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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

IRENE SUH,

Plaintiff and Appellant,

v.

CARLOS DUENAS,

Defendant and Respondent.

B237669

(Los Angeles County
Super. Ct. No. BC423486)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kevin C. Brazile, Judge. Affirmed.

Khang & Khang and Joon M. Khang for Plaintiff and Appellant.

James Ellis Arden for Defendant and Respondent.

INTRODUCTION

This appeal is from a judgment following the granting of a motion for judgment on the pleadings. Appellant, Irene Suh, contends the trial court committed reversible error in failing to set aside a trustee's sale, to cancel a trustee's deed upon sale and to quiet title in favor of appellant. Respondent, Carlos Duenas, contends the judgment was in all respects proper in view of appellant's failure to make full tender under the so called "full tender rule." For the reasons hereafter stated, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant/plaintiff claims to be the owner of real property commonly known as 2300 W. 12th Street in Los Angeles, California prior to September 17, 2009. The subject property will hereafter be referred to as "the property." Respondent/defendant was the beneficiary under a first priority deed of trust against the property securing a promissory note in the amount of \$315,000 dated April 10, 2003 in favor of respondent. The named Trustor in the deed of trust securing the promissory note was Bethlehem Presbyterian Church, a California Corporation, a nonprofit organization, as well as payor on the promissory note.

In 2009, a default in payment under the note occurred. On March 5, 2009, respondent caused to be recorded a Notice of Default and Election to Sell Under Deed of Trust. Subsequently, on or about August 28, 2009, a Notice of Sale was published and posted, providing notice of intent to sell the property at public auction at 11:00 a.m. on September 17, 2009.

Respondent became the owner of the property via the trustee's deed upon sale dated September 17, 2009 as a result of the alleged trustee's sale, allegedly conducted on September 17, 2009. T. D. Service Company, hereafter referred to as "TDSC," conducted the trustee's sale through its auctioneer.

Appellant, through three amended complaints, challenged the validity of the trustee's sale, seeking to have the sale invalidated and have title to the property vested in

appellant on various and sundry theories, eventually culminating in the filing of a verified third amended complaint on November 16, 2010, hereafter referred to as the “TAC.”

The TAC.

In appellant’s TAC, appellant generally challenges the validity of the trustee’s sale by concluding as follows:

1. There were misrepresentations about the purported sale made by respondent to appellant’s husband prior to the sale;
2. There were misrepresentations made by the auctioneer employed by the company to appellant’s husband at the purported sale on September 17, 2009; and
3. There were improper presale and sale procedures in violation of the terms and conditions of the Deed of Trust and in violation of statutory duties and obligations of respondent and the company to appellant.

In support of the aforementioned general challenges, appellant further alleges in the TAC that after causing the Notice of Default to be recorded, respondent contacted appellant’s husband and informed him that if respondent was paid 26 installment payments by July 5, 2009, respondent would stop the scheduled trustee’s sale. Thereafter, payment in the sum of \$20,000 was tendered to respondent in early July 2009. In mid-July 2009, respondent acknowledged receipt of the \$20,000 payment and demanded an additional \$56,540 to stop the scheduled trustee’s sale. Respondent left his demand open and without a deadline and stated that as long as he received payment of the \$56,540 before the trustee’s sale date, the sale would be stopped.

For over one week before the trustee’s sale scheduled for September 17, 2009, appellant’s husband made numerous attempts to contact respondent to make payment in the sum of \$56,540. However, respondent did not answer or return the calls and appellant’s husband was unable to make the payment to stop the trustee’s sale. As a result on September 17, 2009, appellant’s husband attended the trustee’s sale scheduled for 11:00 a.m. and presented a cashier’s check for the sum of \$56,540 dated September 17, 2009, made payable to TD Service Company.

As a result of the tender of payment by appellant's husband at the trustee's sale, the trustee's sale did not proceed at 11:00 a.m. as scheduled and the auctioneer conducting the sale informed appellant's husband and other potential bidders at the sale that the sale would be postponed to 1:30 p.m. that same day. The auctioneer informed appellant's husband that he would contact respondent regarding the tender of payment and ask whether to accept it. The auctioneer then instructed appellant's husband to return at 1:30.

