CASE NO. F064556

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS A. GLASKI,

Plaintiff and Appellant,

v.

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO "LA SALLE BANK N.A. AS TRUSTEE FOR WAMU MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-AR-17", CHASE HOME FINANCE LLC, JPMORGAN CHASE BANK, N.A., AND CALIFORNIA RECONVEYANCE COMPANY,

Defendants and Respondents.

Appeal from a Judgment of the
Superior Court for Fresno County
Hon. Alan M. Simpson, Judge
Case No. 09CECG03601

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

California Statutes

I. INTRODUCTION

When you examine the Respondents' Brief, you have to wonder if respondents read the Opening Brief, the Second Amended Complaint, or Appellant's Appendix. Their arguments rest on misstatements of what documents were before the trial court, misunderstandings of appellant's arguments, and misinterpretations of California law.

Respondents improperly rely on a document they did not present to the trail court when they demurred. That document does not rescue them. Respondents have failed to refute appellant's arguments that he can attack the power of a lender to foreclose, that he has alleged harm, and that the tender rule does not apply. Appellant Thomas A. Glaski ("Glaski") has pleaded valid causes of action in his Second Amended Complaint ("SAC") and he should be allowed to pursue his case.

II. ARGUMENT

A. Respondents' Statement of Facts is Inaccurate.

Respondents make much of a purported December 8, 2008 "Assignment of Deed of Trust," which allegedly assigned Glaski's loan to "LaSalle Bank N.A. as trustee for WaMu Mortgage Pass Through Certificates Services-AR17 Trust (the "Trust" or "the investment Trust"). (Respondents' Brief, at pages 3, 10, 13.) What respondents did not tell the Court is that they did not rely on this document when they demurred to Glaski's Second Amended Complaint (or "SAC"). Their Request for

Judicial Notice in Support of their demurrer to the SAC asked the trial court to take notice of only two documents—a letter from the Office of Thrift Supervision, and the Purchase and Assumption Agreement between the FDIC, as receiver for Washington Mutual, and J.P. Morgan Chase Bank. (2 AA 000301 to 000303). Respondents did not request that the trial court take judicial notice of the December 8, 2009 Assignment of Deed of Trust. (*Ibid.*) Respondents' demurrer to the SAC did not rely on the December 8, 2008 Assignment and did not mention the Assignment. (2 AA 000287 to 000000298.) The trial court did not rely on respondents' Request for Judicial Notice in ruling on the demurrer to the SAC. (2 AA 000410 to 000412,)

Respondents also misconstrue the SAC. Respondents argue that Glaski made what they call a "self-serving" allegation that Brignac's signature on the June March 20, 2009 Notice of Trustee's Sale and June 15, 2009 Assignment of Deed of Trust was forged. (Respondent's Brief, at page 8.) They call this allegation "conclusionary" and say the trial court did not need to accept it as true when ruling on the demurrer to the SAC. (Respondents' Brief, at pages 6, 8.)

Glaski did more than just allege the Brignac signature was forged. The SAC attached as exhibits several documents Brignac supposedly signed in other foreclosure cases. (See Exhibits 6-13 to the SAC, at 1 AA 000247 to 000276.) For example, exhibit 6 was a Notice of Trustee's Sale

for property owned by Jose and Anna Carrisales in Santa Barbara, California. (1 AA 000247 to 000248.) Brignac allegedly signed this document. (1 AA 000248.) Yet, her signature differed significantly from her signatures on the Glaski Notice of Trustee's Sale and the June 15, 2009 Assignment of Deed of Trust. (Compare 1 AA 000248 with 1 AA 000238 and 1 AA 000242.)

Exhibit 7 was a Notice of Trustee's Sale for property Ismael and Esperanza Vieyra owned in Santa Maria, California. (1 AA 000252 to 1 AA 000253.) Again, Brignac supposedly signed this document, but her signature did not match the signatures on the Glaski documents. (Compare 1 AA 000253 with 1 AA 000238 and 1 AA 000242.).

