Filed 5/25/18 Meyer v. CIT Bank CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROGER MEYER, Plaintiff and Appellant, v. CIT BANK, N.A., Defendant and Respondent.	B272208 (Los Angeles County Super. Ct. No. SC104901)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Law Office of Martin D. Gross and Martin D. Gross for Plaintiff and Appellant.

Wright Finlay & Zak, T. Robert Finlay, Jonathan M. Zak and Olivier J. Labarre for Defendant and Respondent.

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Plaintiff and appellant Roger Meyer appeals from a grant of summary judgment in favor of defendant and respondent CIT Bank, N.A., successor by merger to OneWest Bank, N.A., as successor in interest to "IndyMac Mortgage Services, a division of OneWest Bank, FSB."[1] Meyer disputes the trial court's conclusion that the parties never entered into an agreement allowing him to pay off a lien or, if they had, that the conditions precedent contained in that agreement had not been met. We affirm.

BACKGROUND

1. Facts

Between April 2006 and October 2007 James E. Bond, Jr., acquired three loans secured by a condominium he owned in Beverly Hills. At the time of the events relevant to this appeal, IndyMac was first in lien priority; GreenPoint Mortgage Funding, Inc., was second; and Meyer was third.[2]

Bond defaulted on the first and third loans. Meyer initiated foreclosure proceedings and acquired title to the condominium in a foreclosure sale, which was recorded on March 24, 2009. His agents, City Lights Financial,

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[1] Because the alleged offeror of the purported contract at issue in this litigation was IndyMac Mortgage Services, we will refer to defendant as "IndyMac."

[2] In opposing IndyMac's motion for summary judgment, Meyer disputed the ownership of the first priority lien. The trial court did not discuss or resolve the dispute in its order granting the motion, presumably because the issue had not been raised in the pleadings. On appeal, Meyer does not renew his challenge, and we deem it forfeited.

communicated with IndyMac to negotiate a discounted payoff of the first loan and release of the corresponding lien.

On August 3, 2009, IndyMac sent a letter addressed to Bond, as borrower, offering conditions for a "proposed short payoff." Those conditions included that escrow close by September 15, 2009; that the "[g]ross contract sales price" be $925,000; that the "[m]inimum net sales proceeds" to IndyMac be $818,250; and that the "[m]aximum net sales proceeds" to the second and third lienholders be $2,500 each. The letter also imposed limits for "commissions to agent" and "closing costs," and stated that "Borrower (Seller) [was] to receive no funds or cash from this transaction" (underscoring omitted). The letter instructed that "short-sale proceeds" should be wired to an IndyMac account at Wells Fargo Bank. The letter concluded that "[i]f all conditions are followed the borrower(s) will be released from this lien."

In its separate statement of undisputed material facts, IndyMac characterized the letter thusly: "IndyMac provided the Borrower [Bond] with a short-sale demand statement setting forth a number of conditions that had to be fulfilled in order for [Bond] to successfully *short sell the Property to* [Meyer]." IndyMac summarized several of those conditions, including "[t]hat title be conveyed from [Bond] to [Meyer]." Meyer did not dispute this characterization and summary in his response to IndyMac's separate statement.

Bond signed the acknowledgment page attached to IndyMac's letter, certifying under penalty of perjury that he "agree[d] to be governed by all of the terms contained herein, and that the information [Bond] provided to IndyMac . . . is true, correct, and complete." Meyer signed a sheet entitled

"Prospective Purchaser Information" (boldface omitted) that contained his name, Social Security number, and contact information.

The record does not explain why IndyMac sent the letter to Bond, who at that time no longer had title to the condominium, when it was Meyer who was seeking to pay off the lien. In his deposition testimony, Meyer stated that he "didn't understand why" IndyMac wanted Bond to be part of the payoff arrangement, but he persuaded Bond to sign the acknowledgment to "oblig[e]" IndyMac. Meyer admitted that he signed the sheet identifying him as a prospective purchaser although he already owned the property.

2. Proceedings Below

On September 18, 2009, Meyer filed a complaint against IndyMac and Bond for breach of contract, specific performance, breach of the implied covenant of good faith and fair dealing, declaratory relief, quiet title, and injunctive relief to enjoin foreclosure. The complaint alleged that Meyer, IndyMac, and Bond had "entered into a Sale Contract, whereby [IndyMac and Bond] would sell to . . . Meyer the subject property." The complaint identified the August 3, 2009, letter described above as the "Sale Contract" and attached a copy as an exhibit. The complaint alleged that on or about August 21, 2009, IndyMac informed Meyer that it was "canceling the sale." Meyer claimed breach of contract on the basis that he had performed his duties under the agreement and satisfied all conditions precedent, yet IndyMac and Bond refused to convey the property to him.

