28 (internal quotation marks omitted)).

1. Plaintiffs' Challenges to the Assignments

The Complaint challenged defendants' (a) ownership of plaintiffs' loans and mortgages, (b) right to collect and receive payment on the loans, and (c) right to commence or authorize the commencement of foreclosure proceedings where payments have not been made or received (see, e.g., Third Amended Complaint ¶¶ 32, 80, 120, 122, 123, 126), on the ground, inter alia, that there was a lack of compliance with provisions of the assignment agreements. First, the Complaint alleged that the assignments were defective because plaintiffs' mortgage loans were "not specifically list[ed]" in mortgage loan schedules or other attachments to the assignment agreements. (Id. ¶¶ 36, 52; see also id. ¶ 66.) Indeed, according to the Complaint, the assignment agreements did "not specifically list any promissory note, mortgage or deed of trust" that was allegedly sold, transferred, assigned, or conveyed to defendants. (Id. ¶¶ 37, 53 (emphasis added); see also id. ¶¶ 54, 59, 65.)

The Complaint also alleged that assignments by First Franklin to Deutsche Bank of four of plaintiffs' deeds of trust were executed and publicly recorded in 2009 or 2010, after First Franklin had ceased operations and years after the securitization transactions took place. (See id. ¶¶ 74-79.) Plaintiffs argue that the execution and recordation of these mortgage assignments after the securitization transactions that created the Defendant Trusts indicate that these mortgages were not included in the mortgage loan pools that were sold to those trusts.

In addition, the Complaint alleged that two PSA provisions as to documents that were to accompany the conveyance of loans and mortgages to the trusts were not complied with at the time of the securitization transactions. These were (a) a provision stating that an affiliate of the sponsor "has delivered or caused to be delivered to" a named custodian "the original Mortgage Note bearing all intervening endorsements necessary to show a complete chain of endorsements from the original payee" (Third Amended Complaint ¶ 38 (internal quotation marks omitted); see id. ¶¶ 40-42), and (b) a similar provision as to delivery of "the originals of all intervening assignments of Mortgage with evidence of recording thereon evidencing a complete chain of ownership from the originator of the Mortgage Loan to the last assignee" (id. ¶ 43 (internal quotation marks omitted); see id. ¶¶ 46-48; see also id. ¶¶ 69-73).

2. Alleged Injury to Plaintiffs

The Complaint implied that plaintiffs made their loan payments to Deutsche Bank and the Defendant Trusts. It alleged that "Defendants claim[ed] and assert[ed] that payments [we]re due to them monthly" (Third Amended Complaint ¶ 119), and that defendants "received and collected money from payments made by Lead Plaintiffs and Class Members" (id. ¶ 95; see also id. ¶¶ 104, 115) "based upon Defendants' claims of rights, title and interest in the loans in issue in this Action" (id. ¶ 115; see also id. ¶ 81 ("The proposed class is all persons who took loans originated by First Franklin in 2004, 2005 and 2006 and for which Deutsche [Bank] claims to act as the trustee and for which Defendant Trusts have received or collected payments since January 1, 2004.")). The Complaint also alleged that "Defendants have commenced or authorized the commencement of foreclosure proceedings where payments have not been made or received" (id. ¶ 123), and that "[i]ndividuals and families have lost their homes and real property in foreclosure proceedings based upon the loans (including promissory notes, deeds of trust and mortgages) in issue in this Action" (id. ¶ 124).

The Complaint alleged that—and sought a declaratory judgment that—as a result of the alleged failures with regard to the assignment agreements, "Deutsche [Bank] and Defendant Trusts have not obtained ownership over and do not own [plaintiffs'] []promissory notes and deeds of trust" (Third Amended Complaint ¶ 80) and have no "right to collect and receive payment on the [mortgage] loans" (id. ¶ 32) and no "right to foreclose on [plaintiffs'] real property ... in the event that payments are not made" (id. ¶ 120).

While alleging that defendants received and collected money from plaintiffs that defendants "were not entitled to receive and collect" (Third Amended Complaint ¶ 95) and seeking as restitution and as damages "all payments on the mortgage loans in issue money [sic] collected and received by Deutsche [Bank] and Defendant Trusts and their servicers, agents, employees and representatives" (id. WHEREFORE ¶¶ (a) and (b); see also id. ¶¶ 95-112), the Complaint did not allege or imply that any plaintiff or putative Class Member made loan payments in excess of amounts due, made loan payments to any entity other than defendants, or was subjected to duplicate billing or duplicate foreclosure actions.

B. The Dismissal of the Complaint

Defendants moved to dismiss the Third Amended Complaint on the ground, inter alia, that plaintiffs lacked standing to pursue claims based on alleged violations of agreements to which plaintiffs are not parties. In an opinion filed on March 28, 2013, the district court granted the motion to dismiss the Complaint for failure to state a claim on which relief can be granted, finding that plaintiffs lacked standing to challenge defendants' ownership of the notes and mortgages based on alleged noncompliance with the terms of the PSAs. See Rajamin v. Deutsche Bank National Trust Co., No. 10 Civ. 7531, 2013 WL 1285160, at *3-*4 (S.D.N.Y. Mar. 28, 2013). The court pointed out that

Plaintiffs do not claim to have been parties to the PSAs, and none of the PSAs includes provisions indicative of party status for borrowers or mortgagors. The weight of caselaw throughout the country holds that a non-party to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense unless the non-party is an intended (not merely incidental) third party beneficiary of the PSA.

Id. at *3. The court stated that "[t]he intent to render a non-party a third-party beneficiary must be clear from the face of the PSA," and that

Plaintiffs have not alleged any facts that would support plausibly a claim that they are intended third-party beneficiaries of the PSAs. Thus, Plaintiffs lack standing to challenge Defendants' alleged ownership of the Notes and [deeds of trust] or authority to foreclose based on non-compliance with the PSAs.

Id.

In addition, the district court noted the Complaint's allegation that mortgage loan schedules accompanying the assignment agreements did not reflect plaintiffs' loans. The court rejected that allegation as baseless, finding that the mortgage loan schedules in question, submitted by defendants in support of their motion to dismiss the Third Amended Complaint, do in fact identify the relevant loans. See id. at *3 n.2.

II. DISCUSSION

On appeal, plaintiffs contend that the district court erred in dismissing the Complaint, arguing, inter alia, that they have a "concrete interest in putting to the test Defendants' claims to own [plaintiffs'] mortgages and mortgage documents." (Plaintiffs' brief on appeal at 13.) Although it is not clear whether the status of plaintiffs' mortgages was in the record before the district court in 2013 when it dismissed the complaint, it is now undisputed that "[i]n 2009 or 2010, each Plaintiff was declared to be in default on his [sic] mortgage, and foreclosure proceedings were instituted" (id. at 5); that "[i]n connection with the institution of said foreclosure proceedings, Deutsche [Bank], as trustee of one of the Defendant Trusts, claimed to own each Plaintiff's mortgage" (id. (citing the Third Amended Complaint)); and that "Plaintiffs are not seeking to enjoin foreclosure proceedings" (Plaintiffs' brief on appeal at 5 n.2). Assuming that these concessions have not rendered plaintiffs' claims moot, we affirm the district court's ruling that plaintiffs lack standing to pursue their challenges to defendants' ownership of the loans and entitlement to payments.

"[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975). The plaintiff bears the burden of establishing such standing. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)(constitutional standing); Premium Mortgage Corp. v. Equifax, Inc., 583 F.3d 103, 108 (2d Cir. 2009) (prudential standing). We review de novo a decision as to a plaintiff's standing to sue based on the allegations of the complaint and the undisputed facts evidenced in the record. See, e.g., Rent Stabilization Ass'n v. Dinkins, 5 F.3d at 594. "[I]f the court also resolved disputed facts" in ruling on standing, "we will accept the court's findings unless they are `clearly erroneous.'" Id. For the reasons that follow, we conclude that plaintiffs established neither constitutional nor prudential standing to pursue the claims they asserted.

A. Constitutional Standing

The "irreducible constitutional minimum of standing" under Article III of the Constitution includes the requirement that "the plaintiff must have suffered an injury in fact ... which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. at 560 (internal quotation marks omitted). The record in this case reveals that plaintiffs' Third Amended Complaint alleged only injuries that were hypothetical. The chronology of the events alleged helps to make this clear.

Plaintiffs alleged that their loan and mortgage transactions with First Franklin took place in 2005 or 2006 (see Third Amended Complaint ¶¶ 2-8); that "Defendants claim[ed] and assert[ed] that payments [we]re due to them monthly" (id. ¶ 119); and that, for the loans taken out by plaintiffs and the members of the class they seek to represent, "Defendant Trusts have received or collected payments since January 1, 2004" (id. ¶ 81). Plaintiffs asserted that they "[we]re suffering damages

with each and every payment to Defendants," on the theory that defendants "[we]re not proper parties to receive and collect such payments." (Id. ¶ 122.) But plaintiffs acknowledge that they took out the loans in 2005 or 2006 and were obligated to repay them, with interest; and they have not pleaded or otherwise suggested that they ever paid defendants more than the amounts due, or that they ever received a bill or demand from any entity other than defendants. Thus, there is no allegation that plaintiffs have paid more than they owed or have been asked to do so.

Further, plaintiffs' challenge to defendants' claim of ownership of plaintiffs' loans, implying that the loans are owned by some other entity or entities, is highly implausible, for that would mean that since 2005 there was no billing or other collection effort by owners of loans whose principal alone totaled $3,776,000. The suggestion that plaintiffs were in imminent danger—or, indeed, any danger—of having to make duplicate loan payments is thus entirely hypothetical.

