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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LORRAINE ASHER et al.,

Plaintiffs and Appellants,
v.

J.P. MORGAN CHASE BANK et al.,

Defendants and Respondents.

2d Civil No. B234944
(Super. Ct. No. 56-2010-00383623-CU-OR-VTA)
(Ventura County)

Lorraine Asher and Cindy Reid Dart appeal a judgment of dismissal entered after an order sustaining the demurrer of respondents J.P. Morgan Chase Bank, California Reconveyance Co., and Bank of America to a first amended complaint seeking to set aside a foreclosure sale and damages. They appeal on the sole ground that the trial court erred in denying their request to amend their first amended complaint to add a claim of promissory estoppel. We affirm.

STATEMENT OF FACTS[1] *AND PROCEDURAL HISTORY*

Appellants purchased a residence in Port Hueneme as tenants in common in September 2005. They made a down payment of $20,400 and borrowed a total of $612,000 from Washington Mutual Bank to finance the purchase. The loans were secured by deeds of

[1] This statement of facts is taken from the allegations of the first amended complaint and the attached exhibits.

trust. Subsequently, Washington Mutual went into receivership and its assets were sold to J.P. Morgan Chase Bank (Chase).

Appellants sought a loan modification. Chase allegedly told them that they could qualify for a loan modification by not making payments for several months. Appellants followed Chase's instructions and were qualified for both a loan modification and a short sale.

On or about March 2, 2009, appellants were sent a notice of default and election to sell under deed of trust. The notice advised appellants that a sale would take place in three months if they did not make past due payments in the amount of $12,754.08. The notice was rescinded, and a new notice of default was sent to appellants on or about April 22, 2009. By the time the second notice was sent, appellants were in arrears in the amount of $15,811.42. Appellants did not make any past due payments, and a notice of trustee's sale was issued or about August 6, 2009, setting a date of sale for September 4, 2009. The sale did not take place on that date because appellants and Chase were in the process of negotiating a short sale of the property for $300,000. Chase failed to follow through on the short sale and instead resumed nonjudicial foreclosure proceedings. On April 8, 2010, the property was purchased by a third party at a trustee's sale for $260,000.

Appellants filed a complaint alleging wrongful foreclosure under Civil Code sections 2923.5 and 2923.6[2] and numerous tort and contract causes of action. They requested that the court set aside the sale and award them damages. After Chase filed a demurrer to the complaint, appellants filed a first amended complaint. Chase again demurred. After hearing on May 23, 2011, the court sustained the demurrer without leave to amend. The order states:

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[2] Civil Code section 2923.5 requires a lender to contact a borrower to explore options to prevent foreclosure before filing a notice of default. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 221.)

Civil Code section 2923.6 provides that lenders should endeavor to offer homeowners loan modifications. The statute does not impose a duty on a lender to modify a home loan. (*Mabry v. Superior Court*, *supra*, 185 Cal.App.4th at p. 222.)

"Plaintiffs cannot state causes of action under Civil Code sections 2923.5 or 2923.6. As to the former, that section does not provide a post-sale remedy. [Citation.] As to the latter, that section does not create a private right of action. Further, plaintiffs have not alleged a present ability to tender the amount due on the note. Plaintiffs have not alleged the existence of a written contract. Plaintiffs' tort theories are based on the premise that plaintiffs were coaxed into believing that the property would be disposed of through a short sale, as opposed to foreclosure. But the amount of the short sale price was far less than the amount due on the note. Thus, plaintiffs have not alleged resulting harm.

"Plaintiffs seek leave to amend to state a cause of action for promissory estoppel. However, plaintiffs' counsel was unable to identify facts sufficient to state such a cause of action. As noted above, the loss of the ability to participate in a short sale does not constitute detrimental reliance."

Appellants' sole argument on appeal is that the trial court erred in not granting leave to amend the first amended complaint to state a claim based on promissory estoppel.

DISCUSSION

Standard of Review

When reviewing dismissal of a complaint after a demurrer has been sustained without leave to amend, we accept the factual allegations of the complaint as true and review the pleading de novo to determine whether the facts as pleaded state a cause of action. (*Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481.) If we determine that an amendment would cure the defect, we conclude the trial court abused its discretion and reverse. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff bears the burden of establishing that the complaint could have been amended. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.) "[W]here the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 459.)

Denial of Leave to Amend Was Proper

Appellants assert the trial court abused its discretion in denying their request for leave to amend the first amended complaint to state a cause of action for promissory estoppel.[3] They argue that Chase told them that if they defaulted on their loan payments, they could qualify for a loan modification. They also argue that Chase led them to believe that their property would be disposed of by short sale rather than non-judicial foreclosure. They assert they relied to their detriment on the lender's statements.

"'Under [the doctrine of promissory estoppel] a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement. . . .'" (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672, fn. 1.)

"[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . ." (*Division of Labor Law Enforcement v. Transpacific Transportation Co*. (1977) 69 Cal.App.3d 268, 277-278.) The promise must, in addition, be "clear and unambiguous in its terms." (*Laks v. Coast Fed. Sav. & Loan Assn*. (1976) 60 Cal.App.3d 885, 890.) "Estoppel cannot be established from . . . preliminary discussions and negotiations." (*National Dollar Stores v. Wagnon* (1950) 97 Cal.App.2d 915, 919.) A gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable. (*Raedeke v. Gibraltar Sav. & Loan Assn., supra,* 10 Cal.3d at p. 673; *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 547.) Appellants have alleged no firm promise; at most, the complaint alleges only a gratuitous oral promise and preliminary discussions and negotiations.

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[3] On appeal, appellants do not assert the trial court erred in dismissing the causes of action alleged in the first amended complaint. Therefore, no discussion of those claims is necessary. (See *In re Sade C.* (1996) 13 Cal.4th 952, 994 [a party abandons a cause of action by failing to make any appellate contention supported by argument and citation to authority].)

Moreover, as the trial court ruled, appellants cannot establish prejudice. Appellants owed more on the property than the short sale would have brought. Even if a short sale had occurred, appellants would have gained nothing. Therefore, the property's disposal by trustee's sale was not prejudicial to them.

Appellants did not meet their burden of establishing that the complaint could be amended to state a cause of action. According to the declaration of respondents' attorney attached to respondents' brief, [4] the trial court invited appellants' attorney to state on the record how the complaint could be amended to state a cause of action based on promissory estoppel. After continuing the hearing until the end of the calendar to provide appellants' attorney a further opportunity to state facts to support promissory estoppel, appellants' attorney admitted he could not do so.

We conclude that there is no reasonable possibility the defects in the first amended complaint could be cured by amendment. The trial court did not abuse its discretion by sustaining defendants' demurrer without leave to amend. (See, e.g., *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [if plaintiff has not had a chance to amend the complaint in response to a demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face it is incapable of amendment].)

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

[4] We rely on the unchallenged declaration of respondents' counsel as appellants have not provided the court with a reporter's transcript.

Mark Borrell, Judge

Superior Court County of Ventura

Roy Legal Group and Raj D. Roy for Plaintiffs and Appellants.

AlvaradoSmith, APC, Theodore E. Bacon, David J. Masutani and T. Matthew Hansen for Defendants and Respondents.