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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JPMORGAN CHASE BANK, N.A., Plaintiff and Appellant, v. KIM TREISE MATHIS, Individually and as Personal Representative, etc., Defendant and Appellant.	2d Civil No. B253040 (Super. Ct. No. CV118193) (San Luis Obispo County)

In a probate action, the trial court declared void grant deeds for property on which plaintiff was a lender. Plaintiff was not a party in the probate action. In the instant case, plaintiff brings an action against the estate and its representative to have its trust deed declared valid. In the alternative, plaintiff asked that a lien be placed in the same position as a prior trust deed that was paid with the proceeds of its loan under the doctrine of equitable subrogation. The trial court awarded judgment to the estate and its representative.

We reverse. The prior judgment in the probate action cannot be binding on the plaintiff because plaintiff was not a party to that action. We also decide that the trial court used the wrong criteria in denying equitable subrogation.

FACTS

John Carl Treise (Carl) was the sole owner of a 60-acre parcel of property in San Luis Obispo County. On November 23, 1993, Carl executed and recorded a grant deed conveying the parcel to himself and his wife, Barbara, as joint tenants.

On November 30, 1993, Carl and Barbara executed a note for $135,000 to CenFed Bank (CenFed). The note was secured by a deed of trust on the subject property recorded the same day.

Carl died intestate on August 14, 2002. On September 19, 2002, Barbara executed an affidavit of death of joint tenant. The affidavit was recorded October 2002. Title to the property was now solely in Barbara.

On July 28, 2003, Barbara executed and recorded a grant deed of a one-third interest in the property to Dennis T. Vaca. On September 16, 2003, Barbara and Vaca executed a note for $250,000 in favor of Washington Mutual Bank (WAMU). The note was secured by a deed of trust on the property recorded September 26, 2003. A portion of the proceeds from the loan were used to pay off the $116,183.93 balance on the CenFed loan. The CenFed deed of trust was reconveyed.

On July 20, 2004, Carl's daughter by a prior marriage, Kim Treise Mathis, filed a petition to determine title to real property pursuant to Probate Code[1] section 850. The petition requested cancellation of the grant deeds from Carl to Barbara and from Barbara to Vaca. Mathis alleged undue influence, breach of fiduciary duty, and fraud. The petition named Barbara and Vaca as respondents. WAMU was not named a party.

The probate court declared the grant deeds from Carl to Barbara and from Barbara to Vaca void. Barbara and Vaca appealed. We affirmed in an unpublished opinion (*Mathis v. Triese*, B188201, Nov. 27, 2007.) The opinion

[1] All statutory references are to the Probate Code unless otherwise stated.

affirmed the trial court's finding that Barbara breached her fiduciary responsibility to Carl.

On June 30, 2008, the probate court entered a judgment quieting title in Carl as his sole and separate property. The judgment stated that Barbara and Vaca have no right, title or interest in the subject property. The judgment did not mention the interest of any lender.

From July 2004 Mathis, as the administrator of the estate, made multiple attempts to discuss the loan with WAMU. WAMU received letters of administration and a notice to creditors. WAMU either did not respond to attempts to contact it, or refused to negotiate with Mathis because she was not a party on the loan.

After the recorded quiet title judgment, Mathis obtained a lot split dividing the property into three separate 20-acre parcels and had wells drilled for each parcel. The cost was $55,000. Mathis said that at the time she spent the money she thought WAMU "had gone away never to be heard from again." The final parcel map was recorded in December 2010.

In 2009, WAMU recorded a notice of default on its loan. The Carl's estate's attorney sent letters enclosing the quiet title judgment and demanding the deed of trust be removed as a cloud on title because it was void.

Thereafter, JPMorgan Chase Bank (Chase) as successor-in-interest to WAMU filed the instant action. Chase's first amended complaint sought a declaration that the WAMU deed of trust is a valid and enforceable lien secured by the subject property, or in the alternative, that Chase has an equitable lien with the same priority as the CenFed trust deed as a result of paying off the CenFed note.

