

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LYNN BEHRENS
ZIMMERMAN,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

2d Civil No. B275595
(Super. Ct. No. 16CV00796)
(Santa Barbara County)

Lynn Behrens Zimmerman appeals from a judgment after the trial court sustained without leave to amend Wells Fargo Bank, N.A.'s (Wells Fargo) demurrer to the first amended complaint. The first amended complaint alleged causes of action for the cancellation of instruments and declaratory relief regarding real property that was sold in a foreclosure sale.

Zimmerman contends that the trial court erred in sustaining the demurrer without leave to amend, denying leave to file her second amended complaint, ruling that her opposition

to the demurrer was untimely, and “dismissing all causes of action.” We affirm.

BACKGROUND

In 2003, Zimmerman obtained a loan from Wells Fargo secured by a deed of trust on property that she co-owned. The deed of trust named Zimmerman as a co-borrower and trustor and Wells Fargo Home Mortgage, Inc., as the beneficiary.

In 2007, Zimmerman obtained a second loan from Wells Fargo. The 2007 deed of trust named Zimmerman as a co-borrower and trustor and Wells Fargo Bank, N.A.,¹ as the beneficiary.

In 2014, Zimmerman defaulted on the 2007 loan. A substitution of trustee was recorded, which named Cal-Western Reconveyance LLC as the new trustee of record. Cal-Western recorded a notice of default. Three months later, Cal-Western recorded a notice of trustee’s sale.

In 2015, the property was sold to Wells Fargo as the foreclosing beneficiary. After the sale, Zimmerman refused to vacate the property, and Wells Fargo filed an unlawful detainer action. The trial court entered a default judgment for possession in favor of Wells Fargo. Zimmerman moved to set aside the default judgment, which the trial court denied. She appealed the judgment of possession.

Prior Lawsuit

Zimmerman sued Wells Fargo in Santa Barbara County Superior Court (*Lynn Behrens v. Wells Fargo Bank, N.A., et al.*, case No. 15cv04112). She alleged wrongful foreclosure, unfair competition under Business and Professions Code

¹ Wells Fargo Home Mortgage, Inc., merged into Wells Fargo Bank, N.A., in 2004.

section 17200, intentional misrepresentation, negligent misrepresentation, elder abuse, unjust enrichment, and cancellation of recorded documents (notice of default, notice of sale, trustee's deed upon sale, and "all subsequent recordings"). Zimmerman alleged that she was not aware of the second loan on the property and that Wells Fargo engaged in "fraudulent and wrongful foreclosure" of the property. She attempted to set aside a foreclosure sale by seeking an order cancelling the trustee's deed upon sale and other documents related to the sale of the property. She also sought monetary damages.

Wells Fargo demurred to the complaint and filed a motion to strike portions of the complaint. Before the trial court ruled, Zimmerman filed a first amended complaint. The court sustained the demurrer and granted the motion to strike with leave to amend. It deemed the first amended complaint as a response to its ruling on the demurrer and motion to strike.

Case No. 15cv04112 was still pending when the trial court entered its order in the present action (*Lynn Behrens Zimmerman v. Wells Fargo Bank, N.A., et al.*, case No. 16cv00796) sustaining the demurrer without leave to amend. While the instant appeal was pending, Zimmerman voluntarily dismissed case No. 15cv04112 with prejudice.

Present Lawsuit

While the prior action was pending, Zimmerman filed a second lawsuit against Wells Fargo in Santa Barbara County Superior Court (case No. 16cv00796). In her first amended complaint, she alleged two causes of action for cancellation of recorded documents (the 2003 deed of trust, 2007 short form deed of trust, and the substitution of trustee) and declaratory relief. As with case No. 15cv04112, she attempted to set aside the

foreclosure sale by requesting the cancellation of recorded documents.

Zimmerman alleged that the 2003 deed of trust was void because the named beneficiary (Wells Fargo Home Mortgage) was defunct, her signature on the deed was forged, the stated beneficiary was not the “noteholder,” and the deed was not properly notarized. She alleged that the substitution of trustee was void because Wells Fargo Home Mortgage was defunct, the substitution of trustee was assigned alone and not contemporaneously with any “Loan, Debt, or Promissory Note,” and it was “robo-signed.”

Wells Fargo demurred to the first amended complaint on several grounds, including abatement because the prior action was still pending. Before the trial court ruled, Zimmerman filed a second amended complaint, alleging the same two causes of action as the first amended complaint.

The trial court sustained the demurrer to the first amended complaint without leave to amend and struck the second amended complaint. Judgment was entered in favor of Wells Fargo.

