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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES W. MENEFIELD, III,

Plaintiff and Appellant,

v.

FINANCIAL FREEDOM SENIOR  
FUNDING CORPORATION et al.,

Defendants and Respondents.

B277656

(Los Angeles County  
Super. Ct. No. BC610391)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Reversed.

James W. Menefield, III, Plaintiff and Appellant in pro per.

Burke, Williams & Sorensen, Richard J. Reynolds and Amy E. Hoyt for Defendants and Respondents.

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## INTRODUCTION

Plaintiff James W. Menefield, III, appeals the trial court's judgment sustaining defendant MTC Financial, Inc.'s (MTC) demurrer without leave to amend. Plaintiff does not challenge the order sustaining the demurrer itself. Rather, he asserts the trial court erred in denying him leave to amend the complaint to state a cause of action for wrongful foreclosure. We reverse. Although the trial court concluded that plaintiff did not have standing, plaintiff may be able to amend his complaint to establish that status. We also conclude that on the record before us the complaint would not be barred by tender requirements or privilege.

## FACTS AND PROCEDURAL BACKGROUND

Because this case comes to us on demurrer, we base our recitation of the facts on the operative complaint.

1. *The Menefield Trust and the Reverse Mortgage on Trust Property*

Plaintiff James W. Menefield, III, is a beneficiary of his parents' revocable trust (the Menefield trust). He also has been incarcerated since at least 2014.<sup>1</sup> The trust property included his parents' Inglewood home. Prior to his death, plaintiff's father had encumbered the home with a reverse mortgage from Financial Freedom Bank. Upon his father's death in 2014, Willie Mae Mack became the executor of the father's estate and the

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<sup>1</sup> The exact dates of plaintiff's incarceration are unknown. But for all times relevant to our analysis, he has been in the custody of the California Department of Corrections and Rehabilitation.

trustee of the Menefield trust. Mack at one time retained an attorney to help administer the estate.

In September 2014, defendant and respondent MTC, the trustee of the reverse mortgage deed of trust, recorded and mailed to the estate a notice of default and election to sell the Inglewood home under that deed of trust. In October 2014, the probate court found the Inglewood home to be an asset of the Menefield trust, and Mack thus offered the property for sale. Mack then informed Financial Freedom Bank (the beneficiary of the deed of trust) that she was the trustee for the Menefield trust and that she was moving forward with the sale of the property to satisfy Financial Freedom's deed of trust. For about a year, Mack and the real estate office she hired kept in contact with Financial Freedom and requested extensions of time to close a sale. In October 2015, a buyer offered \$337,000 for the home and the parties were proceeding forward with the sale.

*2. Foreclosure Sale Without Proper Notice*

In the interim, MTC moved forward with the foreclosure sale. On June 3, 2015, MTC recorded a notice of trustee's sale, stating that the public auction was set for July 13, 2015. Neither Mack nor the real estate company representing the estate received notice of the sale. Nor did Financial Freedom or MTC post notice of the sale on the Inglewood property. Eagle Vista Equities LLC purchased the Inglewood home for \$290,685 at the ensuing public action conducted by Financial Freedom and MTC.

*3. Plaintiff's Lawsuit and MTC's Demurrer*

Without the assistance of an attorney, plaintiff and Mack sued Financial Freedom and MTC. The complaint was couched in terms of a due process violation but essentially described a claim for wrongful foreclosure. MTC demurred to the first

amended complaint, arguing that (1) plaintiff lacked standing as a beneficiary of the trust, (2) the complaint failed to state a claim because MTC is not a state entity subject to due process claims, (3) MTC's actions were privileged under Civil Code sections 47 and 2924, and (4) plaintiff failed to allege tender.<sup>2</sup> MTC also moved to strike Mack from the first amended complaint since Mack could not sue in pro per or consent to plaintiff's representation of the Menefield trust because neither Mack nor plaintiff had a license to practice law.

In his opposition points and authorities, plaintiff admitted he had mistakenly alleged a due process violation when he intended to allege wrongful foreclosure. He asserted that as the heir to his father's estate, he had standing to maintain the lawsuit and recover the property. Plaintiff argued that MTC was not immune from suit under section 47 because the protections afforded trustees under section 2924, subdivision (d) applied to performance of trustee duties, not the *failure* to perform those duties. Plaintiff explained that he was exempted from tendering the amount of indebtedness because the sale was void.

4. *The Trial Court Sustains the Demurrer Without Leave to Amend*

The trial court held a hearing on the demurrer on August 1, 2016; only counsel for MTC appeared.<sup>3</sup> The court found that as only a trust beneficiary, plaintiff lacked standing. The court observed that although Mack had standing as the trustee, she could not bring the suit in pro per on the trust's behalf because

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<sup>2</sup> All subsequent statutory references are to the Civil Code.

