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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/05/2013
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DUANE VARBEL,) 1 CA-CV 12-0263
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BANK OF AMERICA NATIONAL) Rule 28, Arizona Rules of
ASSOCIATION,) Civil Appellate Procedure)
)
Defendant/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-013703

The Honorable Dean M. Fink, Judge

AFFIRMED

Duane Varbel, Plaintiff/Appellant
In Propria Persona

Phoenix

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Phoenix

T H O M P S O N, Judge

¶1 Duane Varbel (Varbel) appeals from the dismissal of
his amended complaint and action for declaratory judgment

against Bank of America National Association (BANA). For the reasons that follow, we affirm the dismissal.

BACKGROUND

I. The Amended Complaint

¶12 In reviewing the Arizona Rule of Civil Procedure 12(b)(6) dismissal, we assume that the well-pleaded facts in Varbel's amended complaint are true. See *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). According to the Deed of Trust attached to the amended complaint, Bradley H. Wishon and Charlayne P. Lobit (the Borrowers) obtained \$307,789 from LHM Financial Corporation (LHM) to purchase property in Goodyear (the Property) on July 1, 2009. The Deed of Trust identifies the beneficiary as Mortgage Electronic Registration Systems (MERS).

¶13 The Borrowers then quit-claimed the Property to Varbel in consideration for ten dollars in a deed recorded on July 22, 2011. Varbel did not make payments due under the Borrowers' original promissory note (the Note) because of his "lack of knowledge as to the name of the Party entitled to enforce payments." As a result, the Property is "in danger of being lost in a Non Judicial Foreclosure Sale." Varbel accordingly filed suit against BANA to obtain (1) the name of the party entitled to enforce the Note signed by the Borrowers, (2) an order relieving Varbel of any obligation to make payments until

provided with this information, as well as the record attached to the Note, and (3) a \$5000 judgment.¹ BANA then filed a Rule 12(b)(6) motion to dismiss raising issue preclusion, standing, and quiet title issues.

II. The Declaratory Judgment Motion

¶4 Next, Varbel filed a motion for declaratory judgment. Varbel's motion requested a finding that BANA did not possess the Note and lacked an equitable interest in the Property. Varbel appended two new documents to the motion: (1) his settlement agreement with LHM stating that LHM did not possess the Note; and (2) an assignment of deed of trust from MERS to BANA that describes LHM as the "original lender."²

¶5 During briefing on the motion to dismiss, Varbel argued that BANA had no standing to move for the amended complaint's dismissal because (1) BANA has no equitable interest in the Note, and (2) BANA is not entitled to enforce the Note or act as a loan servicer. BANA countered that Varbel's complaint and motion rested on the same flawed "show me the note" theory.

¹ Varbel named LHM as a defendant in the complaint, then dismissed it.

² Among the exhibits Varbel attached to his Reply Brief are a Settlement Agreement and an Assignment of Deed of Trust. Contrary to BANA's arguments, both documents were attached to Varbel's motion for declaratory judgment and are part of the superior court record. Accordingly, we deny BANA's motion under Arizona Rule of Civil Appellate Procedure 13(d) to strike Exhibits 2 and 3 of the Reply Brief.

Further, BANA argued, the whereabouts of the Note and its ownership were immaterial to BANA's right to conduct a non-judicial foreclosure sale.

¶16 The superior court, focusing solely on sufficiency of the complaint's allegations, held that Arizona law does not require possession of the promissory note in order to enforce a deed of trust. Based upon this analysis, the court dismissed both the amended complaint and the motion for declaratory relief. The superior court did not discuss BANA's quiet title, standing, and issue preclusion arguments.

¶17 Varbel moved for reconsideration, arguing that BANA was not a real party in interest, had never recorded an equitable interest, did not possess the Note, and lacked standing to file a motion to dismiss. After denying this motion, the superior court entered a signed judgment dismissing the complaint and the action with prejudice. Varbel timely appealed.

DISCUSSION³

I. Arizona Law Does Not Require Production Of The Underlying Note, Or Its Chain Of Custody, In Order To Conduct A Non-Judicial Trustee's Sale.