After a court trial, the court found for Mathis. The court found that the probate court's decision is law of the case; that Chase's post-trial request to amend the complaint to allege the cancelled deeds were voidable and not void was untimely; that Chase failed to prove it is WAMU's successor-in-interest; that Chase failed to file a timely claim in probate; and that the equities favor Mathis in Chase's

claim of equitable subrogation to the CenFed loan and that the action is barred by laches.

DISCUSSION

I.

Chase contends the trial court erred in applying the doctrine of law of the case. The trial court found that Chase is bound by the probate court's ruling declaring the grant deeds void.

Under the doctrine of law of the case, a principal or rule stated by a reviewing court that is necessary for the court's decision must be applied throughout all later proceedings in the same case. (*Water Replenishment Dist. of So. California v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1071.)

In the probate case, the only matter litigated was the validity of the grant deeds. The case did not concern the validity of the trust deed or Chase's claim to equitable subrogation. In our opinion on appeal of the probate court's order, we stated no rule or principle governing those issues. No such rule or principal was necessary for our decision. The law of the case does not apply.

It is possible the trial court meant to say that the probate court's order is res judicata. The doctrine of res judicata precludes a party or those in privity with a party from relitigating an issue that has been finally decided by a court of competent jurisdiction. (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162.) Any issue necessarily determined in such litigation is conclusively determined as to the parties or those in privity if it is involved in a subsequent lawsuit on a different cause of action. (*Ibid.*)

Here neither WAMU nor Chase were parties in the probate action. In order for a person to be in privity with a party the person's interests must be so similar to a party's interests, that the party was a virtual representative in the earlier action. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150.) Here Chase's and WAMU's interests were adverse to all parties in the probate action. No party was

the virtual representative of WAMU or Chase. For that reason alone res judicata does not apply.

Moreover, the question at issue here was not necessarily determined in the probate action. The probate court did nothing more than cancel the grant deeds. That is not determinative of Chase's interest. Whether Chase's trust deed was affected by cancellation of the grant deeds will depend on whether the grant deeds were void or voidable. That issue was not part of the probate action.

To be effective, a deed must be delivered. (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 291, p. 347.) Delivery is the manifestation of the grantor's intent to make the deed presently operative to convey an interest in property. (*Huth v. Katz* (1947) 30 Cal.2d 605, 608.) A deed that is not delivered is void. (*Reina v. Erassarret* (1949) 90 Cal.App.2d 418, 424-427.) Thus, for example, a deed is void if it is forged or the grantor lacks the mental capacity to make a delivery. (See *Handy v. Shiells* (1987) 190 Cal.App.3d 512, 517 [forged deed a nullity]; *Jones v. Jones* (1960) 183 Cal.App.2d 468, 472 [lack of capacity to form intent to deliver].) A void deed is a nullity and a good faith purchaser or encumbrancer cannot obtain good title under it. (*Trout v. Taylor* (1934) 220 Cal. 652, 656.)

When, however, the grantor intends to deliver the deed, but delivery is procured by some wrongful conduct, such as undue influence or fraud, the deed is not void but voidable. (*Fallon v. Triangle Management Services, Inc.* (1985) 169 Cal.App.3d 1103, 1106.) Until a court declares a voidable deed void, it is fully operative. (*Ibid.*) Thus, the deed cannot be set aside against a bona fide purchaser or encumbrancer. (*Ibid.*)

In this regard, because the grant deeds were recorded they are presumed delivered. (Evid. Code, § 1600, subd. (a).) The presumption is one affecting the burden of proof. (*Id.*, subd. (b).) Thus, Mathis has the burden of proving the deeds are void.

Chase argues that under the undisputed facts, it is entitled to judgment that its trust deed is enforceable. But the facts it cites are from our opinion on appeal of the probate action. For the same reason the judgment of the probate court is not binding on Chase, it is not binding on Mathis in this case. The question whether the grant deeds were void or voidable was never litigated or decided. Mathis, as well as Chase, is entitled to her day in court.

