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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AUGUST FINANCIAL GROUP, LLC,

Plaintiff and Respondent,

v.

2074 CERRO GORDO, LLC,

Defendant and Appellant.

B246030

(Los Angeles County
Super. Ct. No. BC477267)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Robert Leslie Hess, Judge. Reversed.

Law Offices of Jeffrey E. Lieber and Jeffrey E. Lieber for Defendant and
Appellant.

Raiskin & Revitz and Steven J. Revitz for Plaintiff and Respondent.

The question presented is whether August Financial Group, LLC (August Financial) may demolish the buildings on property it purchased from 2074 Cerro Gordo, LLC (CGL) even though August Financial executed a deed of trust in which it promised to preserve those same buildings. The trial court granted August Financial's motion for summary judgment and entered a judgment declaring that it can demolish the buildings without being in breach of its obligations. CGL appeals. It argues that the deed of trust plainly prohibits the demolition of the buildings on the property, and therefore summary judgment should not have been granted. As discussed below, we agree with CGL. Accordingly, the judgment is reversed.

FACTS

Complaint

In a complaint for declaratory relief, August Financial sued CGL and alleged: Luke Investment Group, LLC (Luke Investment) entered into a real estate contract (contract) to purchase properties located at 2064, 2068 and 2074 Cerro Gordo Street in Los Angeles (properties) from CGL. There was a house and shed on 2068 Cerro Gordo Street, and a shed on 2074 Cerro Gordo Street. The sheds were in tear-down condition and added no value to the properties. The contract expressly stated that the house was in tear-down condition. Because of their condition, the house and sheds detract from the value of the properties.

Luke Investment assigned the contract to August Financial.

The contract required August Financial to pay a portion of the purchase price with a promissory note. The promissory note was secured by a deed of trust. Paragraph 1 on page 3 of the deed of trust stated, in part, that “‘to protect the security [interest] of this deed of trust, [August Financial] agrees: [¶] . . . To keep said property in good condition and repair; not to remove or demolish any building thereon[.]’”

August Financial prayed for a declaration that: “(A) The . . . [s]heds are not ‘buildings’ within the meaning of [section 1 of page 3 of the deed of trust] and [¶] (B) [August Financial] has the right to remove the [h]ouse and the . . . sheds and such removal shall not constitute a breach of the [promissory note or the deed of trust].”

Summary judgment

August Financial moved for summary judgment. The undisputed facts established that the purchase price for the properties was \$550,000, August Financial paid CGL \$300,000 in cash at the close of escrow, and August Financial executed a promissory note for \$250,000. In its motion, August Financial argued that it should be permitted to remove the house and sheds because it would not constitute waste, and removing those structures would not adversely impact the value of the properties or jeopardize CGL's security interest.

The motion was granted. In its minute order, the trial court opined that despite "the terms of Paragraph 1 of [page 3 of] the Deed of Trust, the issue is whether the value of the security for the \$2[5]0,000 [promissory] note would [be] substantially impaired by demolition of the house and shed." After sustaining objections to two declarations submitted by CGL, the trial court concluded that CGL failed to demonstrate that its security interest would be compromised. In addition, the trial court ruled that August Financial had waived the issue of whether it could remove a tent¹ from 2074 Cerro Gordo Street.

The amended judgment stated: "The removal of the house and the shed currently situated on the property located at 2068 Cerro Gordo Street in Los Angeles . . . shall not constitute a default in connection with the deed of trust . . . [August Financial] made in favor of [CGL] which concerns the [properties][.]" August Financial was awarded \$28,837.50 in attorney fees.

This timely appeal followed.

DISCUSSION

CGL argues that summary judgment was improper because August Financial agreed not to demolish any buildings.

We agree.

¹ Apparently the evidence demonstrated that there was a tent rather than a shed located on 2074 Cerro Gordo Street.

The trial court's order granting summary judgment is subject to our de novo review. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) When analyzing the underlying motion, “we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue.” (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261 (*Silva*).)

