LAW OFFICES OF TIMOTHY L. MCCANDLESS
Timothy L. McCandless, Esq., SBN 147715
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624

Telephone: (925) 957-9797 / (949) 388-7779
Facsimile: (925) 957-9799
E-mail: legal@prodefenders.com
legalsync@gmail.com

Attorneys for Plaintiff(s): Regina Manantan

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

SOUTHERN BRANCH - HALL OF JUSTICE & RECORDS

REGINA MANANTAN,

Plaintiff(s),

VS.

WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX; QUALITY LOAN SERVICE CORPORATION; MOAB, INVESTMENT GROUP, LLC; and DOES 1 through 50, Inclusive,

Defendant(s).

Case No.: CIV535902

PLAINTIFF'S SUR-REPLY TO DEFENDANTS WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX'S REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER

Hearing's:
Date : July 29, 2016
Time : 9:00 a.m.
Dept. : Law & Motion

[JURY TRIAL DEMANDED]

Complaint Filed: October 20, 2015
1st Amended Filed: February 1, 2016
2nd Amended Filed: May 6, 2016
Trial Date: Not Assigned

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

I.

INTRODUCTION

This case presents the question of whether, in a wrongful foreclosure action, a homeowner may bring suit on the basis that the foreclosing party lacked the power to foreclose because it did not own the homeowner's debt. In this case, Plaintiff, REGINA MANANTAN, ("Plaintiff") alleges that the foreclosing party did not own Plaintiff's debt because the assignments of her debt was void. Thus, while Plaintiff owed a debt to someone, she did not owe it to the entity that foreclosed on her home. A homeowner is entitled to bring such a claim, just as she may protect herself against the wrongful invasion of her property interests in any other context.

Permitting a homeowner to assert a wrongful foreclosure claim on this basis is consistent with public policy, existing law, and recent legislative enactments designed to protect homeowners from abuses in the mortgage industry.

One of the basic tenets of foreclosure law is that the foreclosing party must have an ownership interest in the debt securing the home that is to be foreclosed upon. There is no reason to depart from this fundamental premise where foreclosure proceeds non-judicially. Whether the correct party is foreclosing is not a technicality. A homeowner experiences real harm when a party with no interest in the debt forecloses because the homeowner has lost her home to the wrong party and is deprived of the opportunity to explore options with the true debt owner. It is impossible to know whether that homeowner could have avoided foreclosure if the wrong party had not foreclosed; in other words, it matters who owns the debt.

Here in this instant action Defendants WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY, ("WELLS FARGO"), and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX, ("U.S. BANK), are stuck in their belief that (1) Defendants conducts were privileged and Plaintiff is not allowed to challenge the securitization process, and such have been rejected by California Court of Appeal; (2) Plaintiff has failed to make a valid and

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
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Facsimile (925) 957-9799

unambiguous offer of tender; and (3) Plaintiff's all COAs are fatally defective, that the provisions of HBOR cannot be applied retroactive.

Recognizing wrongful foreclosure actions to challenge foreclosures by the wrong party, such as those resulting from allegedly void debt assignments, is sound policy because it empowers homeowners to protect themselves against "fast and loose" foreclosure practices, incentivizes the mortgage industry to exercise due diligence in the foreclosure process, and helps avoid the confusion and unfairness that would result from more than one party having the power to foreclose. A contrary rule would lead to a legally untenable situation, i.e. that anyone can foreclose on a homeowner because someone has the right to foreclose.

II.

POINTS AND AUTHORITIES

A. Plaintiff Has Alleged A Void Assignment.

Defendants argue that Plaintiff cannot allege the June 2009 assignment of her deed of trust was void. The California Supreme Court held however, that a Plaintiff alleges a foreclosure is "void" when she charges the foreclosing entity had no power to foreclose because it has no right to enforce the loan. *Yvanova*, 62 Cal.4th at 935. "A borrower therefore 'has standing to challenge the assignment of a mortgage on her home to the extent such challenge is necessary to contest a foreclosing entity's 'status qua mortgage'- that is, as the current holder of the beneficial interest under the deed of trust." *Yvanova*, 62 Cal.4th at 935, quoting *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282, 291 (1rst Cir. 2013).

