Filed 10/30/12 Nouri v. Mortgage Lender Services CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FARIBORZ NOURI et al., Plaintiffs and Appellants, v. MORTGAGE LENDER SERVICES, INC., et al., Defendants and Respondents.	B236415 (Los Angeles County Super. Ct. No. LC090669)

APPEAL from orders of the Superior Court for Los Angeles County, Frank J. Johnson, Judge. Affirmed.

Russell J. Thomulka for Plaintiffs and Appellants.

Kronick, Moskovitz, Tiedemann & Girard, Bruce A. Scheidt and Amara Harrell for Defendant and Respondent Mortgage Lender Services, Inc.

The Ryan Firm, Timothy M. Ryan and Austin T. Beardsley for Defendants and Respondents Sam Ostayan and Oakridge Management, LLC.

Knox, Lemmon, Anapolsky & Schrimp, Louis J. Anapolsky and Stephen J. Byers for Defendant and Respondent Nationwide Posting and Publication, Inc.

Plaintiffs Fariborz Nouri, Young America Mortgage Corp., and 1999 Nouri Family Inter Vivos Trust appeal from orders dismissing the causes of action alleged against defendants Mortgage Lender Services, Inc. (MLS), Sam Ostayan and Oakridge Management, LLC (Ostayan[1]), and Nationwide Posting and Publication, Inc. (Nationwide) (we will refer to those respondents collectively as "respondents"), after the trial court sustained those defendants' demurrers without leave to amend. We affirm the dismissal orders.

BACKGROUND

In late July 2010,[2] plaintiffs filed a complaint against MLS, Zions First National Bank, Zions Bank, Zions Bank Credit Management Department, and Doe defendants. (The various Zions defendants (collectively, the Bank) are not parties to this appeal; our discussion of the allegations of the various complaints will be limited to the allegations relevant to MLS, Ostayan, and Nationwide.) Plaintiffs alleged that in September 2000, they obtained a loan from the Bank secured by a deed of trust on certain real property in Reseda (the property); they alleged that they are parties in interest and/or owners of the property.

In the first cause of action, for fraud, they alleged (as relates to respondents) that the Bank foreclosed on the property, and that the Bank, MLS and certain Doe defendants (acting "as 'Trustee' of the loan"), and certain other Doe defendants conspired to carry on a foreclosure sale in which one of the Doe defendants would

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[1] Although we will use "Ostayan" to refer to Sam Ostayan and Oakridge Management, LLC collectively, we will use the singular rather than plural when referring to "Ostayan."

[2] The copy of the original complaint in the appellants' appendix is not file-stamped, nor is it signed. The signature block, however, includes a printed date of July 29, 2010. The index for the appendix, however, lists a file date of July 30, 2010.

bid a certain amount, and the Trustee would accept that bid without allowing any other bids. Plaintiffs alleged that the actions of these defendants violated the statutes governing foreclosure sales and damaged plaintiffs by preventing them from receiving any monies from the sale of the property.[3] They asked for an order cancelling the foreclosure sale, for damages, and for an order enjoining defendants from going onto the property or contacting any of the tenants.

Less than three weeks later, plaintiffs filed a first amended complaint, which made slight corrections or modifications to the original complaint, and added a request to enjoin defendants from removing plaintiffs from the property. On that same date, plaintiffs filed separate amendments to name Ostayan, Nationwide, and Priority Posting in place of Doe defendants.

Ostayan filed a demurrer to the first amended complaint, arguing that plaintiffs failed to state a cause of action for fraud against the Bank, and therefore could not allege a conspiracy to defraud against Ostayan, and that the allegations of fraud were uncertain and did not comply with the strict pleading standards for alleging fraud. Ostayan also argued that plaintiffs' cause of action for injunctive relief failed to state a claim because there is no such cause of action. Before that demurrer was heard, Ostayan filed an amended demurrer, in which he asserted additional grounds for dismissal. In addition to the grounds asserted in the original demurrer, Ostayan argued that plaintiffs' claims failed because plaintiffs failed to comply with the tender rule, which requires a borrower challenging a foreclosure sale to tender the full amount of indebtedness in order to bring an action to set aside the sale. Ostayan also argued that plaintiffs' claims were barred by res judicata, based upon the denial of a motion plaintiffs' brought in federal

