Filed 3/18/15 Lukashin v. Deutsche Bank National Trust 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

IRINA LUKASHIN, etc., et al., Plaintiffs and Appellants, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, Defendant and Respondent.	B251319 (Los Angeles County Super. Ct. No. BC492654)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Law Offices of Russell F. Behjatnia and Russell F. Behjatnia for Plaintiffs and Appellants.

Wright, Finlay & Zak, T. Robert Finlay and Charles C. McKenna for Defendant and Respondent.

INTRODUCTION

After defendant and respondent Deutsche Bank National Trust Company foreclosed on property owned by plaintiffs and appellants Irina Lukashin "and/or" the Goldenberg Family Trust, by and through its trustee, Elizabeth Goldenberg, plaintiffs sued Deutsche Bank for, among other things, wrongful foreclosure. The trial court sustained, with leave to amend, Deutsche Bank's demurrer to the complaint. When plaintiffs failed to amend the complaint, the court dismissed it. Plaintiffs now appeal. We affirm the judgment.

BACKGROUND

I. The Property and the bankruptcy court proceedings.

On November 17, 2006, Money Warehouse, Inc., loaned $1,680,000 to Lukashin. As security for the loan, Lukashin executed a deed of trust on property located on Grand View Drive in Los Angeles (the Property) in Money Warehouse's favor. Money Warehouse assigned the note and deed of trust to Deutsche Bank.[1]

Lukashin defaulted on the note in 2008.[2]

In 2010, Lukashin executed a deed of trust and assignment of rents, secured by the Property, in favor of Garegin Papazov.[3] The deed of trust and assignment of rents was recorded on July 13, 2010. The next day, July 14, Papazov filed a Chapter 7 bankruptcy petition and listed the note on his Schedule B.[4]

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[1] The assignment was recorded in the Los Angeles County Recorder's Office on July 8, 2010. American Home Mortgage Servicing, Inc., acted as Deutsche Bank's servicer of the assignment.

[2] A notice of default and election to sell were recorded on September 2, 2008. Notices of trustee's sale were recorded in December 2008 and in January 2010.

[3] We discuss *post*, Deutsche Bank's assertion that Lukashin had no right to use the Property as security because by the time Papazov loaned her money in 2010, Lukashin had, in 2008, quitclaimed the Property to the Goldenberg Family Trust.

[4] Schedule B refers to a "Real Estate Promissory Note" in the amount of $30,000, which is the amount Papazov loaned to Lukashin.

Deutsche Bank moved for relief from the automatic stay in Papazov's bankruptcy. In support of the motion, Paul Lacombe, who was "[e]mployed by Servicing Agent, American Home Mortgage Servicing, Inc., as a Bankruptcy Specialist," submitted a declaration stating that Papazov was the Property's "sole owner" by virtue of a grant deed. The bankruptcy court granted Deutsche Bank's motion for relief from the automatic stay on December 21, 2010, under title 11 of the United States Code section 362(d)(1), (2) and (4). The order allowed Deutsche Bank "to foreclose upon and obtain possession of the Property in accordance with applicable non-bankruptcy law." The order was "binding and effective in any bankruptcy case commenced by or against the Debtor(s) for a period of 180 days from the hearing of the Motion." The order was also "binding and effective in any bankruptcy case commenced by or against any successors, transferees, or assignees" of the debtor for 180 days from the hearing of the Motion. The order was recorded on January 7, 2011.

Less than a week later, Lukashin, on January 11, 2011, filed a Chapter 7 petition in bankruptcy court. When Lukashin failed to appear at a meeting of creditors (11 U.S.C. § 341(a)), her case was dismissed and the automatic stay was vacated on March 29, 2011.

Soon thereafter, on April 7, 2011, a notice of trustee's sale of the Property was recorded. Two weeks later, Lukashin filed, on April 22, a second bankruptcy action, this time a Chapter 13 petition. Deutsche Bank, however, proceeded with its trustee's sale and foreclosed on the Property on April 27, 2011.[5]

II. The superior court proceedings.

On September 24, 2012, "Irina Lukashin, an individual, and Goldenberg Family Trust, by and through its trustee, Elizabeth Goldenberg," filed a complaint in Los Angeles County Superior Court against, among others, Deutsche Bank,[6] for

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[5] The trustee's deed upon sale was recorded on November 29, 2011.

[6] Lukashin also named as defendants Power Default Services, Inc., and Homeward Residential, Inc., formerly known as American Home Mortgage Servicing, Inc. They are not parties to the appeal.