For the same reason, the Complaint's assertion that "Defendants have commenced or authorized the commencement of foreclosure proceedings where payments have not been made or received" (Third Amended Complaint ¶ 123) does not indicate an actual or imminent, rather than a conjectural or hypothetical, injury. Plaintiffs have acknowledged on this appeal that they were declared in default on their mortgages, and that foreclosure proceedings were instituted by Deutsche Bank, claiming to own those mortgages, in 2009 or 2010. Just as there was no allegation in the Complaint that any entity other than defendants had demanded payments, there was no allegation of any threat or institution of foreclosure proceedings against any plaintiff by any entity other than defendants. And had there been any entity that asserted a claim conflicting with the right of Deutsche Bank to foreclose on plaintiffs' mortgages, surely the interposition of such a claim would have been alleged in the Third Amended Complaint, which was not filed until 2011.

On appeal, plaintiffs purport to assert injury by arguing that the alleged defects in the assignments of their mortgages would prevent Deutsche Bank from being able to reconvey clear title to plaintiffs when they pay off their mortgage loans. (See Plaintiffs' brief on appeal at 13, 17.) We note that such an injury was not alleged in the Complaint, and it is difficult to view it as other than conjectural or hypothetical, given that plaintiffs, several years ago, defaulted on their loans. See, e.g., Rajamin v. Deutsche Bank National Trust Co., No. B237560, 2012 WL 5448401, at *1-*3 & n.3 (Cal. Ct. App. 2d Dist. Nov. 8, 2012) ("Rajamin's California case") (affirming dismissal, for lack of standing, of Rajamin's claim for declaratory relief as to Deutsche Bank's ownership of his promissory note, and noting that Rajamin's home had been sold in foreclosure).

We conclude that plaintiffs failed to allege injuries sufficient to show constitutional standing to pursue their claims.

B. Prudential Standing

Even if plaintiffs had Article III standing, we conclude that they lack prudential standing. The "prudential standing rule ... normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Warth v. Seldin, 422 U.S. at 509. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499. Plaintiffs have advanced several theories for prudential standing. Each fails.

1. The Breach-of-Contract Theory

The principles that any contractual provision "may be waived by implication or express intention of the party for whose benefit the provision inures," Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir. 1991) (internal quotation marks omitted), and that strangers may not assert the rights of those who "do not wish to assert them," Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (plurality opinion), underlie the rule adhered to in New York—whose law governs the assignment agreements (see Third Amended Complaint ¶ 29)—that the terms of a contract may be enforced only by contracting parties or intended third-party beneficiaries of the contract, see, e.g., Mendel v. Henry Phipps Plaza West, Inc., 6 N.Y.3d 783, 786, 811 N.Y.S.2d 294, 297 (2006) (mere incidental beneficiaries of a contract are not allowed to maintain a suit for breach of the contract); see also Restatement (Second) of Contracts § 315 (1981) ("An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.").

This rule has been applied to preclude claims where mortgagors have sought relief from their loan obligations on grounds such as those asserted here. See, e.g., Cimerring v. Merrill Lynch Mortgage Investors, Inc., No. 8727/2011, 2012 WL 2332358, at *9 (N.Y. Sup. Ct. Kings Co. June 13, 2012) ("plaintiffs lack standing to allege a claim for breach of the PSA because they are not parties to this contract, nor do they allege that they are third-party beneficiaries to the agreement"); see generallyReinagel v. Deutsche Bank National Trust Co., 735 F.3d 220, 228 n.29 (5th Cir. 2013)("courts invariably deny mortgagors third-party status to enforce PSAs"). Indeed, in an action brought by a successor trustee of another First Franklin mortgage loan trust, the Appellate Division of the New York Supreme Court ("Appellate Division") ruled that mortgagors lack standing to assert such breaches, citing as authority the opinion of the district court in this very case: While holding that the plaintiff bank was not entitled to summary judgment in its action to foreclose the defendants' mortgage, the Appellate Division affirmed the lower court's denial of the defendant mortgagors' motion to dismiss the foreclosure complaint, ruling that the defendants

did not have standing to assert noncompliance with the subject lender's pooling service agreement (see Rajamin v Deutsche Bank Natl. Trust Co., ... 2013 WL 1285160, 2013 US Dist LEXIS 45031 [SD NY 2013]).

Bank of New York Mellon v. Gales, 116 A.D.3d 723, 725, 982 N.Y.S.2d 911, 912 (2d Dep't 2014).

Here, plaintiffs contend that their loans were not acquired by the Defendant Trusts pursuant to the assignment agreements—of which the PSAs were part—because, plaintiffs allege, parties to those agreements did not perform all of their obligations under the PSAs. Although noncompliance with PSA provisions might have made the assignments unenforceable at the instance of parties to those agreements, the district court correctly noted that plaintiffs were not parties to the assignment agreements. And plaintiffs have not shown that the entities that were parties to those agreements intended that plaintiffs—whose financial obligations were being bought and sold—would in any way be beneficiaries of the assignments. We conclude that the district court properly ruled that plaintiffs lacked standing to enforce the agreements to which they were not parties and of which they were not intended beneficiaries.

Plaintiffs also argue that the district court's third-party-beneficiary analysis was flawed because "Plaintiffs are first parties to their mortgage notes and deeds of trust" (Plaintiffs' brief on appeal at 17 (emphasis added)). This argument is far wide of the mark. Plaintiffs are not suing for breach or nonperformance of their loan and mortgage agreements; those agreements provide, inter alia, that plaintiffs' loans "can be sold one or more times without prior notice to [the b]orrower" (Third Amended Complaint Exhibit E ¶ 20; id. Exhibit G ¶ 20). The notes and deeds of trust to which plaintiffs were parties did not confer upon plaintiffs a right against nonparties to those agreements to enforce obligations under separate agreements to which plaintiffs were not parties.

2. The Breach-of-Trust Theory

In an effort to circumvent their lack of standing to make their contract arguments, plaintiffs argue that assignments failing to comply with the PSAs violated laws governing trusts. They rely on a New York statute that provides: "If the trust is expressed in the 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 ... law, is void." N.Y. Estates, Powers and Trusts Law ("EPTL") § 7-2.4 (McKinney 2002). Here, the PSAs are the instruments creating the trust estates, and plaintiffs argue that the PSAs were "contraven[ed]" by the Trustee's acceptance of mortgage loans conveyed in a manner that did not comply with the procedural formalities that the PSAs specified, thereby rendering those conveyances void under the statute. (E.g., Plaintiffs' brief on appeal at 12.) Plaintiffs' reliance on trust law is misplaced.

First, as the district court concluded, this argument depends on plaintiffs' contention that parties to the assignment agreements violated the terms of the PSAs. If those agreements were not breached, there is no foundation for plaintiffs' contention that any act by the trusts' trustee was unauthorized. But as discussed above, plaintiffs, as nonparties to those contracts, lack standing to assert any nonperformance of those contracts.

Second, under New York law, only the intended beneficiary of a private trust may enforce the terms of the trust. See, e.g., Matter of the Estate of McManus, 47 N.Y.2d 717, 719, 417 N.Y.S.2d 55, 56

(1979) ("McManus") (persons who "were not beneficially interested in the trust ... lack[ed] standing to challenge the actions of its trustee"); Cashman v. Petrie, 14 N.Y.2d 426, 430, 252 N.Y.S.2d 447, 450 (1964) (mere incidental beneficiaries of a trust "cannot maintain a suit to enforce the trust");Naversen v. Gaillard, 38 A.D.3d 509, 509, 831 N.Y.S.2d 258, 259 (2d Dep't 2007); see also Restatement (Third) of Trusts § 94(1) (2012) ("A suit against a trustee of a private trust to enjoin or redress a breach of trust or otherwise to enforce the trust may be maintained only by a beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries."); cf. Rajamin's California case, 2012 WL 5448401, at *2 ("A homeowner who gives a deed of trust to secure his repayment of a home loan does not have standing to challenge the foreclosing party's authority to act on behalf of the deed of trust's beneficiary."). Where the challengers to a trustee's actions are not beneficiaries, and hence lack standing, the court "need not decide whether the conduct of the trustee comported with the terms of the trust." McManus, 47 N.Y.2d at 719, 417 N.Y.S.2d at 56.

Third, even if plaintiffs had standing to make an argument based on EPTL § 7-2.4, on the theory that a mortgagor has standing to "challenge[] a mortgage assignment as invalid, ineffective, or void," Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 354 (1st Cir. 2013) (internal quotation marks omitted), the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law. Under New York law, unauthorized acts by trustees are generally subject to ratification by the trust beneficiaries. See King v. Talbot, 40 N.Y. 76, 90 (1869) ("[t]he rule is perfectly well settled, that a cestui que trust is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option"); Mooney v. Madden, 193 A.D.2d 933, 933-34, 597 N.Y.S.2d 775, 776 (3d Dep't) ("Mooney") ("A trustee may bind the trust to an otherwise invalid act or agreement which is outside the scope of the trustee's power when the beneficiary or beneficiaries consent or ratify the trustee's ultra vires act or agreement. ..."), lv. dismissed, 82 N.Y.2d 889, 610 N.Y.S.2d 153 (1993); Washburn v. Rainier, 149 A.D. 800, 803-04, 134 N.Y.S. 301, 304 (2d Dep't 1912); Hine v. Hine, 118 A.D. 585, 592, 103 N.Y.S. 535, 540 (4th Dep't 1907); English v. McIntyre, 29 A.D. 439, 448-49, 51 N.Y.S. 697, 704 (1st Dep't 1898) ("where the trustee has engaged with the trust fund in an unauthorized business ... the rule is that the cestui que trust may ratify the transactions of the trustee and take the profits, if there are profits"). Moreover, "beneficiary consent may be express or implied from the acceptance of the trustee's act or agreement and may be given either after or before the trustee's act. ..." Mooney, 193 A.D.2d at 934, 597 N.Y.S.2d at 776. To be an effective ratification, however, "all of the beneficiaries" must "expressly or impliedly" agree. Id. at 933, 597 N.Y.S.2d at 776; see also id. at 934, 597 N.Y.S.2d at 776 (remanding for determination of whether "remainder persons who also [we]re beneficiaries" had "consented ... and/or ratified").

