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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MODERN COMFORT, LLC,

Plaintiff and Appellant,

v.

NATIONSTAR MORTGAGE, LLC,

Defendant and Respondent.

B259358

(Los Angeles County
Super. Ct. No. BC499415)

Appeal from a judgment of the Superior Court of Los Angeles County.
Elizabeth Allen White, Judge. Reversed and remanded.

Law Offices of Mary Jean Pedneau, Mary Jean Pedneau, and William R. Larr for
Plaintiff and Appellant.

Akerman and Karen Palladino Ciccone for Defendant and Respondent.

Sitting without a jury, a trial court concluded that a lender was not liable for negligent misrepresentation when it informed a third party escrow agent that no foreclosure sale date was set. We determine there is insufficient evidence to support the trial court's findings. Accordingly, we reverse the judgment in favor of the lender and remand the case for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Events Leading to Foreclosure Sale

On or around October 9, 2007, codefendants Juan Garza Salazar and Minerva Suarez Garza (Salazars)¹ borrowed \$137,438 from Bank of America, N.A., secured by a Note and Deed of Trust, to purchase residential property located in Los Angeles (property). Five years later, on or about October 15, 2012, Bank of America assigned the Note and Deed of Trust to defendant and respondent Nationstar Mortgage, LLC (Nationstar). In the meantime, the Salazars failed to make payments due under the Note, and a Notice of Default was recorded on or around October 20, 2009.

Juan Salazar filed a Chapter 13 bankruptcy on June 22, 2010, which was later dismissed on May 18, 2012. The foreclosure trustee, Cal-Western Reconveyance Corporation (Cal-Western), then recorded a Notice of Trustee's Sale with a foreclosure date set for June 19, 2012. On June 18, 2012, Juan Salazar filed a second Chapter 13 bankruptcy to stop the June 19, 2012 foreclosure sale.

During the second bankruptcy, plaintiff and appellant Modern Comfort, LLC (Modern Comfort) entered into a written contract with the Salazars, dated October 16, 2012, to purchase the property "as is" for \$325,000. Modern Comfort was aware that the Salazars' mortgage was in default. Juan Salazar dismissed the bankruptcy on October 29, 2012.

At Modern Comfort's recommendation, Glen Oaks Escrow was used to handle the sale. The escrow officer in charge of the transaction was assisted by Erika Pena (Pena).

¹ The Salazars are not parties on appeal.

The original closing date for the sale of the property to Modern Comfort was November 5, 2012.

On November 2, 2012, Modern Comfort asked Glen Oaks Escrow to have the closing date pushed back to November 15, 2012. On November 13, 2012, Glen Oaks Escrow finally received a payoff demand it had been repeatedly requesting from Nationstar; the payoff amount was good through November 30, 2012. Upon receipt of the payoff demand, on November 13, 2012, Pena called Nationstar and spoke to a customer service employee named Kendra who told Pena that no foreclosure sale date was set. Pena told Kendra that she was asking about a foreclosure date so that the loan could be paid off through escrow instead of foreclosure. Pena asked another escrow assistant to double check online for a foreclosure sale date. The assistant confirmed that she checked the trustee's Web site on November 13, 2012, and did not find any foreclosure sale date listed for the property.

Modern Comfort obtained financing to purchase the property and Glen Oaks Escrow received the loan documents on November 20, 2012, but funding did not occur until November 27, 2012. On that date, a grant deed was recorded reflecting that Modern Comfort held title to the property. However, the property was sold during a foreclosure sale the day before, on November 26, 2012, to a third party. Modern Comfort's purchase funds were disbursed by Glen Oaks Escrow on November 27, 2012.

Records Regarding the Foreclosure Sale

Yvonne Wheeler (Wheeler) of Cal-Western confirmed that on May 29, 2012, Cal-Western issued a Notice of Trustee's Sale for the property, originally setting a foreclosure sale date for June 19, 2012. Because Juan Salazar had filed for bankruptcy on June 18, 2012, the foreclosure sale was postponed orally several times, and no other Notice of Trustee's Sale was issued. Wheeler testified that all postponements were announced orally by the auctioneer at the trustee's sale and a new date was set for 30 days later. Nationstar had instructed Cal-Western to postpone the foreclosure sale every 30 days due to Juan Salazar's bankruptcy. Nationstar, however, instructed Cal-Western to make the

final postponement for only a week from November 19 to November 26, 2012, at which time the foreclosure sale was held.

