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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN KRASCH et al., Plaintiffs and Appellants, v. WELLS FARGO BANK, N.A., et al., Defendants and Respondents.	B233012 (Los Angeles County Super. Ct. No. GC045984)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Judge. Affirmed.

Ton & Associates and Charles Ton for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Suzanne M. Hankins and Kerry W. Franich for Defendants and Respondents Wells Fargo Bank, N.A. and U.S. Bank National Association, as Trustee for the Asset-Backed Pass-Through Certificates, Series 2006-NC2.

INTRODUCTION

Plaintiffs Steven and Lori Krasch appeal from the superior court's judgment dismissing their lawsuit after it sustained the demurrers of defendants[1] and denied leave to amend the complaint. Plaintiffs contend they can amend their complaint to state causes of action against defendants for unlawful foreclosure and violation of the Unfair Competition Act (the UCL) (Bus. & Prof. Code, § 17200 et seq.). We hold the trial court did not abuse its discretion in denying leave to amend and plaintiffs have not demonstrated how they could amend to state viable causes of action. Accordingly, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of review, we assume the truth of the following allegations extracted from the first amended complaint. (*Wells Fargo Bank, N.A. v. Superior Court* (2008) 159 Cal.App.4th 381, 385.) Plaintiffs were the owners of 4934 Birchland Place, Temple City, California (the property). In 2006, plaintiffs refinanced their mortgage on the property with Lenox Financial Mortgage Corporation. Plaintiffs alleged that Lenox did not disclose how risky the refinance loan was for them or provide alternative loans, and so plaintiffs were deprived of a meaningful choice in mortgage loans for which they actually qualified. America's Servicing Company dba Wells Fargo and Company (ASC or Wells Fargo) was the servicing company for Lenox and was the company to whom plaintiffs sent their mortgage payments. Plaintiffs further alleged that ASC and Lenox entered into a fraudulent scheme to make a loan to plaintiffs that Lenox and ASC knew plaintiffs could not afford, and falsely represented plaintiffs could not qualify for other financing, so as to extract compensation and premiums.

As against Wells Fargo, plaintiffs asserted three of their five causes of action: unjust enrichment, violation of the UCL, and unlawful foreclosure. In their first

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[1] Defendants in this appeal are America's Servicing Company dba Wells Fargo and Company and U.S. Bank National Association, as trustee for the Asset-Backed Pass-Through Certificates, Series 2006-NC2 (US Bank, and together with Wells Fargo, defendants).

cause of action, plaintiffs alleged that Lenox and ASC, as part of a conspiracy, and as agents of each other, were unjustly enriched by predatory lending.

In the second cause of action entitled violation of the UCL, plaintiffs alleged Lenox and Wells Fargo engaged in wrongful foreclosure in violation of Civil Code sections 2923.5 and 2923.6, and section 1709 [deceit] and engaged in predatory lending. These practices, plaintiffs alleged, are likely to mislead the general public and constitute a fraudulent business practice within the meaning of the UCL. Plaintiffs alleged that "the foregoing conduct threatens an incipient violation of a consumer law, including, [*sic*] or violates the policy or spirit of such law or otherwise significantly threatens or harms competition."

Finally, in the fifth cause of action, plaintiffs alleged "against the foreclosing defendants" that after origination and funding, their loan was sold to investors without notifying the borrowers in writing, and so none of the foreclosing defendants owned the loan or corresponding note, none was lawfully appointed trustee or assignee of the original note, none was a beneficiary or representative of the beneficiary, and so none of the foreclosing defendants had the authority to declare default, cause notices of default to issue or to be recorded, or to foreclose on the loan. Furthermore, plaintiffs alleged, the foreclosing defendants violated Civil Code sections 2923.5 and 2923.6 by failing to contact plaintiffs to discuss their financial situation or to explore options to avoid foreclosure, or to inform plaintiffs of the right to have a meeting within 14 days of the contact. Plaintiffs prayed for an order unwinding the foreclosure sale and restructuring the loan.

After filing their first amended complaint, plaintiffs added US Bank as a Doe defendant.