As instructed, appellant's husband returned for the postponed trustee's sale at 1:30 p.m. At that time he was informed by the auctioneer that based on presentment of the cashier's check, he had spoken to respondent and respondent had instructed the auctioneer to cancel the sale. The auctioneer then told appellant's husband that the trustee's sale was canceled, and did not accept any bids from third parties in attendance at the sale. The auctioneer further instructed appellant's husband to contact respondent to make payment of the cashier's check.

Thereafter, appellant's husband followed the auctioneer's instructions and attempted to contact respondent several times on the afternoon of September 17, 2009, to make payment to respondent, but again respondent did not answer or return any calls. The next day, on September 18, 2009, respondent appeared at the subject property and informed appellant's husband and others at the subject property that he was now the new owner of the subject property having obtained ownership at the trustee's sale on September 17, 2009.

Respondent's numerous demurrers.

Respondent successfully demurred to the original, first amended, and second amended complaints, each of said demurrers having been sustained but with leave to amend. On respondent's demurrer to the TAC, the trial court overruled the demurrer and ordered respondent to file an answer to the TAC. Respondent filed an answer to the TAC in March of 2011.

Respondent's answer.

In its answer to the TAC respondent alleged ten affirmative defenses ranging from appellant's lack of standing to sue, nonjoinder of the real parties in interest, waiver of claims by failing to participate in the foreclosure proceedings or cure the default, violation of the statute of frauds, and appellant's obligation and failure to have acted equitably before demanding relief in equity.

Respondent's motion for judgment on the pleading.

On August 9, 2011, respondent filed his Motion for Judgment on the Pleadings which was granted on August 31, 2011, culminating in the judgment dated October 7, 2011.

At the hearing on the Motion for Judgment on the Pleadings the trial court issued a tentative ruling. The court's tentative ruling was to deny the Motion. The court attached to the tentative ruling its legal analysis. The court reasoned that "the facts alleged in the complaint are such that it would be inequitable to require an offering of a full tender of payment prior to the foreclosure sale. . . Finally, Plaintiff alleges that Defendant cancelled the trustee's sale because the requested funds were present at that sale. As such, sufficient facts have been pled to establish that it may be inequitable to require a full tendering of the secured indebtedness based on the facts alleged in the TAC."

At the hearing on the Motion for Judgment on the Pleadings, before the court allowed any oral argument, the court indicated a change of mind and an inclination to reverse its tentative ruling and grant the motion based on lack of full tender.

At oral argument, appellant argued that full tender was waived by respondent. Appellant further argued that because respondent avoided appellant's contact, it was not possible for appellant to tender payment to reinstate the loan and further that the trustee's sale was improper because no bids were taken at the sale.

Appellant further argued that appellant attempted to make contact with respondent in a timely manner more than five days prior to the scheduled sale date to tender the reinstatement amount, but respondent did not take calls from appellant's husband. When

appellant was unable to reach respondent, appellant's husband went to the trustee's sale to tender the reinstatement payment. Finally, appellant argued that since no bids were accepted at the trustee's sale, no auction process occurred and appellant was denied an opportunity to receive any surplus from a sale which generated funds in excess of respondent's debt.

At the end of the hearing on August 31, 2011, the court granted respondent's motion and ordered respondent's attorney to give notice of the ruling and to prepare a proposed judgment. The judgment was subsequently signed on October 7, 2011 and purportedly filed on October 8, 2011, although we note that the record on appeal is not clear as to the actual date of filing of the judgment. We further note that no issue is raised on appeal as to the timely filing of appellant's notice of appeal. Appellant filed a timely notice of appeal on November 28, 2011.

DISCUSSION

Standard of review.

Respondent does not address the standard of review on appeal. We find the appellant's discussion of the standard of review to be accurate and sufficient to provide the background for the proper resolution of the case. Appellant states "A trial court's grant of a motion for judgment on the pleadings is reviewed de novo. [(*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160.)] On appeal, the Court should treat the properly pleaded allegations of plaintiff's complaint as true, and also consider those matters subject to judicial notice. [(*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226.)] The allegations in the complaint must be liberally construed, 'with a view to substantial justice between the parties.' [(Code Civ. Proc., § 452; *Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505.)] The reviewing court's 'primary task is to determine whether the facts alleged provided the basis for a cause of action against defendants under any theory.' [(*Id.* at p. 1508.)]"