Cal-Western, as the trustee, maintained a written record of all oral postponements, and also posted the information on its Web site. Wheeler did not have an explanation for why the information would have been missing from its Web site when searched by the escrow agent.

On November 13, 2012, when Nationstar's customer service employee Kendra told escrow agent Pena that no foreclosure sale was set for the property, Nationstar required its customer service employees to use Nationstar's internal records system known as "Fortracs" to answer inquiries regarding foreclosure sales. As of November 13, 2012, there was no entry in Fortracs showing any future foreclosure sale date. By November 2, 2012, Nationstar knew that Juan Salazar's bankruptcy had been dismissed on October 29, 2012, and informed Cal-Western of the dismissal on November 15, 2012. The foreclosure sale date of November 19, 2012, was entered into Fortracs on November 15, 2012, after the telephone conversation between Pena and Kendra.

Procedural History

In July 2013, Modern Comfort filed a first amended complaint (FAC) against several defendants alleging numerous causes of action. At issue here is the sixth cause of action for negligent misrepresentation against Nationstar. This issue was tried to the court without a jury. The trial court issued a statement of decision finding in favor of Nationstar and entered judgment accordingly. The court denied Modern Comfort's motions for new trial and to set aside judgment. This appeal by Modern Comfort followed.

DISCUSSION

Modern Comfort contends there is insufficient evidence to support the trial court's finding that two elements of negligent misrepresentation are missing.

I. Standard of Review

When faced with a challenge to the sufficiency of the evidence, we look for whether substantial evidence supports the trial court's factual determination. "Substantial evidence" is not synonymous with "'any'" evidence. (*People v. Bassett* (1968) 69 Cal.2d 122, 138–139.) "While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, fn. omitted.)

II. Elements of Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

A. Misrepresentation

In its statement of decision, the trial court found that "no sale date had been set as of November 13, 2012" and therefore "no misrepresentation was made of any material fact." The court cited to the following evidence: "According to Cal-Western, as of November 13, 2012, no sale date had been set, rather it had been postponed from October 19, 2012 to November 19, 2012, due to the bankruptcy of Salazar."

But the evidence presented at the trial does not support the trial court's finding. To the contrary, Wheeler, on behalf of Cal-Western, testified repeatedly that a foreclosure sale date was always set:

"Q. What is the substance of the statement by an auctioneer in the event of a postponement?"

“A. He or she will reference the trustee sale and state that the sale for this particular property is being postponed from this date to whatever the given date is.

“Q. So the new date is the new scheduled sale based on the postponement?

“A. Yes.

“[¶] . . . [¶]

“Q. So you have a new scheduled date of the sale upon the auctioneer crying the postponement?

“A. Correct.

“[¶] . . . [¶]

“Q. As of October 19th was the new scheduled date for this foreclosure sale November 19, 2012?

“A. Yes.

“[¶] . . . [¶]

“Q. If you as the person at Cal-Western had received an inquiry from say an escrow agent on a property that was in foreclosure as to when the foreclosure sale was scheduled for, would you have been able to tell the inquiring person what the new date was based on the postponement? . . . [¶] . . . [¶]

“A. Yes, I would.

“Q. And what would you have told the person if the inquiry was made on November 13th of 2012?

“A That the next scheduled sale date was November 19th.”

“[¶] . . . [¶]

“Q. There was no time that there was not a scheduled foreclosure sale, was there?

“A Yes. From the period of June 19th through November 26th, we had a scheduled sale date.”

“[¶] . . . [¶]

“Q. At all times within the dates shown on your record, the foreclosure sale was scheduled for some date; correct?

“A. Correct.”

Ignoring this testimony, Nationstar argues that no sale date was set because the date was only postponed and therefore not a valid sale date. This argument has no merit. Civil Code section 2924g, subdivision (d) provides: “The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. A public declaration of postponement shall also set forth the new date, time, and place of sale No other notice of postponement need be given.” Thus, if November 19, 2012, had not been an actual, valid sale date, it would not have been legally possible for Nationstar’s trustee, on this date, to further postpone the sale to November 26, 2012, on which date the foreclosure sale actually took place.

Thus, there is insufficient evidence to support the trial court’s finding that the element of misrepresentation is missing.