Wells Fargo generally demurred to the three causes of action in the first amended complaint that were alleged against it. Wells Fargo argued the allegations of unjust enrichment were predicated on the loan origination in which Wells Fargo, as the loan servicer, had no involvement, and in any event, unjust enrichment is not a cause of action. Wells Fargo next argued that the wrongful foreclosure cause of action failed

because plaintiffs had not alleged tender and so they lacked standing, and that Civil Code section 2923.5 could not be used to unwind a foreclosure sale that had already occurred. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 233 (*Mabry*).) Finally, Wells Fargo asserted that plaintiffs failed to allege any unlawful, fraudulent, or unfair conduct by Wells Fargo, either because the complaint did not identify a predicate law that Wells Fargo allegedly violated, or because the specific allegations concerned predatory lending without alleging that Wells Fargo, as the asserted loan servicer, was involved in the loan origination.

After it was named as a defendant, US Bank represented by the same counsel as Wells Fargo, demurred to the complaint[2] on the ground that none of the five causes of action sought relief against it. In addition to the arguments raised in Wells Fargo's demurrer, US Bank requested the trial court take judicial notice (Evid. Code, § 452) of the unlawful detainer action US Bank filed in September 2010, the day before plaintiffs initiated the instant lawsuit. In the unlawful detainer action, US Bank alleged it acquired the property from Wells Fargo at a regularly conducted foreclosure sale under Civil Code section 2924, and thereafter duly perfected its title. (Code Civ. Proc., § 1161a, subd. (b)(3).) US Bank obtained summary judgment in its favor in the unlawful detainer action in October 2010 and plaintiffs did not file an appeal. Accordingly, the unlawful detainer action is final. In demurring to the unlawful foreclosure cause of action, US Bank argued that the doctrine of collateral estoppel precluded plaintiffs from alleging irregularities in the foreclosure sale because US Bank's title to the property had already been finally adjudicated in its favor in the unlawful detainer action based on a properly conducted foreclosure sale.

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[2] In support of their demurrers, Wells Fargo and US Bank asked the trial court to take judicial notice of numerous documents involving plaintiffs' loan. The record does not indicate that the trial court took judicial notice of these documents. We decline to do so as they are not documents that are properly the subject of judicial notice. (Evid. Code, § 452.)

The trial court sustained the demurs of Wells Fargo and US Bank without leave to amend and dismissed the lawsuit.

Plaintiffs moved for reconsideration of the judgment based on new evidence. Plaintiffs asserted they discovered in their loan documents evidence of forgery, backdating, and robo-signing. The trial court denied the motion for reconsideration citing *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, that it had lost jurisdiction to grant reconsideration because the motion was brought after the court had dismissed the action. (*Id*. at pp. 181-182.)

After voluntarily dismissing Lenox from the lawsuit, plaintiffs filed this timely appeal.[3]

CONTENTIONS

Plaintiffs contend the trial court abused its discretion in dismissing the complaint and denying leave to amend because they stated valid causes of action and any defects could be cured by amendment.

DISCUSSION

1. *Plaintiffs have forfeited their challenge to the dismissal of the unjust enrichment cause of action*.

Plaintiffs do not raise any arguments in their brief on appeal that the trial court abused its discretion in sustaining the demurrer to the unjust enrichment allegations and so they have forfeited any contention of trial court error in the dismissal of the first cause of action. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785; *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 125.)

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[3] Plaintiffs also appeal from the ruling sustaining the demurrer of Lenox Financial Mortgage Corporation. However, plaintiffs had already voluntarily dismissed Lenox from their lawsuit and so we granted Lenox's motion for dismissal of the appeal as to it. Consequently, Lenox is not a party to this appeal.

2. *Plaintiffs are collaterally estopped to allege irregularities in the foreclosure sale*.

"Collateral estoppel or issue preclusion bars the relitigation of an issue that was previously adjudicated if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. [Citation.]" (*Bostick v. Flex Equipment Co., Inc*. (2007) 147 Cal.App.4th 80, 96.)

"An unlawful detainer action is a summary proceeding ordinarily limited to resolution of the question of possession. [Citation.] Accordingly, it is true that any judgment arising therefrom generally is given limited res judicata effect. [Citation.] However, a 'qualified exception to the rule that title cannot be tried in unlawful detainer is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property . . . .' [Citation.] Code of Civil Procedure section 1161a, subdivision (b)(3) . . . provides an unlawful detainer action may be filed '[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust . . . and the title under the sale has been duly perfected.' " (*Malkoskie v. Option One Mortgage Corp*. (2010) 188 Cal.App.4th 968, 973 (*Malkoskie*).)

