Filed 3/13/17 Hufnagel v. Bank of New York Mellon 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

VICKI HUFNAGEL, Plaintiff and Appellant, v. BANK OF NEW YORK MELLON, fka The Bank of New York as Successor Trustee for JPMorgan Chase Bank, National Association, as Trustee for NovaStar Mortgage Funding Trust, Series 2006-1 NovaStar Home Equity Loan Asset-Backed Certificates, 2006-1, Defendant and Respondent.	B259419 (Los Angeles County Super. Ct. No. BC441790)

APPEAL from a judgment of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed.

Vicki Hufnagel, in pro. per., for Plaintiff and Appellant.

McGlinchey Stafford, Sanford P. Shatz and Brian A. Paino for Defendant and Respondent.

Bank of New York Mellon successfully moved for summary judgment in an action brought by Vicki Hufnagel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, Hufnagel[1] sued Mellon, alleging that on or about January 19, 2006, she had executed a promissory note and deed of trust in the amount of $586,000 in favor of Mellon, secured by her Los Angeles home. She alleged that after she suffered a "dramatic loss of income," Mellon initiated nonjudicial foreclosure proceedings in 2009. Hufnagel's first cause of action sought a declaration that Mellon had violated former Civil Code section 2923.5[2] by filing a notice of default without satisfying the pre-filing requirements set forth in that statute, and an injunction blocking the scheduled trustee's sale of the home due to Mellon's noncompliance. She sought an accounting in her second cause of action.

Mellon moved for summary judgment in April 2013. The motion was taken off calendar, but in February 2014, the court authorized Mellon to re-schedule the summary judgment motion. The court offered Hufnagel the opportunity to file new opposition papers if she desired. Mellon gave notice on February 13, 2014, that the motion would be heard on June 30, 2014.

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[1] Hufnagel is subject to a prefiling order due to her 1998 designation by the Los Angeles Superior Court as a vexatious litigant. It appears that Hufnagel filed this case and her appeal without obtaining an order permitting the filing of her litigation, in violation of Code of Civil Procedure section 391.7. Neither party advised this court that a prefiling order was in place, and the existence of the order was discovered after the close of briefing but before oral argument. Under these circumstances and in light of the fact that Mellon has already incurred the costs of preparing its respondent's brief, we decide the matter on its merits. We remind Hufnagel that disobedience of the prefiling order may be punished as a contempt of court. (Code Civ. Proc., § 391.7, subd. (a).)

[2] Former Civil Code section 2923.5 was enacted in 2008 (Stats. 2008, ch. 69, § 2). The statute has since been amended in 2009 (Stats. 2009, ch. 43, § 1) and 2012 (Stats. 2012, ch. 86, § 4; Stats. 2012, ch. 87,§ 4).

During the week before the hearing, Hufnagel filed numerous documents and made various requests of the trial court. On June 23, 2014, she filed evidentiary objections to declarations that Mellon had submitted in support of its motion for summary judgment; on June 24, 2014, she filed a document entitled, "Plaintiff's Supplemental Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Adjudication/Judgment." Hufnagel also submitted a declaration to which Mellon filed evidentiary objections. Hufnagel sent Mellon various notices of more than 20 witnesses who would testify at the summary judgment hearing, including one request that three of the attorneys that had represented Mellon during the litigation appear and produce documents at the hearing. Mellon filed an objection to these requests. Finally, Hufnagel requested that one of her witnesses appear telephonically at the hearing. The court denied this request.

The hearing on the motion for summary judgment took place on June 30, 2014. Hufnagel was represented by an attorney providing limited scope representation. The court refused Hufnagel's request to present oral witness testimony at the hearing. It overruled, "both procedurally and substantively," Hufnagel's untimely objections to Mellon's evidence, and declined to consider Hufnagel's late-filed papers.

The court granted summary judgment on the grounds that Mellon had demonstrated that it complied with former Civil Code section 2923.5 before filing the notice of default, that Mellon had shown that it had provided accountings to Hufnagel, and that Hufnagel was not entitled to relief under the accounting cause of action. Hufnagel appeals.

