Filed 3/27/17 Shetty v. Veriprise Processing Solutions CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SATISH SHETTY, Plaintiff and Appellant, v. VERIPRISE PROCESSING SOLUTIONS et al., Defendants and Respondents.	2d Civil No. B267909 (Super. Ct. No. 56-2015-00467724-CU-OR-VTA) (Ventura County)

In this appeal, pro se litigant Satish Shetty continues his pattern of pursuing unmeritorious lawsuits.[1] He purchased real property from a homeowners' association that had foreclosed on a lien for unpaid dues. Two weeks later, the property was

[1] On September 12, 2016, Shetty was declared a vexatious litigant subject to a prefiling order. (*Shetty v. Deutsche Bank National Trust Company* (Superior Court, Los Angeles County, No. BC615847.)

auctioned pursuant to a purchase money deed of trust because the borrowers, who are not parties to this litigation, had defaulted on their loan obligation. Shetty has sued virtually everyone associated with the senior deed of trust.

Shetty asserts that he is a bona fide purchaser (BFP) who possesses "all rights, interest and title to the property." In reality, he purchased property subject to a senior encumbrance. By law, Shetty had constructive knowledge of the trust deed recorded 10 years earlier. Despite the looming trustee's sale, Shetty failed to pay the preexisting debt, and his interest was extinguished. We affirm the trial court's dismissal of Shetty's lawsuit after it sustained demurrers without leave to amend.

FACTS

The facts are derived from Shetty's first amended complaint, the exhibits attached to the pleading, and recorded deeds subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*); *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101 (*Thaler*); *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 803.)

The Dacayanan family purchased property at the Big Sky housing development in Simi Valley (the Property) with a purchase money loan for $629,000 from Shea Mortgage (the Loan). The Loan is secured by a deed of trust on the Property, recorded in December 2005 (the 2005 DOT). The beneficiary of the 2005 DOT is respondent Mortgage Electronic Registration Systems (MERS) "as nominee for Lender and Lender's successors and assigns." The terms of the 2005 DOT allow it and the Loan to be freely sold without notice to the borrower.

In October 2012, MERS assigned the beneficial interest in the Loan and the 2005 DOT to respondent U.S. Bank, as trustee for GSR Mortgage Loan Trust 2006-3F. Another assignment was made in August 2013, by which respondent Bank of America transferred the beneficial interest in the Loan and the 2005 DOT to respondent Nationstar Mortgage.[2] Acting as attorney in fact for U.S. Bank, trustee of the GSR Mortgage Loan Trust 2006-3F, Nationstar substituted in a new trustee, respondent Veriprise Processing Solutions (Veriprise).

The Dacayanans defaulted on the Loan. The recorded January 2015 notice of default attached to Shetty's pleading indicates that the amount of the default was over $144,000, and listed U.S. Bank as the payee for remittances to stop foreclosure. A notice of trustee's sale was recorded in April 2015. U.S. Bank acquired the Property at the trustee's sale on May 22, 2015, for $568,420.39.

Apart from defaulting on the Loan, the Dacayanans also failed to pay dues to the Big Sky Association (the HOA), which recorded a notice of default in November 2013, and a notice of trustee's sale on a delinquent assessment lien in March 2014.

At public auction on April 16, 2014, the HOA successfully bid $8,072.70 on its assessment lien. A trustee's deed recorded in July 2014 transferred the Property to the HOA. By a grant deed recorded May 8, 2015, the HOA transferred its interest in the Property to Shetty. Fourteen days later, the Property was auctioned under the 2005 DOT.

Shetty filed suit against respondents on May 20, 2015. The trial court granted Shetty's application for a lis

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[2] There is an alleged gap, because the record does not show an assignment to Bank of America. (See fn. 5, *post*, at p. 11.)

pendens on the Property in July 2015. Shetty's 94-page first amended complaint alleges causes of action for a judicial determination of the existence of a secured creditor and the validity of any lien; slander of title; cancellation of instruments; quiet title; and declaratory relief.

