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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANNA ZABELINA,

Plaintiff and Appellant,

v.

SELECT PORTFOLIO SERVICING,
INC., et al.,

Defendants and Respondents.

B285746

(Los Angeles County
Super. Ct. No. BC628731)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sunshine S. Sykes, Judge. Affirmed.

Anna Zabelina, in pro. per., for Plaintiff and Appellant.

McGlinchey Stafford, Brian A. Paino and Allison O. Chua
for Defendants and Respondents.

Plaintiff and appellant Anna Zabelina appeals from the summary judgment entered against her and in favor of her prior and current loan servicers, Select Portfolio Servicing, Inc. (Select) and Bayview Loan Servicing, LLC (Bayview). Zabelina argues that triable issues of fact exist regarding the defendants' pursuit of foreclosure while she was diligently pursuing a loan modification. Finding no triable issues, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying Mortgage and Default

In November 2005, Zabelina obtained a mortgage loan for her home from non-party Countrywide Home Loans in the principal amount of \$1,500,000. The note was secured by a deed of trust encumbering the property.

Zabelina became delinquent in her payments in June 2006, and has paid no amounts due on the loan from that date forward.¹

¹ Defendants provided evidence of this fact in support of their motion for summary judgment, and identified it in their separate statement. In her opposition to defendants' separate statement, Zabelina denied the truth of this proposed fact, stating, "Defendant's conduct caused Plaintiff to default," and citing her declaration. Zabelina's declaration did not address the causes of her default in any way. We therefore consider this fact to be undisputed. To the extent Zabelina impliedly relies on the allegations of her complaint that her variable-rate mortgage was "destined for failure," as soon as the "initial teaser monthly payment" increased, those allegations implicate the conduct of non-party Countrywide, not the loan servicers who are the defendants in this action.

2. *Foreclosure Proceedings are Commenced*

In October 2014, more than eight years after Zabelina defaulted, the trustee recorded a notice of default and election to sell.

In July 2015, the trustee recorded a notice of trustee's sale. It is not clear what happened with this notice, but the sale did not occur and a second notice of trustee's sale was recorded in November 2015. This notice, too, did not result in a sale.

3. *Zabelina Seeks a Modification But Misses the Deadline*

A. *Select Seeks Information by July 8, 2016*

On May 9, 2016, Select, the loan servicer, sent Zabelina a letter entitled "REQUIRED INFORMATION NOTICE."² The two-page letter began, "Select Portfolio Servicing, Inc. [], the mortgage servicer on the above referenced account, acknowledges receipt of the Assistance Review Application, but has determined that it is incomplete. Before we can begin our evaluation process, you are required to submit a complete application. We must receive the missing Required Information as shown on the document attached to this letter on or before July 8, 2016 (the '**Expiration Date**'). If we do not receive the Required

² Defendants' separate statement in support of summary judgment thrice stated, as three separate but identical facts, that this notice was sent to plaintiff. The first time, Zabelina denied the fact, stating, "Notice sent to incorrect address." The remaining two times, Zabelina questioned only the truth of the statements in the notice, not whether it was sent to her. We see no indication on the document itself that the notice was sent to the incorrect address; it was addressed to Zabelina at the property. In addition, her declaration does not discuss receipt of this notice. We therefore consider the fact that it was sent to Zabelina undisputed.

Information by the Expiration Date, we may be unable to evaluate your application.”

The notice further stated, “**If there is a foreclosure sale scheduled for your home in the next thirty (30) days you are required to send all documentation via overnight mail with delivery confirmation.** Please know that while we are evaluating your complete application, your account will not be referred to foreclosure nor will it be sold at a foreclosure sale if the foreclosure process has already been initiated. If a foreclosure sale has already been scheduled we will instruct our attorney to file a motion (or other similar action) to postpone such sale.”

The notice emphasized: “**This is an important notice to provide the Required Information. Time is of the essence!** Please understand that if you fail to take the action described prior to the Expiration Date we will not be able to review your request, and foreclosure actions will resume or may be initiated.”

The letter attached a lengthy list of required forms and other information Select sought from Zabelina. Zabelina apparently wanted to rely on funds from her mother in order to qualify for a loan modification. Her mother lived in Ukraine. Zabelina would later concede, in her complaint, that proof of her mother’s income was an “integral part of the requested documents.”

