Filed 8/14/13 Williams v. Novastar Home Mortgage CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| ELENORE A. WILLIAMS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>NOVASTAR HOME MORTGAGE, INC., et al.,<br><br>Defendants and Respondents. | B232620<br><br>(Los Angeles County Super. Ct. No. BC 401442) |
| ELENORE A. WILLIAMS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CHICAGO TITLE COMPANY,<br><br>Defendant and Respondent. | B236026<br><br>(Los Angeles County Super. Ct. No. BC 401442) |

APPEAL from judgments of the Superior Court of Los Angeles County, John Shepard Wiley, Judge. Affirmed.

Elenore A. Williams, in pro. per., for Plaintiff and Appellant.

The Dreyfuss Firm and Bruce W. Dannemeyer for Defendant and Respondent NovaStar Home Mortgage, Inc.

McNulty & Saacke and William C. Saacke for Defendants and Respondents Saxon Mortgage Services, Inc., and BNY Mellon Performance & Risk Analytics, Inc.

Garrett & Tully, Ryan C. Squire and Alia S. Haddad for Defendant and Respondent Chicago Title Company.

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Appellant Elenore A. Williams filed her original complaint, in pro. per., on November 6, 2008, against Danny Tartabull, John S. San Nicolas, Theresa San Nicolas, Centurion Capital, LLC and a number of Does. The gravamen of the complaint was that appellant had been fraudulently deprived of her home located at 3974 Dublin Avenue, Los Angeles. Demurrers to this complaint were sustained and six more complaints followed; parties were added along the way.

This opinion addresses three separate appeals that we will refer to by the respondents' names. They are the Chicago Title Company appeal (Chicago Title), the Saxon Mortgage Services, Inc., appeal (Saxon) and the NovaStar Home Mortgage, Inc., appeal (NovaStar). We have consolidated these appeals on our own motion for purposes of oral argument and the opinion and decision.

The Chicago Title appeal, while without merit, is the most substantial. Accordingly, we take it up first and, in doing so, provide the larger background for these three appeals. Discussion of the Saxon and NovaStar appeals follow. We find no merit in any of these three appeals and therefore affirm the judgments.

## THE CHICAGO TITLE APPEAL

Respondent Chicago Title was added as a defendant in the second amended complaint. The trial court sustained Chicago Title's demurrer to the seventh amended complaint without leave to amend. This appeal followed. We affirm.

We note initially that the trial court sustained the demurrer to the seventh amended complaint without leave to amend on September 7, 2011, and that appellant filed her notice of appeal on September 15, 2011. The "order of dismissal" was entered on

December 21, 2011. Rule 8.104(d)(2) of the California Rules of Court empowers us to treat the premature notice of appeal as filed immediately after the entry of judgment, which was December 21, 2011.

## FACTS

### *1. Overview*

Appellant was persuaded by Danny Tartabull to transfer title to her home to John S. San Nicolas, who in turn obtained a mortgage from Centurion Capital Solutions, LLC (Centurion). (According to the later complaints, the actual lender was NovaStar.) Appellant was told that she could buy the property back from John S. San Nicolas and Centurion in 18 months. Appellant now commenced to make monthly payments to Centurion under a lease-option, buy back, program. After two and a half years, the loan went into default and the lender foreclosed.

Chicago Title's role in this was to act as escrow agent in the original transaction between appellant, on the one hand, and John S. San Nicolas and Centurion, on the other. According to appellant's theory of the case, Chicago Title was part of the conspiracy woven by Tartabull, John S. San Nicolas, Centurion and others, who need not be named here to deprive appellant of her home.

What turned out to be decisive for the trial court was that appellant's original complaint alleged that appellant voluntarily transferred title to her property to John S. San Nicolas while the seventh amended complaint alleged that all that appellant agreed to do was to add John S. San Nicolas to the title for purposes of financing. Instead, the papers that were drawn transferred title to John S. San Nicolas and divested appellant of ownership, which is how Chicago Title became allegedly liable as escrow agent. The trial court relied on the "sham pleadings" rule that prevents parties from ignoring allegations of prior pleadings that are fatal to pleadings that are filed later. (E.g., *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 768-769.)