We now consider the appellate contentions of the parties in determining whether the judgment on the pleadings was properly rendered.

Respondent's contentions.

As a preliminary matter we deem it prudent to first focus on respondent's rather cryptic contentions and conclude respondent is making two major contentions on appeal as follows:

1. Appellant was a complete stranger to all of the transactions involved in the subject litigation and as such had no standing to sue in the first instance;
2. Even if appellant had standing to bring her action, the subject matter of the trustee's sale is equitable in nature. Appellant has failed to do equity and is therefore not entitled to equitable relief, having failed to make full tender of the full amount owing at the time of the trustee's sale.

Appellant's contentions.

A distillation of contentions made by appellant in her opening brief leads this court to conclude that the gravamen and core of her contentions is one centering around the equitable principle of failure to do equity deprives one of the right to seek equity. In other words, appellant contends that her failure to comply with the "full tender rule" does not place her in violation of the equitable principle concept of failure to do equity in this case.

Aside from the gravamen of appellant's contentions, appellant makes two subsidiary arguments as follows:

1. Cancelling the trustee's sale and not accepting bids resulted in irregularities sufficient for the trial court to have set aside the trustee's sale; and
2. Appellant was deprived of the potential benefits of a properly conducted trustee's sale by auction.

With these preliminary comments in mind, we proceed to evaluate the contentions of the parties on appeal.

Initially, we note that TDSC was named as a defendant in the underlying action as well as respondent Duenas. Relying on Civil Code section 2924, TDSC filed a declaration of nonmonetary status setting forth its belief it was named in the proceedings

solely in its capacity as a trustee under the subject deed of trust and not due to any acts or omissions on its part in the performance of its duties as trustee and setting forth the basis for its belief, and its agreement to be bound by whatever the court ordered regarding the deed of trust and because no party objected to its declaration of nonmonetary status within 15 days. TDSC further contended it should not be required to participate further in the action or proceeding and should not be subject to any monetary awards, damages, attorney's fees or costs. Having thus qualified under Civil Code section 2924, the action against TDSC was dismissed. No issue is raised on appeal concerning the propriety of TDSC's dismissal.

The tender requirement.

A reading of the TAC confirms that no allegations are contained therein which state that appellant tendered the full amount necessary to cure the default at time of sale on September 17, 2009. The record so confirms this failure. It is true that the appellant first provided \$20,000 toward curing the default. The record also confirms appellant was willing to provide another \$56,540 by way of a cashiers' check in further part payment of the default at the time of sale on September 17, 2009. But the record reveals that the amount to cure the default at the time of sale was ultimately the sum of \$363,551.58 which constitutes considerable disparity from what appellant offered to pay. At the hearing in the trial court, appellant's counsel conceded that to have stopped the sale, appellant was required to have made a full tender of over \$300,000.

We agree with respondent that the tender rule is a condition precedent to maintaining an action to set aside a duly held trustee's sale. We find appellant's failure to allege that she tendered the full amount of the default was fatal to her causes of action and the judgment dismissing appellant's action was in all respects proper.

Set aside trustee's sale

The "elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party

attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.” (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.) Courts refer to the third requirement as the “tender requirement” or the “tender rule.” The rationale for the tender requirement “is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].” (*Lona, supra*, 202 Cal.App.4th at p. 112; see *FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.)

The tender requirement is rooted in the equitable nature of an action to set aside a foreclosure. “Because the action is in equity, a defaulted borrower who seeks to set aside a trustee’s sale is required to do equity before the court will exercise its equitable powers. Consequently, as a condition precedent to an action by the borrower to set aside the trustee’s sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security.” (*Lona, supra*, 202 Cal.App.4th at p. 112; see *Dimock v. Emerald Properties LLC* (2000) 81 Cal.App.4th 868, 877 [in order to maintain a cause of action to set aside a foreclosure sale, “the debtor must tender any amounts due under the deed of trust.”]; *Karlsen v. American Savings & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 [“A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.”].) “Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount.” (*Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1165; see *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579 [“an action to set aside a trustee’s sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt

for which the property was security”].)¹ “The rules which govern tenders are strictly applied.” (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.)

