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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CALIFORNIA BANK & TRUST, Plaintiff and Respondent, v. PACIFIC FUNDING GROUP, INC., et al., Defendants and Appellants.	B237336 (Los Angeles County Super. Ct. No. LC089629)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bert Glennon, Jr., Judge. Affirmed.

Glazer & Blinder, Mark S. Glazer and David M.S. Taam for Defendants and Appellants.

Frandzel Robins Bloom & Csato, Michael G. Fletcher, Hal D. Goldflam and Brad R. Becker for Plaintiff and Respondent.

This matter involves the default of two loans made to defendants Pacific Funding Group, Inc. (PFG) and Gary Pietruszka. Summary judgment was granted to plaintiff California Bank & Trust (CBT). While there is no dispute that PFG and Gary defaulted on the loans, they contend on appeal that summary judgment should not have been granted because there exists a triable issue of fact regarding the amount of damages, a necessary element of the alleged claims. We affirm the grant of summary judgment.

FACTS

In 2006, Alliance Bank (Alliance) extended to PFG a $2 million warehouse line of credit (Warehouse Line). PFG used the Warehouse Line to fund mortgage loans to its own borrowers. Thus, the Warehouse Line was secured by assets owned by PFG, including the deeds of trust securing the mortgage loans issued by PFG to its own borrowers. The Warehouse Line was guaranteed by Gary and Fern Pietruszka[1] as well as their investment vehicle, G&F Investments (G&F), in three separate commercial guaranties. The commercial guaranties specified that the guarantor would pay Alliance the amount of all credit advanced to PFG, plus interest, costs, attorney fees and legal expenses.

The Warehouse Line was extended several times by Alliance. On February 6, 2009, Alliance was closed by the California Department of Financial Institutions and the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. CBT purchased the majority of Alliance's assets from the FDIC on February 9, 2009, including the collateral securing the Warehouse Line. CBT granted PFG an extension on the Warehouse Line but substantially changed the terms of the loan by amending the interest rate, decreasing the credit amount to $1.11 million from $2 million and converting it to a nonrevolving line of credit.

[1] For ease of identification, we will refer to the Pietruszkas by their first names. By doing so, we mean no disrespect.

On February 19, 2008, Alliance also extended a $1.5 million revolving line of credit (Revolver Loan) to Gary, who is the president of PFG. The Revolver Loan was secured by a promissory note signed by Gary and a guaranty issued by G&F. That was extended several times and also assigned to CBT as part of its asset purchase.

PFG defaulted on the Warehouse Line on December 2, 2009, in the amount of $1.11 million. Gary also defaulted on the Revolver Loan on December 2, 2009, in the amount of approximately $1.5 million.

Not surprisingly, CBT brought suit against the Pietruszkas, G&F and PFG (Defendants) on May 4, 2010, alleging 13 causes of action for defaulting on the Warehouse Line and the Revolver Loan. CBT filed a motion for summary judgment on April 29, 2011, contending there was no triable issue of material fact as to its claims for breach of contract, recovery of personal property, breach of guaranties, breach of trust, and constructive fraud. CBT dismissed the six other causes of action. Defendants opposed, arguing that triable issues of fact existed regarding the amount of damages owed to CBT. In particular, Defendants were entitled to an offset in the amount owed because Alliance failed to assign a deed of trust back to PFG in connection with a loan that had been repaid. PFG sued Alliance and CBT, as its successor, in an action entitled *Pacific Funding Group, Inc. v. Alliance Bank et al.* (Super. Ct. L.A. County, No. LC087843; hereafter PFG Action), which is being litigated in Van Nuys. Defendants also contended that, as to the constructive fraud cause of action, CBT mitigated its damages when it foreclosed on two of the properties securing the Warehouse Line. The trial court rejected Defendant's arguments and granted the motion for summary judgment. Defendants filed a motion for clarification and reconsideration. CBT opposed on the ground that no new evidence or law had been provided to justify reconsideration of the summary judgment ruling. The motions were denied and judgment was entered against Defendants on September 8, 2011, for $1,263,865.86 on the Warehouse Line and $1,762,093.80 on the Revolver Loan, including interest.

