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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NEIL SMITH,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

B230190

(Los Angeles County
Super. Ct. No. BC427643)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed in part; reversed in part.

Aidan W. Butler for Plaintiff and Appellant.

The Ryan Firm, Timothy M. Ryan, and Daniel J. Lee for Defendant and Respondent.

* * * * *

Appellant Neil Smith sought to save his home from foreclosure by filing a complaint for declaratory relief and quiet title. The trial court dismissed the action

against Wells Fargo Bank, N.A. (Wells Fargo), and Smith appeals from that dismissal. We conclude the court properly sustained the demurrer to the quiet title cause of action but should have overruled the demurrer to the declaratory relief cause of action because Smith stated a claim for violation of Civil Code section 2923.5 (section 2923.5). We reverse the order of dismissal.

FACTS AND PROCEDURE

In his first amended complaint, Smith alleged causes of action against Wells Fargo for declaratory relief and quiet title.¹ Smith alleged all of the following. Smith is the sole owner of property located in Altadena, California. Smith borrowed money and signed a note for \$259,000. Smith's note and deed of trust were sold on the secondary market. His note and deed of trust were "pooled together with many other consumer mortgage deals pursuant to the terms of a pooling and servicing agreement" to which Wells Fargo was a party. The assignment of the deed of trust and note to Wells Fargo was not in accordance with the provisions of the pooling and servicing agreements.

Smith also alleged that Wells Fargo did not contact him to discuss his financial condition or to explore options for avoiding foreclosure as required by section 2923.5. (*Id.*, subd. (a)(1) & (2).) That statute provides in pertinent part a notice of default may not be filed until 30 days after "[a] mortgagee, beneficiary, or authorized agent . . . contact[ed] the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." (*Id.*, subd. (a)(2).)

Smith's declaratory relief cause of action was based on a controversy over whether the assignment of deed of trust to Wells Fargo was void because it failed to comply with the pooling and servicing agreement. Smith also alleged that "another controversy exists in that [Smith] contends that [Wells Fargo has] failed to comply with the requirements of . . . section 2923.5, compliance with which [is] now a legal prerequisite to conducting

¹ Smith alleged additional causes of action against other defendants, but those defendants are not parties to this appeal.

[a] foreclosure in California of an owner-occupied residence.” The quiet title cause of action was based on the allegation that the note was not properly pooled into the trust, for which Wells Fargo is trustee. Smith explains that the “gist of the allegations is that [his] note never properly became part of the securitized trust that [Wells Fargo] acts as trustee for, and therefore, [Wells Fargo] does not have any valid claim to ownership of the note.”

Wells Fargo demurred to the first amended complaint, arguing among other things that Smith was not a party to the pooling and servicing agreement and could not rely on the provisions in that agreement and that Smith was required to tender the full amount owed in order to state any cause of action. The court permitted Smith to amend his complaint to allege a tender of the entire sum due under the note/deed of trust. Because Smith did not amend the first amended complaint, the court dismissed the action as to Wells Fargo.

DISCUSSION

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’ [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

As we shall explain, the trial court should have allowed Smith to proceed on his alleged violation of section 2923.5. The remainder of Smith’s claims are based on alleged violations of the pooling and servicing agreement, which he lacked standing to challenge.

1. Standing

As mentioned, Smith states that the “gist of the allegations [in his first amended complaint] is that [his] note never properly became part of the securitized trust that [Wells Fargo] acts as trustee for, and therefore, [Wells Fargo] does not have any valid claim to ownership of the note.” Smith lacked standing to challenge the process under the pooling agreement because he was not a party to those agreements. (*In re Correia* (Bankr. 1st Cir. 2011) 452 B.R. 319 [debtors lacked standing to raise violations of the pooling and service agreement]; *In re Almeida* (Bankr. D.Mass. 2009) 417 B.R. 140, 149, fn. 4 [same].) The alleged violation of the pooling and servicing agreement was the sole basis for Smith’s claim that Wells Fargo does not own the note, which in turn was the principal basis for his declaratory relief cause of action and the sole basis of his quiet title cause of action.²

2. Section 2923.5

The only remaining portion of Smith’s complaint is his request for a declaration that Wells Fargo violated section 2923.5.³ The tender rule does not apply to a claimed violation of section 2923.5, when that claim is made before a sale. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214.) Smith’s allegations that Wells Fargo did not contact him to discuss his financial condition or ways of avoiding foreclosure were sufficient to state a cause of action under section 2923.5. (*Mabry*, at pp. 213-214 [before filing notice of default lender must contact borrower to assess borrower’s financial situation and explore options to prevent foreclosure].) The private right of action under section 2923.5 “is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.” (*Mabry*, at p. 214.) The lender is not

² Because we conclude Smith lacks standing to challenge the pooling and servicing agreements, we need not discuss Smith’s argument that he was not required to allege a tender to pursue these claims.

³ Federal district courts have held that section 2923.5 is preempted. (See, e.g., *Wornum v. Aurora Loan Services, Inc.* (N.D.Cal. Aug. 11, 2011, C-11-02189 JCS) 2011 WL 3516055.) Preemption is not raised in the present case.

required to agree to a loan modification. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617.) The trial court should have overruled the demurrer to Smith's cause of action for declaratory relief insofar as he alleges a violation of section 2923.5.

DISPOSITION

The order dismissing Wells Fargo is reversed. The case is remanded to the trial court. The trial court shall enter a new order sustaining the demurrer to the quiet title cause of action and overruling the demurrer to the declaratory relief cause of action only insofar as that cause of action alleges a violation of section 2923.5. The parties shall bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

SORTINO, J.*

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