There are exceptions to the tender requirement. (*Lona, supra*, 202 Cal.App.4th at p. 112.) These exceptions include: (1) where the borrower attacks the validity of the underlying debt, (2) when the borrower has a counterclaim or set-off against the beneficiary, (3) “where it would be inequitable to impose such a condition on the party challenging the sale,” and (4) where “the trustee’s deed is void on its face.” (*Id.* at pp. 112-113.) Appellant does not specifically invoke any of these exceptions. Appellant comes closest to relying on exception (3) when she argues that by paying respondent \$20,000 and attempting to pay respondent an additional \$56,540 prior to the sale, she “acted in equity and deserves equity,” and “the ‘tender rule’ should not be applied here to deprive [her] of equitable relief.”

California law does recognize a general equitable exception to the tender requirement. (See *Humboldt Savings Bank v. McCleverty* (1911) 161 Cal. 285, 291 [“it is certainly not the law that an offer to pay the debt must be made, where it would inequitable to exact such offer of the party complaining of the sale”]; see also *Cedano v. Aurora Loan Services, LLC* (9th Cir. BAP 2012) 470 B.R. 522, 529 [“there is a general equitable principle exception” to the tender requirement].) California courts, however, have used this general equitable exception to the tender requirement sparingly.

In *Humbolt*, the only published California case to apply the equitable exception to the tender rule, the trustee sought to foreclose on two pieces of property secured by the same deed of trust for a debt of \$57,618.30, one parcel owned by the defendant’s

¹ There is some authority suggesting that a plaintiff challenging a trustee’s sale may satisfy the tender requirement by tendering the entire secured debt “or at least all of the delinquencies and costs due for redemption.” (4 Miller & Starr, *California Real Estate*, § 10:212, at p. 686 (3d ed. 2008); see *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424.) Virtually all of the published cases, however, require full tender of the entire debt, not just the delinquent amount. In any event, appellant does not argue that her tenders of \$20,000 and \$56,540 satisfy the tender requirement.

deceased husband (worth \$57,000) and the other parcel consisting of the defendant's homestead interest (worth \$5,000). (*Humbolt, supra*, 161 Cal. at pp. 287, 291.) The trustee argued that in order for the defendant to challenge the sale, she had to tender the entire debt secured by the deed of trust, \$57,618.30, even though the "property which she was seeking to save from the effect of the sale was worth . . . \$5,000, while the property in which she had no interest was worth over \$57,000." (*Id.* at p. 291.) The Supreme Court held: "Under the circumstances disclosed by this record, the defendant would be subjected to very evident injustice and hardship if her right to attack the sale were made dependent upon an offer by her to pay the whole debt. The debt was not hers, and she was not liable for any part of it. Her only interest was in the homestead property, which, with other land, was held as security for [the] note. . . . It must be apparent from a mere statement of these facts that there is no equity in the claim that, in order to be enabled to attack an unauthorized sale of her \$5,000 homestead, she must pay, or offer to pay, a debt of \$57,000, for which she is in no way liable." (*Ibid.*)

This case does not involve the kind of equity involved in *Humbolt*. Appellant is responsible for the entire debt.² (See *United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1223 [*"Humbolt provides at least some support for the notion that one not liable for a debt is not required to tender as a prerequisite to an attack on a foreclosure sale"*]. Nor is appellant in the same kind of unfair and untenable position the widow in *Humbolt* was in of having to tender a (much larger) debt of another in order to save her property. (See *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579 [the Supreme Court in *Humbolt* "held it inequitable to permit the sale of both parcels when the sale of one would nearly satisfy the debt"].) Unlike the plaintiff in *Humbolt*, appellant is responsible for the default which

² The original loan was \$315,000. Respondent paid \$363,551.58 at the sale.

led to the notice of default and the trustee's sale. The equitable exception to the tender requirement does not apply here.³