On November 8, 2011, Defendants moved to stay enforcement of the judgment under Code of Civil Procedure section 918.5 until the PFG Action was resolved. The trial court granted the stay as to PFG, but denied it as to the Pietruszkas. Defendants appealed the judgment and CBT appealed the order staying enforcement of the judgment.[2] We consolidated the appeals and issued a briefing schedule.

DISCUSSION

A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1074.)

CBT had the burden as the moving party to establish each element of its claims, including the amount of damages. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1106.) Defendants contend CBT failed to meet its burden because its calculation of damages did not include any reduction for: (1) the foreclosure of a property on Hoover Street in Los Angeles (Hoover Property) which served as collateral for the Warehouse Line; (2) CBT's failure to mitigate its damages; and (3) a setoff in connection with a claim PFG had against Alliance in the PFG action. It is important to note at the outset that the damages which Defendants contend remain at issue all relate to the Warehouse Line and not the Revolver Loan.

I. Reduction

Defendants first argue that the damages should be reduced by the amount of the credit bid made on the Hoover Property, on which CBT foreclosed. Defendants failed to raise this issue below and have waived the right to argue it on appeal. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

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[2] By order dated June 19, 2012, the trial court granted CBT's motion for an order lifting the stay of enforcement, rendering CBT's appeal moot. Defendants do not challenge the trial court's order lifting the stay.

In any case, the record does not support Defendants' version of events. Instead, the record shows that PFG foreclosed on the Hoover Property but that the property or the proceeds have yet to be transferred to CBT. Accordingly, no reduction in damages is warranted. Using the money from the Warehouse Line to fund its mortgage loans to borrowers, PFG issued a $385,000 mortgage loan to AV Fund Realty Advisors, Inc. (AV Fund), in 2008, which was secured by the Hoover Property. PFG then assigned to Alliance on May 14, 2009, "all beneficial interest" in the deed of trust to the Hoover Property. A substitution of trustee designating CBT as the present beneficiary under the deed of trust was executed on October 22, 2009. Nevertheless, it appeared that this assignment did not give CBT the right to foreclose on the Hoover Property itself. The property was instead foreclosed upon through a trustee sale by PFG. Despite the completion of the trustee sale, title to the Hoover Property remains in the name of the trustor, AV Fund, and has not transferred to CBT or PFG.

Contrary to Defendants' assertions, the evidence shows CBT did not become the owner of the Hoover property upon its foreclosure. Neither did it initiate the trustee sale resulting in the foreclosure of the property. Therefore, Defendants' reliance on cases which release an outstanding debt after a trustee sale do not apply here. Under the cases cited by Defendants, a full credit bid in an amount equal to the unpaid principal and interest of the AV Fund loan would release AV Fund from its obligation under the defaulted mortgage loan from PFG. None of the cases addresses whether a warehouse line of credit which the lender used to fund the mortgage loan receives a corresponding reduction. That is because none of the cases involves a second loan. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238; *Bank of America v. Quackenbush* (1997) 56 Cal.App.4th 1167, 1171.)

It is clear from the evidence, including testimony from Gary, that the Hoover Property served as collateral to the $385,000 loan made by PFG to AV Fund. When the property was foreclosed via trustee sale, the credit bid effectively erased AV Fund's debt to PFG. But PFG has presented no legal authority, nor did our search reveal any authority, that suggests the amount PFG owes under the Warehouse Line should also be

reduced by the amount of the credit bid on the Hoover Property in the trustee sale. Neither does PFG point to any contractual terms which tie the credit bid on the Hoover Property to a reduction to the Warehouse Line. Accordingly, no triable issue of material fact has been raised with respect to a reduction of the amount of damages under this theory. Whether CBT acted improperly by failing to cooperate in the transfer of title to the Hoover Property is a different issue, which we consider next.

