Filed 12/12/18 Garau v. Nationstar Mortgage LLC CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CARLOS GARAU et al., Plaintiffs and Appellants, v. NATIONSTAR MORTGAGE LLC, et al., Defendants and Respondents.	B281879 (Los Angeles County Super. Ct. No. BS161505)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant and Barbara A. Meiers, Judges. Affirmed.

Olga Garau, in pro. per., and for Plaintiff and Appellant Carlos Garau.

Hall Huguenin, Hall Griffin, and Markus D. Self and Taylor R. Dalton, for Defendants and Respondents Nationstar Mortgage LLC, HSBC Bank USA, National Association, as

Trustee for Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, MANA Series 2007-OAR5.

Barrett Daffin Frappier Treder & Weiss, Edward A. Treder and David L. Chaffin for Defendant and Respondent Barrett Daffin Frappier Treder & Weiss LLP.

Plaintiffs and appellants Carlos and Olga Garau (the Garaus) appeal a judgment of dismissal following the grant of a motion for judgment on the pleadings in favor of defendants and respondents Nationstar Mortgage LLC (Nationstar); HSBC Bank USA, National Association, as Trustee for Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, MANA Series 2007-OAR5 (HSBC); and Barrett Daffin Frappier Treder & Weiss LLP (Barrett) (collectively, Defendants).

In this appeal arising from an action by the Garaus to prevent Defendants from proceeding with a nonjudicial foreclosure, we conclude the trial court properly determined the Garaus failed to state a cause of action for declaratory relief and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts as developed from the Garaus' pleadings and attached exhibits*.

The Garaus, who are married, purchased their home, a single family residence in Torrance, in 1989. In June 2007, they borrowed $432,250 from NBGI, Inc. (NBGI), secured by their home. They signed a 30-year promissory note, as well as a deed of trust, identifying NBGI as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as a nominee for the lender and the lender's successors and assigns, and as the beneficiary

under the deed of trust. The deed of trust included a power of sale in the event of the borrowers' default.

Countrywide Home Loans, Inc. was the original loan servicer until it was acquired by Bank of America in July 2009. In September 2013, servicing of the loan was transferred to Nationstar. In September 2015, Nationstar recorded an assignment of deed of trust, indicating that MERS, as nominee for NBGI, had assigned the Garaus' deed of trust to HSBC. Two months later, HSBC recorded a substitution of trustee, naming Barrett as successor trustee.

On November 17, 2015, Barrett recorded a notice of default and election to sell under the deed of trust, stating that the Garaus were $18,761 behind in their payments. On February 16, 2016, Barrett recorded notice of a trustee's sale to be conducted on March 23, 2016. The Garaus commenced this action two days before the scheduled sale date.

2. *Proceedings*.

On March 21, 2016, the Garaus filed a verified petition against Nationstar, HSBC, and Barrett, seeking a writ of mandate (Code Civ. Proc., § 1085)[1] (first cause of action), writ of prohibition (§ 1102) (second cause of action), and declaratory relief (§ 1060) (third cause of action).[2] That petition is the

---

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

[2] Section 1060 authorizes an action for declaratory relief, stating that "in cases of actual controversy relating to the legal rights and duties of the respective parties," any person may bring an action for a declaration of his or her rights and duties in connection with that controversy.

operative pleading. The following day, the Garaus recorded a lis pendens. Their pleading sought to have the foreclosure sale canceled or stayed until the rights and duties of the parties could be finally adjudicated, to prohibit Defendants from proceeding with a nonjudicial foreclosure, and to obtain a declaration with respect to the rights of the parties in connection with the imminent foreclosure sale. The Garaus pled, inter alia: the reassignment of their note was void; MERS was not authorized to do business in California; and the corporate assignment of the deed of trust, the substitution of trustee, the notice of default, and the notice of trustee's sale, were defective and had been wrongfully recorded.

On March 23, 2016, the Garaus applied ex parte for a temporary restraining order and order to show cause re preliminary injunction to stay the foreclosure sale. The trial court denied the application. Nonetheless, on April 1, 2016, Barrett rescinded the notice of trustee's sale.

