Filed 3/15/17 Dvorin v. Polymathic Properties CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DENNIS J. DVORIN, Plaintiff and Appellant, v. POLYMATHIC PROPERTIES, INC., et. al, Defendants and Respondents.	B269193 (Los Angeles County Super. Ct. No. SC120497)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed.

Dennis J. Dvorin, in pro. per., for Plaintiff and Appellant.

Cohen Law Group and Marc Cohen for Defendant and Respondent Polymathic Properties, Inc.

Locke Lord, Nina Huerta and Daniel A. Solitro for Defendants and Respondents Homeward Residential, Inc., formerly known as American Home Mortgage Servicing, Inc, Wells Fargo Bank, N.A., Trustee for Option One Mortgage Loan Trust 2006-1 Asset Backed Certificates Series 2006-1.

Plaintiff Dennis Dvorin defaulted on a loan secured by his residence which became the subject of nonjudicial foreclosure proceedings and was sold by credit bid at a trustee's sale. Dvorin responded with this lawsuit against defendants Polymathic Properties, Inc. (Polymathic), Wells Fargo Bank, N.A. Trustee for Option One Mortgage Loan Trust 2006-1 Asset Backed Certificates Series 2006-1 (Wells Fargo), and Homeward Residential, Inc., formerly known as American Home Mortgage Servicing, Inc. (Homeward). The gist of Dvorin's operative verified first amended complaint was that his loan was never properly transferred to Wells Fargo, that any assignment was void and defendants lacked authority to foreclose on the property. The trial court sustained defendants' demurrers without leave to amend. On appeal from the judgment of dismissal, Dvorin contends the trial court erred in sustaining the demurrers. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dvorin's Loan, Default and the Foreclosure

According to the allegations of the operative first amended complaint (FAC),[1] in August 2005, Dvorin received a $1.365 million mortgage loan from Option One Mortgage Corporation (Option One).

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[1] Because this appeal follows the sustaining of a demurrer, our summary of facts is drawn from the FAC, its exhibits, and matters judicially noticed. (*Yvanova v. New Century Mortgage Co*rp. (2016) 62 Cal.4th 919, 924 (*Yvanova*); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The loan was secured by real property, a residence on North Tigertail Road in Los Angeles (Property). At the same time, Dvorin executed a deed of trust related to the loan securing the Property, which was recorded on September 15, 2005.

Option One's interest in the note and deed of trust was transferred to Wells Fargo. On December 22, 2008, an Assignment of Deed of Trust reflecting the transfer from Option One to Wells Fargo was recorded.

Dvorin fell behind on his mortgage payments. On June 14, 2010, a Notice of Default and Election to Sell Under Deed of Trust was recorded with the county recorder stating that Dvorin was in default on his loan in the amount of $19,276.39. On August 26, 2010, a Substitution of Trustee was recorded naming Power Default Services, Inc. as the new foreclosure trustee. On June 22, 2012, a notice of trustee's sale was recorded. On July 12, 2012, the Property was sold by credit bid at a trustee's sale to Wells Fargo. A Trustee's Deed Upon Sale was recorded on July 24, 2012. The Property was later sold to Polymathic.

Dvorin's Bankruptcy Proceedings

In January 2011, Dvorin filed a Chapter 13 (later converted to a Chapter 7) Voluntary Petition for Bankruptcy. (*In re Dennis Jay Dvorin*, (Bankr. C.D. Cal. 2011) No. 2:11-bk-10648-ER (*Voluntary Bankruptcy Action*).)

In April 2011, Dvorin filed an "Amended Adversarial Action in Bankruptcy Court" against Homeward involving the Property and loan at issue here. (*Dvorin v. Gateway Bank FSB, ACCOUNT XX–XXXX–39–02, et al.* (Bankr. C.D. Cal. 2011) Adv. No. 2:11-ap-01552–ER (*Adversarial Bankruptcy Action*.)[2] Homeward moved to dismiss the *Adversarial Bankruptcy Action* on the grounds that (1) the Property belonged to the bankruptcy estate; (2) Dvorin's claims arose from the Property; and (3) the bankruptcy trustee in the *Voluntary Bankruptcy Action* had not abandoned the Property or Property–related claims. Accordingly, as a matter of law, Dvorin lacked standing to pursue the *Adversarial Bankruptcy Action*.

The bankruptcy court agreed. It found that Dvorin's claims "relate[d] to events which occurred prepetition," and which were "assets of the estate." Because Dvorin was unable to show those claims were exempt from the bankruptcy estate or that they had been abandoned by the bankruptcy trustee, the claims remained the property of the bankruptcy estate and Dvorin lacked standing to prosecute them. The *Adversarial Bankruptcy Action* was dismissed in July 2011. Dvorin's *Voluntary Bankruptcy Action* was discharged in mid-February 2012, and that action was closed a few days later.