B. *Select Cancels the Scheduled Foreclosure Sale*

On May 19, 2016, in apparent compliance with its representations in the May 9 letter, Select notified Zabelina that the “scheduled foreclosure sale of the . . . property has been cancelled.”

C. *Select Reminds Zabelina of the July 8, 2016 Deadline*

On May 25, 2016, Select sent Zabelina a second Required Information Notice. It began, “Although you may have received previous information regarding your assistance request and documentation requirements, we have performed an additional review and have determined that the submitted documentation is insufficient or additional information is needed as shown on the document attached to this letter (the ‘**Required Information**’). Before we can begin our evaluation process, you are required to submit a complete application. We must receive the missing Required Information on or before July 8, 2016 (the ‘**Expiration Date**’).”

Similar to the May 9 notice, the May 25 letter stated that Zabelina’s account would not be referred to foreclosure “while we are awaiting the additional information.”

The notice repeated that time was of the essence. It emphasized, “in order for us to review your account for all available loss mitigation programs we require a complete application, which requires you to submit all Required Information by the Expiration Date.”

D. *Select Sends a Final Reminder*

On June 29, 2016, Select sent Zabelina a notice stating, “We have reviewed your account and note that you have not returned all of the required information to complete your assistance application. As we have previously explained, we need a complete application before we can begin our evaluation process.” Zabelina was encouraged to contact Select “as soon as possible to discuss the required information” if she still wanted to be considered for a modification.

E. *The July 8, 2016 Deadline is Not Met*

As we shall discuss, Zabelina's main argument on appeal is that she did, in fact, submit the information necessary for a loan modification. But what is also clear is that she did not submit the information prior to the July 8 deadline. Indeed, she concedes that, as late as July 19, 2016, she still had not obtained her mother's financial information from Ukraine, and had requested a delay until she could submit that information.

4. *A New Notice of Trustee's Sale is Recorded*

On July 21, 2016, the trustee recorded a new notice of trustee's sale, setting the sale for August 12, 2016. The sale did not take place; the reason is not clear from the record.

5. *Zabelina Files Suit*

On July 28, 2016, Zabelina, representing herself, filed a complaint against Select and the trustee, seeking to enjoin the then-pending foreclosure sale.³ She alleged causes of action for misrepresentation and slander of title.

6. *Bayview Takes Over Loan Servicing*

While Zabelina's action was pending, Select transferred the loan servicing to Bayview.

7. *The Operative Complaint*

Select filed a motion for judgment on the pleadings on the initial complaint. The motion was granted with leave to amend. On December 29, 2016, Zabelina filed her first amended complaint, which added Bayview as an additional defendant. The complaint alleged causes of action for injunction, misrepresentation, and slander of title.

³ The trustee is not party to this appeal.

The injunction cause of action alleged an actual loan modification agreement existed between Zabelina and Select, under which Zabelina agreed to provide all of the supporting documents (including her mother's information from Ukraine) and Select agreed that the home would not be sold in foreclosure. Zabelina relied on the May 25, 2016 letter as establishing Select's promise not to foreclose. Zabelina alleged that this promise was a false representation, and that Select instead pursued foreclosure. Zabelina sought an injunction to stay the threatened foreclosure and require Select to complete her loan modification.

The misrepresentation cause of action alleged that Select strung Zabelina along promising a modification, while Select always intended to foreclose. Zabelina alleged that she justifiably relied on this representation to her detriment, in that she did not take prompt action to immediately save her home.

The slander of title cause of action alleged that the July 21, 2016 notice of trustee's sale was invalid because it was in violation of the statutory rules governing foreclosure and the alleged loan modification agreement.

8. *Bayview Rejects Zabelina's Request for Modification Because She Failed to Provide the Necessary Documents*

While the case proceeded, it appears that Bayview, the substitute loan servicer, continued to process Zabelina's loan modification request, and sought additional documents from her. On March 17, 2017, Bayview wrote Zabelina, notifying her of documents which must be submitted by April 16, 2017, specifically including income verification from Zabelina's mother.