The principle that a trustee's unauthorized acts may be ratified by the beneficiaries is harmonious with the overall principle that only trust beneficiaries have standing to claim a breach of trust. If a

stranger to the trust also had such standing, the stranger would have the power to interfere with the beneficiaries' right of ratification.

Because, as the above authorities demonstrate, a trust's beneficiaries may ratify the trustee's otherwise unauthorized act, and because "a void act is not subject to ratification," Aronoff v. Albanese, 85 A.D.2d 3, 4, 446 N.Y.S.2d 368, 370 (2d Dep't 1982), such an unauthorized act by the trustee is not void but merely voidable by the beneficiary.

For the contrary position, plaintiffs rely principally on Genet v. Hunt, 113 N.Y. 158, 21 N.E. 91 (1889) ("Genet"), and Wells Fargo Bank, N.A. v. Erobobo, No. 31648/2009, 2013 WL 1831799 (Sup. Ct. Kings Co. Apr. 29, 2013) ("Erobobo"). Neither case compels the conclusion that a trustee's acceptance of property on behalf of a trust without complying with the terms of the trust agreement is void.

In Genet, the New York Court of Appeals described the principal question before it as whether certain testamentary trusts created under an 1867 will (the "bequests") constituted the exercise of a power of appointment conferred by an 1853 trust deed, causing the bequests' suspension of rights of alienation to date back to 1853 and to violate the rule against perpetuities—i.e., whether the bequests were "void for remoteness." 113 N.Y. at 165, 21 N.E. at 92. The testatrix in Genet was the settlor and a beneficiary of the 1853 trust; the trust's other beneficiaries, contingent remaindermen, were the testatrix's heirs. See id. at 169, 21 N.E. at 93. The Court, en route to a conclusion that the bequests must be treated as dating back to the 1853 trust and as violating the rule against perpetuities, observed that a New York statutory provision (which was a predecessor to EPTL § 7-2.4) provided that acts of a trustee in contravention of the trust's terms were void; the Court thus stated that the settlor and income beneficiary of the trust could not "alone, or in conjunction with the trustees, ... abrogate the trust," 113 N.Y. at 168, 21 N.E. at 93 (emphasis added). The Genet Court did not advert to the possibility of ratification; to be an effective ratification, there must be agreement by "all of the beneficiaries," including "remainder persons who also are beneficiaries," Mooney, 193 A.D.2d at 934, 597 N.Y.S.2d at 776. Although the general permissibility of ratification had been described 20 years before Genet as "perfectly well settled," King v. Talbot, 40 N.Y. at 90, there was no possibility in Genet that all of the 1853 trust's beneficiaries could have consented to any attempted abrogation or contravention of trust terms by the testatrix during her lifetime because the remainder beneficiaries, the testatrix's heirs, could not be ascertained until her death. We conclude that Genet has no bearing on the claims of plaintiffs in the present case.

Although Erobobo concerned events more similar to those in this case, as it involved a mortgage, a securitization trust, and allegations of unauthorized acts by a trustee, we find it unpersuasive. In Erobobo, a trial court, in denying the plaintiff bank's motion for summary judgment in its foreclosure action, stated that "[u]nder New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL § 7-2.4." 2013 WL 1831799, at *8. But the court so stated without any citation or discussion of the New York authorities holding (a) that only the beneficiary of

a trust, or one acting on the beneficiary's behalf, has standing to enforce the terms of the trust, and (b) that the beneficiaries may ratify otherwise unauthorized acts of the trustee.

While a few other courts have reached conclusions about EPTL § 7-2.4 similar to that of the Erobobo court, see, e.g., Auroa Loan Services LLC v. Scheller, No. 2009-22839, 2014 WL 2134576, at *2-*4 (N.Y. Sup. Ct. Suffolk Co. May 22, 2014); Glaski v. Bank of America, National Association, 218 Cal. App. 4th 1079, 1094-98, 160 Cal. Rptr. 3d 449, 461-64 (5th Dist. 2013), we are not aware of any New York appellate decision that has endorsed this interpretation of § 7-2.4. And most courts in other jurisdictions discussing that section have interpreted New York law to mean that "a transfer into a trust that violates the terms of a PSA is voidable rather than void," Dernier v. Mortgage Network, Inc., 2013 VT 96, ¶ 34, 87 A.3d 465, 474 (2013); see, e.g., Bank of America National Ass'n v. Bassman FBT, L.L.C., 2012 IL App (2d) 110729, ¶¶ 18-21, 981 N.E.2d 1, 8-10 (2d Dist. 2012); see also Butler v. Deutsche Bank Trust Co. Americas, 748 F.3d 28, 37 n.8 (1st Cir. 2014) ("not[ing] without decision ... that the vast majority of courts to consider the issue have rejected Erobobo's reasoning, determining that despite the express terms of [EPTL] § 7-2.4, the acts of a trustee in contravention of a trust may be ratified, and are thus voidable").

In sum, we conclude that as unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable; and that under New York law such acts are voidable only at the instance of a trust beneficiary or a person acting in his behalf. Plaintiffs here are not beneficiaries of the securitization trusts; the beneficiaries are the certificateholders. Plaintiffs are not even incidental beneficiaries of the securitization trusts, for their interests are adverse to those of the certificateholders. Plaintiffs do not contend that they did not receive the proceeds of their loan transactions; and their role thereafter was simply to make payments of the principal and interest due. The law of trusts provides no basis for plaintiffs' claims.

3. The Nothing-Was-Transferred and Related Theories

In another effort to have the assignments of their mortgages to Defendant Trusts categorized as absolutely void, plaintiffs argue that an attempt to assign a property right that is not owned is without effect, and they assert that the entity from which defendants claim to have received plaintiffs' loans and mortgages—the depositor—did not own them. Even assuming that "standing exists for challenges that contend that the assigning party never possessed legal title," Woods v. Wells Fargo Bank, N.A., 733 F.3d at 354, this argument suffers fatal flaws.

First, the Complaint did not directly allege that the depositor did not own plaintiffs' loans and mortgages. Instead, noting defendants' reliance on documents pertaining to each mortgage loan, the Complaint alleged that the mortgage loan schedules "do[] not specifically list" plaintiffs' notes or mortgages (e.g., Third Amended Complaint ¶ 36), and indeed "do[] not specifically list any promissory note, mortgage or deed of trust or name of any person or individuals" (e.g., id. ¶ 37 (emphasis added)). Thus, plaintiffs' voidness contention rests on the supposition that the mortgage

assignment agreements did not purport to assign any mortgages—or, indeed, any related interests—a supposition that is entirely implausible.

Second, the district court noted plaintiffs' argument and concluded that it was baseless, finding that the mortgage loan schedules submitted by defendants in support of their motion to dismiss did in fact identify the relevant loans. See 2013 WL 1285160, at *3 n.2. Although plaintiffs, in their reply brief on appeal, reiterate the implausible proposition that "no schedule specifying the loans [wa]s attached" to the assignment agreements (Plaintiffs' reply brief on appeal at 7), their briefs do not dispute or even mention the district court's factual finding. We therefore regard any challenge to this finding as waived.

Lastly, we reject plaintiffs contention that the assignments of some of plaintiffs' mortgages were void because the assignments were recorded after the closing dates of the Defendant Trusts or because the named assignor was First Franklin rather than the depositors named in the PSAs. To the extent that plaintiffs argue that these assignments violated the PSAs, the argument, for reasons already discussed, is not one that plaintiffs have standing to make. To the extent that plaintiffs rely on the dates of the recorded mortgage assignments to imply that the assignments of their loans and mortgages to defendants were a sham, we reject the implication as implausible. A post-closing recordation does not in itself suggest that the assignments were made at the time of the recordation, and the record does not give rise to such a suggestion. The PSAs themselves were sufficient to assign plaintiffs' obligations to Deutsche Bank as of the assignments' effective dates. (See, e.g., First Franklin Mortgage Loan Trust 2006-FF11 Pooling and Servicing Agreement, dated August 1, 2006 ("FFMLT 2006-FF11 PSA"), at § 2.01(a) ("The Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders ... all the right, title and interest of the Depositor in" the principal and interest on the mortgage loans (emphases added)).

The subsequent recording of mortgage assignments does not imply that the promissory notes and security interests had not been effectively assigned under the PSAs. Under the law of either California or New York, when a note secured by a mortgage is assigned, the "mortgage passes with the debt as an inseparable incident."U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 754, 890 N.Y.S.2d 578, 580 (2d Dep't 2009); accord Domarad v. Fisher & Burke, Inc., 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529, 535 (1st Dist. 1969) ("a deed of trust is a mere incident of the debt it secures and ... an assignment of the debt carries with it the security" (internal quotation marks omitted)). The assignment of a mortgage need not be recorded for the assignment to be valid. See, e.g., MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 98-99, 828 N.Y.S.2d 266, 269-70 (2006); Wilson v. Pacific Coast Title Insurance Co., 106 Cal. App. 2d 599, 602, 235 P.2d 431, 433 (4th Dist. 1951). Thus, the recorded assignments do not support plaintiffs' contention that their loans and mortgages were not owned by defendants.