Respondents demurred. The trial court sustained the demurrers without leave to amend, and granted a motion to expunge the lis pendens. Shetty timely appealed the judgment of dismissal.

DISCUSSION

Appeal and Review

Appeal lies from the judgment of dismissal after demurrers are sustained without leave to amend. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review the pleading de novo to determine if a cause of action has been stated, and we assume the truth of properly pleaded material facts. (*Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The contents of exhibits attached to the complaint take precedence over conflicting facts alleged in the pleading. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56.)

Shetty's Interest is Subject to the 2005 DOT

California follows a "first in time, first in right" system of lien priorities, so that a real property conveyance recorded first has priority over any later-recorded conveyance. (Civ. Code, § 2897; *Thaler, supra,* 80 Cal.App.4th at p. 1099.)[3] A purchase money deed of trust, in particular, has priority over any

[3] Unlabeled statutory references are to the Civil Code.

later attempts to insert a lien ahead of the lender's right to security for the balance of the purchase price. (§ 2898, subd. (a); *Powell v. Goldsmith* (1984) 152 Cal.App.3d 746, 752.)

Homeowner association assessment liens follow the same priority system. An HOA lien is prior only to liens "recorded subsequent to the notice of delinquent assessment." (§ 5680.) A deed of trust recorded *before* the assessment lien has priority. "As a result, [plaintiff], who purchased pursuant to the Assessment Lien, bought the property subject to [defendant lender's] deed of trust, as a matter of law." (*Thaler, supra,* 80 Cal.App.4th at p. 1101.)

As the successful bidder at the nonjudicial foreclosure sale on its assessment lien, the HOA "[took] title to the property subject to any senior encumbrances." (CEB, Advising California Common Interest Communities, § 5.56 (2016).) The 2005 DOT expressly provides that if any interest in the Property is sold or transferred, the lender may require immediate full repayment of the Loan.

Shetty agrees that the 2005 DOT existed on the Property when he purchased it from the HOA. Like the HOA, Shetty had to pay the senior encumbrance, or face foreclosure. Though the HOA transferred its interest in the Property to Shetty via grant deed, the grant deed did not give Shetty free and clear title to the Property. "A grant deed has no implied covenant that the property was free of encumbrances at the time the grantor acquired title[.]" (3 Miller & Starr, Cal. Real Estate, § 8:7 (4th ed. 2016).)

Shetty's pleading describes him as "a bona-fide purchaser for value of the subject property." As purchaser of the HOA's interest, Shetty could only obtain BFP status "by

(1) acquiring the interest as a bona fide purchaser for valuable consideration with neither actual knowledge nor *constructive notice* of (2) a *previously created* interest and (3) 'first duly record[ing]' the interest, i.e., recording before the previously created interest is recorded. [Citations.]" (*First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1313.)

A recorded conveyance of real property "is constructive notice of the contents thereof to subsequent purchasers[.]" (§ 1213.) Shetty purchased the HOA's interest with constructive notice of the recorded 2005 DOT. As a result, Shetty cannot claim BFP status. (See *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 364 [the absence of actual or constructive notice of another's rights "'is an essential requirement [so] that one may be regarded as a bona fide purchaser'"].)

Shetty's situation is analogous to that of the junior lien purchaser in *Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411. In that case, a property owner obtained two loans secured by two trust deeds; the senior deed secured a purchase money loan. The borrower defaulted on both obligations. After conducting due diligence and concluding, incorrectly, that there was no senior lien, investor Ostayan successfully bid on the second trust deed at auction, without paying off the loan secured by the first trust deed. The lender then foreclosed on the first trust deed, and sold the property to a third party. Ostayan was "shocked" to learn that his purchase of the property was subject to the first trust deed, and he demanded that his money be refunded. His claims were rejected. (*Id.* at pp. 1413-1416.)

