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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHARON SIMANTOV,

Plaintiff and Appellant,

v.

JP MORGAN CHASE BANK,
N.A. et al.,

Defendant and
Respondent.

B279473

(Los Angeles County
Super. Ct. No. LC100573)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Law Offices of Michael Poole, Michael Poole, for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner, Deborah P. Heald, Richard P. Steelman, Jr., for Defendant and Respondent.

INTRODUCTION

In an effort to postpone a residential property foreclosure, Sharon Simantov (plaintiff) sued JPMorgan Chase Bank, N.A. (Chase) and California Reconveyance Company (CRC) (collectively, defendants), for violations of the Perata Mortgage Relief Act (Civ. Code, § 2923.5 (section 2923.5)) and Business and Professions Code section 17200, as well as for breach of the implied covenant of good faith and fair dealing. The latter two causes of action were dismissed without leave to amend on demurrer. Defendants' motion for summary judgment as to the cause of action based on section 2923.5 was subsequently granted. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

Preliminarily, we note Simantov's opposition to defendants' motion for summary judgment included only his brief declaration under penalty of perjury, a separate statement of undisputed facts based on his declaration, and the declaration of his attorney. The opposition did not include the required separate statement "that responds to each of the material facts contended by the moving party to be undisputed." (Code Civ. Proc., § 437c, subd. (b)(3); Cal. Rules of Court, rule 3.1350(e)(2), (f)(2).)² Accordingly, Simantov is deemed to have admitted all the

¹ Although plaintiff noticed his appeal from the judgment in favor of both defendants, he presented no arguments as to CRC. That entity has not appeared in this court.

² Simantov's "Separate Undisputed Facts in Support of His Opposition to Motion for Summary Judgment" only addressed his proffered seven material facts.

material facts in defendants' separate statement. (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1186, fn. 4.) The undisputed facts include the following:

In December 2005, Simantov obtained a \$499,950 loan from Chase on residential real property located in Los Angeles (the property). The promissory note for the loan was secured by a deed of trust that permitted Chase to sell the property if Simantov fell behind on the payments. Simantov indicated in loan documents the property was his primary residence.

Simantov made no payments on the Chase loan after early 2011. CRC recorded a notice of default on July 1, 2011. The notice of default was not recorded until Chase complied with the requisites of section 2923.5.³ Despite the notice of default, defendants did not proceed with foreclosure.

³ The version of section 2923.5 in effect between January 1, 2010 and December 31, 2012 authorized a lender to file a notice of default on a deed of trust recorded between 2003 and 2007, securing "owner-occupied residential real property containing no more than four dwelling units. For purposes of this subdivision, 'owner-occupied' means that the residence is the principal residence of the borrower as indicated to the lender in loan documents." (§ 2923.5, subd. (i).) The notice of default pursuant to section 2924 did not require actual contact with the borrower so long as the lender exercised due diligence. With several options not applicable here, "due diligence" required the lender to accomplish all of the following: First, send "a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency"; then "attempt to contact the borrower by telephone [at the primary number on file] at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file"; wait at least two weeks after the last

Plaintiff initiated this action on July 16, 2013, and defendants demurred. The first amended complaint followed on November 14, 2013, and defendants again demurred. The parties agree the trial court overruled the demurrer as to Simantov's section 2923.5 cause of action and sustained it without leave to amend as to the two other causes of action.⁴

On May 1, 2014, the parties signed a joint stipulation, which the trial court accepted, to stay the action for 60 days so the parties could "explore the possibility of a loan modification as an alternative to foreclosure and further litigation." The stipulation expressly included plaintiff's agreement that there

telephone call and "then send a certified letter, with return receipt requested." In its communication, the lender must provide "a toll-free telephone number that will provide access to a live representative during business hours" and link on its website's homepage concerning refinancing options to avoid foreclosure. (§ 2923.5, subd. (g).)

⁴ The minutes memorializing the trial court's ruling on the demurrer to the first amended complaint state in part, "After arguments, the Court adopts its tentative as the order of the Court. The ruling is ordered filed and is incorporated herein by reference. The Demurrer is sustained without leave to amend." The attached tentative, however, states the demurrer was overruled as to the Civil Code section 2923.5 and Business and Professions Code section 17200 causes of action and sustained without leave to amend as to the cause of action for breach of the implied covenant of good faith and fair dealing cause of action. The parties have treated the trial court's tentative as the ruling. A handwritten notation on the tentative ruling states, "Sustained w/o leave per oral argument." Simantov did not provide this court with a reporter's transcript of the hearing on the demurrer to the first amended complaint.

was no “guarantee that [he] will be found eligible for or will be offered a loan modification” as well as his waiver of “any and all claims under Section 2923.5 of the California Civil Code.” On the next page, plaintiff’s stipulation confirmed “he will waive any claim under California Civil Code Section 2923.5, regardless of whether he is ultimately found eligible for and/or offered a loan modification.”

Simantov did submit an application for a loan modification during this period. The process took much longer than 60 days. Fairly early into it, however, Simantov advised he was living in Israel, the property had been occupied by a tenant under a five-year lease running from May 2010 to May 2015, and he intended to continue renting the property for at least five more years. The application for a loan modification was ultimately unsuccessful for the surprising reason that Simantov no longer owned the property.

