Filed 9/17/18 Vora v. Bank of America 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PARESH VORA, et al., Plaintiffs and Appellants, v. BANK OF AMERICA, N.A., Defendant and Respondent.	B270424 (Los Angeles County Super. Ct. No. BC555013)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Frank A. Weiser for Plaintiffs and Appellants.

Wright, Finlay & Zak, Jonathan D. Fink and Nicole S. Dunn for Defendant and Respondent.

Spouses Paresh Vora and Neeta Paresh Vora appeal from the dismissal with prejudice of their action against Bank of America following a demurrer that was sustained without leave to amend. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises from nonjudicial foreclosure proceedings commenced by Bank of America against the Voras, who had become delinquent in their residential loan payments. The Voras filed suit against Bank of America on August 19, 2014, and then filed a first amended complaint in December 2014 in response to Bank of America's demurrer. In the first amended complaint, the Voras asserted five causes of action: (1) a violation of the unfair competition law, Business and Professions Code section 17200 ("UCL"); (2) a violation of the California Homeowner's Bill of Rights, Stats. 2012, chapters 86 and 87; (3) fraud; (4) quiet title, declaratory and injunctive relief; and (5) a violation of the "Truth in Lending" portion of the Consumer Credit Protection Act (15 U.S.C. § 1601 et seq.) ("TILA"). The trial court sustained Bank of America's demurrers to all five causes of action and gave the Voras leave to amend only their TILA claim.

In August 2015 the Voras filed a second amended complaint alleging only a TILA cause of action. In the second amended complaint, the Voras alleged that they borrowed approximately $1 million from Countrywide Financial Corporation to purchase a home in Glendale. They executed a deed of trust under the loan agreement that was recorded on June 30, 2005.

According to the allegations of the second amended complaint, on July 1, 2008, Bank of America purchased Countrywide and became an assignee of the loan and deed of trust. The Voras alleged that within one year of Bank of America's purchase of Countrywide and its assumption of the loan and deed of trust, through "an agent representative" they notified Bank of America in writing of their intent to either rescind the loan and deed of trust, or in the alternative, requested that the loan be modified as to the balance due, interest rate and payment schedule. Bank of America neither rescinded nor modified the loan.

The Voras alleged that in 2010, they began experiencing severe financial problems in their business due to the downturn in the economy. They began to have difficulty making payments and became delinquent on their loan. The Voras were unable to obtain secondary financing on the property because its value had declined to the point that the loan exceeded the property's value. The Voras attributed this decline not only to the downturn in the general housing market but to an "overinflated" value of the property when the loan was obtained. The Voras alleged that Countrywide had procured an overinflated appraisal of the property and failed to advise them properly of the risk of a loan that was not based on the true value of the property and "the risk of paying overinflated monthly payments on the loan."

The Voras alleged that in 2010 Bank of America placed their property in foreclosure and recorded a notice of default and a notice of trustee's sale of the property. The trustee's sale was set for January 24, 2013, but did not take place. Bank of America recorded a new notice of default and notice of trustee's sale setting a sale date of August 26, 2014. The Voras did not allege

that a sale had taken place, that any new sale date had been scheduled after August 26, 2014, or that Bank of America had made any further attempts to conduct a trustee's sale of the house after the August 2014 scheduled date passed.

The Voras alleged that in 2013 Bank of America "offered to plaintiffs a modification of the loan." The Voras "applied and were involved in the modification loan process when [Bank of America] scheduled the first trustee's sale."

The Voras alleged that Bank of America had refused, and continued to refuse, "to stay the foreclosure proceedings pending a final determination on the modification application by plaintiffs." They argued that the modification process had not ended because a company called Residential Credit Solutions, Inc., which represented Bank of America, had continued to contact them "as to their option for a modification of the loan as late as August 12, 2014."