Another court, applying *Yvanova*, holds that "a mortgage assignment is void, not merely voidable, where the assignor 'had nothing to assign' or 'no interest to assign.'" *Sciarratta*, 2016 Cal. App. LEXIS 399, at * 16, quoting *Wilson v. HSBC Mortgage Services, Inc.*, 744 F.3d 1, 9 (1st Cir. 2014).

Plaintiff here alleges that the MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX, ("TRUST 2007-7AX") had no power to foreclose because it never received a valid assignment of her deed of trust. The June 2009 assignment was invalid as it came years after the closing date of TRUST 2007-7AX. Plaintiff here was not required to allege anything more under

the Supreme Court's ruling. *Yvanova,* 62 Cal.4th at 935.

Defendants continue argue that Plaintiff cannot allege a "void" assignment because under New York law the June 2009 assignment is merely voidable. In any case, New York law is not as clear as respondents insist. Defendants rely on a Second Circuit case, *Rajamin v. Deutsche Bank National Trust Co.*, 757 F.3d 79 (2nd Cir. 2014), for their contention that a late assignment of a loan into a securitized trust is merely voidable, and not void, under New York law. But, as the California Supreme Court held in *Yvanova,* the *Rajamin* opinion is irrelevant because it does not consider the issue that a late assignment of a deed of trust can be void:

> The *Rajamin* court did, in an earlier discussion, state generally that borrowers lack standing to challenge an assignment as violative of the securitized trust's PSA. . . but in that portion of its analysis did not distinguish between void and voidable assignments. In a later portion of its analysis, the court 'assum[ed] that 'standing exists for challenges that contend the assigning party never possessed legal title,' a defect the plaintiffs claimed made the assignments void. . . but concluded the plaintiffs had not properly alleged facts to support their voidness theory. *Yvanova*, 62 Cal.4th at 941, *quoting Rajamin v. Deutsche Bank National Trust Co.*, 757 F.3d at 90-91.

As the California Supreme Court interprets *Rajamin*, even New York law will allow a challenge to a void assignment so long as the plaintiff alleges "the assigning party never possessed legal title." *Yvanova,* 62 Cal.4th at 941.

Here Plaintiff alleges that the TRUST 2007-7AX had no right to foreclose because it claimed to own her loan under the void June 2009 assignment.

Section 10.02 of the sample Pooling and Servicing Agreement, ("PSA") ("Prohibited Transactions and Activities") provides that "[n]either the Depositor, … nor the Trustee shall … accept any contributions to any Real Estate Mortgage Investment Conduit, ("REMIC") after the Closing Date" in order to avoid a result adverse to the status of any Trust REMIC as a REMIC or to cause any Trust REMIC to be subject to a tax on "prohibited transactions" or "contributions" pursuant to the REMIC provisions. Mortgage notes have to be properly endorsed and "delivered" to the trustee by the Depositor showing a complete chain of endorsement from the originator as part of a REMIC qualified mortgage loan with the transfer of the note to the trust occurring before the closing date identified in the PSA. This process ensures that the mortgage loan is protected from the clawback powers of a bankruptcy trustee to avoid a preferential transfer, should the

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

originating lender file for bankruptcy.

A beneficiary of a REMIC trust cannot ratify an untimely, nonconforming, nonq ualifying transfer of a mortgage loan past the closing date of the trust without risking an adverse result to the REMIC's special tax status; the REMIC trustee is constricted to act in a manner that will not jeopardize the trust's REMIC status. The applicable IRS REMIC regulations are referenced in the definitions section (1.01) of the sample PSA. Under IRC §860G(d)(1), the beneficiaries would be exposed to a 100 percent tax on the value of the nonconforming, nonqualifying asset contributed to the trust by the ratification of ultra vires acts of the trustee.

There is no opportunity for the beneficiaries of a REMIC trust to ratify the untimely stuffing of mortgage loans that are already in default into the rest of the trust. Such an act by a REMIC trustee is not voidable, but is void ab initio. It is not possible for REMIC beneficiaries to ratify untimely nonqualifying asset transfers that would bring on an adverse tax consequence. *Glaski v. Bank of America*, (2013) 218 CA4th 1079, 1096, reported at 36 CEB RPLR 111 (Sept. 2013). The decision in *Springer v. U.S. Bank*, (SD NY, Dec. 23, 2015, No. 15–CV–1107(JGK) 2015 US Dist Lexis 171734, appeal filed (Feb. 1, 2016, No. 16–298) 2016 WL 9462083, is not applicable to a REMIC trust based on the clear restrictions in the PSA which strictly prohibit such ratification.