On July 14, 2016, the trial court (Judge Chalfant) sustained demurrers to the writ of mandate and writ of prohibition causes of action without leave to amend, and overruled the demurrer to the declaratory relief claim. The trial court ruled, inter alia: the Garaus were not entitled to a writ of mandate under section 1085 because they were not seeking to compel Defendants to perform any statutory or constitutional duty; and they were not entitled to a writ of prohibition under section 1102, which lies to restrain the exercise of a judicial function, because a nonjudicial foreclosure is *not* a judicial function.

With respect to the declaratory relief claim, the trial court stated: "Respondents demur to the Third Cause of Action on the

grounds that Petitioners lack standing to bring this claim. Petitioners are seeking to bring a preemptive action to determine whether Respondents are entitled to initiate a non-judicial foreclosure, and lack standing to bring such an argument. *The court has already indicated that Petitioners may not seek declaratory relief based on Respondents' lack of authority to foreclose*, but may allege non-compliance with foreclosure procedure in a declaratory relief action. [¶] The demurrer to the third cause of action is overruled." (Italics added.)

Following the elimination of the writ causes of action, the matter was transferred from the writs and receivers department to Judge Meiers for further proceedings.

On November 21, 2016, when the parties appeared on various motions, the trial court on its own motion set a hearing on a motion for judgment "for failure to state a cause of action, the complaint, among other things being overall unintelligible, appearing (to the extent anything can be determined) to be raising issues of law under case law already decided adversely to the plaintiff's position, and being full of conclusions as opposed to facts required in pleadings. [¶] Since the Petition/Complaint rests virtually entirely on issues potentially now moot—the once pending foreclosure proceedings having been terminated and there being no proper setting forth of the declaratory relief issues which plaintiffs ask the court to resolve, the Petition/Complaint is also in violation of California pleading requirements."[3]

---

[3] The court "may upon its own motion grant a motion for judgment on the pleadings." (§ 438, subd. (b)(2).) The court may grant judgment on the pleadings on its own motions on the ground that "[t]he complaint does not state facts sufficient to

Defendants then filed motions for judgment on the pleadings, arguing that the sole remaining cause of action for declaratory relief should be dismissed because there was no pending foreclosure and thus no justiciable controversy. Further, even assuming the existence of a justiciable controversy, the Garaus lacked standing to challenge the assignments of the deed of trust, could not show they were prejudiced by a procedural irregularity in the foreclosure process because they were in default on their loan, and had failed to comply with the requirement that they tender payment.

On January 25, 2017, the matter came on for hearing. The trial court granted the defense motions for judgment on the pleadings, stating: "The plaintiffs' complaint being generally unintelligible, and no prior judge's ruling having been made inconsistent with the ruling by this court, the court finds that there are ample grounds for the granting of a court['s] own motion for a judgment on the pleadings and or for a dismissal for failure to state a cause of action and as an alternative ground for the relief now granted on the defendant[s'] motion. [¶] The court so finds and rules. However, this alternative ruling on the 'court's own motion' is not necessary to be reached in light of the fact that the court is now granting the defendants['] motion for a judgment on the pleading[s] as to all defendants and in its entirety for all of the grounds and reasons argued in the defendants['] motion." The trial court also granted Defendants' motion to expunge any lis pendens that had been recorded on the property.

---

constitute a cause of action against that defendant." (*Id*. at subd. (c)(3)(B)(ii).)

On February 17, 2017, the trial court entered a judgment of dismissal in favor of Nationstar, HSBC, and Barrett. The Garaus filed a timely notice of appeal from the judgment.

CONTENTIONS

The Garaus contend: the trial court erred in granting judgment on the pleadings after a demurrer to the declaratory relief claim had already been overruled; the matter was erroneously reassigned to Judge Meiers from Judge Chalfant; the trial court erred in expunging the lis pendens; and the denial of all writ relief was prejudicial error because it left the Garaus without any effective remedy to prevent foreclosure.

DISCUSSION

1. *Standard of appellate review*.

Because a motion for judgment on the pleadings is the functional equivalent of a general demurrer, the same rules apply. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 900 (*Marzec*).) " 'We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. [Citation.] Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true. [Citation.] We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory.' [Citation.]" (*Ibid*.)