B. Reasonable Reliance

The trial court further found, as stated in its statement of decision, that even “assuming that the statement ‘no sale was set’ was in fact untrue (since the sale date had been postponed to November 19), Plaintiff had no reasonable ground for believing it to be true.” The trial court cited two pieces of evidence: “[Shlomi ‘Sam’ Suliman (Suliman), the owner of Modern Comfort,] knew that Salazar’s bankruptcy had been dismissed and that a foreclosure could potentially occur imminently,” and that “after November 13, neither Plaintiff nor anyone from Glen Oaks Escrow contacted the website identified on the Notice of Trustee’s Sale or attempted to telephone the trustee” to verify whether a sale date was set.

“Whether reliance is justified is a question of fact for the determination of the trial court; the issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience.” (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503.)²

² Nationstar cites to a different definition of justifiable reliance. Not only does Nationstar provide the wrong case cite for its quote (the correct case is *Molko v. Holy Spirit Association* (1988) 46 Cal.3d 1092, 1108), but the definition it cites applies in the context of fraud in the inducement, which is not the situation here.

Once again, the evidence does not support the trial court's finding that Modern Comfort's principal knew a foreclosure sale could occur imminently.

Suliman is in the business of flipping real estate. He testified that the property was "a shell," "nothing there," "just walls," and that Modern Comfort wanted to turn the property around quickly to avoid having to keep paying loans with high interest rates. He had used Glen Oaks Escrow many times and had never had to cancel an escrow. He further testified:

"Q. Now, in going forward with the purchase of the property, were you aware that Nationstar had put a payoff demand into the escrow?

"A. I knew there was a payoff demand good until November 30th. And that's the date that we work with and that's why we close the escrow before that date. . . . And I never knew there was sale set up for 26th, otherwise, I wouldn't—we wouldn't have funded this deal.

"Q. All right. So you're saying if you had known about the foreclosure, you wouldn't have gone through with the deal?

"A. I didn't know about it, and I don't think anybody else knew about it.

"Q. But if you had known about?

"[¶] . . . [¶]

"A. I would have cancelled it right away.

"Q. Now, not knowing about the foreclosure, were you thinking that the money you put into escrow would be used to pay off the Nationstar loan?

"A. That's correct, pay off Nationstar loan and close the deal.

"[¶] . . . [¶]

"Q. So the question was: If you had known there had actually been a foreclosure sale, you would not have gone through with your deal?

"A. No. Nobody knew about it. We knew there was a payoff demand good to November 30th. And that's the date that—that's the reason we push this deal to close before that day.

"Q. Okay. If you had known of the sale, you wouldn't have gone through—

“A. I wouldn’t go through that. I wouldn’t get a loan to close this deal, and I wouldn’t—wouldn’t be here right now.”

Suliman confirmed that Glen Oaks Escrow was authorized to communicate with Nationstar on Modern Comfort’s behalf. He also testified that Modern Comfort took out two high-interest loans to purchase the property, one from a relative at 10 percent interest and one from a private lender at 12 percent interest.

On cross-examination, Suliman testified as follows:

“Q. And when you entered into the escrow, you understood the property was subject to a foreclosure proceeding; correct? [¶]

“A. I knew there was bankruptcy and a default. I knew that.

“Q. So you knew Mr. Salazar had defaulted on his loan?

“A. I did know.

“Q. And you knew—you were aware that a trustee sale could be conducted on the property if the bankruptcy was lifted; is that correct?

“A. I didn’t know.

“Q. You knew there was a bankruptcy—

“A. I knew that the—he’s removing the property from the bankruptcy sale. I knew about that. And that’s—we wait for that to be—before we close escrow, we want that to be done completely. That’s one of the reasons.

“Q. Did you understand that if the property was removed from the bankruptcy that a trustee sale, foreclosure could go forward?

“A. I didn’t know about that.”

The trial court also noted that after November 13, 2012, neither Modern Comfort nor its escrow agent ever contacted the trustee again about any foreclosure sale dates. But no evidence was presented as to whether such further inquiry of the trustee was customary.

Accordingly, there was insufficient evidence to support the trial court’s finding that the element of reasonable reliance is missing.

DISPOSITION

The judgment in favor of Nationstar is reversed and the matter is remanded for a new trial. Modern Comfort is entitled to recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