

245 Cal.App.4th 808  
Court of Appeal,  
Fourth District, Division 1, California.

Laura SATERBAK,  
Plaintiff and Appellant,  
v.  
JPMORGAN CHASE BANK,  
N.A., as Trustee, etc.,  
Defendant and Respondent.

Do66636  
|  
Filed 3/16/2016

### Synopsis

**Background:** Borrower brought action against the assignee of the deed of trust to her home, to cancel the assignment and to obtain declaratory relief. The Superior Court, San Diego County, No. 37-2014-00084605-CU-OR-CTL, Joel R. Wohlfeil, J., sustained demurrer without leave to amend. Borrower appealed.

**Holdings:** The Court of Appeal, McConnell, P.J., held that:

[1] borrower lacked standing to seek cancellation of assignment of deed of trust;

[2] Homeowner's Bill of Rights (HBOR) did not authorize borrower to challenge an assignment that was recorded prior to the effective date of HBOR; and

[3] assignment of deed of trust gave rise to no reasonable apprehension of serious injury.

Affirmed.

West Headnotes (12)

#### [1] Action

↔ Persons entitled to sue  
Standing is a threshold issue, because without it no justiciable controversy exists.

Cases that cite this headnote

#### [2] Action

↔ Persons entitled to sue  
Standing goes to the existence of a cause of action.

Cases that cite this headnote

#### [3] Mortgages

↔ Actions by or against assignees  
For borrower under deed of trust to establish her standing to seek cancellation of the assignment of the deed of trust, she had the burden of proving she had some beneficial interest that was concrete and actual, and not conjectural or hypothetical. Cal. Civ. Code § 3412.

Cases that cite this headnote

#### [4] Declaratory Judgment

↔ Subjects of relief in general  
**Mortgages**

← Actions by or against assignees

Borrower under deed of trust lacked standing to seek declaratory relief and cancellation of the assignment of the deed of trust to a real estate mortgage investment conduit (REMIC) trust on the basis of forgery, “robo-signing,” or voidness under the terms of the pooling and servicing agreement (PSA) for the REMIC trust, even though the new trustee noticed and scheduled a foreclosure sale, and even though the deed of trust provided that borrower had the right to sue prior to foreclosure in order to assert any “defense of Borrower to acceleration and sale,” where the foreclosure sale had not yet been held. Cal. Civ. Code § 3412.

Cases that cite this headnote

[5] **Mortgages**

← Parties who may make assignment

Under deed of trust providing that mortgage registrar had the right to exercise any or all of the interests granted by borrower under the deed of trust if necessary to comply with law or custom, the authority to exercise all of the rights and interests of the lender necessarily included the authority to assign the deed of trust.

Cases that cite this headnote

[6] **Contracts**

← Adhesion contracts; standardized contracts

As a rule, contracts of adhesion are generally enforceable according to their terms, but a provision contained in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or “adhering” party.

Cases that cite this headnote

[7] **Bills and Notes**

← Negotiability in general

**Contracts**

← Adhesion contracts; standardized contracts

Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor, as would support finding a transfer provision in a contract of adhesion to be sufficiently within the borrower's reasonable expectations to be enforced.

Cases that cite this headnote

[8] **Mortgages**

← Actions by or against assignees

The Homeowner's Bill of Rights (HBOR) provision authorizing an action for damages or injunctive relief for a material violation of the requirement for an assignment of a deed of trust to be accurate and complete did not apply retroactively to authorize borrower to challenge

a deed of trust assignment that was recorded prior to the effective date of the HBOR, even if the notice of trustee's sale was recorded after the HBOR went into effect. Cal. Civ. Code §§ 2923.4, 2924.12, 2924.17.

Cases that cite this headnote

**[9] Mortgages**

↔ Actions by or against assignees

To obtain an order for cancellation of the assignment of a deed of trust to a real estate mortgage investment conduit (REMIC) trust, the borrower under the deed of trust was required to establish that the assignment was void or voidable against the borrower, not merely that the assignment was void or voidable. Cal. Civ. Code § 3412.

