Filed 11/6/12 Fonvergne v. First American Loanstar CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ELIZABETH CAROL FONVERGNE, Plaintiff and Appellant, v. FIRST AMERICAN LOANSTAR TRUSTEE SERVICES et al., Defendants and Respondents.	B230793 (Los Angeles County Super. Ct. No. BC423257)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael C. Solner, Judge. Judgment reversed in part and affirmed in part.

Elizabeth Carol Fonvergne, in pro. per., for Plaintiff and Appellant.

Law Offices of Glenn H. Wechsler and Glenn H. Wechsler for Defendant and Respondent First American Trustee Servicing Solutions, LLC.

Litchfield Cavo, Edward D. Vaisbort, Melinda W. Ebelhar and G. David Rubin for Defendant and Respondent Wells Fargo Bank, National Association.

Appellant Elizabeth Carol Fonvergne, appearing in propria persona, appeals from the judgment of dismissal entered in favor of First American Loanstar Trustee Services, now known as First American Trustee Servicing Solutions, LLC (First American), and Wells Fargo Bank, National Association (Wells Fargo)[1] after respondents successfully filed demurrers to her verified amended complaint to quiet title on her Woodland Hills residence (the property). We reverse only as to Wells Fargo because Fonvergne made a showing during oral argument at the Court of Appeal that there is a reasonable possibility she can amend.

FACTUAL AND PROCEDURAL HISTORY[2]

1. *Demurrer to Verified Complaint (First American)*

Two days before the property was sold at a trustee's sale, Fonvergne filed a verified complaint against First American, the foreclosure trustee, to quiet title. Fonvergne alleged she was the owner of the property. First American allegedly claimed "an interest" in the property based on various recorded instruments. First American's claim was "without right whatsoever."

In connection with filing the demurrer, First American sought judicial notice of recorded documents related to the property.[3] Fonvergne and her spouse executed and tendered a deed of trust recorded on October 31, 2005 as security for a loan of $508,000

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[1] The verified amended complaint names "Wells Fargo Home Mortgage, Inc." and "Wells Fargo Bank, National Association," which have now merged into Wells Fargo Bank, National Association.

[2] For purposes of demurrer, we recite only the facts alleged in the complaint and those upon which we may take judicial notice. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) The court may take judicial notice of the "fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity." (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.)

[3] Wells Fargo also requested judicial notice of these recorded documents in its demurrer to the verified amended complaint.

for the purchase of the property. The deed of trust indicates that Fonvergne and her spouse were the borrowers, Sprint Funding Corporation was the lender and beneficiary, and Security Union Title Insurance was the original trustee. A notice of default was recorded by First American, as the agent of the current beneficiary Wells Fargo, on March 30, 2009, indicating a deficiency of $40,879.14 as of March 26, 2009. On May 12, 2009, in a duly recorded substitution of trustee, First American became the successor trustee under the deed of trust. A notice of trustee's sale was recorded on July 1, 2009, and the property was sold at a trustee's sale on October 8, 2009 to U.S. Bank. A trustee's deed upon sale naming First American as the trustee was recorded on October 14, 2009 in favor of U.S. Bank.

First American's demurrer on the ground that it had no interest in the property was sustained with leave to amend.

2. *Demurrers to Verified Amended Complaint (First American and Wells Fargo)*

Fonvergne filed a verified amended complaint to quiet title adding defendant Wells Fargo without any other substantive amendments. The verified amended complaint alleged that First American and Wells Fargo claimed an interest in the property based upon various recorded documents, including the deed of trust, notice of default, and notice of trustee's sale.

First American and Wells Fargo filed demurrers challenging the sufficiency of the allegations to quiet title. First American contended that it had no interest in the property. First American and Wells Fargo also contended that Fonvergne could not attack the trustee's sale, as she did not tender the amount due to cure the default.

In opposition, Fonvergne clarified that her claim to quiet title was premised on notice defects before the trustee's sale, attaching as an exhibit a letter to First American that pointed out these procedural irregularities. She contended that tender is not required when the complaint alleges failure to comply with the statutes governing nonjudicial foreclosure sales.

The trial court sustained the demurrers without leave to amend, dismissed this action, and entered judgment in favor of First American and Wells Fargo. Fonvergne timely appealed from the judgment of dismissal.

DISCUSSION

As noted, Fonvergne's claim to quiet title against First American and Wells Fargo appears to be that (1) there were statutory notice defects before the trustee's sale that render the sale to third-party U.S. Bank (not a named defendant) void; and (2) the trustee's sale should have been halted because Fonvergne filed a lis pendens. Under either of these theories, the allegations in the verified amended complaint do not plead a cause of action to quiet title. Fonvergne, however, presented facts during the Court of Appeal proceedings that showed a reasonable possibility of amending to state a cause of action against Wells Fargo.