II. Mitigation

Defendants argue that CBT failed to mitigate its damages by refusing to cooperate in the transfer of two properties to CBT – the Hoover Property and a property located on Pleasant Avenue in Los Angeles (Pleasant Property) – which would purportedly reduce the amount PFG owes on the Warehouse Line. According to PFG, CBT ignored PFG's efforts to transfer title to the Hoover Property to CBT after the trustee sale. After CBT filed its lawsuit, defense counsel offered to transfer title to CBT and asked CBT how it wanted title to the Hoover Property to be held, whether in its own name or in the name of a limited liability company. CBT failed to respond to defense counsel's communications. PFG also contends CBT refused to execute a substitution of trustee on the Pleasant Property, which would have allowed PFG to foreclose on it. The Pleasant Property, like the Hoover Property, served as collateral to a mortgage loan issued by PFG to a borrower. As a result of CBT's refusal, the value of the Pleasant Property was diminished.

In opposition to CBT's summary judgment motion, Gary submitted a declaration. In paragraph 22, he stated, "[i]f California Bank & Trust had acted reasonably and had given control of the Hoover property to PFG, PFG believes with repairs and improvements of $35,000 it could have sold the Hoover property for $500,000 to $650,000. If California Bank & Trust had acted reasonably and given control of the Pleasant property to PFG, PFG believes with repairs and improvements of $50,000 it could have sold the Hoover property for $1.1 million to $1.3 million. Instead, due to the passage of time, the properties have deteriorated and it will cost significantly more to rehabilitate the properties. Due to declines in the real estate market, the value of the

properties has declined. In other words, if California Bank & Trust had cooperated with PFG regarding the Pleasant and Hoover properties, defendants could have sold one or both of the properties and significantly paid down the debt to California Bank & Trust resulting in less interest accruing."

CBT objected to most of Defendants' evidence, including Gary's declaration, on grounds of lack of foundation, improper lay opinion, lack of personal knowledge, speculation, argument and legal conclusion. All of the objections were sustained by the trial court. Defendants failed to oppose CBT's evidentiary objections until after the trial court's ruling on the summary judgment motion. Argument regarding the admissibility of paragraph 22 from Gary's declaration, quoted above, was submitted by Defendants for the first time in their motion for reconsideration. Defendants did not oppose any other evidentiary objection sustained by the trial court. As a result, the only piece of evidence which may support Defendants' mitigation argument is paragraph 22 from Gary's declaration. As we discuss below, however, Defendants have waived their right to appellate review of the trial court's ruling on that piece of evidence.

"[A] party who fails to provide some oral or written opposition to objections, in the context of a summary judgment motion, is barred from challenging the adverse rulings on those objections on appeal." (*Tarle v. Kaiser Foundation Health Plan, Inc.* (2012) 206 Cal.App.4th 219, 226, 230.) "When an evidentiary objection is raised, and the proponent of the evidence fails to call to the court's attention a theory on which the evidence is admissible, additional evidence which establishes a foundation for the challenged evidence, or an argument for limited admissibility for a particular purpose, those arguments in opposition must be considered waived." (*Id.* at p. 230, fn. omitted.) This is because the objecting party and the trial court must be given an opportunity to address these arguments before the trial court's ruling on summary judgment. (*Ibid.*)

That Defendants belatedly interjected an opposition to CBT's evidentiary objection in their motion for reconsideration does not save them. The trial court properly denied Defendants' motion for failure to present any new facts or law to justify reconsideration. (Code Civ. Proc., § 1008.)[3] Defendants were given the opportunity to make their arguments regarding the admissibility of paragraph 22 and the entirety of Gary's declaration in their opposition to the summary judgment motion. They failed to do so. They were not entitled to correct that failure in a motion for reconsideration or in an appeal.

Having waived the opportunity to challenge the trial court's evidentiary rulings, the evidence on which Defendants rely is inadmissible to support their mitigation argument. Thus, Defendants have failed to establish how CBT's failure to cooperate would impact the amount of damages.

