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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PATRICIA H. LEE,

Plaintiff and Appellant,

v.

CITIMORTGAGE, INC. et al.,

Defendants and Respondents.

2d Civil No. B279119
(Super. Ct. No. BC592107)
(Los Angeles County)

Patricia H. Lee appeals from a judgment of dismissal entered after the trial court sustained, without leave to amend, defendants', CitiMortgage, Inc., MERSCORP Holdings, Inc. (MERSCORP), Mortgage Electronic Registration Systems, Inc. (MERS), CR Title Services, Inc. (CR Title), and Lisa Markham, demurrer to appellant's first amended complaint for wrongful foreclosure. We affirm.

Facts and Procedural History

This lawsuit is the third in a series of actions brought by appellant after her fourplex was sold at a February 14, 2012, trustee's sale. All three lawsuits concern the same allegations

and seek to vindicate the same primary right. In 2002, Patricia G. Lee, Gwendolyn P. Lee, and appellant took out a \$314,071 loan from Realty Mortgage Corporation dba Mylor Financial (Mylor) secured by a deed of trust that designated MERS as the nominee beneficiary for Mylor and its assignees. After appellant and the Lees defaulted on the loan in 2010, MERS assigned the deed of trust to CitiMortgage, Inc., who substituted CR Title as trustee. CR Title recorded a notice of default and election to sell the property and sold the property at a trustee's sale on February 14, 2012.

First Lawsuit - Lee I

In April 2012, appellant sued CitiMortgage and MERS for filing false or forged documents and to remove a cloud on title. (*Lee v. CitiMortgage, Inc. et al.*, Los Angeles County Sup. Ct., Case No. BC482312.) In an amended complaint, appellant alleged that CitiMortgage failed to comply with loan servicing guidelines for conducting a H.U.D. approved foreclosure (24 Code Fed. Regs. § 203.604) and prayed for the court to set aside the trustee's sale. In April 2013, the trial court sustained a demurrer without leave to amend.

Second Lawsuit - Lee II

While *Lee I* was pending, appellant filed a second action against CitiMortgage and MERS. (*Lee v. CitiMortgage, Inc. et al.*, Los Angeles County Sup. Ct., Case No. BC502785.) The complaint was virtually the same as the *Lee I* complaint, alleged violations of H.U.D. foreclosure guidelines, and prayed that the trustee's sale be set aside. In October 2013, the trial court sustained CitiMortgage's and MERS's demurrer without leave to amend.

Third Lawsuit - Lee III

In 2015, nearly two years later, appellant filed a new action against CitiMortgage, MERS, MERSCORP, CR Title, and Lisa Markham. The first amended complaint alleged causes of action for conspiracy, promissory estoppel, wrongful foreclosure, breach of contract, fraud and deceit, declaratory relief, quiet title, defamation, loss of consortium, intentional and negligent infliction of emotional distress, and unfair competition. On August 17, 2016, the trial court sustained defendants' demurrer without leave to amend.

Discussion

The function of a demurrer is to test whether, as a matter of law, the facts alleged in the first amended complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) In our de novo review of the order, we assume the truth of all facts properly pleaded, but not contentions, deductions, or conclusions of law. (*Ibid.*) We determine whether the alleged facts are sufficient, as a matter of law, to state a cause of action under any legal theory. (*Ibid.*) In making this determination, we consider any facts of which the trial court properly took judicial notice. (*Ibid.*)

Ancillary Causes of Action - Waiver

Appellant has submitted no argument regarding the causes of action for conspiracy, promissory estoppel, breach of contract, fraud, declaratory relief, quiet title, defamation, loss of consortium, and intentional and negligent infliction of emotional distress. Those causes of action were dismissed with prejudice and are deemed abandoned for purposes of this appeal. (*Cahill v.*

San Diego Gas & Electric Co. (2011) 194 Cal.App.4th 939, 956;
Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784-785.)