(1) wrongful foreclosure, (2) quiet title, (3) cancellation of instrument, (4) slander of title, (5) fraud/misrepresentation, and (6) injunctive relief. Plaintiffs alleged that defendants "falsely acquired" relief from the automatic stay in Papazov's bankruptcy action. When Lukashin filed her bankruptcy petition on April 22, 2011, defendants fraudulently represented that an " 'automatic stay' had been acquired so they could sell [the Property]." Although Lukashin demanded proof that the automatic stay had been lifted, defendants did not provide proof, and they refused to "cancel and expunge the sale" of the Property.

Soon after filing her complaint, Lukashin recorded a notice of lis pendens, on October 1, 2012, against the Property.

Deutsche Bank demurred to the complaint and moved to expunge the lis pendens.[7] Deutsche Bank conceded that the foreclosure sale "inadvertently" went forward. Nonetheless, the bankruptcy court's order granting relief from the stay in Papazov's bankruptcy action "insulat[ed]" Deutsche Bank from "any conceivable automatic stay violation regarding the Property of [Lukashin's] Second Bankruptcy Action," under title 11 of the United States Code section 362(d)(4). In other words, the stay applied in rem to the Property, not to the debtor. Deutsche Bank also argued that plaintiffs' failure to allege tender of the amount owed on the note and deed of trust precluded the causes of action.

Plaintiffs opposed the demurrer and expungement of the lis pendens. They relied on allegations that Deutsche Bank wrongfully obtained the stay in the Papazov bankruptcy by misrepresenting that Papazov owned the Property. Plaintiffs also argued that the bank had notice of Lukashin's April 22, 2011 bankruptcy filing and that the bank did not obtain valid relief from the automatic stay. Plaintiffs denied "relying on

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[7] Deutsche Bank also requested judicial notice of documents, including ones from the Lukashin and Papazov bankruptcy court proceedings. Lukashin objected to the request. The trial court overruled the objections.

'equitable' princip[le]s"; instead, the foreclosure was void, and therefore they did not have to allege tender.

On June 26, 2013, the trial court sustained the demurrers to all causes of action with 10 days leave to amend. As to the "complaint as a whole," the court found that "there was no violation of [the] automatic stay" and "[n]o bankruptcy proceeding regarding plaintiff Lukashin was in effect at the time of the foreclosure." Tender also had not been sufficiently pled. In connection with the quiet title cause of action, the court found that "[p]laintiff has insufficiently pled her valid interest in the [P]roperty." In ruling on the motion to expunge lis pendens, the court made a similar finding in connection with the fourth and fifth causes of action: "Plaintiff has no interest in the [P]roperty and, therefore, no real property claim." The court expunged the lis pendens and awarded attorney fees to defendants.

That same day, June 26, 2013, the court clerk served by mail the minute order on each party.

Instead of filing an amended complaint, plaintiffs filed, on July 26, 2013, an ex parte application for clarification of the trial court's order and for a stay of the action to permit plaintiffs to seek writ relief. The application repeated plaintiffs' argument that the relief from the stay in the Papazov bankruptcy action was irrelevant to the automatic stay in Lukashin's bankruptcy. Plaintiffs therefore asked the court to exercise its "inherent powers" to "correct" its "errors."[8] The court denied the application.

Defendants then filed, on July 31, 2013, their own ex parte application to dismiss the action and for entry of judgment, based on plaintiffs' failure to file an amended complaint (Code Civ. Proc., § 581, subd. (f)(2); Cal. Rules of Court, rule 3.1320(h)). Plaintiffs argued in opposition that the clerk's service of the minute order did not constitute proper notice. On July 31, 2013, the trial court granted Deutsche Bank's application, issued an order dismissing the complaint, and entered judgment in defendants' favor. Notice of entry of judgment was served by mail that same day.

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[8] Plaintiffs specifically denied seeking reconsideration of the court's order.

DISCUSSION

I. Standard of review and judicial notice.

"[O]ur standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Our review is de novo. (*Zelig*, at p. 1126.)

Generally, we must consider if there is a reasonable probability that pleading defects can be cured by amendment. (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506; Code Civ. Proc., § 452.) But where, as here, the plaintiff is given leave to amend and fails to do so, we strictly construe the complaint and presume it states as strong a case as possible. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091; *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 252.)