A plaintiff in an unlawful detainer action under Code of Civil Procedure section 1161a who has purchased property at a trustee's sale and seeks to evict the occupant in possession "*must show* that he acquired the property at a *regularly conducted sale* and thereafter 'duly perfected' his title. ([former] § 1161a, subd. 3.)" (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255 (*Vella*).) Thus, "Section 1161a provides for a narrow and sharply focused examination of title." (*Ibid.*)

Our supreme court in *Vella* cited the rule that "subsequent fraud or quiet title suits founded upon allegations of *irregularity in a trustee's sale are barred by the prior*

unlawful detainer judgment." (*Vella, supra*, 20 Cal.3d at p. 256, italics added.) The propriety of applying collateral estoppel to an underlying unlawful detainer judgment brought under Code of Civil Procedure section 1161a is uncertain however, when the claims in the second action involve activities or alleged wrongdoing not "directly connected with the conduct of the [foreclosure] sale[.]" (*Vella*, at p. 256.)

Therefore, under the unlawful detainer statutes " 'title to the extent required by section 1161a not only may but *must be tried*. . . . [Citations.]' " (*Malkoskie, supra*, 188 Cal.App.4th at p. 974), and so the language of the judgment, which restored possession to US Bank, can be a sufficient adjudication of its ownership and the validity of the foreclosure sale. (*Ibid.*, italics added.)

Here, plaintiffs' unlawful foreclosure cause of action is predicated on irregularities in the foreclosure sale only. Plaintiffs alleged that none of the "foreclosing defendants" had the authority to declare default, issue or record a notice of default or to foreclose, and the "foreclosing defendants" violated certain provisions of the foreclosure statutes, in particular, Civil Code sections 2923.5 and 2923.6. US Bank's unlawful detainer complaint against plaintiffs was predicated on its "duly perfected" title obtained in the nonjudicial foreclosure. US Bank alleged that the property was sold to it at a trustee's sale following foreclosure proceedings and that the "*foreclosure and all notices preceding said foreclosure were done in compliance with Section 2924 et seq. of the California Civil Code, under power of sale contained in a deed of trust* executed by Steven F. Krasch and Lori L. Krasch, and *title under the sale was duly perfected in Plaintiff*." (Italics added.) The trial court granted US Bank's summary judgment motion and ordered possession of the property be restored to US Bank. The judgment in the unlawful detainer action is final. Therefore, pursuant to *Vella* and *Malkoskie*, the unlawful detainer action adjudicated the foreclosure sale's compliance with Civil Code section 2924 et seq. and that title was duly perfected in US Bank.

In its opposition to the demurrer, plaintiffs cited *Asuncion v. Superior Court* (1980) 108 Cal.App.3d 141 (*Asuncion*) to argue that an "unlawful detainer action is not *res judicata* on the question of fraud in the acquisition of title." (Italics added.) *Asuncion*

is factually distinguished. There, after the bank filed an unlawful detainer action pursuant to Code of Civil Procedure section 1161a, the defendants successfully moved to transfer the action to the superior court on jurisdictional grounds. (*Asuncion*, at pp. 143-144.) The defendants then filed a complaint against the bank alleging fraud, usury, unfair business practices, truth in lending violations, and undue influence among other things, and requested title to the property be quieted in their favor. (*Id*. at p. 143.) After the bank obtained an order transferring the eviction action back to the municipal court, the defendants petitioned for a writ of mandate arguing, inter alia, that to permit the eviction action to proceed summarily would deprive the defendants of the defenses based on fraud that they had raised in their separate action. (*Ibid*.) The appellate court issued the writ directing the superior court to retain jurisdiction. The court stated, "We are prepared to hold homeowners cannot be evicted, consistent with due process guaranties, without being permitted to raise the affirmative defenses which if proved would maintain their possession and ownership." (*Id*. at p. 146.) The appellate court in *Asuncion* recognized the language in *Vella*, but noted "the court in *Vella* was not directly faced with the issue of accommodating summary procedures *and affirmative defenses*, for there the issue was the res judicata effect of an eviction *already consummated, in a later action based on fraud*." (*Id*. at p. 146, italics added.)