The applicable Treasury Regulations (Treas Reg §1.860G-2(f)(i)) define a defective obligation as a mortgage that is already in default, or when a default on the mortgage is reasonably foreseeable. The assignment or transfer of a residential mortgage note after the trust closing date when the loan is already in default is void ab initio under the PSA whether construed under NY Estates Powers & Trusts Law §7–2.4 or in accordance with the common law on trusts.

As the Supreme Court stressed, "the borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security." *Yvanova*, 62 Cal.4th at 938.

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26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
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26875 Calle Hermosa, Suite A
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B. The Express Legislative Intent Of Provisions Enacted Under The Homeowners Bill Of Rights Requires Judicial Scrutiny Of All "Unnecessary" / Wrongful Foreclosures That Continue After January 1, 2013.

The Homeowners Bill of Rights (HBOR) mandates judicial oversight of foreclosure standing and legislatively overrules *Gomes* by requiring the foreclosing entity to show current ownership of a beneficial interest in the note or current authorization from that entity. (*See Gomes v. Countrywide Home Loans, Inc.*, (2011) 192 Cal.App.4th 1149.)

According to the Attorney General's brief in *Yvanova v. New Century Mortgage,* (2014) 226 Cal.App.4th 495: HBOR enacted two reforms aimed at ensuring that only the proper party may foreclose on a Mortgage or Deed of Trust. Newly added Civil Code Section 2923.55 requires large lending institutions, prior to recording a Notice of Default, to provide a written notice to homeowners allowing them to request a copy of the original promissory note and any applicable assignments. (Section 2923.55(b).)

In addition, newly added Civil Code Section 2924(a)(6) provides that a foreclosing party must be the "holder of the beneficial interest" in the debt:

> No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.

Read together, these sections confirm the Legislature's intent to ensure that the party foreclosing on a homeowner is the "holder" of the debt and can demonstrate proof of ownership if called upon to do so.

While the HBOR reforms may have taken effect only recently, the provisions regarding debt ownership codify existing law. In California, it has always been the rule that only a debt owner or its agent has authority to foreclose,.... [Emphasis added] Significantly, this "new law" really just confirms that the same rule has always existed by legislatively overruling Gomes' improper interpretation of the prior Civil Code Section 2924.

Although *Gomes* recognized the previous Civil Code Section §2924(a)(1) only allowed a "trustee, mortgagee, or beneficiary, or any of their authorized agents" to foreclose, the Court improperly rejected arguments that standing was required by "necessary implication" under that earlier foreclosure statute.

Gomes avoided real analysis by conveniently deferring to the Legislature and holding "nowhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action," so such "argument[s] should be addressed in the first instance to the Legislature."

However, California lawmakers legislatively overruled that aspect of *Gomes* as quickly as possible. This suggests that proof of foreclosure standing has always, by necessary implication, been required by Civil Code Section 2924(a).

Moreover, although Civil Code Section 2924(a)(6) ostensibly applies only to foreclosures "commenced" or "initiated" after January 1, 2013, standard rules of statutory construction dictate that HBOR applies to all wrongful foreclosures continuing after that date.

HBOR's stated legislative purpose was to immediately stop wrongful foreclosure "where possible." The Legislature advised that: "(b)... Avoiding foreclosure, where possible, will help stabilize the state's housing market and avoid the substantial, corresponding negative effects of foreclosures on families, communities, and the state and local economy. (c) This act is necessary to provide stability to California's statewide and regional economies and housing market by facilitating opportunities for borrowers to pursue loss mitigation options."

By force of reason, avoiding wrongful foreclosure is eminently "possible." Indeed, it is plainly desirable in order to accomplish HBOR's stated purpose. The Legislature lamented that "the foreclosure crisis is not over; there remain more than two million 'underwater' mortgages in California." So immediate action was necessary.

The clear legislative purpose of HBOR was to stop the bleed right away and Civil Code Section 2924(a)(6) was enacted to further that goal by requiring proof of standing for all pending foreclosures. This means HBOR must apply to all pending foreclosures.

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
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Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

Retroactive application is not required. Courts must simply broaden the scope of the term "initiated" to include all foreclosures going forward right now.