Moreover, plaintiffs have not alleged that the promissory notes were not conveyed to the Trustee in a timely manner. Section 2.01(b) of the PSAs states that documentation, including each "original Mortgage Note" and each "original recorded Mortgage" "has [been] delivered ... to the Custodian." The fact that plaintiffs mount no viable challenge to the timeliness of the assignment of the promissory notes scuttles their contention that the mortgages were not timely assigned.

Finally, although plaintiffs' contend that defendants do not "ha[ve] custody" of the notes (Plaintiffs' reply brief on appeal at 8 (emphasis added)), that contention does not refute defendants' claim of ownership. While the Complaint partially quotes from § 2.01(b)(1) of the FFMLT 2006-FF11 PSA, alleging that it "states in relevant part: `(b) ... Depositor has delivered or caused to be delivered to Custodian ... (i) the original Mortgage Note'" (Third Amended Complaint ¶ 38), the second ellipsis in that allegation omits the quite relevant words "for the benefit of the Certificateholders." Moreover, § 8.02(e) of the FFMLT 2006-FF11 PSA provides that "the Trustee may execute any of the trusts or powers hereunder ... by or through ... custodians." The apparent "custody" of plaintiffs' notes by custodians, which the assignment agreements explicitly allow the Trustee to use, does not imply that those agreements failed to convey ownership of plaintiffs' obligations to defendants.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

[*] The Clerk of Court is directed to amend the official caption to conform with the above.

Glaski v Bank of America, California 5th District Court of Appeals

https://scholar.google.com/scholar_case?case=8535344425094007526

218 Cal.App.4th 1079 (2013)
160 Cal. Rptr. 3d 449

THOMAS A. GLASKI, Plaintiff and Appellant,
v.
BANK OF AMERICA, NATIONAL ASSOCIATION, et al., Defendants and Respondents.

No. F064556.

Court of Appeals of California, Fifth District.

July 31, 2013.

1082*1082 Law Offices of Richard L. Antognini, Richard L. Antognini; Law Offices of Catarina M. Benitez and Catarina M. Benitez for Plaintiff and Appellant.

AlvaradoSmith, Theodore E. Bacon and Mikel A. Glavinovich for Defendants and Respondents.

OPINION

FRANSON, J.

INTRODUCTION

Before Washington Mutual Bank, FA (WaMu), was seized by federal banking regulators in 2008, it made many residential real estate loans and used those loans as collateral for mortgage-backed securities.[1] Many of the loans went into default, which led to nonjudicial foreclosure proceedings. Some of the foreclosures generated lawsuits, which raised a wide variety of claims. The allegations that the instant case shares with some of the other lawsuits are that (1) documents related to the foreclosure contained forged signatures of Deborah Brignac and (2) the foreclosing entity was not the true owner of the loan because its chain of ownership had been broken by a defective transfer of the loan to the securitized trust established for the mortgage-backed securities. Here, the specific defect alleged is that the attempted transfers were made *after the closing date* of the securitized trust holding the pooled mortgages and therefore the transfers were ineffective.

In this appeal, the borrower contends the trial court erred by sustaining defendants' demurrer as to all of his causes of action attacking the nonjudicial foreclosure. We conclude that, although the borrower's allegations are 1083*1083 somewhat confusing and may contain contradictions, he nonetheless has stated a wrongful foreclosure claim under the lenient standards applied to demurrers. We conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under N.Y. law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement.

We therefore reverse the judgment of dismissal and remand for further proceedings.

FACTS

The Loan

Thomas A. Glaski, a resident of Fresno County, is the plaintiff and appellant in this lawsuit. The operative second amended complaint (SAC) alleges the following: In July 2005, Glaski purchased a home in Fresno for $812,000 (the Property). To finance the purchase, Glaski obtained a $650,000 loan from WaMu. Initial monthly payments were approximately $1,700. Glaski executed a promissory note and a deed of trust that granted WaMu a security interest in the Property (the Glaski deed of trust). Both documents were dated July 6, 2005. The Glaski deed of trust identified WaMu as the lender and the beneficiary, defendant California Reconveyance Company (California Reconveyance) as the trustee, and Glaski as the borrower.

Paragraph 20 of the Glaski deed of trust contains the traditional terms of a deed of trust and states that the note, together with the deed of trust, can be sold one or more times without prior notice to the borrower. In this case, a number of transfers purportedly occurred. The validity of attempts to transfer Glaski's note and deed of trust to a securitized trust is a fundamental issue in this appeal.

Paragraph 22 — another provision typical of deeds of trust — sets forth the remedies available to the lender in the event of a default. Those remedies include (1) the lender's right to accelerate the debt after notice to the 1084*1084 borrower and (2) the lender's right to "invoke the power of sale" after the borrower has been given written notice of default and of the lender's election to cause the property to be sold. Thus, under the Glaski deed of trust, it is the lender-beneficiary who decides whether to pursue nonjudicial foreclosure in

the event of an uncured default by the borrower. The trustee implements the lender-beneficiary's decision by conducting the nonjudicial foreclosure.[2]

Glaski's loan had an adjustable interest rate, which caused his monthly loan payment to increase to $1,900 in August 2006 and to $2,100 in August 2007. In August 2008, Glaski attempted to work with WaMu's loan modification department to obtain a modification of the loan. There is no dispute that Glaski defaulted on the loan by failing to make the monthly installment payments.

Creation of the WaMu Securitized Trust

In late 2005, the WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Trust was formed as a common law trust (WaMu Securitized Trust) under New York law. The corpus of the trust consists of a pool of residential mortgage notes purportedly secured by liens on residential real estate. LaSalle Bank, N.A., was the original trustee for the WaMu Securitized Trust.[3] Glaski alleges that the WaMu Securitized Trust has no continuing duties other than to hold assets and to issue various series of certificates of investment. A description of the certificates of investment as well as the categories of mortgage loans is included in the prospectus filed with the Securities and Exchange Commission (SEC) on October 21, 2005. Glaski alleges that the investment certificates issued by the WaMu Securitized Trust were duly registered with the SEC.

The closing date for the WaMu Securitized Trust was December 21, 2005, or 90 days thereafter. Glaski alleges that the attempt to assign his note and deed of trust to the WaMu Securitized Trust was made after the closing date and, therefore, the assignment was ineffective. (See fn. 12, *post.*)

1085*1085 *WaMu's Failure and Transfers of the Loan*

In September 2008, WaMu was seized by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation (FDIC) was appointed as a receiver for WaMu. That same day, the FDIC, in its capacity as receiver, sold the assets and liabilities of WaMu to defendant JPMorgan Chase Bank, N.A. (JP Morgan). This transaction was documented by a "PURCHASE AND ASSUMPTION AGREEMENT WHOLE BANK" (boldface and underscoring omitted) between the FDIC and JP Morgan dated as of September 25, 2008. If Glaski's loan was not validly transferred to the WaMu Securitized Trust, it is possible, though not certain, that JP Morgan acquired the Glaski deed of trust when it purchased

WaMu assets from the FDIC.[4]JP Morgan also might have acquired the right to service the loans held by the WaMu Securitized Trust.

In September 2008, Glaski spoke to a representative of defendant Chase Home Finance LLC (Chase),[5] which he believed was an agent of JP Morgan, and made an oral agreement to start the loan modification process. Glaski believed that Chase had taken over loan modification negotiations from WaMu.

On December 9, 2008, two documents related to the Glaski deed of trust were recorded with the Fresno County Recorder: (1) an "ASSIGNMENT OF DEED OF TRUST" and (2) a "NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST" (boldface omitted; hereinafter the NOD). The assignment stated that JP Morgan transferred and assigned all beneficial interest under the Glaski deed of trust to "LaSalle Bank NA as trustee for WaMu [Securitized Trust]" together with the note described in and secured by the Glaski deed of trust.[6]

1086*1086 *Notice of Default and Sale of the Property*

The NOD informed Glaski that (1) the Property was in foreclosure because he was behind in his payments[7] and (2) the Property could be sold without any court action. The NOD also stated that "the present beneficiary under" the Glaski deed of trust had delivered to the trustee a written declaration and demand for sale. According to the NOD, all sums secured by the deed of trust had been declared immediately due and payable and that the beneficiary elected to cause the Property to be sold to satisfy that obligation.

The NOD stated the amount of past due payments was $11,200.78 as of December 8, 2008.[8] It also stated: "To find out the amount you must pay, or to arrange for payment to stop the foreclosure, ... contact: JPMorgan Chase Bank, National Association, at 7301 BAYMEADOWS WAY, JACKSONVILLE, FL 32256, (877) 926-8937."

Approximately three months after the NOD was recorded and served, the next official step in the nonjudicial foreclosure process occurred. On March 12, 2009, a "NOTICE OF TRUSTEE'S SALE" was recorded by the Fresno County Recorder (notice of sale). The sale was scheduled for April 1, 2009. The notice stated that Glaski was in default under his deed of trust and estimated the amount owed at $734,115.10.

The notice of sale indicated it was signed on March 10, 2009, by Deborah Brignac, as vice-president for *California Reconveyance.* Glaski alleges that Brignac's signature was forged to effectuate a fraudulent foreclosure and trustee's sale of his primary residence.

Glaski alleges that from March until May 2009, he was led to believe by his negotiations with Chase that a loan modification was in process with JP Morgan.

Despite these negotiations, a nonjudicial foreclosure sale of the Property was conducted on May 27, 2009. Bank of America, as successor trustee for the WaMu Securitized Trust and beneficiary under the Glaski deed of trust, was the highest bidder at the sale.