<sup>3</sup> As we have observed, defendant has been incarcerated throughout the trial and appellate proceedings.

she was not an attorney. The court agreed with plaintiff that, assuming the action was for a wrongful foreclosure, MTC was not immune from suit under sections 47 or 2924, and that tender need not be alleged. Nonetheless, because there was no indication the plaintiffs would hire an attorney to represent the trustee, the court dismissed the case. The court denied the motion to strike as moot. Plaintiff, but not Mack, appealed; defendant Financial Freedom is not a party to the appeal.

### **DISCUSSION**

#### *1. There is an Adequate Record on Appeal*

At the outset, MTC argues that plaintiff failed to provide this court an adequate record and we should not reach the merits of the appeal. MTC points out that plaintiff did not furnish us with the reporter's transcript from the demurrer hearing, the first amended complaint, or MTC's reply memorandum in support of the demurrer. The last two items became part of the record when we granted MTC's own motion to augment the record. So we have them. As to the lack of a reporter's transcript, only MTC appeared in the trial court, as plaintiff was still in prison. Prior to the hearing, the court had issued a detailed tentative ruling in MTC's favor. The court then adopted its tentative ruling and attached it to the final minute order as the grounds for sustaining the demurrer without leave to amend. Although an appellant has the obligation to provide this court with an adequate record on appeal (see *Maria P. v. Riles* (1987) 43 Cal.3d 1295, 1296), under the circumstances of this case, any reporter's transcript would not further our ability to decide the merits. "When the record clearly demonstrates what the trial court did, we will not presume it did something different." (*Lafayette Morehouse, Inc. v.*

*Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384; see *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1315, fn. 7.)

2. *Standard of Review*

Plaintiff's single argument on appeal is that the court erred by not granting leave to file an amended complaint. A demurrer, of course, tests the legal sufficiency of the complaint. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321 (*Roman*).) "Where a demurrer is sustained without leave to amend, the reviewing court must determine whether the trial court abused its discretion in doing so. [Citation.] It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment." (*Ibid.*)

3. *Plaintiff Likely Has Standing to Sue MTC if He Joins Mack as a Defendant*

The only issue presented to us is whether plaintiff has standing as a beneficiary of the Menefield trust to sue MTC for wrongful foreclosure. The standing rules for trust-related actions are settled. "In general, the person who has the right to file suit under the substantive law is the real party in interest. At common law, where a cause of action is prosecuted on behalf of an express trust, the trustee is the real party in interest because the trustee has legal title to the cause. The corollary to this rule is that the beneficiary of a trust generally is not the real party in interest and may not sue in the name of the trust. A trust beneficiary has no legal title or ownership interest in the trust assets; his or her right to sue is ordinarily limited to the enforcement of the trust, according to its terms. [Citations.] '[B]ecause an ordinary express trust is not an entity separate from its trustees, action may not be maintained in the name of

the trust. [Citation.] Thus, absent special circumstances, an action prosecuted for the benefit of a trust estate by a person other than the trustee is not brought in the name of a real party in interest and is demurrable.’” (*Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427 (*Saks*).)

Plaintiff acknowledges this rule but asserts that if he is permitted to amend his complaint to join trustee Mack as a defendant, he would gain standing to bring a claim for wrongful foreclosure against MTC. We agree.

“[W]here a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee. In order to prevent loss of or prejudice to a claim, the beneficiary may bring an action in equity joining the third person and the trustee.” (*Saks, supra*, 7 Cal.App.4th at pp. 427-428; *Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 753-754; *Triplett v. Williams* (1969) 269 Cal.App.2d 135, 138.)

Although plaintiff did not expressly assert a claim against Mack as trustee of the Menefield trust in the operative complaint, he does argue on appeal that he can allege Mack “failed or refused to hire a lawyer to maintain the action to recover the trust property, even after the court held that a wrongful foreclosure cause of action had been stated.” This offer is sufficient to allow plaintiff the opportunity to join Mack in the wrongful foreclosure lawsuit against MTC. If plaintiff amends the complaint accordingly, he would appear to have standing to sue for wrongful foreclosure.

MTC argues that plaintiff cannot amend to show standing because plaintiff provided no information as to why Mack could not use the attorney she retained to administer the estate to

prosecute this action. MTC cites no authority for the proposition that that type of allegation is legally required. On the contrary, the assertion appears to raise issues beyond the face of the pleading. MTC also contends that there are no facts alleged to demonstrate that Mack ought to bring an action. This also is an issue for another day.