As the purchaser of a junior interest in real property, Shetty, like the plaintiff in *Ostayan*, did not obtain an exclusive interest in the Property and had to pay the senior encumbrance in order to keep the property. (*Ostayan, supra,* 77 Cal.App.4th at p. 1422.) Like Ostayan, Shetty failed to pay the debt, and made a "legal miscalculation" in thinking that he could purchase the Property free and clear of the sizable debt owed on the senior encumbrance. (*Ibid.*) Shetty was aware of his junior status: on May 8, 2015, the day that the HOA deeded him its interest in the Property, Shetty recorded a "Request for Notice" of default or sale arising from the 2005 DOT.

Shetty Lacks Standing to Challenge Transfers of the 2005 DOT

Shetty does not contend that the 2005 DOT was not "recorded as prescribed by law" (§ 1213), giving it priority over the later recorded HOA lien. Instead, he challenges the transfer of the senior lien, which occurred years before his 2015 purchase of the HOA's interest. He asserts that respondents lacked authority to foreclose because their transfers are bogus.

Shetty has no standing to challenge the transfers. "Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. [Citations.]" (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813-814.) Lack of standing may be raised by demurrer. (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.)

"California law does not give a party personal standing to assert rights or interests belonging solely to others. [Citations & fn. omitted.]" (*Yvanova, supra,* 62 Cal.4th at p. 936.)

Tellingly, Shetty writes that *Yvanova* "held that a *borrower* had standing to sue for wrongful foreclosure on the grounds that [the] assignment of [the] note and deed of trust was void." (Italics added.) (See *Yvanova, supra,* at pp. 928, 935 [posing the issue "does the borrower have standing to challenge an assignment" of a note secured by a deed of trust].) Shetty is not "the borrower," is not suing for wrongful foreclosure, and is not a third party beneficiary of the Loan. (*Martin v. Bridgeport Community Assn., Inc., supra,* 173 Cal.App.4th at p. 1034 [to establish standing, plaintiff must be a party to an agreement or a third party beneficiary of a contract made for his benefit].)

As a stranger to the Loan, Shetty has no standing to assert rights that belong to the Dacayanans, as the borrowers, regarding transfers of the Loan and the 2005 DOT securing the Loan. "A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests[.]" (*Yvanova, supra,* 62 Cal.4th at p. 937.) The borrower is obligated to pay the debt or lose the security. (*Id.* at pp. 937-938.) Here, however, standing to sue is lacking because the sole object is to settle the rights of a third person who is not a party to the deed of trust. (*Id*. at p. 937.)

Shetty cites no authority for his position that a third party—someone who did not sign the purchase money loan or the deed of trust securing the loan—has legal standing to challenge transfers or assignments of the deed of trust. He relies upon cases that give standing to "borrowers," but do not give standing to strangers to the loan transaction.

Shetty Has Not Properly Alleged
That the Transfers Were Void

Even assuming that Shetty has standing, "as the plaintiff challenging a nonjudicial foreclosure, [he] has the burden to prove it was wrongful." (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1260.) Respondents have no duty to prove the validity of the assignments or their right to foreclose. (*Ibid.*)

A borrower may challenge the validity of a loan assignment that is "void and not merely voidable at the behest of the parties to the assignment[.]" (*Yvanova, supra,* 62 Cal.4th at p. 923.) Contracts are "void" if they violate the law or public policy and cannot be ratified (*id.* at p. 929; *Colby v. Title Ins. & Trust Co.* (1911) 160 Cal. 632, 644-646); or if the object is unlawful, impossible or unascertainable (§ 1598); or if there is fraud in the inception, so that the promisor does not know what he is signing (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921); or if the contract is made with the intent to defraud subsequent purchasers (§ 1227). A "robo-signed" assignment is merely voidable at the option of the injured bank, not void *ab initio*. (*Mendoza v. JPMorgan Chase Bank, supra,* 6 Cal.App.5th at p. 819.)