Although the standard of review also permits us to consider matters the trial court judicially noticed, including recorded documents and matters that can be deduced from them (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193-194; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265), Deutsche Bank asks us to take judicial notice of documents that do not appear to have been before the trial court.[9] We may take judicial

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[9] Those exhibits are: (1) *In re Garegin Papazov*, BAP No. CC-12-1584-KiC1D, Memorandum Decision of the United States Bankruptcy Appellate Panel of the Ninth Circuit, filed May 30, 2013; (2) Quitclaim Deed recorded July 8, 2008; (3) *In re Garegin Papazov*, Case No. 2:10-bk-38924-RN, United States Bankruptcy Court Order and Notice of Dismissal for Failure to Appear at 341(a) Meeting of Creditors, dated October 18, 2011; (4) *In re Garegin Papazov*, Case No. 2:10-bk-38924-RN, United

notice of court records outside the record on appeal. (Evid. Code, §§ 459, subd. (a) & 452, subd. (d); *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.) But, "a litigant must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before this court. [Citation.]" (*Deveny*, at p. 418.)

Deutsche Bank has not made such a demonstration. Instead, the bank submits, for example, what purports to be a deed, recorded July 8, 2008, quitclaiming property owned by Lukashin, "as her sole and separate property," to the "Goldenberg Family Trust, Elizabeth Goldenberg, trustee." Although Deutsche Bank asserts that the property quitclaimed to the trust is the Property that is the subject of this lawsuit (and plaintiffs appear to agree),[10] exhibit A, which contains the legal description of the property, to the quitclaim deed is missing. Deutsche Bank also asks that we take judicial notice of the truth of factual representations the bankruptcy appellate panel made in a memorandum decision in Papazov's case. We cannot. (*Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th at pp. 264-266.) We therefore decline to take judicial notice of the exhibits in Respondent's Appendix of Exhibits.

II. Plaintiffs fail to provide an adequate record to demonstrate error.

Plaintiffs have not provided on appeal a settled statement of the hearings on the demurrer, motion to expunge lis pendens, and ex parte applications.[11] Where, as here, appellants raise an issue requiring consideration of an oral proceeding, the record on appeal must include a record of those proceedings, in the form of a reporter's transcript or settled or agreed statement. (Cal. Rules of Court, rule 8.120(b); see also *id.*, rules 8.134

States Bankruptcy Court Order Closing Case, dated January 18, 2012; and (5) bankruptcy schedules of Lukashin, entered May 13, 2011.

[10] Plaintiffs state in their Reply Brief: "Appellant, Elizabeth Goldenberg, as trustee, acquired her interest in the [P]roperty by quitclaim deed, recorded on July 8, 2008, which bears the address of the trust."

[11] Based on the trial court's minute orders, it appears that a court reporter was not at the hearings.

& 8.137.) Plaintiffs, as the appellants, had a duty to provide an adequate record to demonstrate error. (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1; *Rossiter v. Benoit* (1979) 88 Cal.App.3d.706, 712.) To the extent the record here precludes an adequate review, we make all reasonable inferences in favor of the judgment. (*Rossiter*, at p. 712.)

The failure to provide a record of the oral proceedings precludes an adequate review because the face of the complaint shows that plaintiffs failed to state facts sufficient to constitute the causes of action (Code Civ. Proc., § 430.10, subd. (e)); namely, that plaintiffs have an ownership interest in the Property. Wrongful foreclosure, for example, requires these allegations: "(1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062.) A quiet title cause of action requires allegations that "the plaintiff is the owner and in possession of the land and that the defendant claims an interest therein adverse to him." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 740-741, citing *Lucas v. Sweet* (1956) 47 Cal.2d 20, 22 & *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 833; see also Code Civ. Proc., § 761.020.) Causes of action for cancellation of instruments, slander of title, and fraud, like any claim, require the plaintiff to be injured. (See generally Civ. Code, § 3412 ["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"]; *La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 472 [the elements of a cause of action for slander of title are (1) a publication, which is (2) *without privilege* or justification, (3) false, and (4) causes pecuniary loss]; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 [the elements of fraud are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity or scienter; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting

damage].)[12] Finally, a lis pendens requires the plaintiff to have a "real property claim." (Code Civ. Proc., § 405.31; *Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647-648.)

The complaint here fails to allege what interest, if any, plaintiffs have in the Property. The complaint caption states the action is brought on behalf of "Irina Lukashin, an individual, and Goldenberg Family Trust, by and through its trustee, Elizabeth Goldenberg" as plaintiffs. The complaint then alleges, for example: "The Order of the Bankruptcy Court[] was predicated on false and perjured information, and clearly did not divest present PLAINTIFF, ELIZABETH GOLDENBERG, as trustee of the GOLDENBERG FAMILY TRUST and/or IRINA LUKASHIN of the benefits of the stay provisions . . ."; "Defendants, and each of them, now make false, erroneous and fallacious claims of some right, title or interest in the [Property], which is rightfully owned by plaintiff TRUSTEE ELIZABETH GOLDENBERG AND/OR IRINA LUKASHIN"; "Plaintiff TRUSTEE ELIZABETH GOLDENBERG AND/OR IRINA LUKASHIN desires that a determination be made that she, and she alone, has good title" to the Property; and "[P]laintiff TRUSTEE ELIZABETH GOLDENBERG . . . AND/OR IRINA LUKASHIN" pray for "a declaration that plaintiff TRUSTEE ELIZABETH GOLDENBERG AND/OR IRINA LUKASHIN has the exclusive right, title and interest" in the Property. These allegations suggest that three parties might have or had an interest in the Property: Elizabeth Goldenberg, the Goldenberg Family Trust, "and/or" Lukashin.