Cases that cite this headnote

**[10] Mortgages**

↔ Actions by or against assignees

The purported assignment of a deed of trust to a real estate mortgage investment conduit (REMIC) trust after the closing date set forth in the pooling and servicing agreement (PSA) for the REMIC trust was not rendered void or voidable against borrower, as required for borrower to seek cancellation of the assignment under the Civil Code, even assuming the assignment was the result of forgery, "robo-signing," or violation

of the closing date terms of the PSA. Cal. Civ. Code § 3412.

Cases that cite this headnote

**[11] Mortgages**

↔ Actions by or against assignees

There was no "reasonable apprehension" that an allegedly invalid assignment of a deed of trust to a real estate mortgage investment conduit (REMIC) "may cause serious injury" to the borrower if left outstanding, as required for borrower to seek cancellation of the assignment under the Civil Code, even though the new trustee noticed and scheduled a foreclosure sale, since borrower's obligations on the note remained unchanged. Cal. Civ. Code § 3412.

Cases that cite this headnote

**[12] Cancellation of Instruments**

↔ Restoration of Consideration or Benefit

**Cancellation of Instruments**

↔ Offer to restore consideration or benefits

Because a cause of action to cancel a written instrument under the Civil Code sounds in equity, a debtor must generally allege tender or offer of tender of the amounts borrowed as a prerequisite to such claims, but the tender rule is not absolute; tender is not required to cancel a written instrument that is void and

not merely voidable. Cal. Civ. Code § 3412.

See 4 Witkin, Summary of Cal. Law (10th ed. 2005) Security Transactions in Real Property, § 212.

Cases that cite this headnote

**\*\*792** APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed. (Super. Ct. No. 37–2014–00084605–CU–OR–CTL)

#### Attorneys and Law Firms

Law Offices of Richard L. Antognini and Richard L. Antognini, Lincoln, for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr., Santa Monica, for Defendant and Respondent.

#### Opinion

McCONNELL, P.J.

**\*811** Laura Saterbak appeals a judgment dismissing her first amended complaint (FAC) after the sustaining of a demurrer without leave to amend. Saterbak claims the assignment of the deed of trust (DOT) to her home by Mortgage Electronic Registration Systems, Inc. (MERS) to Structured Asset Mortgage Investment II Trust 2007–AR7 Mortgage Pass–Through Certificates 2007–AR7 (2007–AR7 trust or Defendant) was invalid. Arguing the assignment occurred after the closing date for the 2007–AR7 trust, and that the signature

on the instrument was forged or robo-signed, she seeks to cancel the assignment and obtain declaratory relief. We conclude Saterbak lacks standing and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, Saterbak purchased real property on Mount Helix Drive, La Mesa, California through a grant deed. She executed a promissory note (Note) in May 2007, in the amount of \$1 million, secured by the DOT. The DOT named MERS as **\*\*793** the beneficiary, “solely as nominee for Lender and Lender’s successors and assigns.” It acknowledged MERS had the right “to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.”

On December 27, 2011, MERS executed an assignment of the DOT to “Citibank, N.A. as Trustee for [2007–AR7 trust].” The assignment was recorded nearly a year later, on December 17, 2012. It is this assignment that Saterbak challenges. The 2007–AR7 trust is a real estate mortgage investment conduit (REMIC) trust; its terms are set forth in a pooling and servicing agreement (PSA) for the trust, which is governed under New York law. Pursuant to the PSA, all loans had to be transferred to the 2007–AR7 trust on or before its September 18, 2007, closing date.

