Filed 10/23/14 Ambartsumyan v. CitiMortgage CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TIGRAN AMBARTSUMYAN,

Plaintiff and Appellant,

v.

CITIMORTGAGE, INC.,

Defendant and Appellant,

TD CAPITAL, LLC, et al.

Defendants, Cross-Complainants and Respondents,

CR TITLE SERVICES, INC., et al.,

Defendant, Cross-Defendant, and Respondent.

B243131 c/w B246741

(Los Angeles County Super. Ct. No. LC086452)

APPEAL from a judgment of the Superior Court of Los Angeles County; James Kaddo, Judge. Affirmed in part and reversed in part.

Shaghzo & Shaghzo and Armen Shaghzo for Plaintiff and Appellant Tigran Ambartsumyan.

Gibbs Giden Locher Turner Senet & Wittbrodt and Brendan B. Penney for Defendant and Appellant CitiMortgage, Inc.

Miles, Bauer, Bergstrom & Winters, Lawrence R. Boivin and Tami S. Crosby for Defendant, Cross-Defendant and Respondent CR Title Services, Inc.

Allen Matkins Leck Gamble Mallory & Natsis and William R. Harmsen for Defendant, Cross-Complainant and Respondent OneWest Bank, FSB.

Corporate Legal Services and Mark J. Leonardo for Defendant, Cross-Complainant and Respondent T.D. Capital, LLC.

When identity thieves forge home loan documents to defraud a lender, their fraud can leave a stream of victims in its wake. Here, the thieves disappeared with the money and are long gone. What remains is strife among victims about who will bear that loss.

I

The villains of this piece engineered a home loan fraud by targeting a Van Nuys house. They stole the identity of an innocent named Rosemarie Dayao. Dayao had no connection with this house, but to get a loan the identity thieves forged and recorded documents to make it appear she was buying it. The thieves somehow used their concocted sale to convince CitiMortgage's predecessor (Mortgage Solutions Management, Inc.) to loan $444,500 to unknown persons — presumably the thieves — who absconded with the entire $444,500. The true owner of the house was plaintiff Tigran Ambartsumyan, who got notice of the fraud in November 2008 but did nothing. Unsuspecting CitiMortgage then assumed this fraudulent $444,500 loan, and Dayao then notified CitiMortgage of the fraudulent loan. CitiMortgage decided to foreclose against the house and used all the proper statutory notice procedures to announce a trustee's sale. CitiMortgage incorrectly assumed the thieves now had the house. In fact, Ambartsumyan legitimately owned the house all along, but for over eight months he had not responded to danger signals. On the eve of the foreclosure sale, Ambartsumyan finally obtained a restraining order against it, but then failed to serve the restraining order in time. So the

foreclosure sale went forward and a buyer named TD Capital, LLC placed the winning $374,000 bid for a deed that TD soon discovered was a forgery.

Ambartsumyan sued to quiet title to his house. TD counterclaimed against CitiMortgage. After a bench trial, the court quieted title in favor of Ambartsumyan. The court rescinded CitiMortgage's sale to TD and ordered CitiMortgage to refund $374,000 to TD. Four parties now appeal.

II

The first appeal is by CitiMortgage, which challenges the order that it return $374,000 to TD. Our review is de novo.

CitiMortgage argues this fraud loss should remain with TD because that is where "'the course of business'" placed it. But CitiMortgage had no right to foreclose and get money from TD. Just as Dayao had no valid connection to the house, so too was CitiMortgage a stranger to it. CitiMortgage's claims to the house were all based on forgeries by identity thieves, and these forgeries were void and could not pass title. (*Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 43–44.) The thieves had tricked CitiMortgage's predecessor out of $444,500, but the gullibility of that lender (or of CitiMortgage in assuming this loan) gave CitiMortgage no right to victimize TD.

CitiMortgage has no anchor for its untenable position. It cites *Trout v. Taylor* (1934) 220 Cal. 652, 657, but in that case no one like Dayao had triggered a duty to investigate by announcing the presence of fraud. The same holds for *Security Mortgage Co. v. Delfs* (1920) 47 Cal.App. 599, 602, as well as for provisions in Restatements about restitution (which we assume govern in California). CitiMortgage cites *Hilliard v. Bank of America* (1951) 102 Cal.App.2d 730, 734, but that holding does not apply to cases where both the note and mortgage were tainted with fraud. (*Ibid.*; see also *id.* p. 735.)

