

12-560082

Suarez vs. Bank of
New York Mellon

1) Defendants Bank of America, The Bank of New York Mello (erroneously named as Bank of New York Mellon National Association, as Trustee for the Certificate holders of Cwalt, Inc. Alternative Loan Trust 2006-OA16, Mortgage Pass-through Certificates, Series 2006-OA16) Demurrer to the Plaintiff Pauline Suarez's First Amended Complaint

Overrule in part and sustain in part. Defendant's Demurrer to the First Amended Complaint is overruled, as to the First and Second Causes of Action. Defendant's Demurrer is sustained, without leave to amend, as to the Third Cause of Action.

Defendant's Request for Judicial Notice is granted.

First Cause of Action: Cancellation of Instrument:

Firstly, the Deed of Trust which is the subject of this action indicates that the "Lender" was Countrywide Home Loans and "MERS" "is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." (Exhibit "A" of the RJN).

Secondly, a review of the Assignment of Deed of Trust, reveals that the document was executed, only, by "Mortgage Electronic Registration Systems, Inc." (Exhibit "B" of the RJN).

Under similar circumstances, the Court in *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, stated the following:

...[T]he complaint alleges MERS lacked the authority to assign the note because it was merely a nominee of the lender and had no interest in the note. Contrary to plaintiff's claim, the lack of a possessory interest in the note did not necessarily prevent MERS from having the authority to assign the note. While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which *did* possess an assignable interest. A "nominee" is a person or entity designated to act for another in a limited role—in effect, an agent.

Id. at 270-271. Thus, pursuant to *Fontenot*, a nominee for a lender may properly assign a Deed of Trust, *when it does so on behalf of the lender.*

Additionally, the Court in *McNear v. Petroleum Export Corp.* (1929) 208 Cal. 162, in determining whether a contract

signed by "W.K. Thompson," who purported to be acting as agent for a Mr. Smith, of Petroleum Export Corp., was sufficient to satisfy *Civil Code §1624*, stated the following:

It must be concluded that the signature "W. K. Thompson" at the bottom of the telegram is not a signature by the party to be charged or by his agent sufficient to satisfy the requirements of the statute. Thompson did not purport to sign as the agent of the defendant, and even if he had done so there was no offer of proof that he had written authority so to do.

...

Here the telegram relied upon as binding the defendant is not signed by the defendant nor by anyone purporting to act for the defendant in a representative capacity.

...

It appears beyond cavil that it was signed at the usual place for signing by W. K. Thompson individually and not in any representative capacity whatever.

Id. at 166-167. Thus, *McNear* concluded that the subject contract was void, as Mr. Thompson signed the contract as an individual without the individual authority to bind Petroleum Export Corp. to the agreement.

Thus, the contract violated *Civil Code §1624*, as the agreement was not "subscribed by the party to be charged or by the party's agent."

Lastly, the Court in *Fisher v. Salmon* (1851) 1 Cal. 413, stated the following, on this issue:

The consideration of the note was a deed of conveyance of certain lots in the City of San Francisco, executed by the respondent in his own name, representing that he was the attorney and agent of certain heirs, and was executed under his hand and seal, and not in the name of the principals. It is not necessary to cite authorities to show that such a deed is a nullity as to the principals of the agent Fisher, and the most that could be made of it, would be a mere contract on his part to procure a conveyance, but even as a contract it is not binding in law upon the principals.

Id. at 414. Thus, the Court in *Fisher*, clearly concluded that a contract signed by an individual "in his own name" is a nullity, as against the principals.

Therefore, as the Deed of Trust clearly indicates that MERS' authority is limited to its title as "nominee for the lender" and, additionally, as the Assignment of the Deed of Trust indicates that MERS executed the assignment in its individual capacity,

judicially noticeable documents support Plaintiff's claim and demonstrate that the Assignment of the Deed of Trust is void.

As a result, Defendant's Demurrer is overruled.

Second Cause of Action: Violation of Business & Professions Code §17200:

In this instance, as Plaintiff alleges conduct by Defendant, which affects Plaintiff's title to the property, Plaintiff has sufficiently demonstrated that a "present or future property interest" has been diminished, sufficient to support standing under the UCL. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310.

Further, while Defendants assert that Plaintiff's claim fails, as *Penal Code §115* does not create a private right of action, pursuant to *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, a private right is not required.

Lastly, *Penal Code §115* states the following:

Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.

As Plaintiff alleges Defendant caused a false Assignment of Deed of Trust to be recorded, Plaintiff sufficiently alleges a violation of this provision. (§30 of the FAC). Additionally, this allegation sufficiently establishes "fraudulent" conduct, for purposes of §17200, as the recording of the Assignment of the Deed of Trust is likely to deceive members of the public.

Further, while Defendant asserts that Plaintiff failed to allege sufficient facts, within the Complaint, demonstrating that Defendant *knowingly* recorded a false document, this argument fails.

Firstly, *Penal Code §115* does not appear to require such knowledge and, second, judicially noticeable documents clearly demonstrate that MERS lacked individual authority to record the subject assignment.

Thus, judicially noticeable documents support Plaintiff's claim.

As a result, the instant Demurrer is overruled.

Third Cause of Action: Declaratory Relief:

In this instance, Plaintiff asserts the existence of an actual controversy, based on Plaintiff's dispute of the validity and legal effect of the Assignment. (§47 of FAC).

As Plaintiff's First Cause of Action for Cancellation of Instrument is brought under identical grounds and will, therefore, address this issue, the Court concludes, pursuant to *California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, that declaratory relief is neither necessary or proper, given the circumstances.

Thus, the Demurrer to this Cause of Action is sustained, without leave to amend.

M/p to give notice.