#### 4. *Tender Was Not Required*

MTC argues that we should affirm the judgment because plaintiff did not make a valid offer of tender of the loan monies due and thus cannot pursue wrongful a foreclosure action. In most situations, when a trustor challenges a foreclosure sale, the trustor must allege tender of the amount of the secured indebtedness to bring a wrongful foreclosure claim. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.) But, trustors challenging a void deed need not prove tender. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 (*Ram*).)

Here, the trial court observed that tender was not required because if plaintiff proved wrongful foreclosure based on a void sale, plaintiff would be exempt from the rules. We agree.

“In deciding whether to require a showing of tender and prejudice, courts appear to focus on the nature and severity of the defect, omission or failure and its practical effect on the foreclosure process.” (*Ram, supra*, 234 Cal.App.4th at p. 12.) “A sale is not rendered void merely because of minor or technical defects. [Citation.] A sale is rendered void, though, when the defects are substantial, such as when there has been a *failure to give notice of sale to the trustor* or to specify the correct default in the notice of default.” (*Id.* at p. 11 (italics added).)

The alleged failure to notice the foreclosure sale to the trustor would be a “severe defect” if proved at trial. It would void



the sale because it is “directly prejudicial to individuals who could reasonably have relied on the statutory notice requirements for protection of their interests.” (*Little v. CFS Service Corp. Eyeglasses* (1987) 188 Cal.App.3d 1354, 1361.) Trustors, like the Menefield estate here, “are given no right of control over the time of a foreclosure sale. They can neither dictate when the notice of default shall be recorded nor when the sale shall be held. Those matters are within the control of the beneficiaries and the trustee with the possible exception that if the trustee should fail to act at all when required to do so, the trustors might perhaps apply to a court of equity for relief.” (*Scott v. Security Title Ins. & Guarantee Co.* (1937) 9 Cal.2d 606, 613.)

Here, plaintiff alleged that the defendants failed to provide notice of the foreclosure sale to the estate. Specifically, defendants did not send notice to Mack (the trustee/executor) or the real estate company that represented the estate. Plaintiff alleged that defendants also failed to post notice of sale on the property. If proven, the allegations show a notice defect that likely would void the foreclosure sale. Plaintiff thus need not allege tender.

5. *MTC’s Alleged Failure to Give Notice Was Not Privileged*

MTC also asserts we must affirm the judgment because its communications were privileged under sections 47 and 2924 and therefore it cannot be held liable for the alleged wrongful foreclosure. Subdivision (d) states that the “mailing, publication, and delivery of notices” and the performance of the foreclosure sale procedures set forth in section 2924 are “privileged communications pursuant to Section 47.” MTC argues that plaintiff must allege and prove that it acted with malice in order

to proceed with the law suit as its actions were privileged and points out plaintiff has failed to do so.

The trial court observed that MTC's alleged failure to send notice of sale was not privileged under sections 2924 and 47 because the allegation was a failure to act and the privilege only protects the performance of the foreclosure procedures. We agree.

The plain language of section 2924 states that the performance of the foreclosure procedures, like the mailing, publication, and delivery of notices, is privileged. The statute provides no immunity for failing to mail, deliver, or publish notices. Section 2947, subdivision (d) specifically references section 47, which only protects communicative acts and "derives from common law principles establishing a defense to the tort of defamation." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 [explaining section 47 litigation privilege may apply to noncommunicative acts where the gravamen of the complaint is a communicative act].) Similarly, subdivision (b) of section 2924 indicates that the privilege applies solely to communicative acts and not to the failure to act. It states: "In *performing acts* required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage." (§ 2924, subd. (b) [italics added].) When read as a whole, the statutory protection afforded trustees is for communicative acts, not the failure to mail or publish notices.

The cases MTC cites, *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333, and *Silberg v. Anderson* (1990) 50 Cal.3d 205, 213-215, do not stand for the proposition that the

failure to give notice of sale is privileged under sections 2924 or 47. Whatever language respondent might find helpful in *Kachlon, supra*, the case deals with the contents of a default notice and the claim that the trustee engaged in shoddy investigation. It does not address the failure to give notice of a trustee's sale. *Silberg, supra*, is even more removed: it is not a secured transaction case at all. Rather, it deals with the litigation privilege available to an attorney in contested divorce proceedings who had made representations about the neutrality of a psychologist.

MTC cites no authority that failing to give proper notice of sale is a privileged act. The absence of cogent legal argument allows this court to treat the contention as waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) On the current state of the record, the proposed amended allegation to plaintiff's complaint would not be barred by the litigation privilege.

#### **DISPOSITION**

We reverse the judgment. Plaintiff James W. Menefield, III is awarded costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.