1. *Standard of Review*

We review the order sustaining a demurrer de novo to determine whether the verified amended complaint alleges facts sufficient to state a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors*, *supra*, 48 Cal.4th at p. 42.) If the trial court has denied leave to amend, we consider whether that order was an abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) We must consider if there is a reasonable possibility that the defects can be cured by amendment. (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506.) Fonvergne bears the burden of proving that she can amend (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), and she may make this showing for the first time on appeal (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386-1388). But, the assertion of an abstract right to amend does not satisfy this burden, Fonvergne must show in what manner she can amend her complaint and how that amendment will change the legal effect of her pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

2. *The Verified Amended Complaint Fails to State a Cause of Action to Quiet Title*

The elements of an action to quiet title are: (1) "the plaintiff is the owner and in possession of the land," and (2) "the defendant claims an interest therein adverse to [the plaintiff]. [Citations]." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 740-741; see also Code Civ. Proc., § 761.020.) Fonvergne did not plead these elements.

First American, as a trustee of a deed of trust, has no interest in the property. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 677.)

As for Wells Fargo, Fonvergne cannot quiet title against her mortgage lender "without discharging [the mortgage] debt," and she has made no allegation of tender, and does not contend she would do so if given leave to amend. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477-478.)

Thus, the demurrers were properly sustained.

3. *Fonvergne Failed to Meet her Burden in the Trial Court to Show an Amendment Would Cure the Pleading Defects in the Verified Amended Complaint*

Fonvergne does not suggest that she met her burden in the trial court to show there is a reasonable possibility that she can amend to state a cause of action. (*Goodman v. Kennedy*, *supra*, 18 Cal.3d at p. 349.) In her opening brief, Fonvergne abstractly addresses "noncompliance" with the statutory notice requirements but does not specifically identify, what, if any procedural irregularities warrant setting aside the trustee's sale. Thus, we focus on Fonvergne's letter submitted in opposition to the demurrers to determine if she met her burden in the trial court. We conclude that Fonvergne did not show she could amend to allege the trustee's sale is void or voidable, and therefore cannot allege a cause of action to quiet title.

a. *Elements of a Cause of Action to Set Aside Trustee's Sale*

As noted, Fonvergne focuses on notice defects in the trustee's sale. Procedural irregularities in a trustee's sale may be grounds for setting it aside if they are prejudicial to the party challenging the sale. (*Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097-1098.)

In a nonjudicial foreclosure sale, that is, a " ' "trustee's sale," the trustee exercises the power of sale given by the deed of trust.' " (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 440.) " ' "[Civil Code] sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." ' " (*California Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1070; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.) "A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption. [Citation.] [¶] The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. " (*Moeller v. Lien*, *supra*, at p. 831.)

"After a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 103.) The "elements of an equitable cause of action to set aside a trustee's sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Id.* at p. 104.)

1. *Failure to Allege Tender*

Because the action is in equity, a defaulted borrower who seeks to set aside a trustee's sale must tender any amounts due under the deed of trust. (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877-878 (*Dimock*); *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.) " 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any

irregularities in the sale did not result in damages to the [borrower].' [Citation.]" (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at p. 112.)

Fonvergne contends, however, that she is excused from the tender requirement "when the challenge is to the procedures used to conduct the sale." Fonvergne supports this contention by citing *MCA, Inc. v. Universal Diversified Enterprises Corp.* (1972) 27 Cal.App.3d 170, and quoting a paragraph addressing unlawful detainer proceedings. (*Id*. at p. 176.) Matters affecting defects in title are not properly raised in a summary proceeding for possession. (*Ibid*.)[4]

There are, however, exceptions to the tender requirement. (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at pp. 112-113; *Dimock, supra*, 81 Cal.App.4th at pp. 876-877; *Little v.CFS Service Corp*. (1987) 188 Cal.App.3d 1354, 1360-1362.) Although not stated, Fonvergne appears to rely on the exception that a trustor is not required to rely on equity to attack the sale when the trustee's deed is void on its face. (*Dimock, supra*, at p. 878.)

In *Dimock, supra*, 81 Cal.App.4th 868, the trustee's sale was void because it was conducted by the original trustee, but the original trustee had been substituted with a new trustee before the sale. (*Id*. at p. 874.) Recording of the substitution of the trustee was required by law to render it effective. (*Id*. at pp. 874-875.) Therefore, on the face of the recorded documents, the original trustee had been replaced and no longer had the power to conduct the trustee's sale. (*Id.* at pp. 875-876.) For this reason, the sale was void as opposed to merely voidable, the presumption of the validity of the trustee's sale did not apply, and the plaintiff was not required to tender any amount owing under the deed of trust to obtain relief. (*Id*. at pp. 877-878; see also *Little v. CFS Service Corp., supra,*

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[4] Fonvergne's remaining cases do not advance her position; the cases address the tender requirement. (*Abdallah v. United Savings Bank, supra*, 43 Cal.App.4th at p. 1109 [tender required in order to maintain any cause of action for irregularity in the sale procedure]; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 577, 579-580 [junior lienor must tender full amount owing on the senior obligation to set aside trustee's sale]; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 116-117 [tender required when action to set aside trustee's sale is defect in notice of sale].)

188 Cal.App.3d at pp. 1361-1362 [trustee's sale void because trustor, junior lienor, and judgment creditor did not receive notice of sale].)