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[2] Gateway Bank FSB, was dismissed as a defendant to the *Adversarial Bankruptcy Action* in July 2011.

Dvorin Files the Instant Action

On April 4, 2013, Dvorin filed the instant action against Homeward, Wells Fargo and Polymathic. He alleged causes of action for Quiet Title, Fraud, Slander of Title, Removal of Cloud on Title, and Wrongful Foreclosure as to the Property and his loan from Option One.

In late May 2013, Wells Fargo and Homeward filed a general demurrer to the complaint. (Code Civ. Proc., § 430.10, subd. (e).) The demurrer was supported by, among other things, a request for judicial notice of specific evidence in connection with the *Voluntary* and *Adversarial Bankruptcy Actions*. (Evid. Code, §§ 451-453.) Polymathic also filed a demurrer to the two claims to which it was a named defendant (Quiet Title and Removal of Cloud on Title). Polymathic later filed a brief in support of its "first amendment to demurrer" to the complaint and request for judicial notice, the purpose of which was to establish its status as a bona fide purchaser (BFP).[3]

On July 28, 2014, Dvorin filed the operative FAC which is virtually identical to his initial complaint. Dvorin does not deny that he failed to make required mortgage payments. Rather, he asserts that the transfer of the interest in the deed of trust that was the security instrument for his mortgage loan was "forged" and improper.

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[3] The record does not contain a copy of Polymathic's amended demurrer, although the case summary does reflect that document was filed on August 28, 2013. Our resolution, as to Dvorin's lack of standing to pursue this action, renders the absence of this document irrelevant.

Accordingly, Dvorin claims the interest in the note and deed of trust was not properly transferred to Wells Fargo, and is void. And, because the beneficial interest in the Property was never effectively assigned to Wells Fargo, Wells Fargo lacked authority to substitute a foreclosure trustee for the original trustee of the deed of trust, thereby rendering the foreclosure sale of the Property void.

Dvorin opposed the demurrers, and requested that the court take judicial notice of several newspaper or other articles.

The hearing was conducted on October 2, 2015. On October 15, 2015, the trial court entered an order sustaining the demurrers without leave to amend, and entered judgment in defendants' favor. Dvorin appeals.

DISCUSSION

Dvorin contends the trial court erred in sustaining the demurrers without leave to amend. For the reasons explained below, we disagree.

1. *Standard of Review*

"This case comes to us on appeal from the trial court's sustaining of a demurrer. For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. [Citation.] To determine whether the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the

pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects. [Citation.]" (*Yvanova, supra,* 62 Cal.4th at p. 924, fn. omitted; see Evid. Code, §§ 452, subds. (c), (d) & (h), 459, subd. (a).) It is the plaintiff's burden to enumerate the facts he could add to cure existing defects in his pleading to establish a viable claim. (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 734.)

2. *Dvorin Lacks Standing to Prosecute Claims That Belong to the Bankruptcy Estate and That Have Not Been Abandoned by the Bankruptcy Trustee*

Dvorin insists that there are four issues to be resolved by this appeal. He is mistaken. Our resolution as to the issue of jurisdiction renders the remaining issues moot.[4] Specifically, we need only consider whether the trial court erred in concluding that Dvorin lacked standing to pursue the causes of action alleged in the FAC because the bankruptcy court found that those same claims were assets of the

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[4] We address only the first of four independent grounds upon which the trial court sustained the demurrers:
(1) The claims asserted were assets of the bankruptcy estate which had neither been abandoned nor administered by the bankruptcy trustee. As a result, Dvorin lacks standing to pursue any claim alleged in the FAC;
(2) Dvorin was barred from bringing this action because the bankruptcy court ruled on the same matters at issue here and its ruling was dispositive;
(3) Bare allegations challenging the purported assignment of the note and deed of trust were insufficient to maintain a cause of action; and
(4) Polymathic is a BFP.

bankruptcy estate, which had not been administered or abandoned by the bankruptcy trustee. As a result, the court concluded that it lacked jurisdiction to consider the claims

"Standing is a threshold issue, because without it no justiciable controversy exists." (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of Assemblies of God* (2009) 173 Cal.App.4th 420, 445; *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, 286 [a litigant's standing to sue must be resolved before the court may move to the merits of a matter].) In general, "[e]very action must be prosecuted in the name of the real party in interest . . . ." (Code Civ. Proc., § 367; *Iglesia Evangelica Latina, Inc., supra,* 173 Cal.App.4th at p. 445.)