1087*1087 On June 15, 2009, another "ASSIGNMENT OF DEED OF TRUST" was recorded with the Fresno County Recorder. This assignment, like the assignment recorded in December 2008, identified JP Morgan as the assigning party. The entity receiving all beneficial interest under the Glaski deed of trust was identified as Bank of America, "as successor by merger to `LaSalle Bank NA as trustee for WaMu [Securitized Trust]...."'[9] The assignment of deed of trust indicates it was signed by Brignac, as *vice-president for JP Morgan.* Glaski alleges that Brignac's signature was forged.

The very next document filed by the Fresno County Recorder on June 15, 2009, was a "TRUSTEE'S DEED UPON SALE." (Boldface omitted.) The trustee's deed upon sale stated that California Reconveyance, as the duly appointed trustee under the Glaski deed of trust, granted and conveyed to Bank of America, as successor by merger to LaSalle Bank as trustee for the WaMu Securitized Trust, all of its right, title and interest to the Property. The trustee's deed upon sale stated that the amount of the unpaid debt and costs was $738,238.04 and that the grantee, paid $339,150 at the trustee's sale, either in lawful money or by credit bid.

PROCEEDINGS

In October 2009, Glaski filed his original complaint. In August 2011, Glaski filed the SAC, which alleged the following numbered causes of action:

(1) Fraud against JPMorgan and California Reconveyance for the alleged forged signatures of Deborah Brignac as vice-president for California Reconveyance and then as vice-president of JPMorgan;

(2) Fraud against all defendants for their failure to timely and properly transfer the Glaski loan to the WaMu Securitized Trust and their representations to the contrary;

(3) Quiet title against Bank of America, Chase, and California Reconveyance based on the broken chain of title caused by the defective transfer of the loan to the WaMu Securitized Trust;

(4) Wrongful foreclosure against all defendants, based on the forged signatures of Deborah Brignac and the failure to timely and properly transfer the Glaski loan to the WaMu Securitized Trust;

(5) Declaratory relief against all defendants, based on the above acts by defendants;

1088*1088 (8) Cancellation of various foreclosure documents against all defendants, based on the above acts by the defendants; and

(9) Unfair practices under Business and Professions Code section 17200 et seq. against all defendants.

Among other things, Glaski raised questions regarding the chain of ownership, by contending that defendants were not the lenders or beneficiaries under his deed of trust and, therefore, did not have the authority to foreclose.

In September 2011, defendants filed a demurrer that challenged each cause of action in the SAC on the grounds that it failed to state facts sufficient to constitute a claim for relief. With respect to the wrongful foreclosure cause of action, defendants argued that Glaski failed to allege (1) any procedural irregularity that would justify setting aside the presumptively valid trustee's sale and (2) that he could tender the amount owed if the trustee's sale were set aside.

To support their demurrer to the SAC, defendants filed a request for judicial notice concerning (1) order No. 2008-36 of the Office of Thrift Supervision, dated September 25, 2008, appointing the FDIC as receiver of Washington Mutual Bank and (2) the Purchase and Assumption Agreement Whole Bank between the FDIC and JP Morgan dated as of September 25, 2008, concerning the assets, deposits and liabilities of Washington Mutual Bank.[10]

Glaski opposed the demurrer, arguing that breaks in the chain of ownership of his deed of trust were sufficiently alleged. He asserted that Brignac's signature was forged and the assignment bearing that forgery was void. His opposition also provided a more detailed explanation of his argument that his deed of trust had not been effectively transferred to the WaMu Securitized Trust that held the pool of mortgage loans. Thus, in Glaski's view, Bank of America's claim as the successor trustee is flawed because the trust never held his loan.

On November 15, 2011, the trial court heard argument from counsel regarding the demurrer. Counsel for Glaski argued, among other things, that the possible ratification of

the allegedly forged signatures of Brignac presented an issue of fact that could not be resolved at the pleading stage.

Later that day, the court filed a minute order adopting its tentative ruling. As background for the issues presented in this appeal, we will describe the 1089*1089 trial court's ruling on Glaski's two fraud causes of action and his wrongful foreclosure cause of action.

The ruling stated that the first cause of action for fraud was based on an allegation that defendants misrepresented material information by causing a forged signature to be placed on the June 2009 assignment of deed of trust. The ruling stated that if the signature of Brignac was forged, California Reconveyance "ratified the signature by treating it as valid." As an additional rationale, the ruling cited *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 [121 Cal.Rptr.3d 819] (*Gomes*) for the proposition that the exhaustive nature of California's nonjudicial foreclosure scheme prohibited the introduction of additional requirements challenging the authority of the lender's nominee to initiate nonjudicial foreclosure.

As to the second cause of action for fraud, the ruling noted the allegation that the Glaski deed of trust was transferred to the WaMu Securitized Trust after the trust's closing date and summarized the claim as asserting that the Glaski deed of trust had been improperly transferred and, therefore, the assignment was void *ab initio.* The ruling rejected this claim, stating: "[T]o reiterate, *Gomes v. Countrywide,* supra holds that there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary, or any of their authorized agents to initiate the foreclosure process citing Civil Code § 2924, subd. (a)(1)."

The ruling stated that the fourth cause of action for wrongful foreclosure was "based upon the invalidity of the foreclosure sale conducted on May 27, 2009 due to the `forged' signature of Deborah Brignac and the failure of Defendants to `provide a chain of title of the note and the mortgage.'" The ruling stated that, as explained earlier, "these contentions are meritless" and sustained the general demurrer to the wrongful foreclosure claim without leave to amend.

Subsequently, a judgment of dismissal was entered and Glaski filed a notice of appeal.

DISCUSSION

I. *Standard of Review*

The trial court sustained the demurrer to the SAC on the ground that it did "not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) The standard of review applicable to such an order is well settled. "[W]e examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory...." 1090*1090 (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].)

When conducting this de novo review, "[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 [62 Cal.Rptr.3d 614, 161 P.3d 1168].) Our consideration of the facts alleged includes "those evidentiary facts found in recitals of exhibits attached to a complaint." (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 375 [121 Cal.Rptr.2d 234].) "We also consider matters which may be judicially noticed." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241]; see Code Civ. Proc., § 430.30, subd. (a) [use of judicial notice with demurrer].) Courts can take judicial notice of the existence, content and authenticity of public records and other specified documents, but do not take judicial notice of the truth of the factual matters asserted in those documents. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [31 Cal.Rptr.2d 358, 875 P.2d 73], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1262 [63 Cal.Rptr.3d 418, 163 P.3d 106].)

We note "in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue" as "[t]hat is always the ultimate question to be determined by the evidence upon a trial of the questions of fact." (*Colm v. Francis* (1916) 30 Cal.App. 742, 752 [159 P. 237].)

II. *Fraud*

A. *Rules for Pleading Fraud*

(1) The elements of a fraud cause of action are (1) misrepresentation, (2) knowledge of the falsity or scienter, (3) intent to defraud — that is, induce reliance, (4) justifiable reliance, and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 [49 Cal.Rptr.2d 377, 909 P.2d 981].) (2) These elements may not be pleaded in a general or conclusory

fashion. (*Id.* at p. 645.) Fraud must be pled specifically — that is, a plaintiff must plead *facts* that show with particularity the elements of the cause of action. (*Ibid.*)

In their demurrer, defendants contended facts establishing detrimental reliance were not alleged.

1091*1091 B. *First Cause of Action for Fraud, Lack of Specific Allegations of Reliance*

Glaski's first cause of action, which alleges a fraud implemented through forged documents, alleges that defendants' act "caused Plaintiff to rely on the recorded documents and ultimately lose the property which served as his primary residence, and caused Plaintiff further damage, proof of which will be made at trial."

This allegation is a general allegation of reliance and damage. It does not identify the particular acts Glaski took because of the alleged forgeries. Similarly, it does not identify any acts that Glaski did not take because of his reliance on the alleged forgeries. Therefore, we conclude that Glaski's conclusory allegation of reliance is insufficient under the rules of law that require fraud to be pled specifically. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 645.)

The next question is whether the trial court abused its discretion in sustaining the demurrer to the first fraud cause of action without leave to amend.

In March 2011, the trial court granted Glaski leave to amend when ruling on defendants' motion for judgment on the pleadings. The court indicated that Glaski's complaint had jumbled together many different statutes and theories of liability and directed Glaski to avoid "chain letter" allegations in his amended pleading.

Glaski's first amended complaint set forth two fraud causes of action that are similar to those included in the SAC.

Defendants demurred to the first amended complaint. The trial court's minute order states: "Plaintiff is advised for the last time to plead each cause of action such that only the essential elements for the claim are set forth without reincorporation of lengthy `general allegations'. In other words, the `facts' to be pleaded are those upon which liability depends (i.e., `the facts constituting the cause of action')."

After Glaski filed his SAC, defendants filed a demurrer. Glaski then filed an opposition that asserted he had properly alleged detrimental reliance. He did not argue he could amend to allege specifically the action he took or did not take because of his reliance on the alleged forgeries.

Accordingly, Glaski failed to carry his burden of demonstrating he could allege with the requisite specificity the elements of justifiable reliance and 1092*1092 damages resulting from that reliance. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58] [the burden of articulating how a defective pleading could be cured is squarely on the plaintiff].) Therefore, we conclude that the trial court did not abuse its discretion when it denied leave to amend as to the SAC's first cause of action for fraud.

C. *Second Fraud Cause of Action, Lack of Specific Allegations of Reliance*

Glaski's second cause of action for fraud alleged that WaMu failed to transfer his note and deed of trust into the WaMu Securitized Trust back in 2005. Glaski further alleged, in essence, that defendants attempted to rectify WaMu's failure by engaging in a fraudulent scheme to assign his note and deed of trust into the WaMu Securitized Trust. The scheme was implemented in 2008 and 2009 and its purpose was to enable defendants to fraudulently foreclose against the Property.