Glaski's SAC did more than allege that the Brignac signatures were forged. He provided examples of the forgery. Because he pleaded more than just a "conclusionary" allegation, the trial court was required to accept this charge as true when it ruled on the demurrer to the SAC. *Evans v. City of Berkeley,* 38 Cal.4th 1, 6 (2006). This Court must do the same in reviewing the trial court's ruling. *Ibid.*

B. Glaski Can Challenge Respondents' Power to Foreclose.

Respondents contend that *Gomes v. Countrywide Home Loan, Inc.,* 192 Cal.App.4th 1149 (2011), precludes Glaski from challenging their power to foreclose. (Respondents' Brief, at pages 7-9.) As Glaski points out in his opening brief, *Gomes* permits a plaintiff to attack a foreclosure if

he can identify "a *specific factual basis* for alleging the foreclosure was not initiated by the correct party." *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th at 1156 (italics added); Opening Brief, at pages 27-28. Glaski identified a "specific factual basis" because he alleged facts that showed that his loan had not been transferred to the Trust before the Notice of Default and Notice of Trustee's Sale were issued. (Opening Brief, at page 28; 1 AA 000196.)

According to Respondents, the idea that a homeowner can never challenge the power of a party to foreclosure rests on the preemptive effect of California's foreclosure statutes, Civil Code sections 2924 *et seq.* (Respondents' Brief, at pages 7-9.) A close reading of those statutes reveals no language expressly preempting other California statutes, like Civil Code sections 1708 and 1710, which prohibit fraud, or Penal Code section 470 (d), which bars forgery. California law rejects any attempt to say that one statute overrides another statute. *Cf. Murillo v. Fleetwood Enterprises,* 17 Cal.4th 985, 992 (1998). Courts must apply the fraud statutes, the forgery statutes, and the foreclosure statues together. *Ibid.*

If a plaintiff can show fraud or forgery, he should be able to challenge a foreclosure. Even the foreclosure statutes themselves require that a party ordering a foreclosure have the power to do so. Civil Code section 2924 (a) (1). A challenge to a foreclosing party's authority, when

based on a specific factual allegation, does not contradict the foreclosure statutes; it upholds them.

C. The December 2008 Assignment of Deed of Trust Does Not Help Respondents.

According to respondents, the alleged December 8, 2008 Assignment of Deed of Trust allegedly destroys Glaski's case. (Respondents' brief, at pages 10-13.) This Assignment purports to transfer Glaski's Deed of Trust from J.P. Morgan Chase Bank ("Chase") to the investment Trust. (*Ibid.*) That Trust, in turn, initiated the foreclosure. (*Ibid.*) Because the Deed of Trust was properly transferred, argue Respondents, the Trust had the power to foreclose. (*Ibid.*)

Respondents did not present this argument to the trial court. When they demurred to the SAC, they did not contend that the December 2008 Assignment transferred Glaski's Deed of Trust and the Trust therefore had the power to foreclose. (2 AA 000301 to 000303; 2 AA 000287 to 000000298). They did not even ask the trial court to take judicial notice of the December 2008 Assignment. (*Ibid.*) Now, they ask this Court, in effect, to judicially notice the Assignment and apply it to bar Glaski's SAC.

It is an old rule of appellate law that arguments not presented to the trial court cannot be raised on appeal. *Lucich v. City of Oakland,* 19 Cal.App.4th 494, 498 (1993); *Bardis v. Oates,* 119 Cal.App.4th 1, 13, fn. 6 (2004). A defendant cannot raise a defense on appeal that he did not assert

before the trial court. *Bardis v. Oates, supra*; *Curico v. Svanevik,* 155 Cal.App.3d 955, 960 (1984). It is unfair to the trial court and the opposing party to allow a change of theory on appeal. *Giraldo v. California Dept. of Corrections,* 168 Cal.App.4th 231, 251 (2008).

The December 8 Assignment is a new theory and, according to respondents, a complete defense. Yet, they did not argue it in their demurrer to the SAC and they did not request that the trial court take judicial notice of the Assignment. Because it is a new argument, it cannot be raised now and it should be ignored.

Further, the December 8 Assignment proves nothing. The SAC alleged that the investment Trust required that all loans be transferred to it by a "Closing Date." If the transfer occurred after the "Closing Date," it was invalid and the loan was not property of the Trust. (1 AA 000187.) The "Closing Date" was December 21, 2005. (1 AA 000188.) Even if the December 2008 Assignment attempted to transfer the Glaski loan, the transfer came too late and the Trust never held title to the loan. The trial court had to accept this allegation as true when it ruled on the demurrer. *Evans v. City of Berkeley,* 38 Cal.4th at 6. Because the Trust did not acquire title even under the December 2008 Assignment, the Trust never had the power to foreclose.