Dvorin raises this pivotal jurisdictional issue, then proceeds to ignore it. Instead, his entire appellate argument is focused on his claim of wrongful foreclosure. His opening (and only) brief contains no explanation, no argument and no citation to authority to support his contention that the trial court erred when it sustained the demurrers without leave to amend on the ground that he lacked standing to prosecute the causes of action in the FAC. Dvorin characterizes the trial court's ruling on this issue in unfavorable terms, but makes no effort to demonstrate how he could cure the otherwise fatal defects in his pleading. Accordingly, he has forfeited such a contention. (*OCM*

Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal.App.4th 835, 844, fn. 3.)[5]

Assuming, for the sake of discussion, that Dvorin did not forfeit the standing argument, the claim would fail on the merits. The trial court correctly concluded that Dvorin lacks standing to prosecute the causes of action alleged in the FAC because those claims are the property of the bankruptcy estate, and have not been abandoned by the bankruptcy trustee.

Once an individual seeks bankruptcy protection any causes of action he has become the property of the bankruptcy estate. (See 11 U.S.C. § 541(a)(l); *United States v. Whiting Pools, Inc*. (1983) 462 U.S. 198, 203-205 [legal claims are among the broad range of property included in the bankruptcy estate]; *Sierra Switchboard Co. v. Westinghouse Elec. Corp*. (9th Cir. 1986) 789 F.2d 705, 707–708 [adopting a per se rule that scope of 11 U.S.C. § 541(a)(l) is quite broad as to what tangible and intangible assets are property of bankruptcy estate, including causes of action].) Any legal claim Dvorin possessed when he filed the *Voluntary Bankruptcy Action* became the property of the bankruptcy estate and he lost individual standing to assert those claims. This rule is reflected in the July 25, 2011, bankruptcy court order granting the motion to dismiss in the *Adversarial Bankruptcy Action*. By that order, the court found that Dvorin's claims

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[5] Dvorin did not file a reply to address the issue of standing even after being alerted to respondents' assertion of forfeiture.

"relate[d] to events that occurred pre-petition and, therefore, are assets of the estate." The bankruptcy court also held that the "bankruptcy trustee is the real party in interest in suits that belong to the estate," and there was no evidence that the bankruptcy trustee had abandoned the claims that formed the basis of the operative pleading in the *Adversarial Bankruptcy Action*. As a result, Dvorin "lack[ed] standing to pursue" those claims.

Dvorin could establish standing to assert the claims that belonged to the bankruptcy estate, if he could demonstrate that the claims were abandoned by the bankruptcy trustee. Abandonment occurs where the trustee unilaterally abandons the property or is ordered to do so by the bankruptcy court. (11 U.S.C. § 554(a), (b).) Abandonment is also deemed to occur by operation of law in cases in which property has been scheduled but is not administered by the bankruptcy trustee by the time the case is closed. (11 U.S.C. § 554(c).) "Unless the court orders otherwise, property of the estate that is not abandoned . . . and that is not administered in the case *remains property of the estate*." (11 U.S.C. § 554(d), italics added.)

Dvorin made no showing of abandonment of the property (claims) here. In its order dismissing Dvorin's complaint in the *Adversarial Bankruptcy Action*, the bankruptcy court explicitly stated that the bankruptcy trustee had not abandoned the claims that formed the basis of that action. Dvorin points to no evidence in the record (nor has our independent review revealed any) that reflects that the bankruptcy court ordered the trustee to abandon the property. And, because Dvorin

failed to include the claims in his initial or amended personal property schedules in the *Voluntary Bankruptcy Action,* the claims cannot be deemed to have been abandoned by operation of law.

A legal proceeding must be prosecuted by the real party in interest. (Code Civ. Proc., § 367.) The claims Dvorin asserts here are the same as those asserted in the bankruptcy court,[6] which had not been abandoned by the bankruptcy trustee. Property that has not been abandoned or administered by the bankruptcy trustee remains the property of the bankruptcy estate. (See 11 U.S.C. § 554(d).) Dvorin is not the real party in interest and lacks standing to pursue this action. The trial court did not err in sustaining the demurrers without leave to amend on this ground.

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[6] In that action, Dvorin also argued that Homeward "lack[ed] standing to seek relief from stay because it [was] not the noteholder." He also asserted that there was "evidence of mortgage fraud and forgery . . . and the evidence of unauthorized parties which [would] establish . . . that [respondents] are not the real parties in interest to [Dvorin's] mortgage." In response, Homeward argued that the bankruptcy trustee was the only party with standing to pursue the bankruptcy action.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.