The second cause of action for fraud attempts to allege detrimental reliance in the following sentence: "Defendants, and each of them, also knew that the act of recording the Assignment of Deed of trust without the authorization to do so would cause Plaintiff to rely upon Defendants' actions by attempting to negotiate a loan modification with representatives of Chase Home Finance, LLC, agents of JP MORGAN." The assignment mentioned in this allegation is the assignment of deed of trust recorded in June 2009 — no other assignment of deed of trust is referred to in the second cause of action.

The allegation of reliance does not withstand scrutiny. The act of recording the allegedly fraudulent assignment occurred in June 2009, after the trustee's sale of the Property had been conducted. If Glaski was induced to negotiate a loan modification at that time, it is unclear how negotiations occurring after the May 2009 trustee's sale could have diverted him from stopping the trustee's sale. Thus, Glaski's allegation of reliance is not connected to any detriment or damage.

Because Glaski has not demonstrated how this defect in his fraud allegations could be cured by amendment, we conclude that the trial court did not abuse its discretion in denying leave to amend the second cause of action in the SAC.

III. *Wrongful Foreclosure by Nonholder of the Deed of Trust*

A. *Glaski's Theory of Wrongful Foreclosure*

Glaski's theory that the foreclosure was wrongful is based on (1) the position that paragraph 22 of the Glaski deed of trust authorizes only the 1093*1093 lender-beneficiary (or its assignee) to (a) accelerate the loan after a default and (b) elect to cause the Property to be sold and (2) the allegation that a nonholder of the deed of trust, rather than the true beneficiary, instructed California Reconveyance to initiate the foreclosure.[11]

In particular, Glaski alleges that (1) the corpus of the WaMu Securitized Trust was a pool of residential mortgage notes purportedly secured by liens on residential real estate; (2) section 2.05 of "the Pooling and Servicing Agreement" required that all mortgage files transferred to the WaMu Securitized Trust be delivered to the trustee or initial custodian of the WaMu Securitized Trust before the closing date of the trust (which was allegedly set for Dec. 21, 2005, or 90 days thereafter); (3) the trustee or initial custodian was required to identify all such records as being held by or on behalf of the WaMu Securitized Trust; (4) Glaski's note and loan were not transferred to the WaMu Securitized Trust prior to its closing date; (5) the assignment of the Glaski deed of trust did not occur by the closing date in December 2005; (6) the transfer to the trust attempted by the assignment of deed of trust recorded on June 15, 2009, occurred long after the trust was closed; and (7) the attempted assignment was ineffective as the WaMu Securitized Trust could not have accepted the Glaski deed of trust after the closing date because of the pooling and servicing agreement and the statutory requirements applicable to a real estate mortgage investment conduit (REMIC) trust.[12]

B. *Wrongful Foreclosure by a Nonholder of the Deed of Trust*

(3) The theory that a foreclosure was wrongful because it was initiated by a nonholder of the deed of trust has also been phrased as (1) the foreclosing party lacking standing to foreclose or (2) the chain of title relied upon by the foreclosing party containing breaks or defects. (See *Scott v. JPMorgan Chase Bank, N.A.*(2013) 214 Cal.App.4th 743, 764 [154

Cal.Rptr.3d 394]; *Herrera v. Deutsche Bank National Trust Co., supra,* 196 Cal.App.4th 1366 [Deutsche Bank not entitled to summary judgment on wrongful foreclosure claim 1094*1094 because it failed to show a chain of ownership that would establish it was the true beneficiary under the deed of trust]; *Guerrero v. Greenpoint Mortgage Funding, Inc.* (9th Cir. 2010) 403 Fed.Appx. 154, 156 [rejecting a wrongful foreclosure claim because, among other things, plaintiffs "have not pleaded any facts to rebut the unbroken chain of title"].)

In *Barrionuevo v. Chase Bank, N.A.* (N.D.Cal. 2012) 885 F.Supp.2d 964, the district court stated: "Several courts have recognized the existence of a valid cause of action for wrongful foreclosure where a party alleged not to be the true beneficiary instructs the trustee to file a Notice of Default and initiate nonjudicial foreclosure." (*Id.*at p. 973.) We agree with this statement of law, but believe that properly alleging a cause of action under this theory requires more than simply stating that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, a plaintiff asserting this theory must allege facts that show the defendant who invoked the power of sale was not the true beneficiary. (See *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1506 [141 Cal.Rptr.3d 326] [plaintiff failed to plead specific facts demonstrating the transfer of the note and deed of trust were invalid].)

C. *Borrower's Standing to Raise a Defect in an Assignment*

(4) One basis for claiming that a foreclosing party did not hold the deed of trust is that the assignment relied upon by that party was ineffective. When a borrower asserts an assignment was ineffective, a question often arises about the borrower's standing to challenge the assignment of the loan (note and deed of trust) — an assignment to which the borrower is not a party. (E.g., *Conlin v. Mortgage Electronic Registration Systems, Inc.* (6th Cir. 2013) 714 F.3d 355, 361 [third party may only challenge an assignment if that challenge would render the assignment absolutely invalid or ineffective, or void]; *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291 [under Mass. law, mortgagor has standing to challenge a mortgage assignment as invalid, ineffective or void]; *Gilbert v. Chase Home Finance, LLC* (E.D.Cal., May 28, 2013, No. 1:13-CV-265 AWI SKO) 2013 WL 2318890.)[13]

California's version of the principle concerning a third party's ability to challenge an assignment has been stated in a secondary authority as follows: "Where an assignment is merely voidable at the election of the assignor, third 1095*1095 parties, and particularly the

obligor, cannot ... successfully challenge the validity or effectiveness of the transfer." (7 Cal.Jur.3d (2012) Assignments, § 43, p. 70.)

This statement implies that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment. (See*Reinagel v. Deutsche Bank National Trust Co.* (5th Cir., July 11, 2013, No. 12-50569) ___ F.3d ___ [2013 WL 3480207, p. *3] [following majority rule that an obligor may raise any ground that renders the assignment void, rather than merely voidable].) We adopt this view of the law and turn to the question whether Glaski's allegations have presented a theory under which the challenged assignments are void, not merely voidable.

We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position "paint with too broad a brush." (*Culhane v. Aurora Loan Services of Nebraska, supra,* 708 F.3d at p. 290.) Instead, courts should proceed to the question whether the assignment was void.

D. *Voidness of a Postclosing Date Transfers to a Securitized Trust*

Here, the SAC includes a broad allegation that the WaMu Securitized Trust "did not have standing to foreclosure on the ... Property, as Defendants cannot provide the entire chain of title of the note and the [deed of trust]."[14]

More specifically, the SAC identifies two possible chains of title under which Bank of America, as trustee for the WaMu Securitized Trust, could claim to be the holder of the Glaski deed of trust and alleges that each possible chain of title suffers from the same defect — a transfer that occurred after the closing date of the trust.

First, Glaski addresses the possibility that (1) Bank of America's chain of title is based on its status as successor trustee for the WaMu Securitized Trust and (2) the Glaski deed of trust became part of the WaMu Securitized Trust's property when the securitized trust was created in 2005. The SAC alleges that WaMu did not transfer Glaski's note and deed of trust into the WaMu Securitized Trust prior to the closing date established by the pooling and 1096*1096 servicing agreement. If WaMu's attempted transfer was void, then Bank of America could not claim to be the holder of the Glaski deed of trust simply by virtue of being the successor trustee of the WaMu Securitized Trust.

Second, Glaski addresses the possibility that Bank of America acquired Glaski's deed of trust from JP Morgan, which may have acquired it from the FDIC. Glaski contends this alternate chain of title also is defective because JP Morgan's attempt to transfer the Glaski deed of trust to Bank of America, as trustee for the WaMu Securitized Trust, occurred after the trust's closing date. Glaski specifically alleges JP Morgan's attempted assignment of the deed of trust to the WaMu Securitized Trust in June 2009 occurred long after the WaMu Securitized Trust closed (i.e., 90 days after Dec. 21, 2005).

Based on these allegations, we will address whether a postclosing date transfer into a securitized trust is the type of defect that would render the transfer void. Other allegations relevant to this inquiry are that the WaMu Securitized Trust (1) was formed in 2005 under New York law and (2) was subject to the requirements imposed on REMIC trusts (entities that do not pay federal income tax) by the Internal Revenue Code.

The allegation that the WaMu Securitized Trust was formed under New York law supports the conclusion that New York law governs the operation of the trust. McKinney's Consolidated Laws of New York Annotated: Estates, Powers and Trusts Law section 7-2.4 provides: "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."[15]

Because the WaMu Securitized Trust was created by the pooling and servicing agreement and that agreement establishes a closing date after which the trust may no longer accept loans, this statutory provision provides a legal basis for concluding that the trustee's attempt to accept a loan after the closing date would be void as an act in contravention of the trust document.

We are aware that some courts have considered the role of New York law and rejected the postclosing date theory on the grounds that the New York statute is not interpreted literally, but treats acts in contravention of the trust instrument as merely*voidable.* (*Calderon v. Bank of America, N.A.* (W.D.Tex., Apr. 23, 2013, No. SA:12-CV-00121-DAE) ___ F.Supp.2d ___ [2013 WL 1741951, p. *12] [transfer of plaintiffs' note, if it violated a pooling and servicing agreement, would merely be voidable and therefore plaintiffs do not 1097*1097 have standing to challenge it]; *Bank of America National Association v. Bassman FBT, L.L.C.* (2012) 2012 ILApp(2d) 110729 [366 Ill.Dec. 936, 981 N.E.2d 1, 8] [following cases that treat ultra vires acts as merely voidable].)

