Filed 5/18/17 Palmer v. Aurora Loan Services CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAM PALMER, Plaintiff and Appellant, v. AURORA LOAN SERVICES LLC, et al., Defendants and Respondents.	2d Civil Nos. B240307, B241908 (Super. Ct. No. 56-2011-00392361-CU-OR-VTA) (Ventura County)

The trial court sustained the defendants' demurrer to plaintiff's in propria persona second amended complaint alleging wrongful initiation of foreclosure, intentional and negligent misrepresentation, intentional infliction of emotional distress and breach of the covenant of good faith and fair dealing, without leave to amend. We affirm the ensuing judgment.

FACTS

In March 2007, Sam Palmer obtained a loan for $862,500 from Homecomings Financial LLC (Homecomings). The

loan was secured by a deed of trust recorded against her home in Thousand Oaks.

The trust deed provides in part: "'MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." The trust deed states "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument . . . ." The trust deed also states that MERS has "the right to foreclose and sell the Property . . . ." The trust deed provides the note and security interest may be sold one or more times without prior notice to the borrower.

Aurora Loan Services LLC (Aurora) was the loan servicer. In July 2008, Palmer spoke with an Aurora customer representative. The representative "indicated that Ms. Palmer needed to be at least three months late before any consideration for a modification . . . ." In September 2008, Palmer again spoke with an Aurora representative. The representative said, "[I]f Ms. Palmer was at least two months late, then they (Aurora) might consider a workout plan." Palmer decided to stop making payments in order to obtain a loan modification.

In December 2008, MERS substituted Quality Loan Service Corporation (Quality) as trustee under the deed of trust. The next day Quality recorded a notice of default. Two days later MERS assigned the beneficial interest in the note and trust deed to Aurora. Quality recorded a notice of sale in April 2009.

In July 2009, Palmer accepted a workout agreement from Aurora. The agreement warned that it was temporary and that the loan would remain in full force and effect absent a permanent modification. In July 2010, Aurora denied a

permanent modification because Palmer failed to return IRS form 4506-T, allowing Aurora to view Palmer's tax returns.

In July 2010, Aurora offered Palmer another workout agreement. In February 2011, Aurora denied Palmer a permanent modification because she again failed to return IRS form 4506-T.

Palmer filed the instant complaint in March 2011, naming Homecomings, MERS, Quality and Aurora as defendants. Shortly thereafter, she obtained a temporary restraining order prohibiting foreclosure. The trial court later issued a preliminary injunction.

A series of demurrers sustained with leave to amend resulted in Palmer filing the operative second amended complaint in November 2011. The second amended complaint contains 18 causes of action: wrongful initiation of foreclosure against all defendants; three causes of action for fraud and one cause of action for declaratory relief against Homecomings; six causes of action for fraud, six causes of action for intentional and negligent misrepresentation, one cause of action for intentional infliction of emotional distress and one cause of action for breach of the implied covenant of good faith and fair dealing against Aurora; and one cause of action each for fraud and intentional and negligent misrepresentation against MERS and Quality.

All defendants demurred to the complaint. The trial court sustained the demurrers without leave to amend in April 2012. Palmer filed a notice of appeal on June 12, 2012.

In late June 2012, Aurora assigned its beneficial interest in Palmer's note and trust deed to Nationstar Mortgage LLC. In January 2014, Nationstar Mortgage LLC assigned its beneficial interest to Deutsche Bank Trust as trustee for mortgage backed pass-through certificates. In October 2014,

Quality conducted a foreclosure sale. Deutsche Bank Trust, as trustee, was the successful bidder. Deutsche Bank Trust later delivered a grant deed to the premises to private parties.[1]

This appeal was delayed when Homecomings filed for bankruptcy. The bankruptcy court expunged and dismissed with prejudice Palmer's claim against Homecomings. We dismissed this appeal as to Homecomings.

DISCUSSION

I

The function of demurrer is to test whether, as a matter of law, the facts alleged in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loan Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) We assume the truth of all facts properly pleaded, as well as facts of which the trial court properly took notice. (*Ibid.*) But we do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*) Our review of the trial court's decision is de novo. (*Ibid.*)

We review the trial court's decision to allow an amendment to the complaint for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 273.) Where there is no reasonable possibility that plaintiff can cure the defect with an amendment, sustaining the demurrer without leave to amend is not an abuse of discretion. (*Id.* at p. 274.)