### *2. The Pertinent Allegations of the Original Complaint*

A demurrer admits all material and issuable facts properly pleaded. (*McHugh v. Howard* (1958) 165 Cal.App.2d 169, 174.) The facts surrounding appellant's decision to

convey her home to John S. San Nicolas are set forth unambiguously in the original complaint.

On or about April 25, 2005, appellant met with Tartabull, a Centurion representative, who told her that Centurion could save her home from foreclosure. Tartabull told appellant that Centurion could refinance the home and stop Countywide Mortgage from foreclosing. "Defendant [Tartabull] told plaintiff that to save her home, she would have to transfer the title deed of her home to defendant John S. San-Nicolas & equity buyer [Centurion]. Then the plaintiff was told that her mortgage payments would go down from $3600 per month to $2989 per month in a lease-option buy-back contract."

After stating that appellant was told that she had 18 months to "purchase her home back from [Centurion] and John S. San-Nicolas for the amount of $585,000," the complaint alleges that on "July 8, 2005 Chicago Title closed escrow on plaintiff's property." No other allegations are made about Chicago Title and about the escrow process.

***3. The Pertinent Allegations of the Seventh Amended Complaint***

In this complaint, Tartabull and Centurion appear as brokers and agents of NovaStar, who is also named as a defendant. The lender in this complaint is NovaStar. Appellant is a "co-borrower" of the NovaStar loan. The role of John S. San Nicolas is not entirely clear. He is described as a "straw-buyer" as well as the borrower under the NovaStar loan. However, the complaint also alleges that appellant was told to "add" John S. San Nicolas "to her deed because his strong credit could help Plaintiff get a refinance loan for her home to stop foreclosure. Plaintiff was under duress and did not understand that she was transferring her rights and interest in her property to JOHN S. SAN-NICOLAS." The gist of this seems to be that appellant was told that she and John S. San Nicolas were both on the loan as borrowers but, without knowing what she was doing, she actually transferred her home to John S. San Nicolas.

Appellant started making payments to Theresa San Nicolas, who is married to Tartabull.

This complaint generally alleges that Chicago Title was part of a conspiracy comprised of Tartabull, John and Theresa San Nicolas, and Centurion to defraud home owners of their property. Specifically, the complaint alleges that Amy Ausman, an escrow agent working for Chicago Title, "forged plaintiff's name on escrow documents" and allowed a stranger to the escrow to deposit the down payment, which was returned to that person upon the close of escrow. Ausman is also charged with committing other unspecified fraudulent acts.

**DISCUSSION**

If appellant intended to convey her property to John S. San Nicolas, and Chicago Title as the escrow agent assisted in bringing about that result, Chicago Title has breached no duty it owed appellant. This is why the critical fact, as far as appellant's case against Chicago Title is concerned, is whether appellant intended to convey her home to John S. San Nicolas.

The original complaint leaves no doubt that this is exactly what appellant intended.

"For purposes of a demurrer to an amended pleading an unexplained suppression of the original destructive allegation will not, in the words of Lady MacBeth, wash out the 'damned spot.'" (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1058.) "The court, on demurrer, may examine the original complaint, determine that the purpose of the amendment was not to correct but to avoid the effect of a truthful and damaging allegation, and sustain the demurrer." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 458, pp. 589-590.)

The question is whether appellant could appreciate and understand that selling or transferring her home outright to John S. San Nicolas was different from having John S. San Nicolas cosign on a mortgage loan. The answer is yes, as the critical fact, that appellant intended to and did transfer ownership to John S. San Nicolas, was one that is within the common experience of any homeowner. We do not hold that appellant necessarily had to appreciate all the legal ramifications of the difference between a sale and cosigning a note in order for the above-cited rule to apply. But, appellant, who was

in pro. per. when she filed the original complaint, could have said that all she agreed to do was to have John S. San Nicolas cosign the loan, if that was what occurred.

