ADLESON HESS & KELLY
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION

577 Salmar Avenue, 2nd Floor
Campbell, CA 95008
(408) 341-0234
(408) 341-0250 Fax
padleson@ahklaw.com

By: Phillip M. Adleson, Esq.[1] and Lisa Parrella, Esq.

The California Supreme Court grants hearings on cases challenging assignments of deeds of trust in wrongful foreclosure cases.

On August 27, 2014, the California Supreme Court granted review of *Yvanova v. New Century Mortgage Corp. (2014) 226 Cal. App.4th 495*. [now depublished] ("*Yvanova")*. In granting review, the Supreme Court expressly limited the issue to the following:

> "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?"

On October 1, 2014, and on November 21, 2014, the California Supreme Court also granted hearings in *Keshtgar v. U.S. Bank, N.A*., (2014) 226 Cal.App.4th 1201 ("*Keshtgar*") [depublished] and *Mendoza v. JPMorgan Chase Bank, N.A*., (2014) 228 Cal.App.4th 1020 ("*Mendoza*") [depublished]. Each of these cases raises issues related to the single issue being considered by the Supreme Court in *Yvanova*. In granting the petitions for hearing in *Keshtgar* and *Mendoza*, the California Supreme Court ordered that any further action or briefing be deferred *pending consideration and disposition of the related issue in Yvanova*.

Although they have generally failed, it has become commonplace for borrowers who are admittedly in default to assert that the foreclosing beneficiary did not have the right to foreclose because of a defective assignment of the note and deed of trust. These claims are generally made either as a pre-emptive

[1] Corporate Counsel for the United Trustee's Association and for the California Mortgage Association.

challenge to a nonjudicial foreclosure, or in a wrongful foreclosure action (i.e., for damages) after the nonjudicial foreclosure.

The one area of success for borrowers comes from the decision in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079[2] ("*Glaski*"). Among other things, Glaski, the plaintiff/borrower, filed a second amended complaint attempting to allege "wrongful foreclosure" after a trustee's sale because his loan was transferred to a securitized trust after the trust's closing date, thus rendering the transfer ineffective under New York Trust law. He further alleged that the late transfer violated the securitized trust's pooling and servicing agreement *and was void*. The trial court sustained the lender's demurrer to Glaski's second amended complaint without leave to amend and dismissed the case. Glaski appealed and the court of appeal held that Glaski had sufficiently alleged a cause of action for wrongful foreclosure. The *Glaski* court also found that the borrower, after the trustee's sale, had standing to challenge the assignment of the note and deed of trust to the securitized pool. The *Glaski* case breathed life into chain of title challenges by borrowers. However, the *Glaski* case has been almost universally rejected by subsequent state and federal published cases in California.

In *Yvanova,* after the trustee's sale occurred, the borrower/plaintiff filed a second amended complaint against a number of lenders for quiet title, restitution, damages, and declaratory relief; which was dismissed by the trial court without leave to amend because Yvanova failed to state a cause of action. In particular, she failed to state a cause of action because she failed to allege tender as an element of her quiet title cause of action. However, Yvanova, acting in pro per, had attempted to make allegations based upon *Glaski* (defect in an assignment in the chain of title).

After Yvanova appealed the trial court's decision, the court of appeal requested supplemental briefing on whether Yvanova's allegations (e.g., validity of assignment of note and deed of trust to a pool [*Glaski* allegations]) might support a cause of action for wrongful foreclosure. Even though Yvanova's second amended complaint did not contain a wrongful foreclosure claim, the court of appeal reasoned that if she could amend her complaint to do so, the trial court likely abused its discretion by sustaining the lender's demurrer without permitting Yvanova the opportunity to amend.

The *Yvanova* court of appeal compared *Glaski* to other cases like *Jenkins v. JP Morgan Chase Bank, N.A.*, (2013) 216 Cal.App.4th 497 ("*Jenkins*") where the court of appeal rejected the proposition that a borrower has standing to challenge the assignment, or chain of title of assignments. The *Yvanova* court of appeal held that even in a wrongful foreclosure action, the borrower did not have standing to challenge the assignment of the note and deed of trust (pursuant to a pooling or servicing agreement) because the borrower was not a party to those

[2] Cal. Court of Appeal, 5th Dist.

agreements. In any case, because Yvanova did not dispute that she was in default, the court of appeal concluded that she was not damaged by a defective assignment. The real victim, said the court, would be the lender who actually owned the loan. The court of appeal rejected *Glaski*, observing that: ". . . no California court has followed *Glaski* on this point, and many have pointedly rejected it." The court of appeal in *Yvanova* adopted the analysis from *Jenkins* and affirmed the trial court's judgment of dismissal.

In the *Jenkins* case, the borrower was attempting to challenge the assignment or chain of title (securitization) as a pre-emptive attack on a nonjudicial foreclosure. Citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 ("*Gomes"*), the *Jenkins* court of appeal held:

> Importantly, the provisions setting forth California's nonjudicial foreclosure scheme (§§ 2924–2924k) "'cover every aspect of [the] exercise of [a] power of sale contained in a deed of trust.' [Citation.] 'The purposes of this comprehensive scheme are threefold: (1) to provide the [beneficiary-creditor] with a quick, inexpensive and efficient remedy against a defaulting [trustor-debtor]; (2) to protect the [trustor-debtor] from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citation.]" (*Gomes*, supra, 192 Cal.App.4th at p. 1154 . . ..)