DISCUSSION

I. Summary Judgment

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable

dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

Hufnagel asserts that she has been the victim of loan fraud and alleges in her briefing a number of wrongful acts by a variety of actors. Hufnagel's complaint, however, alleged only two causes of action, and thus the question before the trial court was, and the question before this court on appeal is, whether there exists any triable issue of material fact as to (1) whether Mellon filed a notice of default without complying with statutory pre-filing requirements, and (2) whether Hufnagel is entitled to an accounting on the loan from Mellon. (See Code Civ. Proc., § 437c, subd. (c).) "In undertaking our independent review, we apply the same three-step analysis used by the trial court. First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 858-859.) Given the limited scope of the underlying complaint, we must disregard Hufnagel's allegations concerning facts and issues that do not pertain to the two causes of action she alleged. Those contentions exceed the scope of the complaint and the scope of the motion, and they cannot establish any error in the trial court's conclusion that no triable issue of material fact existed as to the two causes of action pleaded in the complaint.

While we perform a de novo review of summary judgments, it is always the appellant's burden on appeal to demonstrate that the trial court erred. "'"[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citations.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

Hufnagel has not satisfied her burden of demonstrating error. Her five-page factual summary in her opening brief lacks citations to the record and is not restricted to a discussion of the significant facts limited to matters in the record, in violation of California Rules of Court, rules 8.204(a)(1)(C) and 8.204(a)(2)(C). Her "rendition of the background history of the case is replete with argument and is lacking in accurate material facts, presenting only information favorable to h[er] position." (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 674, fn. 4.) An appellant has a duty to summarize the facts fairly in light of the judgment, and the appellant's brief must set forth all the material evidence bearing on the issue, not merely the evidence favorable to the appellant. (*Ibid*.)

Hufnagel's briefing also does not "frame the issues for us, show us where the superior court erred, and provide us with the proper citations to the record and case law." (*Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 913.) She does not demonstrate how the admissible evidence before the trial court established the existence of a triable dispute of material fact. While she raises countless factual disputes about events and items in documents that are contained in the sizeable record, she does not show that these disputes are material to her two causes of action. Some of her factual disputes bear no evident relationship to the motion for summary judgment. For instance, a number of facts Hufnagel challenges are statements in a joint ex parte application to continue the trial that was filed the year before the summary judgment motion was filed. Hufnagel also makes numerous conclusory statements, such as, "All documents are fraudulent," and "[T]here was no accounting that ever took place," that are not supported by legal analysis or by citations to specific evidence that was before the court at the summary judgment hearing. Moreover, former Civil Code section 2923.5 set forth the various due diligence requirements that had to be satisfied in order for a lender to file a notice of default. Hufnagel has not presented admissible evidence demonstrating that any of these requirements were not met here. Hufnagel has failed to satisfy her burden of demonstrating error. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we

treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Hufnagel presents a cognizable argument, although it is not supported by citation to California law,[3] that summary judgment was improper because Mellon did not present the note or proof of its ownership of the note. Mellon, however, submitted evidence in the form of a declaration that it was the current owner of the note and deed of trust. Hufnagel has not established any error.

II. Alleged Judicial Misconduct

Hufnagel also alleges judicial bias and misconduct by the trial court in conjunction with the summary judgment motion. We have reviewed the transcript of the hearing on the summary judgment motion and find no evidence of misconduct.

It appears that a number of Hufnagel's complaints about the court were prompted by its reliance upon Hufnagel's counsel to represent her at the hearing, the court's evidentiary rulings, and its limitation of the matters addressed at the hearing to the two causes of action pleaded in the complaint. While Hufnagel construes the court's actions as denying her the right to address the court and refusing to give her a voice in the proceedings, the trial court did not err when it denied Hufnagel the opportunity to directly address the court during argument on the summary judgment motion because she was represented by counsel. (*Epley v. Califro* (1958) 49 Cal.2d 849, 854 [counsel "has the exclusive right to appear in court for his client and neither the party himself nor another attorney should be recognized by the court in the conduct or disposition of the case"].) Similarly, the court did not abuse its discretion in refusing to suspend the hearing while Hufnagel attended to a medical need, because Hufnagel was represented by counsel at the hearing.[4]

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[3] This argument includes numerous citations to decisional law from the state of Florida. Hufnagel does not offer any explanation or argument that Florida law applies to this litigation, nor have we identified in our review any indication that Florida law applies here.