The December 2008 Assignment, as noted, purports to transfer Glaski's Deed of Trust to the investment trust. (RB 000078.) The June 15,

2009 Assignment, which came after the foreclosure on Glaski's home, purports to do the same thing—transfer the Deed to the investment Trust. (RB 000078; 1 AA 000238.) Why did this transfer need to be done twice? If the first transfer in December 2008 was proper, the investment Trust already had acquired the Glaski Deed of Trust. It did not need a second transfer in June 2009. The only thing that changed between December 2008 and June 2009 was the name of the trustee for the investment Trust—Bank of America instead of LaSalle Bank. (Compare RB 000078 with 1 AA 000238). The investment Trust remained the same. The fact that a second transfer became necessary in June 2009 suggested that Chase did not think the December 2008 transfer was valid and had to be redone.

In addition, Chase was the transferring party in both the December 2008 and June 2009 Assignments. If the December 2008 Assignment transferred the Glaski Deed of Trust to the investment Trust, Chase did not have the power to do the June 2009 transfer because it no longer had title. The fact that it did the 2009 transfer implies the December 2008 transfer was not effective and had to done over.

D. The Court Should Not Take Judicial Notice of the 2008 Assignment.

The December 2008 Assignment is not a proper subject for judicial notice. First, respondents did not ask the trial court to take judicial notice

of the Assignment and they have not filed a formal request for judicial notice with this Court.

Second, "' [t]aking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.' While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein." *Herrera v. Deutsche Bank National Trust Co.,* 196 Cal.App.4th 1366, 1375 (2011), *quoting Joslin v. H.A.S. Ins. Brokerage,* 184 Cal.App.3d 369, 374 (1986). "When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable." *StorMedia, Inc. v. Superior Court,* 20 Cal.4th 449, 457, fn. 9 (1999).

What respondents are asking this Court to do is take judicial notice of the truth of matters stated in the December 2008 Assignment—that Chase transferred Glaski's Deed of Trust to the investment Trust. Yet, the "truthfulness and proper interpretation" of this Assignment are disputable. The 2008 and 2009 Assignments, when read together, make no sense, as Glaski shows above.

Third, the December 2008 assignment assumes that Chase had title to the Glaski Deed of Trust, another disputable point. At least one court hearing a case against Chase found that the deeds of trust on Washington Mutual home loans had been transferred to an entity called "WaMu Asset Acceptance Corporation." *Mena v. J.P. Morgan Chase Bank,* 2012

U.S.Dist. LEXIS 128585, at *3 (N.D. Cal. Sept. 7, 2012.) The same thing may have happened here because, as the *Mena* court noted, such transfers were common with Washington Mutual loans.

The problem this possibility creates for respondents is that Chase could transfer Glaski's Deed of Trust in December 2008 only if it had title to the Deed. According to respondents, Chase acquired title under its "Purchase and Assumption Agreement" with the FDIC. (Respondents' Brief, at pages 7-10.) Even a generous reading of the "Purchase and Assumption Agreement" shows that Chase acquired only the assets of Washington Mutual Bank. (RB 000037 and 000045.) The Agreement does not mention "WaMu Asset Acceptance Corporation."

If the Glaski Deed of Trust was not the property of Washington Mutual Bank on September 25, 2008, when the FDIC and Chase signed the "Purchase and Assumption Agreement" (RB 000037), Chase did not acquire the Glaski loan under the Agreement. Glaski can make this allegation based on the *Mena* case and he asks leave to amend the SAC to do so.

Fourth, for this Court to find that the December 2008 Assignment defeats Glaski's claim, it must take judicial notice of the "Purchase and Assumption Agreement." Only this Agreement gave Chase title to all Washington Mutual assets, supposedly including Glaski's mortgage. Without title to the loan, Chase could not transfer it to the investment Trust,

as it purported to do with the December 2008 Assignment. Giving Chase title in December 20089 requires the Court to accept the truth of the statements made in the "Purchase and Assumption Agreement," which it is not allowed to do when considering a request for judicial notice. *StorMedia, Inc. v. Superior Court,* 20 Cal.4th at 457, fn. 9; *Herrera v. Deutsche Bank National Trust Co.,* 196 Cal.App.4th at 1375.

