IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAMES RODNEY LARGENT and BRENDA JEAN LARGENT, husband and wife, *Plaintiffs/Appellants*,

v.

BANK OF NEW YORK TRUST CO., N.A., a banking institution in New York; BAC HOME LOAN SERVICING, L.P. a Texas limited partnership; RECONTRUST CO., N.A., a subsidiary of Bank of America; BANK OF AMERICA, N.A., a North Carolina corporation; COUNTRYWIDE HOME LOANS, INC., a California corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., a Delaware corporation,
Defendants/Appellees.

No. 1 CA-CV 12-0635
FILED 11-26-2013

Appeal from the Superior Court in Maricopa County
No. CV2011-055823
The Honorable Michael R. McVey, Retired Judge

AFFIRMED

COUNSEL

McCauley Law Offices, PC, Cave Creek
By Daniel J McCauley, III

Counsel for Plaintiffs/Appellants

Bryan Cave, LLP, Phoenix
By Robert W. Shely, Rodney W. Ott

Counsel for Defendants/Appellees

MEMORANDUM DECISION

Chief Judge Diane M. Johnsen delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

J O H N S E N, Chief Judge:

¶1 James R. and Brenda J. Largent appeal from the superior court's dismissal of their complaint against Bank of New York Trust Co., BAC Home Loan Servicing L.P., ReconTrust Co., N.A., Bank of America, N.A., Countrywide Home Loans, Inc. and Mortgage Electronic Registration System, Inc. ("MERS") (collectively, "Appellees"). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Largents borrowed money from Decision One Mortgage Company, L.L.C. in 2005. They gave a promissory note to Decision One and secured the loan with a deed of trust to their home. The deed of trust identified Talon Group as the trustee and named MERS as the beneficiary and "nominee for [Decision One] and [Decision One's] successors and assigns." The Largents defaulted on their loan in late 2009.

¶3 On December 1, 2009, MERS, as beneficiary, assigned the deed of trust and "all beneficial interest" under the instrument to Bank of New York. Christina Balandran, as assistant secretary of MERS, executed the assignment, which was notarized on December 4, 2009. Also on December 4, Bank of New York, as the new beneficiary, executed a substitution of trustee appointing ReconTrust as successor trustee to Talon Group. This document also was executed by Balandran, this time as the assistant secretary of Bank of New York. That same day, ReconTrust recorded a notice of trustee's sale for March 16, 2010. A notice of breach or non-performance was sent to the Largents on December 31, 2009. The

trustee's sale did not take place on the noticed date, and according to public record, was canceled.[1]

¶4 The Largents filed a complaint in September 2011 raising four claims. Count one alleges Appellees violated Arizona Revised Statutes ("A.R.S.") section 33-420 (2013) by recording false documents.[2] Count two alleges Appellees breached notice requirements found in the deed of trust and applicable statutes. Count three contends the Appellees lacked standing under Arizona Rule of Civil Procedure 17(a) or otherwise were not real parties in interest under the note. Count four is a claim to quiet title under A.R.S. § 12-1101 (2013).

¶5 Appellees removed the case to federal court in October 2011 and moved to dismiss shortly thereafter. In January 2012, however, the federal court remanded the case. The parties submitted the completed briefing on the motion to dismiss to the superior court, which granted the motion.

¶6 The Largents timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1) (2013).

DISCUSSION

A. Standard of Review.

¶7 We review a superior court's decision to dismiss a complaint *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 8, 284 P.3d 863, 866 (2012). In determining whether a complaint states a claim for relief, "Arizona courts look only to the pleading itself." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (citations omitted).[3] Courts must "assume the truth of the well-pled factual

---

[1] We may take judicial notice of the notice of cancellation of the trustee's sale in the Maricopa County Recorder's Office. *See* Ariz. R. Evid. 201; *Sitton v. Deutsche Bank Nat'l Trust Co.*, __ Ariz. __, n.2, ¶ 14, 311 P.3d 237, 240 n.2 (App. 2013).

[2] Absent material revision after the date of the events at issue, we cite a statute's current version.

[3] The Largents attached to their complaint a report from an expert witness in support of their allegations that false and misleading

allegations" and resolve all reasonable inferences in the plaintiff's favor. *Id.* (citations omitted). Mere conclusory statements, however, "are insufficient to state a claim upon which relief can be granted." *Id.* Dismissal of a complaint for failure to state a claim is appropriate if "as a matter of law [ ] the plaintiff would not be entitled to relief under any interpretation of the facts." *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 484-85, ¶ 9, 47 P.3d 1119, 1122-23 (App. 2002) (citation omitted), *aff'd*, 206 Ariz. 9, 75 P.3d 99 (2003).