III. Setoff

Defendants next argue that they are entitled to a setoff in connection with their claims against Alliance in the PFG Action. In the third amended complaint, PFG alleged causes of action for the breach of the implied covenant of good faith and fair dealing, fraudulent concealment and negligence.

In its suit, PFG alleged that it lent $1,645,000 to Centrium Associates, LLC, which was secured by a property in South Carolina named Cambridge Square. The Warehouse Line provided the funding for this loan and Alliance was named as trustee on a second deed of trust to the Cambridge Square property. Anglo-American Financial, LLC held the first deed of trust on the Cambridge Square property in the amount of $2.5 million. On April 17, 2007, PFG repaid $1,657,392.68 to Alliance in connection with the

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[3] Subdivision (a) of section 1008 of the Code of Civil Procedure provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

Centrium loan, which required Alliance to assign back the deed of trust in the Cambridge Square property to PFG. Alliance failed to do so. In June 2007, Anglo-American initiated foreclosure proceedings on the Cambridge Square property. Although the deed of trust was assigned back to PFG on August 9, 2007, Alliance continued to receive notice and communications about the foreclosure proceedings and failed to forward them to PFG. As a result, PFG was unable to participate and defend its interests in the Cambridge Square property until December 6, 2007, when it learned of the foreclosure. It was forced to participate in the sale of the property to a third party for $9.3 million. PFG alleged that it "would not have entered into the [sale] transaction but for Alliance's failure to inform PFG of the [f]oreclosure [p]roceedings and the fact that Centrium's debt to Anglo-American had significantly increased due to interest accruing at the default interest rate from at least June 2007 to December 2007."

At the time of the summary judgment motion proceedings, the PFG Action was still in the pleading stages. The trial court had overruled the Defendants' general demurrer but the matter was far from decided. Defendants rely on the trial court's ruling on demurrer to support the argument that they are entitled to a setoff from any sums they may recover from the PFG Action. We conclude there is no basis for a setoff under such circumstances.

There is no legal authority for Defendants' position. "The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike or balance, holding himself owing or entitled only to the net difference." (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 550.) An offset, however, cannot be applied in circumstances where the offset amount is pending and not yet finally adjudicated. (*San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 156.) That a different judge in a different courtroom has found that PFG has alleged facts sufficient to survive a general demurrer does not mean Defendants are entitled to an offset in this case. There has been no final adjudication of damages in the PFG Action, much less a determination of liability.

For the same reason, Defendants' evidence—the complaint filed in the PFG Action and the trial court's ruling on demurrer—is insufficient to create a genuine issue of material fact under this theory. Just as a party may not rely on its pleadings to support or oppose a motion for summary judgment, neither can a party solely rely on its pleadings in a different action to oppose a motion for summary judgment. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7.)

IV. Punitive Damages

We now address an issue raised by defense counsel at oral argument. Defendants contended in their opening brief that CBT was not entitled to punitive damages because it failed to present clear and convincing evidence of fraud. Defendants argued that the failure to perform a promise is not evidence of fraudulent intent (i.e., that there was no intention to perform when the promise was made). As the trial court did not grant punitive damages in its judgment, however, this issue is moot. At oral argument, defense counsel expanded on the initial point and asserted that the lack of any evidence of fraudulent intent also defeated summary judgment on CBT's eighth cause of action for constructive fraud. Defense counsel was mistaken. CBT's claim for constructive fraud rested on Civil Code section 1573, which does not require fraudulent intent. Section 1573 instead provides that constructive fraud consists of a breach of duty which confers an advantage to the person at fault by misleading another to his prejudice. CBT presented evidence below that Defendants had a fiduciary duty under the Warehouse Line and gained an advantage when they collected rents from the Pleasant property and failed to turn them over to CBT. That is sufficient to prove constructive fraud under section 1573. Whether Defendants intended to default on the loans when they entered into the Warehouse Line agreements is irrelevant. The trial court properly granted summary judgment as to the entirety of CBT's claims, including the cause of action for constructive fraud.

DISPOSITION

The judgment is affirmed. Respondent CBT to recover its costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.