Res Judicata/Claim Preclusion - Wrongful Foreclosure

Claim preclusion, a facet of res judicata, bars relitigation of the same cause of action between the same parties or those in privity with them. (*Mycogen Corp. v. Monsanto Co.*, (2002) 28 Cal.4th 888, 896, fn. omitted.) Here the demurrers in *Lee I* and *Lee II* were sustained without leave to amend and resulted in dismissals with prejudice, the legal equivalent of a judgment on the merits. (*Torrey Pines Bank. v. Superior Court* (1989) 216 Cal.App.3d 813, 820-821.) ““Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.” [Citation.]” (*Mycogen Corp v. Monsanto Co.*, *supra*, at p. 897.) Because the same primary right was litigated in *Lee I* and *Lee II*, the judgments in those cases bar appellant from seeking recovery in this action. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798-798.) Claim preclusion applies to those in privity with CitiMortgage and MERS and bars any action based on derivative liability between a corporation and its employees.¹ (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 828.)

The wrongful foreclosure action is also time-barred by the three-year statute of limitations. (Code Civ. Proc., § 338, subds. (a) & (d); *Salazar v. Thomas* (2015) 236 Cal.App.4th 467,

¹ The *Lee III* complaint alleges that MERSCORP owns and operates MERS, that CR Title is CitiMortgage’s agent, that Lisa Markham is Assistant Vice President of CitiMortgage, MERS, and CR Title, and that all the defendants were agents and employees of one another who conspired to defraud appellant.

476.) The trustee's sale occurred on February 14, 2012. Appellant filed her complaint more than three years later, on August 20, 2015.

Unfair Competition Law

Appellant contends that the trial court erred in sustaining the demurrer on the Unfair Competition Law (UCL) cause of action, a law that prohibits unlawful, unfair, or deceptive acts. (Bus. & Prof. Code, § 17200; *Cel-Tech Communications, Inc. v. LA Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) To state a cause of action under the UCL, appellant must have lost money or property “as a result of . . . unfair competition.” (Bus. & Prof. Code, § 17204; *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 372.) The phrase “as a result of” imposes a causation requirement. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1013.)

Appellant argues that the trustee's sale occurred while a loan modification was in process but no facts are alleged that appellant lost money or property as a result of the unfair business practice. (See *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854-855 [collecting casing on causation requirement for UCL claim].) Appellant, lost the property because she defaulted on the loan three years prior. The loan default triggered the enforcement of the power of sale clause in the deed of trust, which subjected appellant's home to nonjudicial foreclosure. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522-523, overruled on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939.) Appellant's assertion that defendants violated the California Homeowners Bill of Rights by engaging in dual tracking (Civ. Code, § 2923.6 et seq.) is subject to the same claim preclusion/res judicata bar

because the claim could have been raised in *Lee I* and *Lee II*. (See, e.g., *DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at p. 824.) “It is black letter law that ‘[r]es judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding.’ [Citation.]” (*In re Prather* (2010) 50 Cal.4th 238, 260.)

The UCL claim also fails because no facts are alleged that appellant is entitled to restitution or injunctive relief, the only remedies the UCL affords private plaintiffs. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1187.) “[I]n the UCL context . . . restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.” [Citation.]” (*Ibid.*) No facts are alleged that appellant paid defendants’ penalties or fees which are required to state a viable UCL claim. (*Ibid.*) The UCL cause of action does pray for punitive damages, but that is not permitted. “While any member of the public can bring suit under the [UCL] to enjoin a business from engaging in unfair competition, it is well established that individuals may not recover damages. [Citation.]” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.) The UCL claim is derivative of the wrongful foreclosure cause of action and stands or falls with that cause of action. (*Id.* at p. 1143 [UCL “borrows” violations from other laws by making them independently actionable as unfair competition practices].) The trial court correctly found that appellant was barred from suing for wrongful foreclosure and that it was fatal to the UCL cause of action. (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1101; see *Susilo v. Wells Fargo Bank, N.A.* (C.D. Cal. 2011) 796

F.Supp.2d 1177, 1196 [plaintiff's wrongful foreclosure claims served as predicate violations for her UCL claim].)

Request for Default

The day after the demurrer was filed, appellant filed a request for entry of default against CitiMortgage, CR Title, and Lisa Markam which was rejected by the superior court clerk. A second request for default was filed against MERS and MERSCORP on December 1, 2015, and denied on December 11, 2015. Appellant argues that the requests for entry of default were erroneously denied but it is settled that a default cannot be entered while a demurrer is pending. (Code Civ. Proc., § 585, subds. (a)-(b); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 7:34.1, p. 7(l)-18.)