³ We exercise our discretion to consider Varbel's arguments notwithstanding his failure to adequately support them with references to the record and legal authority. See ARCAP 13(a)(6); *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004).

¶18 Although we accept the amended complaint's well-pleaded facts as true, our acceptance does not extend to allegations containing conclusions of law, unreasonable inferences or unsupported conclusions, inferences and deductions not necessarily implied by the well-pleaded facts, or legal conclusions alleged as facts. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4, 121 P.3d 1256, 1259 (App. 2005). We affirm the dismissal only if "plaintiff would not be entitled to relief under any interpretation of the facts." *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 484, ¶ 9, 47 P.3d 1119, 1122 (App. 2002), *aff'd*, 206 Ariz. 9, 75 P.3d 99 (2003).

¶19 Varbel attached the deed of trust and quit claim deed to the amended complaint as exhibits. A court may consider such documents without converting a motion to one for summary judgment, because public records referenced in a complaint are not "outside the pleading" for purposes of Rule 12(b). See *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63, ¶ 10, 64, ¶ 13, 226 P.3d 1046, 1049, 1050 (App. 2010).

¶10 On appeal, Varbel reiterates his contentions that BANA had no standing to move for dismissal because BANA has no equitable interest in the Note, and indeed does not even claim that it is entitled to enforce the Note or act as a loan

servicer. BANA counters that Varbel lacks standing and his claims are barred by collateral estoppel.

¶11 Like the superior court, we direct our attention to the sufficiency of the amended complaint's allegations. The pleading's premise is that Varbel does not know to whom he should make payments on the Note, and any successor to the lender must demonstrate an assignment of the Note, or the deed of trust is invalid. This theory appears to derive from a Uniform Commercial Code principle that a purported note holder who does not possess the original negotiable instrument is not entitled to enforce it. *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (citing Ariz. Rev. Stat. (A.R.S.) §§ 47-3101 to -3119). Arizona's non-judicial foreclosure statute contains no such requirement. See A.R.S. § 33-807(A) (2007) ("[a] power of sale is conferred upon the trustee of a trust deed under which the trust property may be sold . . . after a breach or default").

¶12 Moreover, the Arizona Supreme Court and local federal courts have held that a party need not present the promissory note in order to enforce the deed of trust. See *Diessner*, 618 F. Supp. 2d at 1187 (holding that MERS was entitled to foreclose and need not be in possession of the note); *Mansour v. Cal-W. Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009) (reaching the same result and holding that the plaintiff failed

to state a claim for this reason); *Hogan v. Washington Mut. Bank, N.A.*, ___ Ariz. ___, ___, ¶¶ 11-13, 277 P.3d 781, 784 (2012) (allowing a trustee to proceed with a non-judicial foreclosure without first requiring the beneficiary to prove ownership of the underlying note); see generally *In re Weisband*, 427 B.R. 13, 22 (Bankr. D. Ariz. 2010) ("Arizona's deed of trust statute does not require a beneficiary of a deed of trust to produce the underlying note (or its chain of assignment) in order to conduct a Trustee's Sale."). The claim for declaratory relief also fails, because the facts alleged likewise fail to support it.

¶13 Finally, we find that Varbel has misplaced his reliance upon *In re Vasquez*, 228 Ariz. 357, 266 P.3d 1053 (2011). That case holds that recording an assignment of a deed of trust is not a prerequisite to a trustee's sale. *Id.* at 359, ¶ 5, 266 P.3d at 1055. Thus, any failure to record does not affect the deed's validity as to the obligor. *Id.* at ¶ 7 (citing A.R.S. § 33-412(B)).

¶14 Because Varbel can prove no set of facts to support his claims for relief from his payment obligations and prevent non-judicial foreclosure, and he is not entitled to the requested declaratory relief, the superior court's dismissal was proper. This holding obviates the need to discuss the remaining issues raised by the parties.

CONCLUSION

¶15 We affirm the dismissal of the amended complaint and this action.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
DONN KESSLER, Judge