Deutsche Bank alluded to this problem in its demurrer: "The Complaint seems to allege that Plaintiff GOLDENBERG FAMILY TRUST, by and through its trustee, ELIZABETH GOLDENBERG, is a co-owner of the Property, although it is entirely unclear how GOLDENBERG FAMILY TRUST and/or ELIZABETH GOLDENBERG gained any interest in the Property." (Fn. omitted.) Plaintiffs state in their Reply Brief—

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[12] Plaintiffs' sixth cause of action is for "injunctive relief." "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168; see also *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293.)

but not in their complaint—that "Elizabeth Goldenberg, as trustee, acquired her interest in the [P]roperty by quitclaim deed, recorded on July 8, 2008 . . . . "

Although who owned the Property was not the focus of the parties' written motions and oppositions, the trial court appears to have considered this issue. Its minute order states, for example, "[w]ith regard to the demurrer to the complaint as a whole, there was no violation of automatic stay. Argument that the foreclosure was improper is without merit. No bankruptcy proceeding regarding plaintiff Lukashin was in effect at the time of the foreclosure." As to the quiet title cause of action, the court sustained the demurrer because "[p]laintiff has insufficiently pled her valid interest in the [P]roperty." With regard to the lis pendens motion, the court said: "The fifth and fourth causes of action are not real property claims. Plaintiff has no interest in the [P]roperty and, therefore, no real property claim."

Who owned the Property at the relevant times therefore appears to have been considered by the trial court. But, in the absence of a record of the oral proceedings, we cannot ascertain what the court considered and, moreover, whether plaintiffs stated how their complaint could be amended. No error has been demonstrated on this limited record.

The failure to provide an adequate record also precludes adequate review of plaintiffs' alternative contention that judgment was improperly entered because the time allotted to amend the complaint never began to run. The demurrer and motion to expunge the lis pendens were heard on June 26, 2013. Plaintiffs' trial counsel appeared and argued in opposition to the demurrer. The trial court ruled on the demurrer and motion at the hearing but took an attorney fees issue under submission. The court ruled on the submitted issue later that day, and the clerk of the court served the minute order sustaining the demurrer and granting the motion to expunge that same day on both parties' counsel. Plaintiffs never filed an amended complaint.

Plaintiffs argue that they didn't have to: the 10 days (or 15, given service by mail) never began to run because the clerk's service of the minute order did not trigger the time in which they had to file an amended complaint. (Code Civ. Proc., § 472b [time in which

to amend a pleading after a demurrer has been sustained with leave to amend begins to run from service of the notice of the order, unless notice is waived in open court, and the waiver is entered in the minutes].) When a court rules on a submitted matter, the clerk must notify the parties of the ruling, but the notification "constitutes service of notice only if the clerk is required to give notice under Code of Civil Procedure section 664.5." (Cal. Rules of Court, rule 3.1109(a).) Code of Civil Procedure section 664.5 does not directly require a clerk to give notice of orders or rulings on a demurrer.

Code of Civil Procedure section 664.5, subdivision (d), however, provides: "Upon order of the court in any action . . . , the clerk shall mail notice of entry of any judgment or ruling, whether or not appealable." For there to be an "order of the court," there must be "some indication in the record that an order by the court was, in fact, made." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64.) This requirement may be met by an affirmative statement—absent here—in the clerk's notice that it was given "upon order of the court" or "under section 664.5." (*Van Beurden*, at pp. 62-63.)

In the absence of a record of the oral proceedings, we cannot ascertain whether any such order was made. It is possible that the court made such an order or even that plaintiffs were ordered to give notice of the ruling. It was plaintiffs' burden to provide an adequate record on appeal to demonstrate error, and failure to do so precludes adequate review and results in affirmance of the trial court's judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

DISPOSITION

The judgment is affirmed. Deutsche Bank's request for judicial notice is denied. Deutsche Bank is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KITCHING, Acting P. J.

LAVIN, J.*

* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.