Appellant claims respondent broke several promises to cancel the foreclosure. Appellant alleges she tendered the \$20,000, and then attempted to tender an additional \$56,540 respondent had represented he would accept to cancel the trustee's sale. Appellant alleges at the September 17, 2009 trustee's sale, the trustee's auctioneer told appellant's husband the sale was postponed and then, pursuant to respondent's instructions, canceled. These allegations may support a claim for fraud, or perhaps promissory estoppel, but they do not excuse appellant's obligation to make a full tender in order to challenge the sale. (See *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 231 ["a promissory estoppel claim generally entitles a plaintiff to the damages available on a breach of contract claim"]; *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1038-1044 [promising "nothing more than [the lender] was due under the original loan agreement" may not be sufficient consideration for breach of an oral promise to postpone the sale, but the borrower's detrimental reliance may support a claim for promissory estoppel].) Appellant, however, has not asserted these claims in this action. The trial court properly granted respondent's motion for judgment on the pleadings on appellant's cause of action to set aside the trustee's sale.

³ Appellant does not argue "the trustee's deed is void on its face" (one of the exceptions to the tender requirement listed in *Lona, supra*, 202 Cal.App.4th at p. 112) because of an oral agreement to postpone or cancel the sale, or that respondent is estopped from invoking the tender rule. (See *Bank of America, N.A. v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 711-712 [trustee's sale invalid where "the trustor and beneficiary entered into an agreement to cure the default"]; *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 822 [trustee's sale occurring after beneficiary/lender and trustor/borrower had reached an agreement to postpone the sale was void]; *Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 659 [in "extreme cases the beneficiary may be estopped to proceed with foreclosure if he accepts payments from the trustor without objection and the trustor is misled by the beneficiary into believing that the default has been cured and the foreclosure proceedings terminated"].)

Quiet title

The tender requirement applies to “any cause of action for irregularity in the sale procedure,” including quiet title, rescission, and declaratory relief. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; see *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 394.) Thus, appellant’s failure to tender defeats her quiet title claim. Moreover, “[i]t is well settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured.” (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; see *Aquilar v. Bocci* (1974) 30 Cal.App.3d 475, 477-478 [mortgagor “cannot clear his title without satisfying his debt”].) Appellant’s actual and attempted tenders do not extinguish the entire debt secured by the property. The trial court properly granted respondent’s motion for judgment on the pleadings on appellant’s cause of action to quiet title.

Cancellation of trustee’s deed

Cancellation of a trustee deed “is not an independent cause of action, but a request for a particular remedy.” (*Solomon v. Aurora Loan Services, LLC* (E.D. Cal. 2012) 2012 WL 2577559 at p. 10; see *Plastino v. Wells Fargo Bank* (N.D. Cal. 2012) __ F.Supp.2d ___, 2012 WL 2061515 at p. 7; *Yazdanpanah v. Sacramento Valley Mortg. Group* (N.D. Cal. 2009) [“A request to cancel the trustee’s deed is ‘dependent upon a substantive basis for liability, [and it has] no separate viability’”], quoting *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3.) Because the trial court properly granted respondent’s motion for judgment on the pleadings on appellant’s causes of action to set aside the trustee’s sale and to quiet title, there are no remaining substantive bases for liability, and the trial court properly granted respondent’s motion on appellant’s cause of action to cancel the trustee’s deed.

Accounting

An accounting is an equitable remedy appropriate where “the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.” (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.) “There is no

right to an accounting where none is necessary.” (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594.) An accounting is not an independent cause of action but merely a type of remedy [citation], and an equitable remedy at that.” (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82; see *Janis v. California State Lottery Commission* (1998) 68 Cal.App.4th 824, 833-834 [“A right to an accounting is derivative; it must be based on other claims”].)

Appellant has not alleged any complicated accounts that justify equitable relief. There is the loan, appellant’s default, and one payment of \$20,000 to credit (because appellant was never able to deliver the \$56,540 cashier’s check). And because the right to an accounting depends on the existence of other claims, appellant’s failure to state any other claims defeats her request for an accounting.

DISPOSITION

The judgment is affirmed. Respondent to recover costs of appeal.

WOODS, Acting P. J.

We concur:

JACKSON, J.

SEGAL, J.*

*Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.