Filed 9/18/17 Fernandez v. JPMorgan Chase Bank CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PATRICIA FERNANDEZ et al., Plaintiffs and Appellants, v. JPMORGAN CHASE BANK N.A., Defendant and Respondent.	B259875 (Los Angeles County Super. Ct. No. PC055047)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin Sandvig, Judge. Reversed.

Patricia Fernandez and Manuel Fernandez, in pro. per., for Plaintiffs and Appellants.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman, Jr. for Defendant and Respondent.

INTRODUCTION

Plaintiffs Patricia and Manuel Fernandez appeal from a judgment of dismissal entered after the demurrer of defendant JPMorgan Chase Bank N.A. (Chase) to plaintiffs' first amended complaint was sustained without leave to amend. Plaintiffs' attorney withdrew from representing them when the demurrer was pending, but the attorney served the order granting the motion to withdraw by mailing it to plaintiffs at an incorrect address. As a result, plaintiffs did not learn that they were self-represented until shortly before the demurrer hearing, having failed to file opposition or retain new counsel. Plaintiffs filed a case management statement requesting a continuance and appeared at the hearing, but the court failed to address the continuance request and sustained the demurrer without leave to amend. We conclude that the failure to grant the continuance was an abuse of discretion that denied plaintiffs their right to be heard. We accordingly reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' first amended complaint, filed on January 23, 2014, alleged that plaintiffs purchased property located at 34710 Caprock Road in Agua Dulce. They refinanced the property with a Chase subsidiary and then fell behind on their mortgage payments. Chase offered plaintiffs an agreement for a loan modification; the agreement required plaintiffs to make loan payments for three months, after which they would be offered a final loan modification. Plaintiffs made the three monthly loan payments, and Chase indicated a final loan modification would be

provided shortly. Plaintiffs made payments for an additional three months, while Chase continued to promise that they would receive a final loan modification. A Chase employee told plaintiffs that they would receive the final loan modification shortly and they should stop making monthly loan payments. Plaintiffs stopped making the payments and continued to contact Chase, but they never received the final loan modification paperwork. Plaintiffs relied on Chase's representations that they would receive a loan modification and did not pursue other avenues of relief, such as refinancing or bankruptcy. Plaintiffs are now threatened with foreclosure and have had thousands of dollars of fees and interest added to their loan.

Plaintiffs' first amended complaint, filed on January 23, 2014, alleged causes of action for breach of contract, promissory estoppel, violation of the Fair Employment and Housing Act, intentional and negligent misrepresentation, unfair business practices, and breach of the implied covenant of good faith and fair dealing. Defendant filed a demurrer to the first amended complaint on February 27, 2014.[1]

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[1] Plaintiffs did not file a clerk's or reporter's transcript. (Cal. Rules of Court, rules 8.120, 8.122, 8.130.) They appended several documents to their opening brief, and this court deemed those documents to constitute appellants' appendix. The appellants' appendix does not include a copy of Chase's demurrer or the trial court's ruling on it. Chase filed a respondent's appendix consisting of the case summary, the minute order granting plaintiffs' former trial counsel's motion to be relieved, the ruling on the demurrer, and the judgment of dismissal. We obtained the entire superior court file in order to facilitate our review of the issues presented. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

On April 30, 2014, plaintiffs' attorney filed a motion to be relieved as counsel. The proof of service in the superior court file reflects that the motion was served on defendants (plaintiffs sued the alleged foreclosure trustee in addition to Chase) but was not served on plaintiffs themselves, in violation of rule 3.1362(d) of the California Rules of Court. The trial court granted the motion on May 30 and continued the hearing on Chase's demurrer to August 5. The proof of service in the superior court file reflects that, on July 11, plaintiffs' counsel served the court's order by mailing copies to plaintiffs at "34710 Capwalk Rd." in Agua Dulce, which plaintiffs claim is a nonexistent address. As alleged in their first amended complaint, plaintiffs' address is 34710 Caprock Road.

Unaware that their attorney had been relieved, plaintiffs filed no opposition to Chase's demurrer. On July 30, Chase filed a reply to plaintiffs' non-opposition to the demurrer, requesting that the trial court sustain the demurrer without leave to amend based on plaintiffs' failure to file opposition.

Plaintiffs filed a case management statement in propria persona on August 4. In it, they requested a 90-day continuance in order to hire counsel to file opposition to Chase's demurrer. According to Manuel Fernandez's attached declaration, plaintiffs had no knowledge that their attorney had stopped representing them. The last time they spoke with him, he said Chase had stipulated to a postponement of foreclosure proceedings pending resolution of the litigation, and he was negotiating a settlement with Chase involving a loan modification and a reduction of the principal amount of the loan. Plaintiffs knew nothing about the demurrer or their attorney's withdrawal from representation until July 31, when they received a copy of Chase's reply to

plaintiffs' non-opposition to the demurrer, indicating that plaintiffs were self-represented. Plaintiffs immediately contacted Chase's counsel and requested an extension of time to find a new attorney and file opposition to the demurrer. She said she could not stipulate to an extension of time because the hearing on the demurrer was scheduled for August 5, and the matter would have to be addressed at the hearing. She did provide plaintiffs with a copy of the demurrer, from which they learned the time to oppose it had passed.