The *Gomes* case supports a line of cases holding that California's comprehensive legislative scheme is exhaustive, and preempts common law or judicially-imposed conditions to commencing a nonjudicial foreclosure. Nowhere in these provisions is the person commencing the foreclosure required to prove the title or chain of assignments before commencing or conducting a nonjudicial foreclosure.

Glaski was not appealed to the Supreme Court. Therefore, when *Yvanova* was handled down by the court of appeal, it created a conflict between two different districts of the court of appeal. The Supreme Court will often grant a hearing when different districts of the court of appeal have handed down conflicting opinions on the law.

The cases involving alleged defects in the assignment of the note and deed of trust break down into two basic categories: (1) pre-emptive attacks on pending nonjudicial foreclosure sales (i.e., *Jenkins*); or, (2) post-sale wrongful foreclosure actions (*Glaski* and *Yvanova*). By accepting the *Yvanova* case and limiting the issue to be heard, the California Supreme Court squarely raises the question of whether, after the nonjudicial foreclosure sale, the borrower has standing to challenge an "assignment of the note and deed of trust on the basis of defects allegedly rend the assignment void." The Supreme Court will likely resolve the conflict between the *Yvanova* and *Glaski* cases. Because of the limitation in the Supreme Court's order granting hearing, the resolution is likely to focus upon situations where the assignment of the note and deed of trust is "void" as

opposed to “voidable”. Should the Supreme Court adopt the position of *Glaski,* it would create an anomaly where the borrower could not challenge the assignment before the foreclosure sale but could challenge it after the trustee’s sale; creating a huge amount of title issues relating to real property foreclosures and unnecessary litigation where the borrower has suffered no damages other than those resulting from their own default.

Since the court of appeal’s decision in *Yvanova*, there have been a number of other published opinions dealing with the *Glaski/Yvanova* issue.

In *Mendoza v. JPMorgan Chase Bank, N.A*., (2014) 228 Cal.App.4th 1020 [depublished], the borrower’s second amended complaint for wrongful foreclosure, quiet title, and declaratory relief was based primarily upon a *Glaski* argument (i.e., improper assignment or securitization). *Mendoza*, like *Glaski* and *Yvanova*, was a lawsuit filed *after the trustee’s sale* and not a pre-emptive attempt to stop a nonjudicial foreclosure.

The court of appeal in *Mendoza* held that the borrower did not have standing to challenge the assignment of the note and deed of trust to a securitized trust. As the court of appeal did in *Yvanova*, the *Mendoza* court pointed out that both state and federal cases have generally criticized the holding in *Glaski* and refused to follow it.

In addition, the *Mendoza* court observed that, even if *Glaski* applied in general, before the borrower can state a claim for wrongful foreclosure he/she *must allege prejudice*. Prejudice is not alleged where the borrower admittedly is in default and cannot show that the alleged transfer of note and deed of trust did not interfere with the borrower’s ability to pay, or that the lender would not have foreclosed in the circumstances. Prejudice is not presumed when there are irregularities in the foreclosure process. The type of prejudice that must be shown is “that the foreclosure would have been averted but for [the] alleged deficiencies.” In addition, the court of appeal held that the borrower did not have standing to challenge the assignments or securitization as the borrower is not a party to these third party agreements. The court of appeal affirmed the trial court’s dismissal based upon its sustaining a demurrer without leave to amend. As discussed above, the Supreme Court granted a hearing on *Mendoza,* but has ordered that any further proceedings be deferred until the Supreme Court’s decision in *Yvanova*.

In *Keshtgar v. U.S. Bank, N.A*., (2014) 226 Cal.App.4th 1201 [depublished], a borrower in default, attempted to use the *Glaski* argument as a preemptive attack on the authority of the beneficiary/trustee to nonjudicially foreclose. On October 1, 2014, the Supreme Court granted a petition and, as in *Mendoza*, ordered any further action to be stayed until the disposition of the *Yvanova* case.

Kan v Guild Mortgage Company (2014) 230 Cal.App.4th 736, ("*Kan*") is another failed attempt by a borrower to allege a defect in the assignment of the note and deed of trust to pre-emptively challenge the nonjudicial foreclosure sale.

In granting hearings in *Yvanova*, *Mendoza* and *Keshtgar*, the Supreme Court made it clear that the Court is interested in resolving the issue of the borrower's ability and standing to challenge a foreclosure based upon an allegedly defective assignment or transfer of the note and deed of trust (either before or after the trustee's sale). How the Court resolves the *Yvanova* appeal and the related cases could have huge impact on nonjudicial foreclosures in California; on titles to real property; and on litigation over nonjudicial foreclosure sales.

The Supreme Court's resolution of the issues will be critical. That is, after a trustee's sale, will the *Glaski* rule apply only where the assignment is void rather than voidable? Does a borrower have to suffer actual damages and be prejudiced from the defect in the assignment? Many cases observe that the foreclosure itself is not the borrower's damages where the payment default is admitted and the borrower cannot allege he/she can cure the default. Hopefully, the Supreme Court will require as a condition to any challenge to assignments and/or chain of title that the borrower be able to show actual damage and prejudice - i.e., that the defendant's conduct caused the harm to the borrower, not the borrower's default; and that but for the defendant's conduct, the borrower could have cured the default and stopped the foreclosure. We can expect the Supreme Court's opinion in *Yvanova* mid-2015.

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