Shetty generally alleges that he investigated his title and researched public records, and "made a determination that defendants herein are third parties to the subject property and any debt obligations related to the subject property." He describes each recorded assignment of the 2005 DOT as "a false and forged instrument, executed and recorded without authority." Shetty does not allege that the assignments violate

the law or public policy and cannot be ratified; or have an impossible or unascertainable object; or were made with the intent to defraud. At best, the assignments are voidable at the behest of the various parties to the assignments. Respondents do not—individually or collectively—dispute the validity of the foreclosure sale. (See *Yhudai v. IMPAC Funding Corp., supra,* 1 Cal.App.5th at p. 1257 [where an assignment is merely voidable, power to ratify or void lies solely with the parties to the assignment].)

Shetty's Claims Are Insufficient

1. Request for Judicial Determination

In his first cause of action, "[p]laintiff seeks a judicial determination of the identity of [the] true and correct creditor (if any), [the] extent, validity, amount of a lien and secured status of the defendants failing which plaintiff will be subject to unlawful foreclosure action by the defendants and will improperly be forced to pay the defendants to preserve his interest in this property and be subject to duplicate claims to a true and lawful creditor claiming an interest in plaintiff's property."[4]

The claim is moot, because the foreclosure sale that Shetty fears "will" occur has already taken place. He purchased the Property subject to the debt secured by the 2005 DOT, which was, at the time, in default. (*Thaler, supra,* 80 Cal.App.4th at p.

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[4] Shetty posits that the lender, Shea Mortgage, still holds the right to declare a default and foreclose under the 2005 DOT. He did not name Shea as a defendant/creditor in his request to have the court determine "the true and correct creditor." It appears from the face of the pleading that Shetty failed to join Shea as an indispensable party. (Code Civ. Proc., § 389, subds. (a), (c).)

1101.) He does not challenge the validity of the 2005 DOT. His junior interest was extinguished in the foreclosure sale.

The beneficiary named in the 2005 DOT, MERS, assigned the Dacayanans' debt to U.S. Bank in 2012. "The courts in California have universally held that MERS, as nominee beneficiary, has the power to assign its interest under a [deed of trust]," a power that is granted when the borrower signs the trust deed. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1498 (disapproved on other grounds in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13.)[5] When Nationstar brought in Veriprise, it did so as attorney-in-fact for U.S. Bank. Veriprise's 2015 Notice of Default listed U.S. Bank as the payee for remittances to stop foreclosure. U.S. Bank was the high bidder at the auction. If Shetty had participated in the auction and outbid U.S. Bank, he could at that point have claimed BFP status. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238 [a nonjudicial foreclosure sale is a "final adjudication" of the debt].) Despite his criticisms of respondents, Shetty has not alleged sufficient facts to overcome the presumption that

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[5] MERS is a national electronic registry that tracks transfers of ownership interests and servicing rights in mortgage loans. When MERS is listed as the beneficiary of a trust deed, lenders can sell their interests without recording the transaction in public records. "'A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.' [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151; *Yvanova, supra,* 62 Cal.4th at p. 931, fn. 7.) Shetty's pleading acknowledges that MERS remains the nominal beneficiary no matter how many times a particular loan is traded among MERS members.

Veriprise was authorized to conduct the foreclosure sale under a recorded substitution of trustee. (§ 2934a, subd. (d); *Rossberg v. Bank of America* (2013) 219 Cal.App.4th 1481, 1493; *Ram v. OneWest Bank* (2015) 234 Cal.App.4th 1, 14 [a nonjudicial foreclosure is presumed to have been properly conducted].)

2. Slander of Title

The elements of slander of title are a false publication, made without privilege or justification, which causes direct and immediate pecuniary loss. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1051.) Shetty alleges that Veriprise and U.S. Bank slandered his title by foreclosing on the Property without authority, so that the recorded trustee's deed upon sale contains untrue information.