II.

Chase contends the trial court erred in concluding it lacks standing because it failed to prove it succeeded to any interest in WAMU.

But numerous courts have taken judicial notice as a matter not reasonably subject to dispute that on September 25, 2008, the Federal Deposit Insurance Corporation transferred WAMU's assets to Chase. (Evid. Code, § 452, subd. (h)); *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753, fn. 2, 757.) We join them in taking judicial notice.

III.

Chase contends the trial court erred in concluding its action is barred for failure to file a creditor claim in probate.

Chase argues it need not file a creditor claim to enforce a secured interest. Mathis relies on section 9391.

Section 9391 provides, in part: "[T]he holder of a mortgage or other lien on property in the decedent's estate . . . may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate."

Mathis argues Chase did not expressly waive recourse to other property in its complaint. But section 9391 does not require any particular form of express waiver. It is clear from Chase's first amended complaint that it is seeking nothing more than a determination that its deed of trust is valid or that it has an equitable lien on the subject property. Chase is not seeking recourse to any other

property in the estate. That is a sufficient expression of waiver. Moreover, section 9391 does not apply to a nonjudicial foreclosure. (*Cosentino v. Coastal Construction Co.* (1994) 30 Cal.App.4th 1712, 1715.)

In any event, a "claim" is defined as a "demand for payment." (§ 9000, subd. (a).) A "claim does not include a dispute regarding title of a decedent to specific property alleged to be included in the decedent's estate." (*Id.*, subd. (b).) Chase's action makes no demand for payment and concerns title to property in the decedent's estate. The claims statutes do not apply.

IV.

Chase contends the trial court used the wrong legal standard in denying its claim to equitable subrogation. The seminal case on equitable subrogation, as the doctrine applies to trust deeds, is *Simon Newman Co. v. Fink* (1928) 206 Cal. 143. There, the court stated: "'One who advances money to pay off an encumbrance on realty at the instance of either the owner of the property or the holder of the [e]ncumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.' [Citations.]" (*Id.*, at p. 146.)

Here Chase bases its claims to equitable subrogation on the ground that part of the proceeds from its loan were used to pay off the $116,183.93 balance of the prior CenFed loan. The trial court denied Chase's claim on the ground that superior or equal equities of others would be prejudiced.

The court found that the fault was in Barbara and Vaca, not the estate. Thus, the loss should be placed where the course of business with WAMU placed it.

But it is not a question of loss to the estate. Chase seeks an equitable lien only to the extent the estate benefited by having the CenFed loan paid. The equitable lien would place the estate in the same position it would have been in if the WAMU loan not been made. The issue is whether the estate receives a windfall at Chase's expense.

The court found that WAMU benefited because liens arising from Vaca's unpaid child support and Barbara's creditors were paid by the proceeds from the loan, thus assuring WAMU's trust deed had priority over Barbara's and Vaca's other creditors. But Chase is only asking for subrogation for the amounts used to pay the CenFed loan. The CenFed loan was prior to the conveyances to Barbara and Vaca, thus prior to any liens for their debts. Chase only wants to be placed in CenFed's position. That does not prejudice the estate because without WAMU's loan, the estate would be subject to CenFed's trust deed.

The court found WAMU refused to participate in the probate action and ignored Mathis' letters after the probate action because she was not a borrower or the loan. During the long delay between the probate action and this action Mathis spent over $55,000 to improve the property by splitting the parcel into three lots and drilling a well on each lot. But Mathis cites no authority that WAMU had a duty to intervene in the probate action. That action was not determinative of WAMU's interest. Mathis could have joined WAMU as a party in the probate action, but she chose not to. Nor does she cite any authority requiring WAMU to negotiate with her. Moreover, Mathis was aware of the existence of WAMU's trust deed at the time she spent money for the improvements. Her statement that by the time she spent the money she thought WAMU had gone away never to be heard from again, defies reason. Banks do not simply forget about their secured loans. Nor is it clear why the existence of a trust deed would render the improvements less valuable.