This is needed to effectuate the legislative intent to immediately stop the bleed. In construing a statute, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute" (emphasis added). *Smith v. Superior Court*, (2006) 39 Cal.4th 77, 83. The plain meaning is not always controlling. "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." *Silver v. Brown*, (1966) 63 Cal.2d 841, 845; accord, *County of Sacramento v. Hickman*, (1967) 66 Cal.2d 841, 849, fn. 6.

The statute's various components should be read together to achieve the overriding purpose of the legislation. *Eisner v. Uveges*, (2004) 34 Cal.4th 915, 933. Courts must try to avoid a construction that renders any part of the statute meaningless or extraneous (*Woosley v. State of California*, (1992) 3 Cal.4th 758, 775- 776), unconstitutional (*Conservatorship of Wendland*, (2001) 26 Cal.4th 519, 548), or suggests that the Legislature "engaged in an idle act" (*Eisner Uveges*, supra, 34 Cal.4th at p. 935, quoting *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, (1997) 14 Cal.4th 627, 634).

So modern Civil Code Section 2924(a)(6) must be broadly construed to require proof of standing before allowing any foreclosures to continue after January 1, 2013.

Under Section 2924. 17, Defendants cannot escape liability merely because they recorded a Notice of Default before January 1, 2013. Any new foreclosure related notice issued or relied upon after HBOR took effect must also conform to HBOR requirements. Civil Code section 2924.17. Thus, any actions in 2015, such is in this case, as Defendants have recorded Notice of Trustee's Sale in 2015, must conform to section 2924.17.

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26875 Calle Hermosa, Suite A
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III.

CONCLUSION

The logic of Defendants' argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee's sale - and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. As a district court observed in rejecting the no-prejudice argument, "[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust." *Yvanova,* 62 Cal.4th at 935, quoting *Miller v. Homecomings Financial, LLC,* (S.D.Tex. 2012) 881 F.Supp.2d 825, 832.)

For these reasons, Plaintiff REGINA MANANTAN respectfully requests that this Court follow its tentative rulings made already in this case.

Respectfully submitted,

DATED: July 19, 2016

LAW OFFICES OF TIMOTHY L. MCCANDLESS

Timothy L. McCandless, Esq.
Attorney for Plaintiff(s): Regina B. Manantan

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

MANANTAN *vs.* WELLS FARGO BANK
SAN MATEO SUPERIOR COURT / Case No.: CIV535902

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is LAW OFFICES OF TIMOTHY L. MCCANDLESS, 26875 Calle Hermosa, Suite A, Capistrano Beach, California 92624.

On the date set forth below, I served the following document(s) described as:

♦ **PLAINTIFF'S SUR-REPLY TO DEFENDANTS WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX'S REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER**

On the interested parties in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

♦ **SEE ATTACHED SERVICE LIST**

☒ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above with fees for overnight delivery paid or provided for.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on July 19th, 2016, at Capistrano Beach, Orange County, California.

Timothy L. McCandless, Esq.

LAW OFFICES OF TIMOTHY L. MCCANDLESS
26875 Calle Hermosa, Suite A
Capistrano Beach, California 92624
Telephone (925) 957-9797 / (949) 388-7779
Facsimile (925) 957-9799

SERVICE LIST

- **Mark D. Lonergan, Esq.**
  Thomas N. Abbott, Esq.
  Brian S. Whittemore, Esq.
  SEVERSON & WERSON, A.P.C.
  One Embarcadero Center, Suite 2600
  San Francisco, California 94111

  ***Attorney(s) for Defendant(s)*: Wells Fargo Bank, N.A. D/B/A America's Servicing Company; and U.S. Bank National Association, as Trustee, Successor-In-Interest to Bank of America, National Association as Trustee, Successor by Merger to Lasalle Bank, National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-7AX**

- **Melissa Coutts, Esq.**
  Nancy Lee, Esq
  MCCARTHY & HOLTHUS, LLP
  1770 4th Avenue
  San Diego, California 92101

  ***Attorney(s) for Defendant(s)*: Quality Loan Service Corporation**

- **Joanna Kozubal, Esq.**
  375 Potrero Avenue, #5
  San Francisco, California 94103

  ***Attorney(s) for Defendant(s)*: MOAB Investment Group, LLC**