Clearly *Asuncion* is distinguished. First, US Bank brought the unlawful detainer action on September 14, 2010. The following day, plaintiffs filed their original complaint in the instant action against Wells Fargo *but did not raise foreclosure irregularities as a defense in the unlawful detainer action. Nor did plaintiffs seek to stay the eviction proceeding until trial of this action* based on Code of Civil Procedure section 526 (which permits a preliminary injunction to preserve the status quo on such grounds as irreparable injury and the like), *or to consolidate this case with the unlawful detainer action* (see *Asuncion*, *supra*, 108 Cal.App.3d at pp. 146-147 [suggesting Code Civ. Proc., § 526, or consolidation, as a procedural device to facilitate accommodating eviction and fraud actions]). *Asuncion* is distinguished because the defendants there attempted to raise affirmative defenses of fraud in the ongoing unlawful detainer action by consolidating it

with their fraud suit. Here, by contrast, plaintiffs did not name US Bank in any lawsuit raising irregularities in the foreclosure until January 2011, *after the unlawful detainer action had already become final*. For that reason, this case is more like the facts of the Supreme Court's *Vella*, which held collateral estoppel would apply to bar fraud or quiet title lawsuits founded upon allegations of *irregularity in an already consummated trustee's sale*. (*Vella*, *supra*, 20 Cal.3d at p. 256.) Stated simply, plaintiffs knew at the time of the unlawful detainer action that they wanted to challenge the foreclosure sale, and yet did not raise those defenses during the eviction proceeding and did not include US Bank as a defendant here until after the unlawful detainer action had become final. *Asuncion* does not aid plaintiffs.

Returning to the elements of collateral estoppel, they are all satisfied here: (1) the issues in this and the unlawful detainer action were identical, namely the regularity of the foreclosure sale under Civil Code section 2924 et seq. under a power of sale contained in a deed of trust and that, pursuant to the foreclosure sale, title was duly perfected. Indeed, all of the allegations in this lawsuit concern activities or alleged wrongdoing "directly connected with the conduct of the [foreclosure] sale[.]" (*Ibid.*) (2) This issue was actually litigated; and (3) necessarily decided (*Vella*, *supra*, 20 Cal.3d at pp. 255-256); (4) the decision in the unlawful detainer action is final and on the merits as there is no evidence that plaintiffs appealed from the judgment; and (5) plaintiffs, against whom US Bank and Wells Fargo assert collateral estoppel here, were the same parties to the unlawful detainer action. (*Bostick v. Flex Equipment Co., Inc*., *supra*, 147 Cal.App.4th at pp. 96-97.) Accordingly, all of plaintiffs' allegations in the fifth cause of action alleging unlawful foreclosure based on irregularity in the foreclosure sale are barred by the final judgment in the unlawful detainer action.

Additionally, plaintiffs seek to unwind the foreclosure sale and restructure the loan and contend defendants violated Civil Code sections 2923.5 and 2923.6. Part of the Perata Mortgage Relief Act, Civil Code section 2923.5 specifies that, before a notice of default may be filed, the lender must contact the borrower in person or by telephone to " 'assess' " the borrower's financial situation and " 'explore' " options to prevent

foreclosure. (*Mabry, supra,* 185 Cal.App.4th at pp. 213-214, citing Civ. Code, § 2923.5.) Civil Code section 2923.6 "expresses the *hope* that lenders will offer loan modifications on certain terms." (*Mabry*, at pp. 222-223.)

However, Civil Code section "2923.5 does not provide for damages, or for setting aside a foreclosure sale, nor could it do so without running afoul of federal law, that is, the Home Owners' Loan Act (12 U.S.C. § 1461 et seq.; HOLA), and implementing regulations (12 C.F.R. § 560.2(b) (2011)). [Citations.] The statute was 'carefully drafted to avoid bumping into federal law' regulating home loans. [Citation.] As a result, the *sole* available remedy is 'more time' before a foreclosure sale occurs. [Citation.] *After the sale, the statute provides no relief.* [Citations.] *Further, the statute does not—and legally could not—require the lender to modify the loan.* [Citation.]" (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526, citing *Mabry, supra*, 185 Cal.App.4th at pp. 235–236; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1615–1617, first italics in original.) As they merely expresses the "hope" that lenders will offer loan modifications, these two statutes do not provide for a remedy. (*Mabry*, at pp. 222-223.)