The Voras set forth a series of allegations concerning Bank of America's participation in the Troubled Asset Relief Program (TARP) and Home Affordable Modification Program (HAMP). The Voras alleged that Bank of America knew it could make more money from foreclosures than from loan modifications, and that although it agreed to use reasonable efforts to modify loans under HAMP and to dedicate staff and resources to focus on modification requests, Bank of America actually intended to appear to comply with the program's requirements while denying the vast majority of modification applications. Pursuant to this scheme, the Voras alleged, Bank of America "unlawfully proceed[ed] with foreclosure actions under 'dual tracking' protocols while homeowners such as plaintiffs were under review or being requested for review for HAMP eligibility." Additionally,

they asserted that Bank of America tacked on overinflated and unnecessary fees and costs to the notice of default and notice of trustee's sale to generate additional profits on the sale.

Bank of America demurred to the second amended complaint. The trial court sustained the demurrer without leave to amend and dismissed the action with prejudice. The Voras appeal.

DISCUSSION

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment. The plaintiff bears the burden of proving an amendment could cure the defect. [Citation.]" (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.)

I. TILA Claim

"TILA requires that specific disclosures be provided to borrowers of qualifying consumer credit transactions that are secured by the borrowers' residence." (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1349.) If a lender does not satisfy TILA's disclosure requirements, the borrower may rescind the loan anytime within three years of the "date of consummation of the transaction" by giving written notice to the lender. (15 U.S.C. § 1635(f); *Jesinoski v. Countrywide Home Loans, Inc.* (2015) 574 U.S. ___ [135 S.Ct. 790, 792].) A transaction is "consummated" for purposes of TILA as soon as the consumer becomes contractually obligated on the credit transaction. (12 C.F.R. § 226.2(a)(13) (2017).)

The Voras alleged in the second amended complaint that they entered into a written promissory note on or about June 24, 2005; that, concurrent with the execution of the loan agreement, they executed a deed of trust in favor of Countrywide; and that the deed of trust was recorded on June 30, 2005. Thus, the transaction was consummated on or about June 24, 2005, and at the latest was completed by June 30, 2005. According to the second amended complaint, the Voras did not give notice of their intent to rescind the loan until July 2008 at the earliest. Specifically, they alleged that Bank of America bought Countrywide on July 1, 2008, and that they advised Bank of America of their intent to rescind "[w]ithin one (1) year" of that purchase. The claim is untimely. Title 15 United States Code section 1635(f) completely extinguishes the right of rescission at the end of the three-year period. (*Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 412.)

The Voras assert that they had the right to rescind the loan and deed of trust as against Bank of America within three years of Bank of America's purchase of Countrywide and the assignment of the loan to Bank of America, but they have not identified any authority to support this contention. As the right of rescission for the failure to make required disclosures expires three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first (15 U.S.C. § 1635(f)), the Voras' cause of action for rescission is time-barred as a matter of law.

To the extent that the Voras seek damages under TILA for the failure to properly make statutorily-mandated disclosures at the time the loan was made, this claim is time-barred as well. TILA authorizes individual actions for damages and attorney fees

against "any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section § 1641 of this title, or part D or E of this subchapter. . . ." (15 U.S.C. § 1640(a).) The statute of limitations for such lawsuits is one year "from the date of the occurrence of the violation." (15 U.S.C. § 1640(e).) The Voras' loan was made in 2005. The original complaint was filed in August 2014. The trial court did not err when it sustained Bank of America's demurrer to the TILA cause of action.

II. UCL Claim

The Voras contend that the trial court erred when it sustained Bank of America's demurrer to their UCL cause of action in the first amended complaint without leave to amend.