(5) Despite the foregoing cases, we will join those courts that have read the New York statute literally. We recognize that a literal reading and application of the statute may not

always be appropriate because, in some contexts, a literal reading might defeat the statutory purpose by harming, rather than protecting, the beneficiaries of the trust. In this case, however, we believe applying the statute to void the attempted transfer is justified because it protects the beneficiaries of the WaMu Securitized Trust from the potential adverse tax consequence of the trust losing its status as a REMIC trust under the Internal Revenue Code. (6) Because the literal interpretation furthers the statutory purpose, we join the position stated by a New York court approximately two months ago: "Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL § 7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void." (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A) [2013 WL 1831799, p. *8]; see Levitin & Twomey,*Mortgage Servicing, supra,* 28 Yale J. on Reg. at p. 14, fn. 35 [under N.Y. law, any transfer to the trust in contravention of the trust documents is void].) Relying on*Erobobo,* a bankruptcy court recently concluded "that under New York law, assignment of the Saldivars' Note after the start up day is void *ab initio.* As such, none of the Saldivars' claims will be dismissed for lack of standing." (*In re Saldivar*(Bankr. S.D.Tex., Jun. 5, 2013, No. 11-10689) 2013 WL 2452699, p. *4.)

We conclude that Glaski's factual allegations regarding postclosing date attempts to transfer his deed of trust into the WaMu Securitized Trust are sufficient to state a basis for concluding the attempted transfers were void. As a result, Glaski has a stated cognizable claim for wrongful foreclosure under the theory that the entity invoking the power of sale (i.e., Bank of America in its capacity as trustee for the WaMu Securitized Trust) was not the holder of the Glaski deed of trust.[16]

1098*1098 We are aware that some federal district courts sitting in California have rejected the postclosing date theory of invalidity on the grounds that the borrower does not have standing to challenge an assignment between two other parties. (*Aniel v. GMAC Mortgage, LLC* (N.D.Cal., Nov. 2, 2012, No. C 12-04201 SBA) 2012 WL 5389706 [joining courts that held borrowers lack standing to assert the loan transfer occurred outside the temporal bounds prescribed by the pooling and servicing agreement]; *Almutarreb v. Bank of New York Trust Co., N.A.* (N.D.Cal., Sept. 24, 2012, No. C 12-3061 EMC) 2012 WL 4371410.) These cases are not persuasive because they do not address the principle that a borrower may challenge an assignment that is void and they do not apply New York trust law to the operation of the securitized trusts in question.

E. *Application of* Gomes

The next question we address is whether Glaski's wrongful foreclosure claim is precluded by the principles set forth in *Gomes, supra,* 192 Cal.App.4th 1149, a case relied upon by the trial court in sustaining the demurrer. *Gomes* was a preforeclosure action brought by a borrower against the lender, trustee under a deed and trust, and Mortgage Electronic Registration Systems, Inc. (MERS), a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans in the secondary mortgage market. (*Id.* at p. 1151.) The subject trust deed identified MERS as a nominee for the lender and that MERS is the beneficiary under the trust deed. After initiation of a nonjudicial forclosure, borrower sued for wrongful initiation of foreclosure, alleging that the current owner of the note did not authorize MERS, the nominee, to proceed with the foreclosure. The appellate court held that California's nonjudicial foreclosure system, outlined in Civil Code sections 2924 through 2924k, is a "`comprehensive framework for the regulation of a nonjudicial foreclosure sale"' that did not allow for a challenge to the authority of the person initiating the foreclosure. (*Gomes, supra,* at p. 1154.)

In *Naranjo v. SBMC Mortgage* (S.D.Cal., July 24, 2012, No. 11-CV-2229-L(WVG)) 2012 WL 3030370 (*Naranjo*), the district court addressed the scope of *Gomes,*stating: "In *Gomes,* the California Court of Appeal held that a plaintiff does not have a right to bring an action to determine the nominee's authorization to proceed with a nonjudicial foreclosure on behalf of a noteholder. [Citation.] The nominee in *Gomes*was MERS. 1099*1099 [Citation.] Here, Plaintiff is not seeking such a determination. The role of the nominee is not central to this action as it was in *Gomes.* Rather, Plaintiff alleges that the transfer of rights to the WAMU Trust is improper, thus Defendants consequently lack the legal right to either collect on the debt or enforce the underlying security interest." (*Naranjo, supra,* 2012 WL 3030370 at p. *3.)

Thus, the court in *Naranjo* did not interpret *Gomes* as barring a claim that was essentially the same as the postclosing-date claim Glaski is asserting in this case.

Furthermore, the limited nature of the holding in *Gomes* is demonstrated by the*Gomes* court's discussion of three federal cases relied upon by Mr. Gomes. The court stated that the federal cases were not on point because none recognized a cause of action requiring the noteholder's nominee to prove its authority to initiate a foreclosure proceeding. (*Gomes, supra,* 192 Cal.App.4th at p. 1155.) The *Gomes*court described one of the federal cases by stating that "the plaintiff alleged wrongful foreclosure on the ground that assignments of the deed of trust had been improperly backdated, and thus the wrong party had initiated the foreclosure process. [Citaiton.] No such infirmity is alleged here." (*Ibid.;* see *Lester v. J.P. Morgan Chase Bank*(N.D.Cal., Feb. 20, 2013, No. C 12-05491 LB)

F.Supp.2d [2013 WL 633333,p. *7] [concluding *Gomes* did not preclude the plaintiff from challenging JP Morgan's authority to foreclose].) The *Gomes* court also stated it was significant that in each of the three federal cases, "the plaintiff's complaint identified a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party." (*Gomes, supra,* at p. 1156.)

The instant case is distinguishable from *Gomes* on at least two grounds. First, like*Naranjo,* Glaski has alleged that the entity claiming to be the noteholder was not the true owner of the note. In contrast, the principle set forth in *Gomes* concerns the authority of the *noteholder's nominee,* MERS. Second, Glaski has alleged specific grounds for his theory that the foreclosure was not conducted at the direction of the correct party.

(7) In view of the limiting statements included in the *Gomes* opinion, we do not interpret it as barring claims that challenge a foreclosure based on specific allegations that an attempt to transfer the deed of trust was void. Our interpretation, which allows borrowers to pursue questions regarding the chain of ownership, is compatible with *Herrera v. Deutsche Bank National Trust Co., supra,* 196 Cal.App.4th 1366. In that case, the court concluded that triable issues of material fact existed regarding alleged breaks in the chain of ownership of the deed of trust in question. (*Id.* at p. 1378.) Those triable issues existed because Deutsche Bank's motion for summary judgment failed to establish it was the beneficiary under that deed of trust. (*Ibid.*)

1100*1100 F. *Tender*

Defendants contend that Glaski's claims for wrongful foreclosure, cancellation of instruments and quiet title are defective because Glaski failed to allege that he made a valid and viable tender of payment of the indebtedness. (See *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 [92 Cal.Rptr. 851] ["valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"].)

Glaski contends that he is not required to allege he tendered payment of the loan balance because (1) there are many exceptions to the tender rule, (2) defendants have offered no authority for the proposition that the absence of a tender bars *a claim for damages,*[17] and (3) the tender rule is a principle of equity and its application should not be decided against him at the pleading stage.

(8) Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property.

(*Lester v. J.P. Morgan Chase Bank, supra,* ___F.Supp.2d ___ [2013 WL 633333, p. *8]; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, § 10:212, p. 686.)

Accordingly, we cannot uphold the demurrer to the wrongful foreclosure claim based on the absence of an allegation that Glaski tendered the amount due under his loan. Thus, we need not address the other exceptions to the tender requirement. (See, e.g., *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 [64 Cal.Rptr.2d 74] [tender may not be required where it would be inequitable to do so].)

G. *Remedy of Setting Aside Trustee's Sale*

Defendants argue that the allegedly ineffective transfer to the WaMu Securitized Trust was a mistake that occurred outside the confines of the statutory nonjudicial foreclosure proceeding and, pursuant to *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 445 [129 Cal.Rptr.2d 436], that mistake does not provide a basis for invalidating the trustee's sale.

First, this argument does not negate the possibility that other types of relief, such as damages, are available to Glaski. (See generally, Annot., 1101*1101 Recognition of Action for Damages for Wrongful Foreclosure — Types of Action, *supra,* 82 A.L.R.6th 43.)

Second, "where a plaintiff alleges that the entity lacked authority to foreclose on the property, the foreclosure sale would be void. [Citation.]" (*Lester v. J.P. Morgan Chase Bank, supra,* ___F.Supp.2d ___ [2013 WL 633333, p. *8].)

Consequently, we conclude that *Nguyen v. Calhoun, supra,* 105 Cal.App.4th 428does not deprive Glaski of the opportunity to prove the foreclosure sale was void based on a lack of authority.

H. *Causes of Action Stated*

(9) Based on the foregoing, we conclude that Glaski's fourth cause of action has stated a claim for wrongful foreclosure. It follows that Glaski also has stated claims for quiet title (third cause of action), declaratory relief (fifth cause of action), cancellation of instruments (eighth cause of action), and unfair business practices under Business and Professions Code section 17200 (ninth cause of action). (See*Susilo v. Wells Fargo Bank, N.A.* (C.D.Cal. 2011) 796 F.Supp.2d 1177, 1196[plaintiff's wrongful foreclosure claims served as predicate violations for her UCL claim].)