Saterbak fell behind on her payments. On December 17, 2012, Citibank N.A. substituted and appointed National Default Servicing Corporation (NDS) as trustee under the DOT. The substitution of trustee form was

**\*812** executed by JPMorgan Chase Bank, N.A. (hereafter Chase) as attorney-in-fact for Citibank N.A., trustee for the 2007–AR7 trust. NDS recorded a notice of default on December 17, 2012. By that point, Saterbak had fallen \$346,113.99 behind in payments. On March 19, 2013, NDS recorded a notice of trustee's sale, scheduling a foreclosure sale for April 10, 2013. By that point, Saterbak owed an estimated \$1,600,219.13.<sup>1</sup>

Saterbak filed suit in January 2014. She alleged the DOT was transferred to the 2007–AR7 trust four years after the closing date for the security, rendering the assignment invalid. She further alleged the signature on the assignment document was robo-signed or a forgery. She sought to cancel the assignment as a “cloud” on her title pursuant to Civil Code<sup>2</sup> section 3412. She also sought declaratory relief that the same defects rendered the assignment void.

In May 2014, the trial court sustained Chase's demurrer. It held Saterbak lacked standing to sue based on alleged noncompliance with the PSA for 2007–AR7 trust because she did not allege she was a party to that agreement. The court granted Saterbak leave to amend to plead a different theory for cancellation of the DOT.

Saterbak filed the FAC in May 2014. The FAC asserted the same causes of action for cancellation of the assignment and declaratory relief premised on the same theories of untimely securitization of the DOT and robo-signing. The FAC claimed it did not “seek to challenge ... any Foreclosure Proceedings and or Trustee's Sale.”

Chase demurred and requested judicial notice of the following instruments: the DOT, the corporate assignment DOT, substitution of trustee, notice of default, and notice of trustee sale. The trial court granted Chase's request for judicial notice and sustained its demurrer. The court held, “Despite the arguments made by Plaintiff, the FAC does, in fact, allege that the assignment is void because the loan was not moved into the securitized trust in a timely manner.” As it had previously, the court held Saterbak lacked standing to sue based on alleged noncompliance with the PSA, as she was not a party to that agreement. The court also rejected Saterbak's robo-signing theory for lack of standing, **\*\*794** stating she had not alleged that she “relied” on the assignment or sustained injury from it. The court denied leave to amend, noting the FAC was Saterbak's second attempt and concluding there was no possibility she could remedy her standing deficiencies through amendment.

The court entered judgment for Chase in August 2014, and Saterbak timely appealed.

### **\*813 DISCUSSION**

“On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 989–990, 125 Cal.Rptr.3d 260.) We may consider matters that are properly judicially noticed. (*Four Star*

*Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379, 10 Cal.Rptr.2d 1.)

“If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, 6 Cal.Rptr.3d 457, 79 P.3d 569.)

Central to this appeal is whether as a borrower, Saterbak has standing to challenge the assignment of the DOT on grounds that it does not comply with the PSA for the securitized instrument. For the reasons discussed below, the trial court properly sustained Defendant's demurrer to the FAC without leave to amend.

## I. STANDING

### A. Saterbak Bears the Burden to Demonstrate Standing

[1] [2] “Standing is a threshold issue, because without it no justiciable controversy exists.” (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445, 93 Cal.Rptr.3d 75.) “Standing goes to the existence of a cause of action.” (*Apartment*

*Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128, 38 Cal.Rptr.3d 575.) Pursuant to Code of Civil Procedure section 367, “[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.”

[3] Saterbak contends the 2007–AR7 trust bears the burden of proving the assignment in question was valid. This is incorrect. As the party seeking to \*814 cancel the assignment through this action, Saterbak “must be able to demonstrate that ... she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.” (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 315, 109 Cal.Rptr.2d 154.)

Saterbak's authorities do not suggest otherwise. She cites *Fontenot*, but that case actually held “MERS did not bear the burden of proving a valid assignment”—instead, “the burden rested with plaintiff affirmatively to plead facts demonstrating the impropriety.” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270, 129 Cal.Rptr.3d 467 (*Fontenot* ), disapproved \*\*795 on other grounds in *Yvanova v. New Century Mortgage Corp.* 62 Cal.4th 919, 939, fn. 13, 199 Cal.Rptr.3d 66, 365 P.3d 845 (*Yvanova* ).) Saterbak also cites *Cockerell* and *Neptune*, but those cases merely held that an assignee *who files suit to enforce an assigned right* bears the burden of proving a valid assignment. (*Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292, 267 P.2d 16; *Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, 1242, 240 Cal.Rptr. 117.)