In its motion for summary judgment, August Financial bore the burden of negating the need for a trier of fact to resolve that factual issues raised by the complaint. (*Silva, supra*, 65 Cal.App.4th at p. 261; *Hilton K. v. Greenbaum* (2006) 144 Cal.App.4th 1406, 1412 [“a summary judgment motion is directed to the issues framed by the pleadings” because “[t]hose are the only issues a motion for summary judgment must address”]; Code Civ. Proc., § 437c, subd. (c) [“[t]he motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”].) In its complaint, August Financial requested a declaration that demolishing the house and shed located on 2068 Cerro Gordo Street would not constitute a breach of the deed of trust. Thus, August Financial was required to establish that paragraph 1 of page 3 of the deed of trust did not prohibit the demolition of existing buildings.

August Financial did not meet its burden, and there is nothing it could have done differently. Per the deed of trust, it agreed “not to remove or demolish any building” on the properties. There was no dispute that the house qualified as a building under the terms of the deed of trust. That is the end of the story. Seeking a way around this roadblock, August Financial argued that demolishing the house and shed would not constitute waste or an impairment of CGL's security. This argument failed because it merged the issue of breach with the premature issue of whether August Financial would have an equitable defense to foreclosure on some future date.

Miller & Starr illuminates the distinction. It explains that “[b]y the terms of the usual form of trust deed, the trustor has a contractual duty to preserve and maintain the

property security so that the beneficiary's security is not impaired.” (4 Miller & Starr, Cal. Real Estate (3d ed. 2011) Deeds of Trust, § 10:53, p. 167.) Moreover, “[a]ny person who has an interest in real property that is subject to the lien of a mortgage or deed of trust has a duty not to do any act that will substantially impair the lienor's security, or that would constitute waste. This duty is imposed by law.” (*Id.* at pp. 167–168, fn. omitted.) “Even though the trustor or other person in possession alters the premises or fails to maintain the property, the beneficiary may not be able to declare a default or commence foreclosure proceedings. . . . [¶] The breach of the covenant must result in a substantial depreciation in the value of the property. Thus, when the trustor fails to repair damage to the premises, or removes improvements to the premises that are part of the security for the debt, there may be a breach of the covenant in the security instruments, but the lender cannot accelerate the debt unless it can prove that there has been a resulting diminution in the value of the security such that its security has been impaired.” (*Id.* at pp. 169–170.) “Not only must there be an adverse effect on the value of the property, but the diminution in the value of the property must jeopardize the beneficiary's security. The court will not eliminate the trustor's equity because of a technical default that does not cause actual or imminent injury to the beneficiary. Therefore, even though the trustor or the person in possession commits waste that reduces the value of the property, the beneficiary cannot declare a default or commence foreclosure proceedings as long as the remaining value of the property is sufficient to satisfy the debt.” (*Id.* at pp. 170–171.) Case law is in accord. (*Bart v. Streuli* (1935) 5 Cal.2d 67, 68 [because the removal of the front porch of a building benefited the mortgagee and therefore did not cause any harm, the trial court “had power to relieve against the effect of any technical violation of covenants in the mortgage”].)

Application of the law easily establishes that demolition of the house will constitute a technical breach of the deed of trust.² Therefore, August Financial was not entitled to a declaration that it could remove the house and shed from 2068 Cerro Gordo

² We express no opinion as to the shed.

Street without committing a breach. Insofar as the trial court's declaratory judgment indicates the contrary, it is legally unsound. To the degree the declaratory judgment could be interpreted as establishing that August Financial would have an equitable defense to foreclosure on some future date after it demolishes the house and shed, that issue was premature. The reason is simple. On the future date, the market value of the properties might be less than the balance of the loan and therefore demolishing the house and shed might substantially impair the security. It was impossible for the trial court to know what would happen in the future.

All other issues are moot.

DISPOSITION

The judgment, including the award of attorney fees, is reversed.

CGL shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.