There are no facts alleged in this case to suggest the trustee's deed is void on the face of the recorded documents, or that Fonvergne did not receive notice of default or notice of sale. Rather, Fonvergne instead focuses on the content of the notice of default and notice of sale. Fonvergne objects to the authority of First American to record a notice of default before it was substituted as a trustee. But, the notice of default states First American was acting as the beneficiary's agent. A notice of default may be recorded by a "trustee, mortgagee, or beneficiary, or any of their authorized agents." (Civ. Code, § 2924, subd. (a)(1).) Fonvergne also appears to question Wells Fargo's status as the current beneficiary. The lender readily could have assigned the note to Wells Fargo in an unrecorded document that was not disclosed to Fonvergne.[5] (*Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 272.) To state a claim, Fonvergne must not only allege that the assignment was invalid, but also that Wells Fargo did not receive an assignment of the debt in any other manner. (*Ibid.*) There is no such allegation. Moreover, where a deed of trust is involved, the trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest has been recorded. (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 332-333, 336-337.) Thus, because this exception to the tender requirement does not apply, and Fonvergne identified no other applicable exception, she had to allege tender to state a cause of action to set aside the trustee's sale.

2. *Failure to Allege Prejudice*

As previously stated, Fonvergne also had to allege prejudice. (*Lo v. Jensen, supra,* 88 Cal.App.4th at pp. 1097-1098.) Fonvergne has failed to allege prejudice from any

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[5] The deed of trust states: "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument . . . ."

procedural irregularities she identified in opposition to the demurrer.[6] Fonvergne effectively concedes that she and her spouse were in default. She does not state the assignment to Wells Fargo interfered with their payment obligations, the original lender would have refrained from foreclosure, or the address of Wells Fargo's agent in the notice of default prevented her from making payments to cure the default. She also does not state how any of the other procedural irregularities that she has identified in the notice of default and the notice of sale prevented her from taking steps to stop foreclosure. (See *Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 272.) Thus, Fonvergne has not shown she can plead the elements to set aside the trustee's sale.

b. *Effect of Lis Pendens*

Fonvergne also appears to contend that the filing of a lis pendens should have halted the trustee's sale and "it was error for the trial court to consider anything that happened after the date the [verified] complaint and lis pendens were filed and recorded respectively." A lis pendens is "void and invalid" as to any adverse party or owner of record unless the statutory filing and service requirements are met. (Code Civ. Proc., § 405.20-405.24.) Among the requirements are "[i]mmediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending." (Code Civ. Proc., § 405.22.) The clerk's transcript presented on appeal does not contain a copy of the recorded lis pendens.

Even if recorded and filed with the court, a lis pendens does not prevent the transfer of property after the date of recording the lis pendens. A lis pendens provides constructive notice of the litigation, such that any judgment later obtained in the action

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[6] Aside from raising the assignment of the note to Wells Fargo, Fonvergne's letter questions the authority and titles of the individuals signing the notice of default and notice of sale, and finds fault with the following: (1) the failure of the notice of default to list the book and page number of the recorded deed; (2) the failure of the notice of default to describe the property; and (3) the failure of the notice of sale to include the zip code where the sale would occur. Fonvergne also claims that the notice of default declaration lacked specificity, but Civil Code section 2923.5 does not provide relief after a sale has taken place (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214, 223-224, 231-232), and Fonvergne does not allege failure to comply with the statute.

relates back to the recording of the lis pendens. (*Bishop Creek Lodge v. Scira* (1996) 46 Cal.App.4th 1721, 1733.) A lis pendens clouds title until the litigation is resolved or the lis pendens is expunged and any party acquiring an interest in the property after the action is filed will be bound by the judgment. (*Arrow Sand & Gravel, Inc. v. Superior Court* (1985) 38 Cal.3d 884, 888.)

Having concluded that Fonvergne did not meet her burden to show how she could amend the verified amended complaint to state a cause of action to set aside the trustee's sale, she cannot allege facts with regard to her interest in the property to state a cause of action for quiet title. The trial court did not abuse its discretion in denying leave to amend.

4. *Fonvergne Presented Facts During the Court of Appeal Proceedings that Showed the Reasonable Possibility of Amendment*

Fonvergne, however, has a right to make the showing that she can amend her complaint for the first time on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d 1386-1388.) To satisfy that burden on appeal, a plaintiff must show in what manner she can amend and how that amendment will change the legal effect of her pleading. (*Goodman v. Kennedy*, *supra*, 18 Cal.3d at p. 349.)

Fonvergne represented to us at oral argument that, if given an opportunity to do so, she could allege a cause of action based on her efforts to negotiate a loan modification and based on certain misrepresentations made to her by defendant Wells Fargo with respect to such modification. While we express no opinion on her ability to plead such a cause of action, we believe that she should be given the opportunity to attempt to do so. Accordingly, we reverse the trial court's order sustaining without leave to amend Wells Fargo's demurrer to the verified amended complaint.

DISPOSITION

The judgment of dismissal is reversed as to Wells Fargo, and in all other respects is affirmed. No costs are awarded on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.