### B. Saterbak Lacks Standing to Challenge the Assignment

[4] Saterbak alleges the DOT was assigned to the 2007–AR7 trust in an untimely manner under the PSA. Specifically, she contends the assignment was void under the PSA because MERS did not assign the DOT to the 2007–AR7 trust until years after the closing date. Saterbak also alleges the signature of “Nicole M. Wicks” on the assignment document was forged or robo-signed.

Saterbak lacks standing to pursue these theories. The crux of Saterbak's argument is that she may bring a preemptive action to determine whether the 2007–AR7 trust may initiate a nonjudicial foreclosure. She argues, “If the alleged ‘Lender’ is not the true ‘Lender,’” it “has no right to order a foreclosure sale.” However, California courts do not allow such preemptive suits because they “would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.” (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513, 156 Cal.Rptr.3d 912 (*Jenkins*), disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13, 199 Cal.Rptr.3d 66, 365 P.3d 845; see *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156, 121 Cal.Rptr.3d 819 (*Gomes*) [“California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure”].) As the court reasoned in *Gomes*:

“[The borrower] is not seeking a remedy for misconduct. He is seeking to impose

the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure.... [S]uch a requirement would \*815 be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.” (*Gomes, supra*, at p. 1154, fn. 5, 121 Cal.Rptr.3d 819.)<sup>3</sup>

The California Supreme Court recently held that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment \*\*796 renders the assignment void. (*Yvanova, supra*, 62 Cal.4th at pp. 942–943, 199 Cal.Rptr.3d 66, 365 P.3d 845.) However, *Yvanova*'s ruling is expressly limited to the post-foreclosure context. (*Id.* at pp. 934–935, 199 Cal.Rptr.3d 66, 365 P.3d 845 (“narrow question” under review was whether a borrower seeking remedies for *wrongful foreclosure* has standing, not whether a borrower could *preempt* a nonjudicial foreclosure).) Because Saterbak brings a preforeclosure suit challenging Defendant's ability to foreclose, *Yvanova* does not alter her standing obligations.<sup>4</sup>

Moreover, *Yvanova* recognizes borrower standing only where the defect in the assignment renders the assignment *void*, rather than *voidable*. (*Yvanova, supra*, 62 Cal.4th at pp. 942–943, 199 Cal.Rptr.3d 66, 365 P.3d 845.) “Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire.” (*Id.* at p. 936, 199 Cal.Rptr.3d 66, 365 P.3d 845.) *Yvanova* expressly offers no opinion as to whether, under New York law, an untimely assignment to a securitized trust made after the trust's closing date is void or merely

voidable. (*Id.* at pp. 940–941, 199 Cal.Rptr.3d 66, 365 P.3d 845.) We conclude such an assignment is merely voidable. (See *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir.2014) 757 F.3d 79, 88–89 [“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”]; “an unauthorized act by the trustee is not void but merely voidable by the beneficiary”].)<sup>5</sup> Consequently, Saterbak lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007–AR7 trust.

**\*816 C. *The DOT Does Not Confer Standing***  
[5] Saterbak argues “clear language” in the DOT and “the rules of adhesion contracts” confer standing. We disagree. In signing the DOT, Saterbak agreed the Note and DOT could be sold “one or more times without prior notice.” She further agreed:

“Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”<sup>6</sup>

“The authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust.” (*Siliga*

*v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84, 161 Cal.Rptr.3d 500, disapproved on other grounds in *Yvanova, supra*, 62 Cal.4th at p. 939, fn. 13, 199 Cal.Rptr.3d 66, 365 P.3d 845; see **\*\*797 *Herrera v. Federal National Mortgage Assn.*** (2012) 205 Cal.App.4th 1495, 1504, 141 Cal.Rptr.3d 326 [interpreting language identical to Saterbak's DOT to give MERS “the right to assign the DOT”], disapproved on other grounds in *Yvanova*, at p. 939, fn. 13, 199 Cal.Rptr.3d 66, 365 P.3d 845.) The federal court adjudicating Saterbak's parallel case against her loan servicer cited the above-quoted language in the DOT to reject the same securitization theory proffered here. (*Saterbak v. National Default Servicing Corp.* (S.D.Cal. Oct. 1, 2015, Civ. No. 15–CV–956–WQH–NLS) 2015 WL 5794560, at \*7.)

Saterbak nevertheless points to language in the DOT that only the “Lender” has the power to declare default and foreclose, while the “Borrower” has the right to sue prior to foreclosure in order to “ ‘assert the non-existence of a default or any other defense of Borrower to acceleration and sale.’ ” But these provisions do not change her standing obligations under California law; they merely give Saterbak the power to argue any defense *the borrower* may have to avoid foreclosure. As explained *ante*, Saterbak lacks standing to challenge the assignment as invalid under the PSA. (*Jenkins, supra*, 216 Cal.App.4th at p. 515, 156 Cal.Rptr.3d 912.)

**\*817** Saterbak also points to the presuit notice provisions in the DOT to argue the DOT contemplates her action. She quotes language in the DOT requiring the Borrower and Lender



to provide notice and a reasonable opportunity to repair before “any judicial action ... that arises from the other party’s actions pursuant to this Security Instrument.” However, by Saterbak’s own theory, her action does not arise “pursuant to *this* Security Instrument”; it is premised instead on a violation of the PSA. The presuit notice provisions in the DOT do not contemplate her action.

[6] [7] Finally, Saterbak contends the deed of trust is an adhesion contract, and, therefore, restrictive language that “deprives a borrower of the right to argue her loan has been invalidly assigned” must be “conspicuous and clear.” She claims, “If the assignment clause was intended by the drafter to cutoff the borrower’s right to challenge the assignment, it should have used clear language to that effect. It did not.” As a rule, “contracts of adhesion are generally enforceable according to their terms, [but] a provision contained in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or ‘adhering’ party.” (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1446, 1 Cal.Rptr.3d 162 (*Fischer* ).) However, “[b]ecause a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor” (*Fontenot, supra*, 198 Cal.App.4th at p. 272, 129 Cal.Rptr.3d 467), together with the deed of trust securing it. Saterbak “irrevocably grant[ed] and convey[ed]” the Mount Helix property to the Lender; recognized that MERS (as nominee) had the right “to exercise any or all” of the interests of the Lender; and agreed that the Note, together with the DOT, could be sold one or more times without notice to her. There is no reasonable expectation

from this language that the parties intended to allow Saterbak to challenge future assignments made to unrelated third parties. (Cf. *Fischer, supra*, at pp. 1448–1449, 1 Cal.Rptr.3d 162 [holding there was a triable issue of fact “as to whether the parties mutually intended to permit cross-collateralization” on two separate loans, given ambiguity between the broadly worded dragnet clause and a “ ‘Related Document[ ]’ ” *incorporated by reference into the loan agreement* as to whether the parties mutually \*\*798 intended it].)<sup>7</sup>

#### \*818 D. *The Homeowner Bill of Rights Does Not Confer Standing*

For the first time on appeal, Saterbak relies on the California Homeowner Bill of Rights (HBOR) to claim standing. She argues sections 2924.17 and 2924.12 allow her to challenge the alleged defects in MERS’S assignment of the DOT to the 2007–AR7 trust. In relevant part, section 2924.17, subdivision (a), provides an “assignment of a deed of trust ... shall be accurate and complete and supported by competent and reliable evidence.” Section 2924.12, subdivisions (a) and (b) allow borrowers to bring an action for damages or injunctive relief for “a material violation of Section ... 2924.17.”