IndyMac moved for summary judgment, arguing among other things that there was no binding contract between Meyer and IndyMac, that the conditions in the August 3, 2009 letter

were not met, and that IndyMac's performance was excused because the terms of the letter were impossible to perform. Meyer opposed the motion.

The trial court granted the motion, finding the evidence undisputed that Meyer and IndyMac never reached an agreement for either a discounted payoff of the senior lien or a short sale; that IndyMac's offer was made to Bond, not Meyer, "and the fulfillment of that offer was impossible because it was based on inaccurate facts"; and that the evidence indicated that the offer's conditions precedent never occurred. The court entered judgment for IndyMac.[3]

Meyer timely appealed.

DISCUSSION

"A court shall grant a motion for summary judgment if all the papers show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370, citing Code Civ. Proc., § 437c, subd. (c).) "On appeal from summary judgment, we review the record de novo and must independently determine whether triable issues of material fact exist. [Citations.] We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment." (*Nealy, supra*, at pp. 370-371.)

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the

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[3] The record does not indicate that Bond was involved in the summary judgment proceedings, and his name is not included in the judgment (apart from being listed in the caption). Bond is not a party to this appeal.

resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Here, the trial court concluded that there was no contract between IndyMac and Meyer and granted summary judgment on that basis. Meyer asserts that this ruling was in error.

We disagree. "[W]here the subject matter, or something essential to performance, ceases to exist before the agreement is reached, there is no contract." (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 259, p. 284.) The only agreement alleged in the complaint is the August 3, 2009 letter from IndyMac to Bond. The letter clearly contemplated a short-sale transaction in which Bond conveyed the property to a purchaser: Bond was identified as "Borrower (Seller)" and there were requirements for escrow, closing costs, commissions, and "short-sale proceeds." Yet it is undisputed that when IndyMac sent its letter to Bond on August 3, Bond no longer held title to the property because Meyer had already acquired it through a foreclosure sale. As the trial court noted, fulfillment of IndyMac's offer was impossible because "something essential to performance," that is, Bond's ownership of title, had "cease[d] to exist before the agreement [was] reached." (*Ibid.*) Thus, "there [was] no contract." (*Ibid.*)

In his briefing, Meyer characterizes the agreement as one "allowing [Meyer] to pay[ ]off the senior lien" belonging to IndyMac. He claims that under the terms of the agreement he, not Bond, was to "remit the sum of $818,250.00 to IndyMac as a net sales price for removal of IndyMac's purported lien and close escrow on or before September 15, 2009." He argues that given the date of the foreclosure, IndyMac was aware by August 3, 2009, that Bond no longer held title, so the agreement must have

been intended for Meyer. He claims the written communications between him and IndyMac support this, although he cites to no such communications in the record, nor have we discovered any.

These arguments are not persuasive. To the extent Meyer is claiming that the agreement was not for a short sale between Bond and a purchaser, but for a discounted payoff between Meyer and IndyMac, this assertion is flatly contradicted by the terms of the August 3 letter, as well as by Meyer's own complaint characterizing the letter as a "Sale Contract" under which Bond and IndyMac "would sell" the condominium to him. Further, in his response to IndyMac's separate statement of material facts, Meyer did not dispute that the August 3 letter was a "short-sale demand statement" that required Bond to convey title to him. There is no basis to conclude the August 3 letter was anything other than a presentation of conditions for a short sale between Bond and a purchaser. Because such an event was impossible from the outset given that Bond did not have title, the trial court correctly concluded that the August 3 letter was not an agreement with Meyer (or Bond for that matter) that IndyMac could breach.[4]

Meyer also claims he and IndyMac entered into a second payoff agreement on September 17, 2009 (one day before he filed his complaint). Meyer does not cite to any evidence in the record regarding this agreement. Regardless, there is no mention of this purported agreement in the complaint, and "[u]nder settled summary judgment standards, we are limited to assessing those theories alleged in the plaintiffs' pleadings." (*Falcon v. Long*

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[4] Given our holding, we do not address the court's conclusion that the conditions precedent required by the August 3 letter never occurred.

Beach Genetics, Inc. (2014) 224 Cal.App.4th 1263, 1275.) " '[A] plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing.' " (*Ibid.*) Here, the record does not indicate that Meyer amended the pleadings to allege causes of action based on a second agreement; thus, we will not consider his arguments pertaining to it.

The absence of a contract also defeats Meyer's claim for specific performance. (See *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472 [specific performance requires " 'an underlying contract' "].) And he raises no challenge to the court's judgment as to his other causes of action.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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