On May 2, 2017, Bayview sent Zabelina two letters rejecting her requests for modification. She was rejected for a so-called "HAMP" (Home Affordable Mortgage Program)

modification, because the unpaid principal balance on the loan exceeded the program limit. She was denied a non-HAMP modification because she “did not complete and submit all of the documents we requested.” She was advised that if she could provide the documentation at a later date, she should immediately do so.

Whether any further documentation was submitted is unclear from the record on appeal. It does appear that Zabelina continued to seek a modification, and no trustee’s sale had occurred by May 11, 2018.⁴

9. *Select and Bayview Move for Summary Judgment*

On June 21, 2017, Select and Bayview moved for summary judgment. They submitted declarations setting forth the course of the loan modification negotiations, including their multiple requests for information set forth above. The Bayview declaration specifically declared that, to date, Zabelina still had not submitted a complete modification application.

Based on this evidence, the defendants argued that each of Zabelina’s causes of action failed. As to injunction, they argued no cause of action for injunction exists independently of a substantive cause of action, and, in any event, the documents defeated Zabelina’s allegation that any loan modification agreement existed. To the extent Zabelina argued the May 25,

⁴ The trial court sustained objections to the exhibits Zabelina submitted in opposition to summary judgment, and Zabelina has failed to include the documents in the record on appeal. However, the trial court’s order states that one of her exhibits “appears to be a loan modification application submitted on May 17, 2017.” The respondents’ brief on appeal, filed May 11, 2018, indicates that the property has not yet been lost in foreclosure.

2016 letter contained a promise to not foreclose, the language of the letter itself established that the promise was conditioned on Zabelina submitting the necessary documents by July 8, 2016, which she had failed to do.

The defendants argued the misrepresentation cause of action failed because it was not pleaded with particularity and, to the extent it relied on the May 25, 2016 letter, there was no misrepresentation. Additionally, they argued Zabelina suffered no damages in reliance on any such representation.

As to slander of title, they argued that the recordation of a trustee's notice of sale is absolutely privileged under Civil Code section 47.

10. *Zabelina Opposes the Motion*

In her memorandum in opposition, Zabelina argued that a single triable issue of fact existed: whether she had provided defendants with a complete loan modification application including all of the documents requested by defendants.⁵ Although she argued that documents she had submitted met all of defendants' requests, she never argued that she had *timely* submitted the documents. Indeed, she argued that prior to the recordation of the July 21, 2016 notice of trustee's sale, she "did not receive any telephone calls or written correspondence from the Defendants regarding her request to wait for receipt of the financial information from Ukraine." This is an implicit

⁵ She also identified a second issue: whether the mortgage contained a power of sale clause. This issue is not pursued on appeal, likely because it was never pleaded, and the deed of trust clearly contains such a clause.

concession that the Ukrainian information had not been received and submitted by the July 8, 2016 deadline.

Zabelina's evidence in opposition consisted of her brief declaration and several exhibits. Defendant's objections to this evidence were all sustained. When the statements to which defendants objected are excised from her declaration, nothing substantive remains beyond plaintiff's admission that she purchased the house subject to a mortgage in favor of Countrywide.⁶

11. *Ruling, Judgment and Appeal*

After a hearing, the trial court granted summary judgment, considering each cause of action separately.

As to injunctive relief, the court concluded that the allegations of Zabelina's complaint based this cause of action on a misrepresentation that the home would not be sold; thus, the cause of action was identical to the misrepresentation cause of action, and rose and fell with it.

As to misrepresentation, the court concluded that Zabelina's evidence did not raise a triable issue of fact of fraud. The court specifically addressed Zabelina's exhibits, even though it had sustained objections to their foundation, and noted that Zabelina's "evidence only shows actions by the Defendants which took place after the date of the complaint." The court added that Zabelina "has not introduced evidence to show that Defendants

⁶ Zabelina apparently submitted four exhibits. She attempted to authenticate three of those exhibits in her declaration; objections to these attempts as insufficient were sustained. She made no attempt to authenticate the fourth exhibit, exhibit 3, which was not mentioned at all in her declaration, opposition, or opposition to defendants' separate statement.

never intended to allow her to modify the loan. Defendants, by contrast, have introduced evidence to show that, not only have they allowed Plaintiff to live in her house for over 10 years without paying the mortgage, they have repeatedly requested further documents and canceled at least one foreclosure sale to allow Plaintiff time to obtain the required documents. [Citation.] Plaintiff has not submitted a properly completed application for modification. [Citation.]”