With this significant revelation, formal discovery, requests for admission, and defendants’ motion for summary judgment followed. Defendants’ August 10, 2016 summary judgment motion launched a broad-spectrum attack on plaintiff’s lawsuit, which at that point included only the single cause of action for violation of section 2923.5.

Defendants asserted they complied with section 2923.5, subdivision (g)’s due diligence requirements, so the notice of default was procedurally and legally effective; Simantov had no standing to allege noncompliance with section 2923.5 because he was no longer a “borrower” within the meaning of the Civil Code section 2920.5, subdivision (c)(1) or an owner occupant; the only remedy for a violation of section 2923.5 was to postpone the foreclosure, and Simantov had already achieved that, rendering

the action now moot; if defendants violated section 2923.5, Simantov was not prejudiced. Defendants cited, but did not rely on, Simantov's express waiver in 2014 of the right to proceed with his cause of action under section 2923.5 in exchange for the stay to explore loan modification options.

Defendants' separate statement and supporting evidence included Simantov's verified complaint in a related case against the current record owner of the property, Mega Holding, Group, LLC, and its principal, Danny Siag, as well as a declaration Simantov prepared in that matter. (*Simantov v. Mega Holding, Group, LLC*. (Super. Ct. L.A. Co. 2015, No. LC101516) Simantov contended Mega Holding, Group, LLC, fraudulently obtained title to the property via a quitclaim deed executed on Simantov's behalf by his brother, Alon Simantov, who was acting as his attorney in fact.⁵ As already noted, Simantov did not file the required response to defendants' separate statement of undisputed material facts.

The trial court granted the motion, concluding "for the reasons set forth in the Motion, that there are no triable issues of material fact regarding" plaintiff's section 2923.5 claim. Judgment was entered November 4, 2016. Plaintiff timely appealed.

DISCUSSION

I. Summary Judgment

Summary judgment is proper when the moving party establishes "either (1) one or more elements of the [plaintiff's] cause of action cannot be established, or (2) a complete

⁵ An appeal in that matter is pending. (*Simantov v. Mega Holding, Group, LLC*, B287068.)

affirmative defense to the cause of action exists. (Code Civ. Proc., § 437c, subds. (o)(1), (2), (p)(2).) . . . Once the [moving party] has met its initial burden, the burden shifts to the [opposing party] to produce evidence showing a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) [¶] On appeal from summary judgment, we review the record de novo and must independently determine whether triable issues of material fact exist. [Citations.] We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment.” (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370-371.) On appeal, we concern ourselves with the trial court’s ruling, not its rationale. (*Shephard v. Loyola Marymount Univ.* (2002) 102 Cal.App.4th 837, 842.)

In support of the motion for summary judgment, Chase presented evidence that it fully complied with the version of section 2923.5, subdivision (g) in effect in 2011. Chase’s proof shifted the burden to Simantov to produce evidence raising a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) Simantov failed to do so. As a matter of law, defendants were entitled to judgment in their favor.⁶

⁶ Chase makes much of the fact that Simantov, then living in Israel, was not using the property as his primary residence in 2011 when the notice of default was recorded. Chase presented no evidence that it was aware of that fact when it went through the due diligence procedures set forth in section 2923.5, subdivision (g). The parties agree defendants never made personal contact with Simantov before recording the notice of default. Accordingly, Chase was required to—and did—comply with section 2923.5, subdivision (g).

We observe, however, the result would be no different even if we determined Chase failed to comply with section 2923.5. As

Having concluded Chase complied with section 2923.5, we do not reach Simantov's other contentions concerning summary judgment.

II. Demurrer

Simantov's companion causes of action for violation of Business and Professions Code section 17200 and breach of the covenant of good faith and fair dealing (based on the deed of trust) similarly fail. As pleaded, both these causes of action depended on Chase having violated section 2923.5. With our finding that Chase did not violate section 2923.5, these causes of action cannot be revived. (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 664 [when a grant of summary judgment demonstrates the plaintiff cannot establish an element of a cause of action, any error by the trial court in sustaining a demurrer to a related cause of action containing same element as the summarily adjudicated claim is harmless].)

Simantov has the burden in this court to demonstrate he can amend the complaint to state a cause of action against Chase.

the Court of Appeal recognized in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214, the remedy for a violation of section 2923.5 is "postponement of an impending foreclosure to permit the lender to comply with section 2923.5." The parties stayed this action for almost one year in 2014 so the parties could explore loan modification options. During that process, Chase learned not only that Simantov was no longer the owner in residence, but that he was no longer the owner—period. With this discovery in 2015, section 2923.5 no longer applied to the property. Subdivision (f) of section 2923.5 (eff. 2013 through 2017) provided section 2923.5 applied only to deeds of trust described in Civil Code section 2924.15, i.e., those "secured by owner-occupied residential real property."

Rakestraw v. California Physicians' Service (2000) 81 Cal.App.4th 39 explains what a plaintiff must do: “[P]laintiff may make this showing for the first time on appeal. [Citations.] [¶] To satisfy his burden, . . . plaintiff must clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. . . . [¶] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend.” (*Id.* at pp. 43-44.)

DISPOSITION

The judgment is affirmed as to both defendants. Chase is awarded its costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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