DEPARTMENT ONE
JUDGE PAUL L. BEEMAN
707-207-7301
TENTATIVE RULINGS SCHEDULED FOR WEDNESDAY, OCTOBER 18, 2017

INVESTMENT RETRIEVERS, INC. V DIONNE L. SAMUEL, et. al.,
Case No. FCM148012

Motion to Vacate and Set Aside Dismissal and to Reinstate and Re-Set Order to Show Cause

TENTATIVE RULING

Granted.

SERGIO PRECIADO, et. al., v A & S FLOORS, INC., et. al.,
Case No. FCS047238

Defendant's Motion to be Relieved as Counsel

TENTATIVE RULING

Granted.

KALOCZI v. BANK OF AMERICA, N.A., et al.
Case No. FCS048491

Demurrer by BANK OF AMERICA, N.A. and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to Plaintiff's 1st Amended Complaint

TENTATIVE RULING

The assignment attacked here by Plaintiff as somehow invalid was recorded in 2009. The trustee's sale occurred on September 21, 2011, completing the foreclosure process. The trustee's deed upon sale was recorded on September 28, 2011, giving notice to the world of the sale, and end of Plaintiff's rights to ownership.

Plaintiff's complaint was not filed until March 6, 2017, almost 5 ½ years later.

The statute of limitations on a wrongful foreclosure cause of action is 3 years. Ancheta v. Mortgage Elec. Registration Sys. (N.D.Cal. March 29, 2017) 2017 U.S. Dist. LEXIS 47105, *5-*6.

The statute of limitations on an unfair business practices cause of action is 4 years. Business & Professions Code §17208.

The statute of limitations on a claim of unjust enrichment is either 3 years or 4 years, depending upon whether the claim is based upon fraud or mistake (3 years) or written contract (4 years). F.D.I.C. v. Dintino (2008) 167 Cal.App.4th 333, 347-348.

Even if Plaintiff could claim later accrual of the claims because of her "delayed discovery" of the claims, she would have to have alleged facts sufficient to plead around the running of the statutes of limitation upon completion of the trustee's sale. She would have to have pled not only when and how she (later) discovered the claims, but also facts sufficient to establish her inability to have made discovery earlier despite her reasonable diligence.

> In order to rely on the discovery rule for delayed accrual of a cause of action, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal. Rptr. 2d 645].) In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to "show diligence"; "conclusory allegations will not withstand demurrer." (*Ibid.*)
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> Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 808-809.

Plaintiff's 1st amended complaint contains only conclusory allegations that she was unaware of the problems with the (September 2011) foreclosure sale until she received her forensic auditor's report in January 2017 [¶43]. She does not allege facts sufficient to show why she did not know, around the time of September 2011 trustee's sale, that someone had done something wrong to cause her injury. She does not sufficiently allege circumstances under which she

reasonably would not have received at least constructive if not actual notice of default or notice of sale preceding the trustee's sale.

The applicable statutes of limitations therefore bar each of the causes of action.

As a separate and independent reason for sustaining the demurrer as to each cause of action alleged against each of the demurring defendants:
A borrower only has standing to challenge an assignment of secured note if the assignment is void rather than merely voidable. Yvanova v. New Century Mortgage Corp. (2016) 62 Cal.4th 919.

Plaintiff's 1st amended complaint failed to allege sufficient facts to support a claim that the assignment by MERS was void.

MERS acts as the agent of its members in effectuating transfers which are not necessarily recorded in the public records. Herrera v. Federal National Mortgage Assn. (2012) 205 Cal.App.4th 1495, 1503.

MERS charges its members for its services. Robinson v. Countrywide Home Loans, Inc. (2011) 199 Cal.App.4th 42, 46 n.4.

Still, this does not mean that MERS cannot, as an accommodation to a member, hold a note sold to a non-member, send that note to a non-member, or even record a formal assignment of the note or the trust deed beneficiary rights in the public records.

In fact, California cases have long recognized the ability of MERS, as a nominee beneficiary, to formally assign the beneficiary rights to a deed of trust in documents recorded in public records. Herrera v. Federal National Mortgage Assn. (2012) 205 Cal.App.4th 1495; Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal.App.4th 75, and Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256. [While the California Supreme Court in Yvanova ultimately disapproved all 3 of these cases, it did so only "to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void", without any suggestion that their holdings honoring those MERS transfers were improper. Yvanova, supra, 62 Cal.4th at 939.

Cases in California or applying California law decided after Yvanova have continued to recognize the ability of MERS to effectuate assignments of trust deed beneficiary rights, by recording assignments in the public records. Saterbak, supra, 245 Cal.App.4th 808 [MERS assignment to securitized investment trust]; Yhudai, supra, 1 Cal.App.5th 1252 [same]; Avila, supra, 2016 U.S.Dist.LEXIS 178229 [same].

It is a general practice for MERS to record assignments in the public records only when its member requests it, if it believes it might be necessary (or helpful) under state law, such as when the note holder/assignee chooses to record a substitution of trustee.