B. Dismissal of the Complaint.

1. Material misrepresentations under A.R.S. § 33-420.

¶8 Section 33-420(A) provides:

> A person purporting to claim an interest in, or a lien or encumbrance against, real property, who causes a document asserting such claim to be recorded in the office of the county recorder, knowing or having reason to know that the document is forged, groundless, contains material misstatement or false claim or is otherwise invalid is liable to the owner or beneficial title holder of the real property for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording, whichever is greater, and reasonable attorney fees and costs of the action.[4]

¶9 The statute also grants the "owner or beneficial title holder of the real property" a claim for relief against a person named in a document that creates an interest in real property when that person

---

recordings were made. If the superior court considers "matters outside the pleading" on a motion to dismiss, it must treat the motion as one for summary judgment. Ariz. R. Civ. P. 12(b)(6); *see Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63, ¶ 10, 226 P.3d 1046, 1049 (App. 2010). Like the superior court, however, we assume the truth of the allegations in the complaint and so need not consider the expert report.

[4] A substitution of trustee, a notice of trustee's sale and an assignment of deed of trust all assert an interest in real property within the meaning of § 33-420. *See Stauffer v. U.S. Bank Nat'l Ass'n*, 233 Ariz. 22, 26-27, ¶¶ 12, 15, 308 P.3d 1173, 1177-78 (App. 2013).

knows that a document is "forged, groundless, contains a material misstatement or false claim or is otherwise invalid." A.R.S. § 33-420(C).

¶10 The Largents' complaint alleges the assignment of the deed of trust was executed by a person not employed by MERS whose signature was notarized three days after the document was executed, and alleges the document also is invalid because it fails to identify the correct assignor. The complaint alleges the substitution of trustee is invalid because of questions about the authority of the individual who executed the document and the manner in which it was notarized. Finally, the complaint alleges the notice of trustee's sale is invalid because it fails to identify the correct trustee and beneficiary. The complaint alleges all three documents contain material misstatements that rendered them invalid.

¶11 Even if, as the complaint alleges, the three recordings contain misstatements, A.R.S. § 33-420 affords the Largents no relief because the alleged misstatements were not material to the Largents. *See Sitton v. Deutsche Bank Nat'l Trust Co.*, __ Ariz. __, ¶¶ 32-33, 311 P.3d 237, 243-44 (App. 2013). In order to state a claim under § 33-420, the misrepresentation must be material to the owner or beneficial title holder. *See id.*; A.R.S. § 33-420(A), (C), (E). "A misrepresentation is material if a reasonable person 'would attach importance to its existence or nonexistence in determining [his or her] choice of action in the transaction in question.'" *Caruthers v. Underhill*, 230 Ariz. 513, 521, ¶ 28, 287 P.3d 807, 815 (App. 2012) (quoting Restatement (Second) of Torts § 538(2)(a) (1977)).

¶12 Here, the disputed documents did not concern the Largents' obligation to pay or the risk of foreclosure they faced upon breach, both of which were created by the note and the deed of trust. *See Sitton*, ___ Ariz. at ___, ¶ 28, 311 P.3d at 243. The Largents indisputably executed the note, which indisputably was secured by a deed of trust that named as beneficiary "MERS . . . and the successors and assigns" of MERS. Further, the deed of trust expressly gave MERS or its successors and assigns "the right to foreclose and sell the [p]roperty." The Largents' liability, as secured by the deed of trust, was unaffected by any assignment of the deed of trust or substitution of trustee. *See id.* Although the validity of the recordings may be material to the assignees or purported assignees of interests in the deed of trust, given the Largents' default, the validity of the disputed recordings was not material to the Largents. *See id.* at __, ¶¶ 32-33, 311 P.3d at 243-44.

2. Alleged breach of notice requirements and claim of "no standing."

¶13 The Largents' complaint also alleges breach of the notice provisions of §§ 33-801 to -821. The Largents allege they did not receive the required notice of default prior to the trustee's sale and also allege the notice of trustee's sale was invalid because it was based on the purportedly invalid documents addressed above.

¶14 We take judicial notice that the noticed trustee's sale was canceled in August 2013. The cancelation of the sale moots the Largents' claim based on any purported procedural defects related to the sale. The cancellation also moots the Largents' claim that the trustee's sale was noticed by the incorrect party (count three of the complaint, labeled "No Standing – No True Party in Interest Under A.R.C.P. 17(a)").[5]

CONCLUSION

¶15 For the foregoing reasons, we affirm the superior court's dismissal of the Largents' complaint.[6]

COURT OF APPEALS STATE OF ARIZONA
Ruth A. Willingham · Clerk of the Court
FILED: mjt

[5] Although the Largents' complaint also contains a claim to quiet title, on appeal the Largents do not argue the court erred by dismissing that claim.

[6] Appellees moved to strike the Largents' reply brief. The motions panel of the court denied that motion without prejudice to being reconsidered by this panel. Having considered the motion, we deny the motion as moot.