[3] Plaintiffs purported to allege a cause of action for "injunctive relief" based upon these same factual allegations, and also alleged a cause of action for breach of contract against the Bank.

bankruptcy court. Finally, Ostayan argued that plaintiffs lack standing to assert improprieties in the foreclosure sale because documents plaintiffs filed in the bankruptcy action (of which Ostayan requested the court take judicial notice) show there were more than $936,000 in loans secured by the property; therefore, Ostayan asserts, plaintiffs suffered no damages from the alleged improprieties.

After the trial court sustained Ostayan's demurrer and amended demurrer, plaintiffs filed a second amended complaint, the complaint at issue in this appeal. That complaint alleges five causes of action, two of which are alleged only against the Bank. One of the remaining causes of action, the second cause of action for fraud, is a slightly more detailed version of the earlier conspiracy to commit fraud claim in the earlier complaints, i.e., alleging that all of the defendants conspired to conduct a foreclosure sale in which only Ostayan's bid would be accepted, resulting in a sale for below market value and lost equity, which damaged plaintiffs in an amount in excess of $130,000. Plaintiffs seek both damages and an order cancelling the foreclosure sale. The fourth cause of action, for negligence, is alleged against MLS and Nationwide, and alleges that MLS and Nationwide negligently conducted the foreclosure sale by failing to allow open bidding on the property; plaintiffs allege that had MLS and Nationwide accepted the highest bid, there would have been sufficient funds to pay off the secondary loans, with excess funds for plaintiffs. The fifth cause of action, for declaratory relief, was alleged against all defendants, and seeks a determination of plaintiffs' rights and duties concerning their interest in the property, and a declaration that the foreclosure sale was improperly conducted.

Ostayan, MLS, and Nationwide each filed demurrers to the second amended complaint.[4] The grounds for Ostayan's demurrer were the same as those stated in Ostayan's amended demurrer to the first amended complaint, i.e., uncertainty, failure to comply with the tender rule, res judicata, lack of standing due to absence of damages, and failure to plead fraud with specificity. MLS argued in its demurrer that it cannot be held liable for foreclosure-related activities because its activities as a trustee were privileged under Civil Code section 2924, subdivision (d). It also argued that plaintiffs failed to state a claim against it for fraud because MLS did not owe plaintiffs any fiduciary duties, and because plaintiffs failed to allege fraud with the requisite specificity. Nationwide's demurrer rested on three grounds. First, it argued that the declaration of nonmonetary status MLS filed under Civil Code section 2924*l* applies equally to Nationwide because Nationwide acted as the agent of MLS as trustee, and therefore Nationwide cannot be subject to any monetary award. Second, it argued that plaintiffs' fraud claim was not alleged with the requisite specificity and is uncertain. Finally, it argued that plaintiffs' claims fail because plaintiffs failed to comply with the tender rule.

The court sustained all three demurrers without leave to amend, finding that the allegations of the fraud cause of action lacked specificity and were uncertain, even after plaintiffs amended the complaint twice, and that the negligence claim failed because MLS and Nationwide owed no duty to plaintiffs. The court

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[4] In addition, Ostayan filed a motion to strike the declaratory relief cause of action, on the ground that the trial court did not give plaintiffs permission to file a new and different cause of action when it granted plaintiffs leave to amend after sustaining Ostayan's previous demurrers.

dismissed MLS, Ostayan, and Nationwide from the second amended complaint. Plaintiffs appeal from the dismissal orders.[5]

DISCUSSION

We conduct a de novo review of a judgment of dismissal following the sustaining of a demurrer without leave to amend. We assume the truth of all well-pleaded facts and accept as true all facts that may be implied or inferred from the facts alleged. We also treat as having been pled relevant matters that properly are the subject of judicial notice. (*Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 716; *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1098-1099.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the *factual* allegations of the complaint are adequate to state a cause of action under any legal theory.'" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Having examined the factual allegations of the complaint, we find that (1) to the extent plaintiffs seek to set aside the trustee's sale of the property, they fail to state a cause of action because they did not (and apparently cannot) allege they