An amicus brief in Yvanova explained "the general practice in home loan securitization is to initially execute assignments of loans and mortgages or deeds of trust to the trustee in blank and not to record them; the mortgage or deed of trust is subsequently endorsed by the trustee and recorded if and when state law requires." Yvanova, supra, 62 Cal.4th at 942.

In fact, in most cases, MERS' recording of an assignment in the public records of the assignment of trust deed rights does not appear to be necessary under California law. Those rights follow the note, and no separate assignment is necessary.

> A promissory note is a negotiable instrument the lender may sell without notice to the borrower. The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment. Id. at 927 [citing Civil Code §2936; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291; and *U.S. v. Thornburg* (9th Cir. 1996) 82 F.3d 886, 892.)

The Yhudai case further confirmed that the actual transfer of trust deed beneficiary rights occurred with the note, not an assignment recorded years after the note transfer.

> As *Yvanova* stated, "[t]he deed of trust … is inseparable from the note it secures, and follows it even without a separate assignment." (*Yvanova*, *supra*, 62 Cal.4th at p. 927; see Civ. Code, § 2936 ["The assignment of a debt secured by mortgage carries with it the security"].) Thus, if the note was timely conveyed to the ISA Trust, as Yhudai alleged, so was the deed of trust. Although the conveyance of the note may have been separated in time from the execution, recording, and physical transfer of the instrument reflecting the assignment of the deed of trust, that gap does not alter the legal fact that the deed of trust and the right to foreclose was, as a matter of law, transferred along with the note. (See *U.S. v. Thornburg* (9th Cir. 1996) 82 F.3d 886, 892 [even if party holding the deed of trust instrument fails "to hand [it] over" to the note holder, the note holder has the right to foreclose].) Under California law, therefore, there is no basis for Yhudai's allegation that the deed of trust was assigned to Deutsche Bank after Deutsche Bank the note. Yhudai, supra, 1 Cal.App.5th at 1259, n.6.

In addition to the standing issue, California courts have imposed an additional requirement on homeowners challenging "voidable but not void" assignments: tender of the outstanding balance of the loan, or at least the amount in default (if the foreclosure sale has not yet occurred, to "cure" the default).

As one court explained:

> A full tender must be made to set aside a foreclosure sale, based on equitable principles. (*Abdallah v. United Savings Bank* (1996) 43

> Cal.App.4th 1101, 1109 [51 Cal. Rptr. 2d 286]; see *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439 [129 Cal. Rptr. 2d 436].) *Mabry* held tender was not required to delay a sale (*Mabry*, *supra*, 185 Cal.App.4th at pp. 225–226) but did not suggest a tender is not required postsale. Nor do plaintiffs propose any facts showing it would be inequitable to require a full tender. Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt. Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 526.

The California Supreme Court in Yvanova carefully avoided making any statement as to this tender requirement, limiting its opinion only to the standing to challenge void assignment issue. Thus, the tender requirement appears intact, subject only to the court's equitable powers.

Here, it would be anything but equitable to excuse Plaintiff from tendering the entire loan balance owed at time of trustee's sale, to the extent she is attempting to undo the foreclosure sale (with the property since sold to an apparent innocent third party purchaser).

Plaintiff's 2nd cause of action for unfair business practices alleged that BA and MERS (and U.S. BANK) engaged in a "fraudulent business practice" and conduct likely to deceive, by MERS' purported assignment to U.S. BANK of the deed of trust beneficiary rights.

To be actionable, a "fraudulent" business practice requires a showing that members of the public are likely to be deceived. Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 839. It also requires a pleading (and later showing) that the plaintiff actually relied on the deceptive act or practice, to cause the injury. In re Tobacco II Cases (2009) 46 Cal.4th 298, 326.

Plaintiff's 1st amended complaint here fails to allege how Plaintiff was injured here, such as by claiming that Plaintiff paid her mortgage payments to one party, only to later be told that those payments were made to the wrong party and caused her to default.

Unjust enrichment is not an independent cause of action, but rather a theory under which restitution can be ordered when it would be equitable to do so. Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793; Dinosaur Development, Inc. v. White (1989) 216 Cal.App.3d 1310, 1314.

Unjust enrichment is not proper when an enforceable, binding agreement exists defining the rights of the parties. Jones v. Wells Fargo Bank (2003) 112 Cal.App.4th 1527, 1541; California Medical Association, Inc. v. Aetna U.S. Healthcare of California, Inc. (2001) 94 Cal.App.4th 151, 172 ["as a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights"].

In our case, a loan note and deed of trust defines the rights of these parties.

Finally, since unjust enrichment is equitable in nature, Plaintiff would have to allege (and later prove) that she made payments during her occupancy and/or possession of the subject property far in excess of the fair rental value of that property during the entirety of the time she remained in occupancy and/or possession of that property.

With no showing made by Plaintiff as to how she could allege around the statutes of limitations, and/or allege a void rather than merely voidable assignment, and/or standing and tender, or allege the inapplicability of the note and deed of trust and that her payments during occupancy and/or possession far exceeded the fair rental value, the demurrer is sustained as to all causes of action, and the entirety of the 1st amended complaint, without leave to amend.