[4] The record does not support Hufnagel's contentions that she "informed the court several times she was having problems on the record" and that the court removed her from the court knowing that she was ill when any

The court did not commit misconduct or demonstrate bias when it refused Hufnagel's request to present witnesses at the summary judgment hearing. Oral testimony is not permitted on a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (b)(1); *Spencer v. Hibernia Bank* (1960) 186 Cal.App.2d 702, 717.)

Hufnagel contends that the court threw her out of the courtroom in a deliberate attempt to deprive her of information, but the record demonstrates that the court directed Hufnagel to leave the courtroom only after advising her multiple times that she was not to address the court because she was represented by counsel. "'Every court has the inherent power, in furtherance of justice, to regulate the proceedings of a trial before it; to effect an orderly disposition of the issues presented; and to control the conduct of all persons in any manner connected therewith.'" (*Schimmel v. Levin* (2011) 195 Cal.App,4th 81, 87.) Moreover, when reminded that Hufnagel's counsel's representation was limited to the summary judgment proceedings, the court promptly ceased inquiring about further scheduled events in the case, made no new orders, and handled no new matters in Hufnagel's absence. The record does not support Hufnagel's assertion that "notice of the mediation" was given in her absence or that the court "acted with intention and thought out actions to prevent the Plaintiff from due process and having her day in court."

Hufnagel's generalized and repeated complaints that the court did not listen to the evidence, did not read her papers, and had no interest in the evidence she claimed to have uncovered of a massive loan fraud scheme appear to be the consequence of her late filing of various documents and her attempts to present evidence and make argument about subjects outside the limited scope of the causes of action alleged in her complaint. Matters raised by Hufnagel at the hearing such as alleged fraud in the origination of the

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reasonable person would have summoned a medic. The record reflects that Hufnagel's counsel asked for a break so that Hufnagel could administer her insulin, and the court said that Hufnagel could step out whenever she wished. Neither Hufnagel nor her counsel stated that she was suffering medical distress or required medical attention, and the record contains no further information about her medical condition at the summary judgment hearing.

loan, the alleged misconduct of non-defendants, possible criminal conduct, whether Hufnagel fit into the category of a victim of mortgage company crimes for which criminal settlements had been reached, and the "national scandal" of foreclosures to which her counsel referred ranged far beyond the questions before the court at the hearing. There is no evidence in the record that the court failed to consider the documents and evidence properly before it, as well as the pertinent arguments of counsel, in conjunction with the motion for summary judgment. The mere fact that a judicial officer rules against a party does not show bias. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1328.)

Additionally, the transcript of the hearing does not support Hufnagel's claim that the court labeled her a criminal when it referred to "criminal conduct of others." While Hufnagel supplies no citation to the evidence to support this assertion, in the course of reviewing the transcript of the hearing we observed that the court used the phrase "criminal conduct of others" while referring Hufnagel to state and federal prosecutors if she believed that she was a victim of crime, characterizing her as a possible victim of crime, not as a perpetrator.

Finally, we have reviewed the court's questions and comments about Hufnagel's payments on the loan in question, which Hufnagel argues demonstrate a willful lack of understanding and prejudice against her. Upon being told that Hufnagel had not made a loan payment in several years, the court asked how a person can live in a "big home in L.A." without making mortgage or rent payments, and commented, "I'd like to figure out a way I could do that." "I would like to do it myself," said Hufnagel's counsel. "Wouldn't we all," responded Mellon's attorney. Observing that there was no evidence of tender, the court commented that it was "wondering about the equity of somebody not making mortgage payments, not tendering the funds, home has been foreclosed, living, effectively, rent-free." Also, when taking the matter under submission, the court said, "I hope it mediates. Maybe someone can come up with a fourth or fifth suggestion as to how a loan modification can occur. [¶] But, you know, it strikes me it's fundamentally unfair for everybody else in this community to have to pay rent and property taxes and she's living in a one to two million dollar home without paying a

nickel. It's pretty tough to deal with." While the court's comments about the underlying equities demonstrated skepticism concerning Hufnagel's conduct and her assertion that Mellon owed her money, the court's observations were based on the admissible evidence presented in conjunction with the summary judgment motion and distinct from its determination of whether there existed a triable issue of material fact as to the two causes of action pleaded in the complaint. Hufnagel has not demonstrated bias or misconduct by the court.

DISPOSITION

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

ZELON, J.

We concur:

PERLUSS, P. J.

SMALL, 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.