Finally, the court concluded that the cause of action for slander of title was barred because of the Civil Code section 47 privilege.

Judgment was entered in favor of Select and Bayview. Zabelina filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

“‘A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff’s asserted causes of action can prevail.’ [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or

denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

“The declarations in support of a motion for summary judgment should be strictly constructed, while the opposing declarations should be liberally construed. [Citation.] This does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration. Only admissible evidence is liberally construed in deciding whether there is a triable issue.” (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.)

2. *No Triable Issues of Fact Exist*

Generally speaking, Zabelina opposed the motion for summary judgment on the basis that a triable issue of fact existed as to whether she had submitted the necessary documents for a loan modification. Defendants submitted evidence that Zabelina had not. Although Zabelina proffered evidence purporting to dispute this, objections were sustained to nearly all of Zabelina’s evidence. Zabelina does not challenge any of the trial court’s evidentiary rulings; thus, there is no evidence properly before us supporting Zabelina’s contention, and we must affirm. We briefly address each of Zabelina’s causes of action.

A. *Injunction*

Zabelina's operative complaint sought injunctive relief on the basis of breach of a purported loan modification agreement, under which Select agreed not to foreclose. On appeal, Zabelina inappropriately changes her theory, and argues that she raised a triable issue of fact on this cause of action because she raised a "genuine issue of whether [defendants] carefully evaluated her loan modification application." As we have discussed, Zabelina submitted no admissible evidence on this point. Moreover, Zabelina has provided no legal authority for the proposition that a loan servicer cannot pursue foreclosure after the defaulting borrower has failed to timely submit the documents necessary for a loan modification application.

B. *Misrepresentation*

The elements of fraud are misrepresentation, knowledge of falsity, intent to defraud, justifiable reliance, and damage. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249.) Zabelina argues that her misrepresentation cause of action can proceed on the basis that Select misrepresented to her, in its May 25, 2016 letter, that it would postpone any foreclosure sale already noticed. The undisputed evidence shows that this was not a misrepresentation. Select had made the same representation in its May 9, 2016 letter, and then, on May 19, cancelled the then-pending foreclosure sale. By the time of the May 25 letter, there was no active notice of sale. The May 25 letter indicated that Select would not foreclose while it was awaiting receipt of the documentation which it must receive by the July 8, 2016 expiration date. When July 8 came and went without the information having been received, Select was free to record a new notice of sale without going back on its word.

C. *Slander of Title*

“To state a claim for slander of title, a plaintiff must allege ‘(1) a publication, (2) which is without privilege or justification,’ (3) which is false, and (4) which ‘causes direct and immediate pecuniary loss.’ [Citations.]” (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336.) Zabelina alleged in the operative complaint that the July 21, 2016 recordation of the notice of trustee’s sale slandered her title to the property. On appeal, she argues for the first time that her title was slandered by the recordation of the notice of default, which she asserts, without further explanation, was “defective.”

Zabelina cannot change her theory for the first time on appeal. Even if she could, however, it remains that recordation of both a notice of default and a notice of trustee’s sale are privileged acts. (Civ. Code, § 2924, subd. (d)(1).) Zabelina suggests that her cause of action can proceed because the privilege is only qualified, not absolute, and defendants did not plead and prove the absence of malice. Courts are split on whether the privilege is absolute or qualified. (*Schep v. Capital One, supra*, 12 Cal.App.5th at p. 1337.) However, even if we were to determine the privilege is only qualified, the burden to plead and prove malice is on Zabelina. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630-631 [when the complaint shows that the communication is within the class of communications qualifiedly privileged, the plaintiff must go further and plead malice].) She has failed to do so, neither pleading malice in her complaint nor raising a triable issue as to malice in opposition to the summary judgment motion.

DISPOSITION

The judgment is affirmed. Zabelina is to pay Select and Bayview's costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J .