At the hearing on August 5, the trial court sustained Chase's demurrer without leave to amend on the grounds of uncertainty and failure to allege facts sufficient to state a cause of action. The court stated that plaintiffs "have failed to oppose the demurrer or give any indication that they can cure the defects in their pleading. The hearing on the demurrer was even continued from June to August, after [plaintiffs'] counsel's motion to withdraw [was] granted. However, [plaintiffs] still failed to respond to the demurrer." The court's order did not mention but implicitly denied plaintiffs' request for a further continuance to retain new counsel. A judgment of dismissal was entered on August 19, 2014.

DISCUSSION

We review the trial court's decision to grant or deny a continuance for abuse of discretion. (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 418-419.) We conclude that the court abused its discretion by denying plaintiffs' request.

At the time of the demurrer hearing, the superior court's file reflected that plaintiffs were never served with their former

counsel's motion to be relieved and that the court's order granting the motion was sent to an incorrect address. Manuel Fernandez's declaration stated that plaintiffs first became aware that they were self-represented less than one week before the demurrer hearing, and plaintiffs' case management statement sought a continuance in order to retain new counsel. We are not aware of any reasonable basis to deny plaintiffs' request for a continuance. Chase has articulated none, and the court's order does not address the continuance request at all. We conclude that the denial of plaintiffs' continuance request was an abuse of discretion. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 [defining abuse of discretion].)

Chase argues that we still must affirm the judgment, however, because plaintiffs have failed to show that they were prejudiced by the denial of their request for a continuance. In particular, Chase argues that plaintiffs "still have not substantively opposed Chase's demurrer"; plaintiffs have never articulated any basis on which the demurrer might be found to lack merit, nor have they argued that they could cure the (purported) defects in the first amended complaint by further amendment.

We find the analysis in *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201 (*Seacall*) instructive. In *Seacall*, this court reversed an order denying a motion for equitable relief from a judgment on grounds of attorney abandonment. (*Id.* at pp. 203-204.) The plaintiff's lawyer had filed a petition for administrative mandate, ordered preparation of the administrative record, and then done nothing else. (*Id.* at pp. 203, 206.) The action was eventually dismissed

for failure to prosecute, but the plaintiff did not learn of the dismissal until more than one year after it was entered. (*Id.* at p. 204.) The plaintiff then promptly moved for relief from the dismissal, but the motion was denied. (*Ibid.*)

We reversed. While acknowledging the general rule that "the negligence of an attorney is imputed to the client," we also noted the well-established exception: "Imputation of the attorney's neglect to the client ceases at the point where 'abandonment of the client appears.'" (*Seacall*, *supra*, 73 Cal.App.4th at pp. 204-205, quoting *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898, 900.) "What constitutes 'abandonment' of the client depends on the facts in the particular action. Even where abandonment is shown, however, the courts also consider equitable factors in deciding whether the dismissal of an action should be set aside. These factors include the client's own conduct in pursuing and following up the case [citation], whether the defendant would be prejudiced by allowing the case to proceed [citation] and whether the dismissal was discretionary or mandatory [citation]. The courts must also balance the public policy favoring a trial on the merits against the public policies favoring finality of judgments and disfavoring unreasonable delays in litigation [citation] and the policy an innocent client should not have to suffer from its attorney's gross negligence against the policy a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence. [Citation.]" (*Seacall*, at p. 205.) We concluded that the plaintiff's attorney's inaction constituted abandonment and that, even though the plaintiff had failed to contact counsel "in the two years between the filing of the action and its dismissal" (*id.* at p. 206), the balance of the

factors compelled the conclusion that the plaintiff was entitled to relief. (*Id.* at p. 208.)

The facts of the present case are even more compelling than those of *Seacall*. This is a straightforward case of client abandonment: Three months after filing the first amended complaint and with a demurrer pending, plaintiffs' attorney successfully moved to be relieved without notifying his clients of either his motion or the court's order granting it. When plaintiffs learned, on the eve of the demurrer hearing, that they had been abandoned, they promptly requested a continuance, appeared at the hearing, and timely appealed from the adverse judgment. Chase has not shown that it would suffer significant prejudice if the judgment is reversed, and indeed, Chase's demurrer will still be heard on the merits. The policies in favor of resolution on the merits and protecting innocent clients from their attorney's gross negligence weigh very heavily in favor of granting relief, and no countervailing policy weighs heavily against.

Plaintiffs were abandoned and were kept in the dark about their abandonment. When they learned of their predicament, they acted quickly to take whatever steps they believed were available to protect their rights. For all of the foregoing reasons, we must reverse the judgment and remand for further proceedings.

DISPOSITION

The judgment and the order sustaining the demurrer without leave to amend are reversed. The superior court is directed to conduct a new hearing on the demurrer after affording an opportunity for plaintiffs to file written opposition and for Chase to file a reply. Plaintiffs are awarded their costs on appeal.

MENETREZ, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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