Fifth, the Purchase and Agreement is open to dispute. Although it purports to transfer all Washington Mutual assets to Chase in section 3.1, section 3.1 mentions several exceptions, which are found in sections 3.5, 3.6 and 4.8. (RB 000045.) We have no idea if those exceptions apply. A request for judicial notice is not the proper vehicle for handling that dispute. Resolution of that issue requires discovery and a trial on the merits.

E. Respondents Do Not Understand or Mischaracterize Glaski's Arguments.

Respondents fail to understand or mischaracterize many of Glaski's arguments. They contend that Glaski "does not allege that the documents at issue were not recorded or served in accordance with the applicable provisions of California Civil Code . . . or that the information contained in those recorded documents was not accurate." (Respondent's Brief, at page 9.) The point of the forgery charge is that the Notice of Trustee Sale and the June 2009 Assignment, key foreclosure documents, are false because

the Brignac signature is forged. (1 AA 000189 to 1 AA 000190.) The SAC alleges in the Second Cause of Action for Fraud that the Notice of Default and the Notice of Trustee's Sale are invalid because they falsely represent that the foreclosing entity has the power to foreclose. (1 AA 000190 to 1 AA 000192.)

The same allegations undermine respondents' attempts to invoke *Nguyen v. Calhoun,* 105 Cal.App.4th 428 (2003). *Nguyen,* they say, stands for the rule that a plaintiff cannot sue to undo a foreclosure when he alleges defects "outside" or "dehors the foreclosure." (Respondents' Brief, at page 15.) But, as shown above, Glaski attacks the foreclosure documents themselves, by alleging that the Brignac signatures on the Notice of Trustee's Sale and the June 2009 Assignment are forged and that the foreclosure documents are fraudulent because they falsely represent that respondents have the power to foreclose. (1 AA 000189 to 1 AA 000192.) Because these charges attack the foreclosure documents, they are not "outside" or "dehors the foreclosure."

Respondents' interpretation of *Nguyen* also does not accurately state California law. Numerous cases hold that homeowners can sue to prevent or undo a foreclosure when they rely on misrepresentations lenders make during the foreclosure process. *See, e.g., Garcia v. World Savings,* 183 Cal.App.4th 1031 (2010), *and Aceves v. U.S. Bank National Assoc.,* 192 Cal.App.4th 218 (2011). In *Garcia* and *Aceves*, the lenders or their

representatives made oral or written statements to homeowners that foreclosures would be postponed if the homeowners complied with certain lender requests. The misrepresentations came outside the foreclosure documents and, under respondents' interpretation of California law, were "dehors the foreclosure." Yet, the *Garcia* and *Aceves* courts allowed the cases to proceed. These two opinions, among others, stand for the principle that you can sue to undo a foreclosure even if you are relying on irregularities outside the foreclosure documents.

Respondents then mischaracterize Glaski's arguments on his cause of action for violation of the Unfair Competition Law (or "UCL"). They insist Glaski waived any right to appeal the dismissal of this claim because his opening brief did not "address the Trial Court's ruling as to the Ninth Cause of Action." (Respondents' Brief, at page 17.) Perhaps respondents did not read pages 40 and 41 of the Opening Brief. Glaski argued on those pages why he pleaded a claim for violation of the UCL and why the trial court erred in sustaining the demurrer to that cause of action.

The Opening Brief also refers the Court back to earlier arguments on why Glaski pleaded harm and reliance. (Opening Brief, at pages 40-41.) These arguments establish that Glaski was harmed by respondents' conduct and demonstrate he has standing to sue under the UCL. (Opening Brief, at pages 30-31, 40-41.)

Next, respondents say that Glaski's UCL cause of action does not plead "facts demonstrating that the practice violates an underlying law." (Respondents' Brief, at page 18.) The Opening Brief, however, pointed out how the SAC alleged violations of at least five California statutes—Civil Code sections 1572 (3), 1709, 1710, and 2924 (a) (1), and Penal Code section 470 (d). (Opening Brief, at page 40.)