The court found that WAMU's lis pendens interfered with the administration of the estate, causing continued expense. Mathis cites no authority

that WAMU is not entitled to a lis pendens. Moreover, Mathis could have saved time and uncertainty had she joined WAMU as a party in the probate action.

The trial court found that WAMU had done nothing to collect the debt from Barbara and Vaca. But it has never been finally adjudicated that the trust deed is void. Foreclosure is the only form of action for enforcing a debt secured by a trust deed. (Code Civ. Proc., § 726, subd. (a).) Thus, unless the trust deed is adjudicated void, Chase cannot sue Barbara and Vaca personally on the debt.

The issue of equitable subrogation here involves a simple question. Carl held the property subject to a CenFed trust deed. Is Carl's estate entitled to benefit by holding the property free of the trust deed at Chase's expense? None of the reasons provided by the trial court for denying Chase equitable subrogation support the court's conclusion. The trial court may reconsider the matter on remand. Of course, should the court determine Chase's trust deed is valid, the question of equitable subrogation will be moot.

Based on the same findings, the trial court determined Chase's action is barred by laches. For the above sated reasons, we conclude laches is not supported by the trial court's findings.

V.

Chase contends the trial court erred in denying its post-trial motion to amend its complaint to conform to proof.

Chase's original complaint alleged a cause of action to quiet title to its trust deed on the ground that Chase is a bona fide encumbrancer. Mathis demurred on the ground that the trial court in the probate action had declared Barbara's and Vaca's grant deeds void.

In the introduction to Chase's opposition to the demurrer, Chase said the complaint seeks nothing more than the amount it paid to discharge the CenFed loan. Nevertheless, in the body of the opposition, Chase argued the judgment of the probate court is not binding on it.

The trial court sustained the demurrer to the quiet title cause of action with leave to amend. The court overruled the demurrer as to the equitable subrogation cause of action.

Chase filed a first amended complaint containing a declaratory relief cause of action, as well as an equitable subrogation cause of action. The declaratory relief cause of action asks the court to declare the WAMU trust deed a valid and enforceable lien. The prayer to the first amended complaint requests the same. Mathis did not demur or move to strike.

Chase raised the issue of the validity of the WAMU trust deed in its trial brief. Mathis objected that she was only ready to proceed on the subrogation claim because Chase conceded in its opposition to the demurrer it is the only issue in the case. The trial court ruled it would not preclude evidence on the validity of the WAMU trust deed, but deferred ruling on waiver until the end of trial.

Chase made a post-trial motion to amend its complaint to conform to proof that its trust deed is valid. The trial court denied the motion. Nevertheless, the trial court discussed the issue of the validity of the trust deed in its statement of decision.

There is a long-standing policy of great liberality in permitting amendments to pleadings at any stage of the proceedings. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1194, pp. 625-626.)

Here, in denying Chase's post-trial motion to amend, the trial court found that waiting to amend after all the evidence was in is prejudicial to Mathis, and that Chase failed to take full advantage of the opportunity to amend at a time that might have allowed Mathis to prepare a response for trial.

But Chase did not wait until after trial to amend its complaint. Whatever concession Chase may have made in the introduction to its opposition to Mathis' demurrer, the trial court allowed Chase leave to amend. Chase responded with a first amended complaint. The first amended complaint both in its allegations and prayer asked the court to declare its deed of trust valid. That should have given

Mathis ample notice to prepare the issue for trial. If any post-trial amendment was needed, the trial court abused its discretion in denying Chase's motion.

VI.

Mathis appeals the trial court's denial of her request for attorney fees. Mathis relies on attorney fee clauses in the CenFed and WAMU trust deeds. She argues she is entitled to fees as the prevailing party. Our reversal renders the argument moot.

The judgment is reversed and remanded for further proceedings consistent with this opinion. Costs are awarded to JPMorgan Chase Bank, N.A.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

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