The trial court correctly rescinded this bad sale and ordered CitiMortgage to give TD's money back.

III

The second appeal is by TD, which attacks the trial court's denial of its motions to amend its cross-complaint. We review for an abuse of discretion.

We have just recounted how TD at trial successfully rescinded its house purchase from CitiMortgage. But just before trial and then again during trial, TD also sought leave to add tort counts against CitiMortgage for fraudulent concealment and negligent misrepresentation. The trial court denied both motions. Neither ruling was an abuse of discretion. We treat each in turn.

A

On May 23, 2012, TD brought an ex parte application to file its motion to amend its cross-complaint and to have the motion heard on shortened time. On June 5, 2012, the trial court denied TD's motion to amend its cross-complaint because TD was dilatory and CitiMortgage would be unfairly prejudiced. This ruling was not an abuse of discretion. (See *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377–1379.) TD was dilatory. The trial date was June 18, 2012. The allegation about Dayao's fraud alert had been in the case since December 8, 2010. Unjustifiably, TD had waited nearly 18 months to advance tort theories. TD protests it discovered new evidence but does not satisfactorily explain why it delayed the search for this evidence until the eve of trial. And CitiMortgage would have been unfairly prejudiced. TD waited to spring its allegations until the eve of trial, after discovery was closed. The timing eliminated defense opportunities for discovery and dispositive motions. Adding new tort claims would have lifted the ceiling on the case's value from $374,000 to some higher level. It is rational to tailor the extent of defense effort to the case's scale. (*See Duchrow v. Forrest*, *supra*, 215 Cal.App.4th at p. 1381.) CitiMortgage was entitled to fair notice and an opportunity to prepare that would correspond to the true extent of TD's attack. The trial court's ruling was not an abuse of discretion.

B

During trial, TD renewed its effort to add claims for fraudulent concealment and negligent misrepresentation: TD moved to conform its pleading to the trial proof. For

this motion, TD waived tort damages. This waiver now has mooted this motion, for TD's later trial victory gave TD the remedy it sought, which was $374,000 plus interest. In cautious and lawyerly fashion, TD pursued the trial amendment as "another avenue" to its goal of $374,000 plus interest. TD lost on the amendment avenue but achieved its goal nonetheless. This ruling thus had no effect and is no reason to disturb the judgment.

IV

The third appeal is by Ambartsumyan. He secured good title to his house. Nonetheless, he appeals the denial of his motion for leave to amend his complaint, as well as a different order granting a motion by CitiMortgage.

A

The trial court denied Ambartsumyan's tardy motion to amend his complaint. We review for an abuse of discretion.

The court properly based its denial on long unexcused delay and the need to reopen discovery. Ambartsumyan filed his complaint on August 5, 2009 and on December 9, 2010 amended his complaint to level accusations against CitiMortgage about the Dayao fraud alert. The trial date was June 18, 2012. Ambartsumyan filed his motion to amend on April 9, 2012. The court promptly heard Ambartsumyan's motion to amend on May 7, 2012: a May amendment for a June trial date. The case was years old by that time. Ambartsumyan was dilatory and his motion was tardy. There was no valid reason for Ambartsumyan to delay investigating a theory he had alleged in documentary detail in 2010. There was prejudice because the court would have had to reopen discovery and delay the trial in a stale case. This ruling was not an abuse of discretion. (See *Duchrow v. Forrest, supra*, 215 Cal.App.4th 1359, 1377–1379.)

B

The trial court properly granted CitiMortgage's motion for summary judgment against Ambartsumyan. This ruling covered three questions of law. We independently review each one.