[8] As Saterbak acknowledges, the HBOR went into effect on January 1, 2013. (§ 2923.4.) The FAC alleges the DOT was assigned on December 27, 2011, and recorded on December 17, 2012. Saterbak fails to point to any provision suggesting that the California Legislature intended the HBOR to apply retroactively. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841,

123 Cal.Rptr.2d 40, 50 P.3d 751 [“California courts comply with the legal principle that unless there is an ‘express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application’ ”].) Therefore, the HBOR does not grant Saterbak new rights on appeal.<sup>8</sup>

In summary, for the reasons discussed above, we conclude Saterbak lacks standing to challenge MERS's assignment of the DOT to the 2007–AR7 trust.

## II. SECTION 3412

[9] Saterbak seeks to cancel the assignment of the DOT pursuant to section 3412. She argues that to withstand a demurrer, she merely needs to allege the assignment was void or voidable and that it could cause serious injury. We disagree.

[10] To state a cause of action under section 3412, Saterbak must allege the assignment was void or voidable *against her*. (§ 3412 [“A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person *against whom* it is void or voidable, may, upon his application, be so adjudged, and ordered to be \*819 delivered up or canceled” (italics added) ]; see also *Johnson v. PNC Mortg.* (N.D.Cal.2015) 80 F.Supp.3d 980, 990 (*Johnson*) [section 3412 requires “the challenged instrument be void or voidable *against the party seeking to cancel it*”].) *Johnson* dismissed a similar cause of action

under \*\*799 section 3412 because the plaintiffs, borrowers like Saterbak, failed to “allege a plausible case that the assignment is ‘void or voidable’ against them.” (*Johnson, supra*, at p. 990.) Here, Saterbak fails to state a cause of action under section 3412 because she cannot allege that MERS's assignment of the DOT to the 2007–AR7 trust was void or voidable against her.

[11] Saterbak also fails to allege “serious injury.” She argues she “faces the prospect of losing her home due to the actions of an entity that has no power to foreclose because it does not own her [DOT].” However, even if the assignment was invalid, it could not “*cause serious injury*” under the statute because her obligations on the Note remained unchanged. (§ 3412, italics added.) For example, in *Johnson, supra*, 80 F.Supp.3d 980, borrowers sought to cancel the assignment of their deed of trust, claiming alleged infirmities in the assignment cast a shadow on their title and continued to ruin their credit. The court rejected this theory because the alleged defects did not change the borrowers' payment obligations, and the borrowers did not deny they had defaulted. The court concluded: “It is not really the assignment, then, or its challenged provenance, that has stained their credit report. It is the fact that they defaulted.” (*Id.* at p. 989.) Likewise, here, the allegedly defective assignment did not alter Saterbak's payment obligations under the Note. Saterbak does not deny she defaulted or that her debt remains in arrears. Consequently, she cannot demonstrate how the allegedly invalid assignment could “*cause serious injury*” within the meaning of section 3412 if left outstanding. (§ 3412, italics added.)

[12] Finally, because a cause of action to cancel a written instrument under section 3412 sounds in equity, a debtor must generally allege tender or offer of tender of the amounts borrowed as a prerequisite to such claims. The tender requirement “is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose.” (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878, 97 Cal.Rptr.2d 255, italics omitted.) The tender rule is not absolute; tender is not required to cancel a written instrument that is *void* and not merely voidable. (*Id.* at p. 876, 97 Cal.Rptr.2d 255; *Smith v. Williams* (1961) 55 Cal.2d 617, 620–621, 12 Cal.Rptr. 665, 361 P.2d 241; *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11, 183 Cal.Rptr.3d 638.) As discussed *ante*, we conclude the alleged defects merely rendered MERS's assignment of the DOT to the 2007–AR7 trust *voidable* under New York law. In any event, because we affirm the judgment on standing grounds, we do not decide \*820 whether Saterbak was required to plead the ability or willingness to tender to cancel the assignment pursuant to section 3412.