IV. *Judicial Notice*

A. *Glaski's Request for Judicial Notice*

When Glaski filed his opening brief, he also filed a request for judicial notice of (1) a consent judgment entered on April 4, 2012, by the United States District Court of the District of Columbia in *United States v. Bank of America Corp.* (D.D.C. No. 12-CV-00361); (2) the settlement term sheet attached to the consent judgment; and (3) the federal and state release documents attached to the consent judgment as exhibits F and G.

Defendants opposed the request for judicial notice on the ground that the request violated the requirements in California Rules of Court, rule 8.252 because it was not filed with a separate proposed order, did not state why the matter to be noticed was relevant to the appeal, and did not state whether the matters were submitted to the trial court and, if so, whether that court took judicial notice of the matters.

1102*1102 The documents included in Glaski's request for judicial notice may provide background information and insight into "robo-signing"[18] and other problems that the lending industry has had with the procedures used to foreclose on defaulted mortgages. However, these documents do not directly affect whether the allegations in the SAC are sufficient to state a cause of action. Therefore, we deny Glaski's request for judicial notice.

B. *Defendants' Request for Judicial Notice of Assignment*

The "ASSIGNMENT OF DEED OF TRUST" recorded on December 9, 2008, that stated JP Morgan transferred and assigned all beneficial interest under the Glaski deed of trust to "LaSalle Bank NA as trustee for WaMu [Securitized Trust]" together with the note described in and secured by the Glaski deed of trust was not attached to the SAC as an exhibit. That document is part of the appellate record because the respondents' appendix includes a copy of defendants' request for judicial notice that was filed in June 2011 to support a motion for judgment on the pleadings.

In ruling on defendants' request for judicial notice, the trial court stated that it could only take judicial notice that certain documents in the request, including the assignment of deed of trust, had been recorded, but it could not take judicial notice of factual matters stated in those documents. This ruling is correct and unchallenged on appeal. Therefore, like the trial court, we will take judicial notice of the existence and recordation of the December 2008 assignment, but we "do not take notice of the truth of matters stated therein." (*Herrera v. Deutsche Bank National Trust Co., supra,* 196 Cal.App.4th at p. 1375.) As a result, the

assignment of deed of trust does not establish that JP Morgan was, in fact, the holder of the beneficial interest in the Glaski deed of trust that the assignment states was transferred to LaSalle Bank. Similarly, it does not establish that LaSalle Bank in fact became the owner or holder of that beneficial interest.

Because the document does not establish these facts for purposes of this demurrer, it does not cure either of the breaks in the two alternate chains of ownership challenged in the SAC. Therefore, the December 2008 assignment does not provide a basis for sustaining the demurrer.

DISPOSITION

The judgment of dismissal is reversed. The trial court is directed to vacate its order sustaining the general demurrer and to enter a new order overruling that demurrer as to the third, fourth, fifth, eighth and ninth causes of action.

1103*1103 Glaski's request for judicial notice filed on September 25, 2012, is denied.

Glaski shall recover his costs on appeal.

Wiseman, Acting P.J., and Kane, J., concurred.

[1] Mortgage-backed securities are created through a complex process known as "securitization." (See Levitin & Twomey, *Mortgage Servicing* (2011) 28 Yale J. on Reg. 1, 13 ["a mortgage securitization transaction is extremely complex..."].) In simplified terms, "securitization" is the process where (1) many loans are bundled together and transferred to a passive entity, such as a trust, and (2) the trust holds the loans and issues investment securities that are repaid from the mortgage payments made on the loans. (Oppenheim & Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-backed Securitization Process Is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense* (2012) 41 Stetson L.Rev. 745, 753-754 (hereinafter, *Deconstructing Securitized Trusts*).) Hence, the securities issued by the trust are "mortgage-backed." For purposes of this opinion, we will refer to such a trust as a "securitized trust."

[2] Civil Code section 2924, subdivision (a)(1) states that a "trustee, mortgagee, or beneficiary, or any of their authorized agents" may initiate the nonjudicial foreclosure process. This statute and the provision of the Glaski deed of trust are the basis for Glaski's position that the nonjudicial foreclosure in this case was *wrongful* — namely, that the power of sale in the Glaski deed of trust was invoked by an entity that was not the true beneficiary.

[3] Glaski's pleading does not allege that LaSalle Bank was the original trustee when the WaMu Securitized Trust was formed in late 2005, but filings with the Securities and Exchange Commission identify LaSalle Bank as the original trustee. We provide this information for background purposes only and it plays no role in our decision in this appeal.

[4] Another possibility, which was acknowledged by both sides at oral argument, is that the true holder of the note and deed of trust cannot be determined at this stage of the proceedings. This lack of certainty regarding who holds the deed of trust is not uncommon when a securitized trust is involved. (See Mortgage and Asset Backed Securities Litigation Handbook (2012) § 5:114 [often difficult for securitized trust to prove ownership by showing a chain of assignments of the loan from the originating lender].)

[5] It appears this company is no longer a separate entity. The certificate of interested entities filed with the respondents' brief refers to "JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC."

[6] One controversy presented by this appeal is whether this court should consider the December 9, 2008, assignment of deed of trust, which is not an exhibit to the SAC. Because the trial court took judicial notice of the existence and recordation of the assignment earlier in the litigation, we too will consider the assignment, but will not presume the matters stated therein are true. (See pt. IV.B., *post.*) For instance, we will not assume that JP Morgan actually held any interests that it could assign to LaSalle Bank. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [127 Cal.Rptr.3d 362] [taking judicial notice of a recorded assignment does not establish assignee's ownership of deed of trust].)

[7] Specifically, the notice stated that his August 2008 installment payment and all subsequent installment payments had not been made.

[8] The signature block at the end of the NOD indicated it was signed by Colleen Irby as assistant secretary for California Reconveyance. The first page of the notice stated that recording was requested by California Reconveyance. Affidavits of mailing attached to the SAC stated that the declarant mailed copies of the NOD to Glaski at his home address and to Bank of America, in care of Custom Recording Solutions, at an address in Santa Ana, California. The affidavits of mailing are the earliest documents in the appellate record indicating that Bank of America had any involvement with Glaski's loan.

[9] Bank of America took over LaSalle Bank by merger in 2007.

[10] The trial court did not explicitly rule on defendants' request for judicial notice of these documents, but referred to matters set forth in these documents in its ruling. Therefore, for purposes of this appeal, we will infer that the trial court granted the request.

[11] The claim that a foreclosure was conducted by or at the direction of a nonholder of mortgage rights often arises where the mortgage has been securitized. (Buchwalter, *Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage,* 52 Causes of Action Second (2012) 119, 149 [§ 11 addresses foreclosure by a nonholder of mortgage rights].)

[12] This allegation comports with the following view of pooling and servicing agreements and the federal tax code provisions applicable to REMIC trusts. "Once the bundled mortgages are given to a depositor, the [pooling and servicing agreement] and IRS tax code provisions require that the mortgages be transferred to the trust within a certain time frame, usually ninety dates from the date the trust is created. After such time, the trust closes and any subsequent transfers are invalid. The reason for this is purely economic for the trust. If the mortgages are properly transferred within the ninety-day open period, and then the trust properly closes, the trust is allowed to maintain REMIC tax status." (*Deconstructing Securitized Trusts, supra,* 41 Stetson L.Rev. at pp. 757-758.)

[13] "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." (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6 [107 Cal.Rptr.3d 373], citing Cal. Rules of Court, rule 8.1115.)

[14] Although this allegation and the remainder of the SAC do not explicitly identify the trustee of the WaMu Securitized Trust as the entity that invoked the power of sale, it is reasonable to interpret the allegation in this manner. Such an interpretation is consistent with the position taken by Glaski's attorney at the hearing on the demurrer, where she argued that the WaMu Securitized Trust did not obtain Glaski's loan and thus was precluded from proceeding with the foreclosure.

[15] The statutory purpose is "to protect trust beneficiaries from unauthorized actions by the trustee." (Turano, Practice Commentaries, McKinney's Consolidated Laws of New York Annotated (2002), Book 17B, Estates, Powers and Trusts Law, § 7-2.4, p. 356.)

[16] Because Glaski has stated a claim for relief in his wrongful foreclosure action, we need not address his alternate theory that the foreclosure was void because it was implemented by forged documents. (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.*(2003) 113 Cal.App.4th 597, 603 [6 Cal.Rptr.3d

574] [appellate inquiry ends and reversal is required once court determines a cause of action was stated under any legal theory].) We note, however, that California law provides that ratification generally is an affirmative defense and must be specially pleaded by the party asserting it. (See *Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 424 [203 P.2d 72] [ratification is an affirmative defense and the defendant ordinarily bears the burden of proof]; 49A Cal.Jur.3d (2010) Pleading, § 186, p. 319 [defenses that must be specially pleaded include waiver, estoppel and ratification].) Also, "[w]hether there has been ratification of a forged signature is ordinarily a question of fact." (*Common Wealth Ins. Systems, Inc. v. Kersten* (1974) 40 Cal.App.3d 1014, 1026 [115 Cal.Rptr. 653]; see *Brock v. Yale Mortgage Corp.* (2010) 287 Ga. 849 [700 S.E.2d 583, 588] [ratification may be expressed or implied from acts of principal and "is usually a fact question for the jury"; wife had forged husband's signature on quitclaim deed].)

[17] See generally, Annotation, Recognition of Action for Damages for Wrongful Foreclosure — Types of Action (2013) 82 A.L.R.6th 43 (claims that a foreclosure is "wrongful" can be tort-based, statute-based, and contract-based).

[18] Claims of misrepresentation or fraud related to robo-signing of foreclosure documents is addressed in Buchwalter, *Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage,*52 Causes of Action Second, *supra,* at pages 147 to 149.