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[5] The orders sustaining the demurrers filed by Ostayan and Nationwide did not include orders dismissing those parties. Nevertheless, plaintiffs purported to appeal from the orders sustaining those demurrers, which are nonappealable orders. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) Because there were no dismissal orders for Ostayan or Nationwide in the appellants' appendix, we directed plaintiffs' counsel to obtain such orders and forward them to this court. We have now received the dismissal orders, and exercise our discretion to deem plaintiffs' appeal to have been taken from the dismissal orders.

tendered the full amount of the debt for which the property was security; and (2) plaintiffs' claim for damages, regardless of the theory underlying it, is barred by plaintiffs' admission, found in a document plaintiffs filed in bankruptcy court and which is subject to judicial notice, that the property was subject to liens that exceeded its value.

A. *The Tender Rule Bars Plaintiffs' Claim to Set Aside the Sale But Does Not Necessarily Bar a Claim for Damages*

It is well established that, "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. [Citations.] 'The rationale behind the rule 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 v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.)

In their appellants' opening brief, plaintiffs appear to concede that the tender rule bars their claims to the extent they seek to set aside the trustee's sale, but they argue they are not barred from seeking damages. Respondents contend that plaintiffs' failure to tender the entire amount of the debt bars *any* claim for damages based upon irregularities in the sale procedure. While respondents' argument finds support in the broad language used in some appellate cases (see, e.g., *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 [borrower is "required to allege tender of the amount of [the bank's] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure"]), we conclude the tender rule is not intended to apply quite so broadly.

The tender rule "is premised upon the equitable maxim that a court of equity will not order that a useless act be performed. 'Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention.'" (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579; see also *FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1021-1022 ["The rationale behind the rule 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]"].)

This rationale for the tender rule does not support its application in all cases seeking damages resulting from irregular procedures in a trustee's sale. Consider the following hypothetical. A property owner, Owner, owns property worth $500,000, subject to a deed of trust securing a $450,000 promissory note to ABC Bank. Owner defaults on the note, and ABC institutes nonjudicial foreclosure proceedings. Before the trustee's sale, ABC and the trustee agree that only ABC will be allowed to bid on the property. At the sale, the trustee accepts a credit bid from ABC for the amount of the note, even though there was a bidder present who was ready, willing, and able to pay $500,000. Had the trustee allowed the other bidder to bid, Owner would have been entitled to receive any surplus funds after the loan from ABC was paid off and the costs of the sale were paid. If Owner could prove there would have been surplus funds in such a case, she could state a "tort in essence" cause of action against ABC and the trustee. (See, e.g., *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1121-1123 (*South Bay*); *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, *supra*, 207 Cal.App.3d at p. 1022.) In such a case, the rationale of the tender rule would have

no application, because the irregularities in the sale clearly did result in damages to Owner.

B. *Plaintiffs Cannot Allege They Were Damaged*

In the instant case, plaintiffs alleged that respondents and the Bank agreed in advance of the sale that Ostayan's $470,000 bid would be accepted at the sale, even though there were other bidders willing to pay more than that amount, and that plaintiffs were damaged as a result because they lost their equity in the property. Even if, as asserted by respondents, these allegations are insufficient to allege a cause of action for fraud or negligence (which is an issue we need not resolve in light of our resolution of this appeal), they would be sufficient to allege a tort in essence claim. As we explained in *South Bay*, *supra*, 72 Cal.App.4th 1111, "'[a] tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory duty to another may therefore be a tort and violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself." (*Id.* at p. 1123.) In this case, as in *South Bay*, plaintiffs' claim is based upon an alleged violation of Civil Code section 2924h, subdivision (g), which makes it "unlawful for any person, acting alone or in concert with others, . . . (2) to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage."