II

Palmer's second amended complaint is over 500 pages long, including exhibits. It is not a clear and concise statement of ultimate facts necessary for a proper pleading. (See

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[1] We grant Aurora's, MERS's and Palmer's requests for judicial notice of the official public records. (Evid. Code, § 452, subd. (h).)

Green v. Palmer (1860) 15 Cal. 411, 414-417.) Her briefs on appeal do not help. We could dismiss the appeal as abandoned for failure to state any intelligible legal argument. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.) We elect not to do so.

III

Palmer contends the trial court was not fair and impartial.

Palmer points to several instances where the trial court stated in colloquy with counsel that she is not entitled to a free house.

Palmer's counsel did not object because the court said nothing objectionable. It is the typical colloquy that takes place between the court and counsel. The court must be free to engage in such candid discussions to ensure that it makes the proper ruling.

In any event, even had the trial court shown bias, Palmer failed to object or move to disqualify the judge. She waived the issue. It is too late to raise the issue for the first time on appeal. (See *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 386, 392 [disqualification waived by failure to object at earliest practical opportunity].)

IV

Palmer contends the trial court abused its discretion in sustaining the demurrer to her cause of action alleging wrongful initiation of foreclosure.

As far as we can discern, Palmer appears to be basing her contention on the theory that Aurora had no interest in the note and trust deed at the time foreclosure was initiated. This is in spite of a recorded assignment of the beneficial interest to Aurora two days prior to the recording of the notice of default by Quality. Palmer appears to be referring to a transfer of

Homecomings's servicing portfolio. That does not affect a transfer of Homecomings's beneficial interest in the loan to Aurora.

Assuming for the sake of argument that Aurora had no beneficial interest at the time the notice of default was recorded, MERS is the nominee, not only for Homecomings, the original lender, but also for its "successors and assigns." Thus MERS is the nominee for whoever might hold the beneficial interest. California courts have consistently upheld the right of MERS to foreclose as nominee of the holder of the beneficial interest. (See 5 Miller & Starr, California Real Estate (4th ed. 2016) Deeds of Trust, § 13:51, pp. 13-226 - 13-227.) Indeed, Palmer's deed of trust expressly grants to MERS the authority to foreclose.

Palmer argues that MERS had no authority to foreclose because its license to do business in California was suspended from May 21, 2002, to July 21, 2010. The point is raised in a footnote without legal analysis or citation to authority. The point is waived. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139.)

Palmer alleges that foreclosure was improper because her note was forged. But her allegation of forgery is contradicted by her own allegations and exhibits to her second amended complaint. She admits having made a note to Homecomings in the amount of $862,500 and attaches a copy to her complaint as exhibit 7. She alleges she was later shocked to find the note had been forged. She attaches two allegedly forged notes as exhibits. But the allegedly forged notes are identical to the original note attached as exhibit 7, except that they contain endorsements and an allonge. In light of the exhibits attached to Palmer's second amended complaint, Palmer fails to adequately allege forgery.

In any event, Palmer cannot challenge the right of a party to initiate the foreclosure process. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, states: "By asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, Gomes is attempting to interject the courts into this comprehensive nonjudicial scheme. As Defendants correctly point out, Gomes has identified no legal authority for such a lawsuit. Nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated."

Palmer attempts to distinguish *Gomes* on the ground that there, plaintiff's complaint did not identify a specific factual basis for alleging the foreclosure was not initiated by the correct party. (Citing *Gomes*, *supra*, 192 Cal. App.4th at p. 1156.) Palmer claims she has alleged such a specific factual basis.

But Palmer misses the point. The point is that the Legislature enacted a comprehensive scheme for nonjudicial foreclosure. That scheme does not include a cause of action to challenge the right of a party to initiate foreclosure. Alleging a specific factual basis for challenging that right does not create such a cause of action. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 814 [California's nonjudicial foreclosure law does not provide for such an action].)

We need not consider whether Palmer must tender the amount due on the loan.

V

Palmer contends she adequately alleged fraud.