2. *No cause of action stated for declaratory relief; the Garaus cannot challenge Defendants' right to initiate nonjudicial foreclosure of the property.*

a. *The Garaus' pertinent allegations.*

In the third cause of action, the Garaus sought declaratory relief challenging Defendants' right to initiate a nonjudicial

foreclosure of the property. They asserted a plethora of alleged defects in the pending foreclosure, including: HSBC, the investor foreclosing on the note, was not the current owner of the note; there was fraud in the belated substitution of trustee and assignment of the deed of trust; Barrett, the purported trustee, had failed to comply with various statutory requirements; the note lacked language that it could be reassigned after an alleged default; MERS improperly transferred ownership of the note; there was a discrepancy between the corporate assignment of deed of trust and the county registrar's cover sheet; the corporate assignment failed to duly identify the property; there were various defects in the substitution of trustee; and the Garaus were not served with the corporate assignment of the deed of trust or the substitution of trustee at the time those documents were recorded.

b. *The Garaus cannot maintain a preemptive action for declaratory relief challenging Defendants' right to foreclose*.

As discussed in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*), California courts consistently have refused to delay the nonjudicial foreclosure process by allowing trustor-debtors to pursue actions, like the present one, to preemptively challenge the right, power, and authority of a foreclosing beneficiary or beneficiary's agent to initiate and pursue foreclosure. The *Jenkins* court explained: "In *Gomes* [*v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149 (*Gomes*)], [the court] considered whether California's nonjudicial foreclosure statutes allow a defaulting trustor-debtor, before his or her property is sold, to bring a preemptive judicial action to challenge whether the person initiating the foreclosure is, or is duly authorized to do so by, the person who possesses a

secured interest in the property. (*Gomes*, *supra*, 192 Cal.App.4th at p. 1152.) Much like Jenkins's first cause of action, the appellant in *Gomes* alleged, 'on information and belief,' the entity that initiated the nonjudicial foreclosure process did not have the authority to do so because (1) the entity was not the owner of the promissory note that was secured by the deed of trust and (2) the entity was not an authorized agent of the owner of the promissory note. (*Ibid*.)

"In the *Gomes* court's analysis of the validity of the appellant's claim, it made the important point that such a preemptive action does not seek a remedy for a foreclosing party's misconduct with regards to the initiation and processing of the nonjudicial foreclosure, which . . . may serve as the basis for a valid cause of action. (*Gomes*, *supra*, 192 Cal.App.4th at p. 1154, fn. 5.) Instead, the *Gomes* court found that such a preemptive action seeks to create 'the additional requirement' that the foreclosing entity must 'demonstrate *in court* that it is authorized to initiate a foreclosure' before the foreclosure can proceed. (*Ibid*., italics added.) After examining the nonjudicial foreclosure statutes and considering the well-established purposes of nonjudicial foreclosure, the *Gomes* court found no express or implied grounds for allowing such a preemptive action. (*Id*. at p. 1156.) Consequently, the *Gomes* court concluded that allowing a trustor-debtor to pursue such an action, absent a '*specific factual basis* for alleging that the foreclosure was not initiated by the correct party' would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature, and 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and

efficient remedy. [Citation.]' (*Id.* at pp. 1154–1156 & fn. 5.) [¶] . . . .

"Jenkins's first cause of action, like the claim brought by the appellant in *Gomes*, asserts she has a right to bring a preemptive judicial action to determine whether Defendants have the authority to initiate nonjudicial foreclosure on her home; however, like the appellant in *Gomes*, she fails to identify legal authority for such a preemptive action in the statutory provisions setting forth the nonjudicial foreclosure scheme. After our own examination of the nonjudicial foreclosure statutes, we agree with the *Gomes* court that the provisions do not contain express authority for such a preemptive action. Also, even if the statutes are interpreted broadly, it cannot be said the provisions imply the authority for such a preemptive action exists, because doing so would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature. (See . . . *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80 . . . [plaintiff may not use claim for declaratory relief to ' "create a cause of action that otherwise does not exist" '].) 'The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the note holder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.' (*Gomes*, *supra*, 192 Cal.App.4th at p. 1155.)" (*Jenkins*, *supra*, 216 Cal.App.4th at pp. 511–513.)