Although we conclude that, on their face, the allegations of the complaint are sufficient to allege a tort in essence claim, for which plaintiffs were not required to allege compliance with the tender rule, we nevertheless hold that plaintiffs' damages claims -- regardless of the legal theory under which they are alleged -- properly were dismissed because a judicially-noticed admission establishes that they suffered no damages. (See *Del E. Webb Corp. v. Structural*

Materials Co. (1981) 123 Cal.App.3d 593, 604 ["a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless"].)

Plaintiffs allege they lost their equity in the property as a result of respondents' agreement to sell the property for less than another bidder was willing to bid.[6] To establish those damages, plaintiffs would have to show that there was a bidder ready, willing, and able to pay a price for the property sufficient to pay off all of the liens on the property, plus the trustee's costs and expenses, and leave a surplus, which would have been distributed to plaintiffs. (Cf. *South Bay*, *supra*, 72 Cal.App.4th at pp. 1122-1123; *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, *supra*, 207 Cal.App.3d at p. 1024; see also *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1102 ["[Civil Code] Section 2924k directs the trustee to apply proceeds from the foreclosure sale: (1) first, to pay the trustee's costs and expenses in exercising the power of sale and conducting the sale; (2) next, to satisfy the debt to the beneficiary (lender); (3) next, to the payment of junior creditors 'in the order of their priority'; and (4) the balance, if any, to the trustor (or its successor in interest)"].) If there was no possibility of a bid sufficiently high to leave a surplus, plaintiffs did not suffer the damages they alleged.

In support of their demurrers to the first and second amended complaints, Ostayan asked the trial court to take judicial notice of several documents, including

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[6] Shortly after plaintiffs filed their second amended complaint, they filed a motion to require Nationwide and MLS to answer the complaint. In support of that motion, plaintiffs filed declarations from two investors, who stated that they attended the trustee's sale and were prepared to bid up to $600,000 for the property, but that the trustee would not allow them to bid. They attached as exhibits to their declarations copies of cashier's checks issued on the date of the sale, for a total of $600,000. Although these specific facts were not alleged in the second amended complaint, the parties refer to them as though they were.

schedules filed by Fariborz and Elida Nouri in the United States Bankruptcy Court less than two months before plaintiffs filed the complaint in the instant action, which Ostayan asserted establish that plaintiffs suffered no damages. Those schedules -- which included a verification in which the Nouris declared, under penalty of perjury, that the information was true and correct -- show that the property, which the Nouris stated was valued at $1,200,000, was subject to four deeds of trust securing loans of $425,000 (first deed of trust), $272,000 (second deed of trust), $2,200,000 (third deed of trust, cross-collateralized with another property), and $31,000 (disputed fourth deed of trust). The schedules state that total amount of claims on the property exceeds its value by approximately $1,720,000.

Plaintiffs argue that judicial notice of these schedules is improper because the court may not take judicial notice of the *contents* of documents from a court file, and because the documents at issue here are "subject to further interpretation." While it is true that, generally, a court may take judicial notice of the existence of each document in a court file but cannot take judicial notice of the truth of facts asserted in those documents under the hearsay rule (see, e.g., *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914), that does not preclude the court, when considering a demurrer, from taking judicial notice of a *party admission* that contradicts an allegation of the complaint. (See, e.g., *Del E. Webb Corp. v. Structural Materials Co.*, *supra*, 123 Cal.App.3d at pp. 604-605 [court may take judicial notice of party admissions that are inconsistent with the allegations of the complaint]; *Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 265 [court may take judicial notice of party admissions in affidavit that render complaint defective]; see also *Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989-990 [in ruling on summary adjudication motion, court may take judicial notice of a party's admissions that are fatal to party's claim].)

In this case, the schedules unequivocally state that the amount of secured claims against the property "Exceeds [the] Value" of the property. In fact, they state with regard to the third deed of trust securing a loan of $2,200,000, that $1,689,000 of the $2,200,000 claimed is unsecured due to the "existence of Superior Liens." This party admission contradicts plaintiffs' allegation that they were damaged by respondents' conduct because they lost their equity in the property. There simply was no equity to lose. Therefore, plaintiffs' claims for damages properly were dismissed.

DISPOSITION

The dismissal orders are affirmed. Respondents shall recover their costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.