To state a cause of action for fraud, plaintiff must allege: the defendant represented that an important fact was true; the defendant knew the representation was false when

made; the defendant intended the plaintiff to rely on the representation; the plaintiff reasonably relied; the plaintiff's reliance was a substantial factor in causing harm to the plaintiff. (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

Palmer alleges that Aurora promised a loan modification. She alleges that Aurora representatives told her that she must miss payments before "any consideration" of a loan modification and that Aurora "might consider" a loan modification. Palmer alleges no facts to show that Aurora did not consider a modification. In pleading a cause of action for fraud, general and conclusory allegations will not suffice. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.)

In addition, Palmer admits that Aurora offered two workout agreements. Palmer argues she made all the payments under the agreements. But there was more to the agreements than making payments. Palmer admitted she defaulted by failing to provide Aurora with the IRS forms it required.

Palmer alleges Aurora originally represented that she would be considered for a loan modification under the Home Affordable Modification Program (HAMP). She did not learn until later that her loan was too large to qualify under HAMP. She claims an Aurora representative told her that reference to HAMP was a mistake.

But Palmer admits Aurora twice offered her non-HAMP workout agreements. She pleads no facts to show the alleged reference to HAMP caused her any damages.

Other allegations of fraud involve MERS's standing to initiate foreclosure and forgery of Palmer's note. We have rejected those claims.

For the reasons stated, Palmer's allegations of negligent misrepresentation must also fail.

VI

Palmer contends she stated causes of action for intentional infliction of emotional distress.

The elements of a cause of action for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Cervantes v. J.C. Penney* (1979) 24 Cal.3d 579, 593.) The conduct must be so extreme as to exceed all bounds of behavior usually tolerated in a civilized society. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.)

Palmer claims she alleged Aurora engaged in outrageous conduct in making continuous demands for duplicate documentation and inconsistent and erroneous information while issuing notice of trustee's sale and taking payments. Palmer is apparently referring to the period during which she had workout agreements with Aurora.

Although requesting duplicate, inconsistent and erroneous information is undoubtedly annoying, it does not rise to the level of outrageous conduct necessary for intentional infliction of emotional distress. Nor does Palmer point to anything in the workout agreements that prohibits Aurora from recording a notice of sale.

Palmer argues that Aurora had no right to foreclose. But Aurora was the beneficiary of the deed of trust. The

beneficiary has the right to foreclose. (Civ. Code § 2924, subd. (a)(1).)

Palmer alleges that Aurora engaged in outrageous conduct by sending her letters dated May 27, 2011; July 1, 2011; and August 3, 2011. The letters were sent after the trial court restrained Aurora from proceeding with the foreclosure.

The May 27 letter notified Palmer that her loan modification application had been denied and contained a statement that foreclosure could be resumed at any time. But the restraining order did not prevent Aurora from sending her notice that her loan modification had been denied. Nor does a statement that foreclosure may be resumed at any time violate the restraining order. Aurora did not, in fact, proceed with foreclosure.

The other letters notified Palmer of a servicing transfer. Those letters do not concern the foreclosure procedure. No reasonable person would consider a servicing transfer notification outrageous conduct.

VII

Palmer contends she stated a cause of action for breach of the covenant of good faith and fair dealing.

The covenant of good faith and fair dealing is imposed on each party to the contract. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 524.) It prevents a contracting party from taking actions that will deprive another party of the benefits of the agreement. (*Ibid.*) The implied covenant does not impose duties that are beyond the scope of the contract. (*Id.* at p. 525.)

Palmer claims Aurora breached the covenant of good faith and fair dealing in the trust deed and workout agreements by not modifying her loan. But nothing in the trust deed or

workout agreements promises a modification. In fact, Palmer defaulted under the workout agreements by failing to provide Aurora with the required forms.

VIII

As far as we can tell, Palmer's causes of action against Quality are derivative of her causes of action against Aurora and MERS. Having failed to state valid causes of action against Aurora and MERS, Palmer's causes of action against Quality must also fail.

IX

We do not consider points raised by Palmer for the first time in her reply brief. (*Ganahl v. Certain Individuals* (1962) 204 Cal.App.2d 571, 582-583.)

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Sam Palmer, in pro. per. for Plaintiff and Appellant.

Ackerman, Justin D. Balser and Karen Palladino Ciccone for Defendants and Respondents Aurora Loan Services LLC; Aurora Commercial Corp, as Successor by Merger to Aurora Bank FSB; and Mortgage Electronic Registration Systems, Inc.

McCarthy & Holthus, Melissa Robbins Coutts and Matthew Bryan Learned for Defendant and Respondent Quality Loan Service Corporation.