Respondents argue that Glaski "does not allege . . . any . . . facts that would entitle him to relief that is actually recoverable under the UCL. (Respondents' Brief, at page 18.) Again, one must wonder if respondents have read the SAC. The SAC asks the trial court to issue several orders, including an order cancelling the trustee's sale of Glaski's home, vacating the foreclosure sale, and canceling the Notice of Default, the Assignment of Deed of Trust, and the Notice of Trustee's Sale. (1 AA 000203.) These orders, in effect, amount to an injunction, because they require respondents to take affirmative steps to undo the foreclosure sale. An injunction is one form of relief under the UCL. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003).

F. Glaski Pleaded Harm and Reliance.

Respondents devote a good portion of their brief to the argument that, even if they committed forgery and fraud, they did not harm Glaski. (Respondents' Brief, at pages 8-10.) The Opening Brief shows how Glaski was harmed. (Opening Brief, at pages 30-31 and 39-40.)

What respondents miss is that this, above all, is a fraudulent concealment case. The key question in a concealment case is what would the plaintiff have done had the defendants revealed the truth? What would Glaski have done had respondents disclosed the Brignac signatures were forged and that the investment Trust did not have title to Glaski's Deed of Trust? Glaski would have demanded that respondents restart the foreclosure process by issuing a new Notice of Default in the name of the correct beneficiary. Respondents would have had no choice but to agree. Restarting the foreclosure process would have given Glaski more time, time to pursue a loan modification or perhaps time to file for bankruptcy and keep his home. If nothing else, Glaski would have had a few more months to stay in his home. The loss of that opportunity is sufficient harm.

Respondents fall back on the argument that Glaski was in default and would have lost his home anyway. (Respondents' Brief, at pages 8-10.) But, not all homeowners in default lose their home. The purpose of mortgage relief programs and loan modifications is to help homeowners keep their homes. Glaski could have applied for those programs. Respondents' argument assumes a fact that has not been proven. A demurrer is not the place to resolve factual disputes or make factual assumptions.

G. Tender is Still Not Required.

Respondents repeat their demurrer argument that Glaski was required to tender his loan balance before he could sue. (Respondents' Brief, at pages 14-16.) Respondents' discussion of the tender rule is little more than a recitation of cases favoring tender. (*Ibid.*) They do not address the multiple exceptions to the tender rule and how those exceptions apply to Glaski. (*Ibid.*) Respondents apparently believe the tender rule has no exceptions. (*Ibid.*) Glaski's Opening Brief analyzes the exceptions to the rule in detail and explains why they excuse him from tendering. (Opening Brief, at pages 32-33.)

Glaski pleaded several causes of action for damages in his SAC, including fraud and wrongful foreclosure. (1 AA 000189 to 1 AA 000192, and 1 AA 000194 to 1 AA 000196.). Respondents do not explain why the tender rule bars a claim for damages and they cite no case that supports this proposition. (Respondents' Brief, at pages 14-16.)

What happens if respondents are correct that the tender rule has no exceptions and bars any claim for wrongful foreclosure, whether for equitable relief or damages? In reality, few plaintiffs can ever allege tender. Tender means in most cases that a plaintiff must raise several hundred thousand dollars before filing suit, as most mortgages involve six figure debts. If a plaintiff has that kind of money, he is not in foreclosure in the first place, as he can easily make his payments. The practical effect of

respondents' tender position is that they are entitled to immunity from any wrongs they commit in the foreclosure process. Because a plaintiff cannot tender, defendants can never be sued under any theory, equitable or legal. Lenders and servicers can commit fraud and forgery and be immune.

This result is a distortion of California law and cannot be true. The tender rule is a principle of equity and should not be applied when it is inequitable to do so. *Onofrio v. Rice,* 55 Cal.App.4th 413, 424 (1997). This Court should decline to enforce the tender rule when it amounts to a grant of immunity.

Ultimately, the tender rule comes from the equitable principle that a party that seeks equity must first do equity. *United States Cold Storage v. Great Western Savings & Loan Assoc.,* 165 Cal.App.3d 1214, 1224-1225. (1985). A defendant who has committed fraud and forgery hardly has done equity. The tender rule should not shield respondents when Glaski has charged them with fraud and forgery.

III. CONCLUSION

For these additional reasons, plaintiff and appellant THOMAS A. GLASKI respectfully requests that the judgment of the trial court be reversed.

Dated: January 17, 2013

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Dated: January 17, 2013

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