Thus, the Garaus cannot challenge Defendants' right to proceed with foreclosure by way of the instant action for declaratory relief.

c. *The Garaus' reliance on* Yvanova *is misplaced.*

The Supreme Court's decision in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*) is of no assistance to the Garaus. *Yvanova* does not enable them to maintain a preemptive suit against foreclosure.

Yvanova arose out of the allegedly wrongful foreclosure of the plaintiff's home based on an allegedly void assignment. The Supreme Court granted review to consider an extremely narrow question: "[w]hether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." (*Yvanova*, *supra*, 62 Cal.4th at p. 923.) As to that limited issue, the Supreme Court concluded that a borrower has standing "to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest was not merely voidable but void." (*Id.* at pp. 942–943.) The Court's holding was explicitly narrow, declining to reach, among other questions, whether a homeowner had standing to *preemptively* challenge a nonjudicial foreclosure. (*Id.* at p. 934.) The Court stated: "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Id.* at p. 924.)[4]

Unlike *Yvanova*, which involved an action for wrongful foreclosure, brought *after* foreclosure, the Garaus' action is for

---

[4] *Yvanova* disapproved *Jenkins*, *supra*, 216 Cal.App.4th 497, to the extent it held borrowers lack standing to challenge an assignment of the deed of trust as void. (*Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.)

declaratory relief, to prevent foreclosure. Therefore, *Yvanova* is unavailing to them.

Saterbak v. JPMorgan Chase Bank, N.A. (2016) 245 Cal.App.4th 808 (*Saterbak*) reflects the narrow scope of *Yvanova*'s holding. In *Saterbak*, as here, the plaintiff brought a *preforeclosure* lawsuit challenging the defendant's ability to foreclose; the plaintiff pled, inter alia, that the deed of trust was not timely assigned to a real estate mortgage investment conduit trust, allegedly rendering the assignment void. (*Id*. at p. 814.) *Saterbak* held the plaintiff lacked standing to challenge the assignment, explaining: "The California Supreme Court recently held that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment renders the assignment void. (*Yvanova*, *supra*, 62 Cal.4th at pp. 942–943.) *However, Yvanova's ruling is expressly limited to the post-foreclosure context*. (*Id*. at pp. 934–935 ('narrow question' under review was whether a borrower seeking remedies for *wrongful foreclosure* has standing, not whether a borrower could *preempt* a nonjudicial foreclosure).) *Because Saterbak brings a preforeclosure suit challenging* [*d*]*efendant's ability to foreclose,* Yvanova *does not alter her standing obligations*." (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815, certain italics added.)

In view of the above, we conclude the Garaus cannot maintain a preforeclosure claim for declaratory relief to determine whether Defendants are entitled to proceed with nonjudicial foreclosure. Further, the Garaus have not met their burden to show they are capable of amending their pleading to state a cause of action for declaratory relief. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166 [burden is on plaintiff to show what facts he or she could plead to cure

existing defects in the complaint].) Accordingly, the trial court properly granted judgment on the pleadings on the Garaus' cause of action for declaratory relief.

3. *The Garaus' remaining arguments fail.*

a. *No merit to the Garaus' contention the trial court prejudicially erred in entering judgment on the pleadings after a demurrer to the declaratory relief claim already had been overruled.*

The Garaus argue it was prejudicial error to enter judgment on the pleadings on an untimely motion, especially after a demurrer to the same cause of action for declaratory relief already had been overruled on the same grounds. As explained, the argument is meritless.

First, the Garaus assert the motions for judgment on the pleadings were untimely due to their proximity to the date set for trial. The pertinent statute, section 438, states in relevant part at subdivision (e): "No motion may be made pursuant to this section . . . within 30 days of the date the action is initially set for trial . . . *unless the court otherwise permits*." (Italics added.) Here, the trial court otherwise permitted. It set a hearing on its own motion, as it was authorized to do (§ 438, subd. (b)(2)), and also gave Defendants the opportunity to file their own motions for judgment on the pleadings. Thus, the motions for judgment on the pleadings were timely.