DISCUSSION

Briefing

Zimmerman fails to provide a single citation to the appellate record as required by California Rules of Court, rule 8.204(a)(1)(C). “If a party fails to support an argument with necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived.” (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Zimmerman is a pro. per. litigant, but pro. per. litigants are not exempted from the rules of appellate procedure. They are

afforded no greater consideration than any other litigant. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) Nonetheless, we review her contentions on the merits.

Demurrer

Zimmerman contends that the trial court erred by sustaining Wells Fargo’s demurrer without leave to amend. This claim lacks merit.

We independently review the order sustaining the demurrer, accepting the truth of material facts properly pleaded but not contentions, deductions, or conclusions of fact or law. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) A demurrer should be sustained where the complaint fails to allege facts sufficient to state a cause of action, or discloses a defense that would bar recovery. (Code Civ. Proc., § 430.10²; *Balikov v. Southern Cal. Gas Co.* (2001) 94 Cal.App.4th 816, 819-820.)

“A single cause of action cannot be the basis for more than one lawsuit.” (*Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 856.) A plaintiff may not “split” a cause of action by filing multiple lawsuits based on the violation of the same primary right. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) “The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action.” (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574 (*Leadford*); see *Lord v. Garland* (1946) 27 Cal.2d 840, 848.) This defense may be raised by filing a demurrer to the subsequent lawsuit. (*Leadford*, at p. 574; § 430.10, subd. (c).)

² Further statutory references are to the Code of Civil Procedure unless otherwise specified.

Both Zimmerman’s prior and present lawsuits involve the same parties, the same property, the same loans, and the same foreclosure sale. In the first action, Zimmerman alleged that Wells Fargo engaged in wrongful conduct and sought to cancel the notice of default on the 2007 loan, notice of trustee’s sale, and other documents related to the foreclosure of the 2007 deed of trust. In the second action, Zimmerman alleged that the 2003 and 2007 deeds of trust and the substitution of trustee were void and sought to cancel these documents, which she claimed were “clouds” on her property title. Both lawsuits alleged the same harm and sought the same remedy—to invalidate the foreclosure sale. Because Zimmerman’s lawsuits were both pending and both alleged a violation of the same primary right, the demurrer was properly sustained.

Because we affirm the trial court’s ruling sustaining the demurrer on abatement grounds, we need not address the alternative grounds raised in the respondent’s brief (res judicata, lack of tender, and failure to state a claim).

Zimmerman also claims that the trial court erred in denying leave to amend her complaint. Although leave to amend is to be liberally granted, the trial court has discretion to sustain a demurrer without leave to amend where there is no reasonable probability that its defects could be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The plaintiff bears the burden to prove there is a reasonable possibility that she can amend the complaint to overcome any legal deficiencies. (*Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 912 (*Gillies*).) We will affirm a trial court’s decision to deny leave to amend unless that decision is arbitrary, capricious or exceeds the

bounds of reason. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731.)

Zimmerman argues that she should have been granted leave to amend the complaint to include several new causes of action (i.e., wrongful foreclosure, tortious interference with a contract, and violation of Civil Code section 1788.17). But these causes of action allege violations of the same primary right. (See *Bescos v. Bank of America* (2003) 105 Cal.App.4th 378, 397 [“additional theories are not ‘different wrongs’ that give rise to different primary rights . . . but rather are different ways of committing the same wrongs”].) Because these causes of action allege violations of the same primary right, they are barred on abatement grounds.

Zimmerman therefore could not prove a reasonable possibility that her proposed amendment could cure the defects in her cancellation of instruments or her declaratory relief causes of action. (*Gillies, supra*, 7 Cal.App.5th at p. 912.) The trial court properly sustained the demurrer without leave to amend.

Motion to Strike

Zimmerman claims that the trial court erred by striking her second amended complaint, which alleged the same causes of action as the first amended complaint. The trial court may “[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state” (§ 436, subd. (b).) Zimmerman did not obtain leave of the court before filing her second amended complaint in violation of section 472. The court was within its discretion to strike the second amended complaint.

Other Causes of Action

Lastly, Zimmerman contends that the trial court erred in “dismissing all causes of action of the merits.” She specifies 13 causes of action (wrongful foreclosure, fraud, business tort claims, contract, and quasi-contract claims), but these were never raised in the underlying pleadings. We will not consider new claims raised for the first time on appeal. (See *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [issues raised not considered nor ruled upon by the trial court are waived and will not be considered for the first time on appeal].)

DISPOSITION

The judgment is affirmed. Wells Fargo shall recover its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

Lynn Behrens Zimmerman, in pro. per.; Burris,
Schoenberg & Walden and Donald S. Burris, for Plaintiff and
Appellant. [*Retained.*]

Kutak Rock, Jeffrey S. Gerardo and Steven M.
Dailey, for Defendant and Respondent.