1

The trial court correctly rejected Ambartsumyan's quiet title and declaratory judgment claims because, in its answer, CitiMortgage disclaimed all interest in his house. As a result, there was no further dispute between Ambartsumyan and CitiMortgage on the quiet title and declaratory relief counts. CitiMortgage had appeared in the case and had irrevocably surrendered its property claims. A trial was unnecessary because Ambartsumyan had won on the merits. The holdings Ambartsumyan cites are not pertinent because, in each one, the defendant *contested* the plaintiff's claim of ownership. (See *Pacific States Sav. & Loan Co. v. Warden* (1941) 18 Cal.2d 757, 758; *Lee v. Silva* (1925) 197 Cal. 364, 366–367; *Deutsche Bank National Trust Co. v. McGurk* (2012) 206 Cal.App.4th 201, 206). Moreover, this is moot after the bench trial, for the trial court removed all clouds from Ambartsumyan's title to the house.

2

On the negligence count, the trial court correctly ruled CitiMortgage owed no tort duty to Ambartsumyan. Ambartsumyan launches an ill-founded attack on this ruling, but the trial court correctly applied the law to undisputed facts.

"A bank's basic duty of care—to act with reasonable care in its transactions with its customers—arises out of the bank's contract with its customer." (*Rodriguez v. Bank of The West* (2008) 162 Cal.App.4th 454, 460 [citing authorities].) Ambartsumyan cites no precedent in the foreclosure setting for extending a bank's tort duty to people who are not customers. The holdings Ambartsumyan discusses run against his position. *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1628 ruled the defendant bank owed a plaintiff no tort duty because the plaintiff was not a bank customer. *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 478–483 reached the same conclusion. *I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285–288 held the common law does not require the trustee of a deed of trust to take reasonable steps to provide actual notice to a defaulting trustor. *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 864 had nothing to do with foreclosure.

Ambartsumyan cites *Munger v. Moore* (1970) 11 Cal.App.3d 1, but that holding is not on point. In *Munger v. Moore*, lender Moore improperly refused to accept a valid tender that would have cured a payment default. Instead of accepting the tender (as the law required), Moore deliberately and illegally exploited the situation by ordering the trustee to sell the property. Moore (with others) then bought it at a bargain auction price. Moore acted "intentionally, wrongfully and pursuant to an intentional design with regard to [the victim]." (11 Cal.App.3d at p. 10.) By contrast, in this case CitiMortgage had no crooked plan to appropriate the appreciated value of someone else's land. Here the deceivers were the identity thieves, not CitiMortgage. CitiMortgage's investigator testified Dayao's letter led him to conclude the borrower on the Dayao loan had impersonated Dayao to obtain the loan and buy the property. CitiMortgage had seen many such frauds, the investigator explained, where a borrower stole another's identity to get a loan and buy the property. No one told CitiMortgage that the purchase or sale of the Van Nuys house involved a fraudulent or forged deed. CitiMortgage thus mistakenly assumed the people in the house — who had never responded to notices about Dayao and the Van Nuys house — were the malefactors. There was no evidence that CitiMortgage was acting "intentionally, wrongfully and pursuant to an intentional design with regard to [Ambartsumyan]," as in *Munger v. Moore*. The *Munger v. Moore* holding does not support Ambartsumyan's position.

"No negligence cause of action need be recognized here. Otherwise, we would be engaging in judicial legislation by grafting a tort remedy onto a comprehensive statutory scheme in the absence of a compelling justification for doing so." (*Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827.)

In sum, Ambartsumyan has not established error in the summary judgment of his negligence count.

3

On the count involving the unfair competition law, the trial court ruled Ambartsumyan had no case. A plaintiff alleging an unfair business practice must show the defendant's conduct is tethered to an underlying constitutional, statutory, or

regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of antitrust law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186-187; *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 613.) Ambartsumyan cites no constitutional, statutory, or regulatory provision and does not mention antitrust. He gives no reason to suspect trial court error.

V

The fourth appeal is by CR Title Services, which protests being made jointly and severally liable to TD Capital. This apparently was an oversight: TD's opposition brief ignores CR's appeal, thus conceding the validity of CR's position, and we agree.

DISPOSITION

The judgment against CR Title Services is reversed. The matter is remanded to the trial court for entry of a new judgment in favor of CR Title in connection with TD's Fourth Amended Cross Complaint. In all other respects, the judgments are affirmed. TD is to pay CR's costs of appeal. All other parties will bear their own costs.

NOT TO BE PUBLISHED

WILEY, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.