The Garaus also contend Judge Meiers could not properly grant a motion for judgment on the pleadings after Judge Chalfant determined the declaratory relief claim was well pled. Although Judge Chalfant did overrule the demurrer to the declaratory relief claim, his ruling identified a basic defect in the Garaus' pleading. Judge Chalfant stated: "Petitioners are

seeking to bring a preemptive action to determine whether Respondents are entitled to initiate a non-judicial foreclosure, and lack standing to bring such an argument. *The court has already indicated that Petitioners may not seek declaratory relief on Respondents' lack of authority to foreclose*, but may allege non-compliance with foreclosure procedure in a declaratory relief action." (Italics added.) Thus, consistent with Judge Meiers's subsequent ruling, and with this court's conclusion, Judge Chalfant specifically ruled that the Garaus could not maintain a cause of action for declaratory relief based on Defendants' alleged lack of authority to foreclose.

Further, bearing in mind that the failure to state a cause of action is a defect that may be raised at any time (*Bocanegra v. Jakubowski* (2015) 241 Cal.App.4th 848, 855), and that appellate review of the sufficiency of the pleading is de novo (*Marzec*, *supra*, 236 Cal.App.4th at p. 900), the Garaus cannot demonstrate prejudicial error in Judge Meiers's further scrutiny of the pleading after Judge Chalfant overruled the demurrer to the declaratory relief claim.[5]

b. *No error in reassignment of the matter from Judge Chalfant to Judge Meiers*.

The Garaus contend the reassignment of their case from Judge Chalfant in the writs and receivers department to Judge Meiers in an unlimited civil division violated a local rule requiring ancillary declaratory relief claims, when joined with

---

[5] Contrary to the Garaus' assertion, Judge Chalfant's decision to overrule the demurrer to the declaratory relief claim was *not* "a binding final ruling" with respect to the sufficiency of the Garaus' pleading.

writ proceedings, to be assigned to the writs and receivers department. (Super. Ct. L.A. County, Local Rules, rule 2.7(b)(G)(iii) [declaratory relief claim when joined with petition for writ of review, mandate or prohibition to be assigned to writs and receivers department].) The Garaus further contend the reassignment deprived them of "procedural due process."

However, once Judge Chalfant eliminated the Garaus' causes of action for writ of mandate and writ of prohibition on demurrer, leaving only the declaratory relief claim, the reassignment of the case from the writs and receivers department was not inconsistent with the local rule. Further, the reassignment did not, contrary to the Garaus' contention, deprive them of their right to "procedural due process of law" because they had notice and an opportunity to be heard. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279 [essence of procedural due process is notice and an opportunity to respond].)

c. *The Garaus' contention with respect to expungement of the lis pendens is not properly before this court.*

After granting the motions for judgment on the pleadings, the trial court granted a defense motion to expunge the lis pendens that had been recorded on the real property. The Garaus contend the trial court erred in ordering expungement of the lis pendens without making any findings as to the probable validity of their claim. (See § 405.32 [court shall order expungement if it finds the claimant has not established by a preponderance of the evidence the probable validity of the real property claim].)

We do not address this contention because it is not properly before this court. An order granting or denying a motion to expunge a lis pendens is not an appealable order, and a petition

for writ of mandate is the exclusive method of obtaining appellate review of such an order. (§ 405.39; *Woodridge Escondido Property Owners Assn*. v. *Nielsen* (2005) 130 Cal.App.4th 559, 577; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:259.2.)

d. *No merit to contention that denial of all writ relief was prejudicial error*.

The Garaus' final contention is that it was error to deny them any writ relief to prevent foreclosure. However, the Garaus have not shown a basis for allowing their action to proceed.

Judge Chalfant sustained Defendants' demurrer to the mandamus and prohibition claims without leave to amend, and granted the Garaus 30 days leave to amend to allege legal theories *other than* mandamus and prohibition. The Garaus have not shown the trial court erred in sustaining the demurrer to their causes of action under section 1085 (writ of mandate) or section 1102 (writ of prohibition). Further, the Garaus have not demonstrated that leave to amend under some other theory is warranted.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.