Plaintiffs and defendants both argue we should re-examine *Mabry.* However, we agree with *Hamilton v. Greenwhich Investors XXVI, LLC, supra*, 195 Cal.App.4th 1602, another division of this District Court of Appeal, that *Mabry* was a "thorough, lucidly written opinion to which we have nothing to add . . . ." (*Id.* at p. 1616.)

Finally, plaintiffs did not allege they tendered arrearages before attacking the foreclosure sale. "A full tender must be *made* to set aside a foreclosure sale, based on equitable principles. [Citations.]" (*Stebley v. Litton Loan Servicing, LLP, supra,* 202 Cal.App.4th at p. 526.) Accordingly, assuming plaintiffs had a viable basis for attacking the sale, the complaint fails because plaintiffs did not allege tender and do not suggest they can allege they tendered arrearages.

As no amount of amendment could cure these barriers, the trial court did not abuse its discretion in sustaining the demurrer to this cause of action and denying leave to amend.

3. *Plaintiffs are unable to amend to state a violation of the UCL*.

For the same reason the wrongful foreclosure cause of action fails, plaintiffs' allegations of violation of the UCL also fail. That is, all of the allegations of violation of the UCL aimed at Wells Fargo are based on predatory lending and irregularities in the foreclosure sale.

No amount of amendment would enable plaintiffs to demonstrate the requisite standing under the UCL. Proposition 64 amended sections 17203, 17204, and 17535, to provide that a claimant may pursue representative claims or relief on behalf of others "only if the claimant meets the standing requirements of Section 17204," i.e., if the claimant has "suffered injury in fact and has lost money or property as a result of such unfair competition." (Bus. & Prof. Code, §§ 17203, 17204.) Plaintiffs' UCL cause of action is predicated on wrongful conduct during the foreclosure of plaintiffs' loan. However, because the foreclosure was adjudicated in the unlawful detainer action to have been valid, and that adjudication is final, plaintiffs cannot demonstrate they suffered injury in fact or lost money or property as the result of "foreclosing defendants" *wrongful* foreclosure.

The other asserted unfair business practice in violation of the UCL plaintiffs allege was "predatory lending." Yet, plaintiffs alleged that *Lennox*, not Wells Fargo or US Bank, was the lender; Wells Fargo was the loan servicer. Thus, plaintiffs alleged in their cause of action entitled fraudulent misrepresentation that *Lenox* falsified plaintiffs' income on the loan application; *Lenox* failed to inform plaintiffs they did not qualify for the loan or that it was risky; and *Lenox* misrepresented that the interest was fixed and was the best loan for plaintiffs. Plaintiffs cannot now amend their complaint to allege that Wells Fargo, the loan servicer, or US Bank, the purchaser, engaged in the unlawful business practice of predatory lending in the origination of plaintiffs' loan.

In their motion for reconsideration and on appeal, plaintiffs suggest they could amend their complaint to allege certain of their loan documents were "robo-signed" and that Steven Krasch's signature on a rider to the deed of trust was forged, and plaintiffs were unable to obtain a loan modification. Not only are these facts not "new evidence,"

as they are contained in plaintiffs' loan documents, which documents plaintiffs have had in their possession since the origination of the loan, but even if they were new evidence, the trial court was correct that it had no power to grant a motion for consideration after it had entered judgment dismissing this action. (*APRI Ins. Co. v. Superior Court*, *supra*, 76 Cal.App.4th at pp. 181-182.)

We deem the motion for reconsideration to be an attempt to demonstrate how plaintiffs would amend their complaint. (*Long v. Century Indemnity Co*. (2008) 163 Cal.App.4th 1460, 1467 ["Leave to amend may be granted on appeal even in the absence of a request by the plaintiff to amend the complaint"]; see Code Civ. Proc., § 472c, subd. (a).) However, all of these latest allegations are made against *Lenox*, the defendant who plaintiffs voluntarily dismissed from the action. Plaintiffs' complaint alleges Lenox was the lender and Wells Fargo was the loan servicer. Plaintiffs cannot now amend to allege Wells Fargo was the lender or committed these alleged acts.

For the foregoing reasons, the trial court did not abuse its discretion in denying leave to amend the first amended complaint.

DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.