A plaintiff like Shetty, who does not contest the validity of the underlying debt, lacks standing to challenge the validity of allegedly "robo-signed" assignments in a slander of title claim. (*Pratap v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 63 F.Supp.3d 1101, 1109.) The assignments are voidable at the behest of the affected lenders, not void *ab initio*. (*Id.* at pp. 1109-1110.) The trustee's performance of statutory nonjudicial foreclosure procedures is privileged pursuant to section 47, and requires a showing of malice to succeed. (§ 2924, subd. (d); *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333-344.) Other than a conclusory allegation that Veriprise "acted with ill will" Shetty has not alleged facts showing malice.

3. Cancellation and Expungement of Instruments

Shetty seeks cancellation of the substitution of trustee, the assignments of the 2005 DOT, the notice of default and the notice of trustee's sale. He does not seek to cancel the 2005 DOT. "A written instrument, in respect to which there is a

reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (§ 3412.)

To state a cause of action under section 3412, Shetty must allege "serious injury." The problem is, even if an assignment of the 2005 DOT or a substitution of trustee was voidable, and assuming that Shetty has standing to challenge the transfer, Shetty's obligation to repay the encumbrance is unchanged. He does not allege that the Dacayanans repaid the Loan in full, and he cannot claim "serious injury" after purchasing property subject to a prior encumbrance. (*Saterbak v. JPMorgan Chase Bank, N.A., supra,* 245 Cal.App.4th at p. 819.) Shetty does not allege that he tendered the debt, a prerequisite to the cancellation of a written instrument that is merely voidable at the behest of the parties to the assignment. (*Ibid.*)

The 2005 DOT has now been extinguished by the foreclosure sale, so its assignment has no remaining legal significance. The exhibits attached to Shetty's pleading show that the original beneficiary, MERS, assigned the 2005 DOT to U.S. Bank, as permitted by the instrument itself; Veriprise recorded the notice of default on behalf of U.S. Bank; U.S. Bank purchased the Property at the trustee's sale. As the assignee of the original lender, U.S. Bank acted within its rights. Shetty has not alleged facts demonstrating the actual invalidity of the instruments he wishes to cancel. (*Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 833-835.)

4. Quiet Title

To quiet title, the complaint must describe (1) the property, (2) the basis of plaintiff's title, (3) the adverse claims to

plaintiff's title, (4) the date as of which the determination is sought, and (5) a prayer for giving superior title to plaintiff against the adverse claims. (Code Civ. Proc., § 761.020.) Shetty pits his alleged sole ownership of the Property as a BFP, arising from the HOA assessment lien, against respondents, who purportedly have no interest in the Property.

As discussed above, Shetty cannot claim title as a BFP, because he purchased the Property with actual and constructive knowledge of the 2005 DOT. He does not challenge the validity of the 2005 DOT, has not articulated why his claim is superior to the senior encumbrance, and lacks standing to challenge transfers of the 2005 DOT.

5. Declaratory Relief

Shetty's final claim simply reiterates that a controversy exists because respondents seek to foreclose on the 2005 DOT, he contests the validity of their interest in the Property, and he believes that his title is senior to any liens on the Property. As we have discussed above, none of his claims survive scrutiny.

Leave to Amend

A plaintiff may request an amendment on appeal. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.) The burden of demonstrating a reasonable possibility that defects can be cured "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Here, Shetty did not carry his burden by spelling out in detail in his brief how an amendment could cure a defect or change the legal effect of the pleading. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1467-1468; *People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.) Instead, he repeats the

allegations in his current pleading. The trial court did not abuse its discretion by sustaining respondents' demurrers without leave to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal from appellant Shetty.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Rocky J. Baio, Judge
Superior Court County of Ventura

Satish Shetty, in pro. per., for Plaintiff and Appellant.

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