### III. LEAVE TO AMEND

We must consider whether Saterbak has demonstrated a reasonable probability that she could cure the defects that we have identified. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081, 6 Cal.Rptr.3d 457, 79 P.3d 569.) Saterbak contends she could amend her complaint to “argue that the language in her [DOT] gives her the right to attack a void assignment of her loan.” As discussed in detail above, we conclude the DOT does not confer this right. Because Saterbak has not shown how she could remedy her lack of standing to challenge MERS's assignment of the DOT to the 2007–AR7 trust, we conclude the trial court properly sustained \*\*800 Defendant's demurrer to the FAC without leave to amend.

### DISPOSITION

The judgment is affirmed. Respondent 2007–AR7 trust shall recover its costs on appeal.

WE CONCUR:

HALLER, J.

McINTYRE, J.

### All Citations

245 Cal.App.4th 808, 199 Cal.Rptr.3d 790, 16 Cal. Daily Op. Serv. 2864, 2016 Daily Journal D.A.R. 2565

### Footnotes

- 1 The parties do not dispute Saterbak is in arrears on her debt obligations and a foreclosure sale has yet to take place.
- 2 All further statutory references are to the Civil Code unless otherwise specified.

- 3 Saterbak is mistaken in claiming *Gomes* holds "a borrower can challenge the power of an alleged loan purchaser to foreclose if [the borrower] can allege specific facts showing the assignment is invalid." As discussed, *Gomes* holds that under California law, plaintiffs may not bring preemptive actions to challenge a defendant's power to foreclose. (*Gomes, supra*, 192 Cal.App.4th at p. 1156, 121 Cal.Rptr.3d 819.)
- 4 The Supreme Court has granted review in *Keshtgar v. U.S. Bank, N.A.* (2014) — Cal.4th —, 178 Cal.Rptr.3d 320, 334 P.3d 686, a case involving a preforeclosure challenge based on alleged deficiencies in the assignment of the deed of trust.
- 5 Saterbak cites *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 160 Cal.Rptr.3d 449, but the New York case upon which *Glaski* relied has been overturned. (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y.App.Div.2015) 127 A.D.3d 1176, 1178, 9 N.Y.S.3d 312; see *Rajamin, supra*, 757 F.3d at p. 90 [rejecting *Glaski*'s interpretation of New York law].) We decline to follow *Glaski* and conclude the alleged defects here merely render the assignment voidable.
- 6 As the court explained in *Fontenot*: "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records. [Citation.] [¶] Ordinarily, the owner of a promissory note secured by a deed of trust is designated as the beneficiary of the deed of trust. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot, supra*, 198 Cal.App.4th at p. 267, 129 Cal.Rptr.3d 467.)
- 7 Saterbak also cites *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 13 Cal.Rptr.3d 68, 89 P.3d 381, which involved a dispute over auto insurance coverage. The court stated the general rule that "to be enforceable, any [insurance] provision that takes away or limits coverage *reasonably expected* by an insured must be 'conspicuous, plain and clear.'" (*Id.* at p. 1204, 13 Cal.Rptr.3d 68, 89 P.3d 381, italics added.) Even if *Haynes* were relevant to the current context, there is no reasonable expectation created in the DOT that Saterbak would have the power to challenge assignments made to unrelated third parties. (*Fontenot, supra*, 198 Cal.App.4th at p. 272, 129 Cal.Rptr.3d 467.)
- 8 Saterbak contends the notice of trustee's sale was recorded after the HBOR went into effect. However, the FAC challenges MERS's assignment of the DOT to the 2007–AR7 trust, not the notice of trustee's sale. We further reject Saterbak's argument that the HBOR "overruled" *Jenkins* and cases citing it: *Jenkins* was decided *after* the HBOR went into effect. (*Jenkins, supra*, 216 Cal.App.4th 497, 156 Cal.Rptr.3d 912 [decided May 17, 2013].)