The requests for default were also rejected because the first amended complaint sought punitive damages and no statement of damages had been served and filed. (Code Civ. Proc., § 425.115, subds. (b) & (f).) Appellant was precluded from requesting an entry of default until a statement of damages was first served on defendants. (*Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 430; *Matera v. McLeod* (2006) 145 Cal.App.4th 44, 61-62.) Appellant cites no authority to the contrary.

Code Civ. Proc. § 170.6 Peremptory Challenge

When defendants filed the demurrer, they also filed a “Notice of Related Case” notifying the superior court that *Lee I* and *Lee II* involved the same parties, was based on the same or similar claims, and that *Lee III* would require a substantial duplication of judicial resources if the case was heard by a different judge. (Cal. Rules of Court, rule 3.300.) On October 22, 2015, the Los Angeles Superior Court assigned *Lee III* to Los Angeles Superior Court Judge Holly Kendig for all purposes

because Judge Kendig heard the demurrers in *Lee I* and *Lee II*. (Cal. Rules of Court, rule 3.300(h)(1)(A); Los Angeles County Sup. Court, rule 3.3(f); 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 375, pp. 509-510.)² Appellant filed a peremptory challenge to disqualify Judge Kendig on November 24, 2015. The peremptory challenge was denied as untimely on the ground that it was not filed within 15 days of notice of the all-purpose assignment. (Code Civ. Proc. § 170.6, subd. (a)(2).)

Appellant argues that she was not served with notice of the all-purpose assignment but the record reflects that notice was served November 2, 2015, at the same address listed on the *Lee I* and *Lee II* complaints. Appellant complains that the proof of mailing does not list appellant's apartment number (i.e., #1), but appellant owned the entire building (i.e., all four units) as reflected in the loan documents. Appellant was required to file

² Appellant argues that the all-purpose assignment of *Lee III* violated her due process rights because such an assignment may not be ordered unless the related cases (i.e., *Lee I* and *Lee II*) are actually pending. That ignores California's express policy favoring the assignment of related cases to a single judge where the cases involve the same parties and are based on the same or similar claims. (See Cal. Rules of Court, rule 3.300.) The purpose is to promote judicial efficiency and to prevent plaintiffs from judge shopping. (Weil & Brown, Cal. Practice Guide, *supra*, ¶ § 12:38, p. 12(l)-9.) This policy makes clear that a pending case can be related to an already completed case. California Rules of Court, rule 3.300(a) provides: "A pending civil case is related to another pending civil case, *or to a civil case that was dismissed with or without prejudice*, or to a civil case that was disposed of by judgment." (Italics added.) Appellant failed to file a response/objection to CitiMortgage's Notice of Related Case (see Cal. Rules of Court, rule 3.300(g)), but did file a peremptory challenge to disqualify Judge Kendig.

peremptory challenge no later than November 23, 2015 (Code Civ. Proc., § 170.6, subd. (a)(2)) and filed the peremptory challenge one day late on November 24, 2015.

Appellant argues that the trial court had “no jurisdiction but to grant the Peremptory Challenge and recuse [itself].” The order denying the peremptory challenge is nonappealable and may only be reviewed by writ of mandate. (Code Civ. Proc., § 170.3, subd. (d); *People v. Hull* (1991) 1 Cal.4th 266, 268.) The 10-day time period to seek writ review has come and gone. (*Ibid.*; *People v. Panah* (2005) 35 Cal.4th 395, 444.) Arguments about the trial court’s disqualification may not be raised in this appeal.³ (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 487.)

Disposition

The judgment (order sustaining demurrer without leave to amend) is affirmed. Defendants are awarded costs on appeal.

³ Code of Civil Procedure, section 170.3, subdivision (d) provides: “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought [within 10 days of notice of the parties to the decision].” The statute applies to all statutory judicial disqualification claims, even those claims based on statutory provisions that appear to codify due process grounds for relief. (*People v. Brown* (1993) 6 Cal.4th 322, 335.) Appellant makes no showing that the judgment is constitutionally invalid because of judicial bias. (*Ibid.*)

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Holly Kendig, Judge

Superior Court County of Los Angeles

Law Offices of Angela Swan and Angela R. Swan, for
Plaintiff and Appellant.

Akerman and Preston K. Ascherin, for Defendants
and Respondents.