Preliminarily, Bank of America contends that the Voras waived the issue of the correctness of the ruling on the demurrers to the first amended complaint when it filed a second amended complaint. This argument is meritless. A plaintiff does not lose the opportunity to appeal the sustaining of a demurrer to a cause of action without leave to amend by amending the complaint to assert the causes of action as to which leave to amend was granted. "It is only where the plaintiff amends the cause of action to which the demurrer was sustained that any error is waived." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)

Bank of America also argues that the appeal is untimely because the Voras did not appeal from the trial court's minute order sustaining the demurrers to the first amended complaint. "It is hornbook law that the order sustaining a demurrer is interlocutory, is not appealable, and that the appeal must be

taken from the subsequently entered judgment." (*Collins v. City & County of San Francisco* (1952) 112 Cal.App.2d 719, 722; see also *I.J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331, superseded by statute on other grounds as stated in *County of Monterey v. Mahabir* (1991) 231 Cal.App.3d 1650, 1652-1653 ["[a]n order sustaining a demurrer without leave to amend is *not* an appealable order; only a judgment entered on such an order can be appealed"].) The ruling sustaining the demurrer to the UCL claim in the first amended complaint is properly before this court for review.

The Voras' UCL cause of action in the first amended complaint consisted of a paragraph incorporating the prior allegations of the first amended complaint; one sentence alleging a violation of the UCL; and two paragraphs concerning their requested relief. In the sentence stating the basis of their UCL claim, the Voras asserted that Bank of America "fraudulently and intentionally misrepresented material terms in the origination and enforcement of the loan which plaintiffs relied upon to their detriment in entering the transaction and in negotiating terms regarding the enforcement of the loan, and further misrepresented to plaintiffs defendant [Bank of America's] intention to honestly and promptly treat plaintiffs' modification request under its obligations under HAMP, a representation upon which plaintiffs relied upon to their detriment in attempting to modify their loan while in fact defendant [Bank of America] really intended and in fact did engage in a practice of 'dual tracking' in order to foreclose on plaintiffs' home, and have added fees to the notice of default and trustee's sale that are overinflated and unnecessary costs in order to generate additional profits on the sale." The Voras sought "a rescission of

the trustee's sale set for August 26, 2014, or any sale that may have been conducted thereafter," damages of not less than $10 million, an injunction against the sale of the home and a rescission of any trustee's sale that occurs in the future, and attorney fees.

We conclude that the trial court properly sustained the demurrer to the UCL cause of action. Only a plaintiff who has "suffered injury in fact and has lost money or property as a result of the unfair competition" has standing to sue. (Bus. & Prof. Code, § 17204.) This requires a plaintiff to "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.)

Here, the Voras did not demonstrate any economic injury. According to the first amended complaint, a trustee's sale had been scheduled for January 2013 but did not occur. The sale was later scheduled for August 2014, but it appears that this sale did not take place either, because as of the December 2014 filing of the first amended complaint the Voras continued to allege that they were the owners of the home and they did not allege that a trustee's sale had occurred or was scheduled. While they complained of fees that were added to the notice of default and trustee's sale, they did not allege that they had paid any fees but described them as added "to generate additional profits on the sale"—a sale that had not yet occurred. As the Voras neither alleged that they lost money or that they lost the property through a foreclosure sale, they did not identify any damages they had actually suffered or costs sustained to which they were

entitled to restitution. Without an economic injury the Voras have no standing to bring a UCL claim. The demurrer was properly sustained.

The Voras have not shown any reasonable probability that this cause of action can be amended to state a viable claim. In the second amended complaint, filed in in August 2015, the Voras again alleged that they remained the owners of the home, they did not allege that any new trustee's sale had been scheduled or conducted after the sale scheduled for August 2014, and they did not identify any economic loss they had actually suffered. On appeal, the Voras did not request leave to amend this claim or articulate any economic loss they had sustained. As the Voras have not shown a reasonable probability that the complaint can be amended to state a UCL claim, the court did not abuse its discretion when it sustained the demurrer without leave to amend.

III. Wrongful Foreclosure

The Voras request leave to amend their complaint to state a cause of action for wrongful foreclosure. The first element of a wrongful foreclosure action, however, is that 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. (*Crossroads Investors v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 782.) As previously discussed, the Voras have never alleged that the foreclosure sale has taken place; to the contrary, they have pleaded that they continue to own the home. Accordingly, the Voras have not demonstrated any reasonable possibility that they can amend their complaint to state a claim for wrongful foreclosure.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.