Appellant contends that the original complaint was unverified and that it was therefore "not evidence." She goes on to claim that the fourth amended complaint, drafted by an attorney, was verified and sets forth that all she intended was to have John S. San Nicolas cosign. This argument boils down to the request that we should ignore the original complaint. However, it has been held that even if the original complaint containing the later-suppressed fact is unverified, the demurrer should be sustained because what matters is that a fact destructive of the claim has been suppressed, not that the original complaint was unverified. (*Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 836.)

Unfortunately for appellant, her argument about the unverified/verified complaints goes too far in that she points out that the attorney she retained to draft the fourth amended complaint explained "the correct order of events," i.e., that John S. San Nicolas was not a buyer but a coborrower. This new theory did not change the operative facts.

Appellant also contends that the trial court erred in ruling that California's "tender rule" bars the cause of action to quiet tile.[1] In the first place, Chicago Title as escrow agent is really not a party to the cause of action to quiet title. This really ends the matter as to Chicago Title. We address the merits of appellant's argument on the tender issue in the Saxon appeal, *post.*

Possibly the most damaging circumstance, in terms of the equities, is that after several attempts appellant's efforts to show that Chicago Title is liable cannot get beyond vague generalities. That the escrow agent "prepared multiple, conflicting closing settlement statements and allowed other fraudulent acts to take place during escrow" says nothing about fraud and deceit. That is, it remains unclear what, if any misrepresentations were made, and whether appellant's reliance thereon was reasonable;

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[1] This rule requires the mortgagor who seeks to set aside an allegedly void foreclosure sale to offer to pay the mortgage. (*Burns v. Hiatt* (1906) 149 Cal. 617, 623.)

in fact, reliance isn't even pleaded. In the same vein, simply stating that an escrow agent forged the plaintiff's name "on escrow documents" tells one nothing in that the effect, if any, of such alleged forgeries remains unknown. The only concrete allegation is that the down payment was allegedly returned but there is no allegation that appellant was unaware of this; in fact, one would think that as the seller she would have been well aware of this and would have been part and parcel of the scheme. In sum, appellant has simply failed to allege facts that would show that Chicago Title defrauded her.

It is not that we fail to appreciate the dire personal crisis that appellant faces. Nonetheless, Chicago Title is not answerable for that crisis.

**DISPOSITION**

The judgment (order) is affirmed.

**THE SAXON APPEAL**

The Saxon appeal involves respondents Saxon and BNY Mellon Performance & Risk Analytics, Inc. (BNY). BNY is a bank that bought the problem loan from NovaStar and Saxon performed foreclosure services for the Dublin Avenue home at BNY's request.

**PROCEDURAL HISTORY**

On April 11, 2011, the trial court heard demurrers brought by BNY and Saxon to appellant's sixth amended complaint. For the reasons set forth in detail in the court's minute order of that day, the court sustained both demurrers without leave to amend. Appellant filed her notice of appeal on April 20, 2011.

On January 22, 2013, we entered an order advising appellant that there was no order of dismissal or judgment as to the order sustaining the demurrers without leave to amend and we gave appellant until March 15, 2013, to augment the record with such an order or judgment.

On March 15, 2013, appellant filed a request to augment the record with an order of dismissal as to BNY and Saxon, entered on August 11, 2011, and with a judgment as to NovaStar that was entered on June 29, 2011. That request is granted and the record is augmented with the aforesaid documents.

## THE TRIAL COURT'S RULINGS

The trial court gave three reasons why it sustained the demurrers without leave to amend. They were that claims of fraud were not specific and factual; that the privilege established by subdivision (d) of Civil Code section 2924 barred the action; and the tender rule.

As to the first ground, the trial court's minute order states: "Williams has not been able to specify who from BNY and Saxon made fraudulent statements to her, what they said, when they said it, how Williams relied on those statements to her detriment, why her reliance was justifiable, and what facts show they made those supposedly fraudulent statements with scienter -- that is, with an evil intention to deceive at the time they spoke. Williams says Saxon and BNY behaved in fraudulent ways, but her pleadings do not set forth the specific facts to back up these general claims. Williams's fraud claims fall flat."

The court ruled that under subdivision (d) of Civil Code section 2924, the various acts undertaken to foreclose were privileged. As an example, this privilege extends to the "mailing, publication, and delivery of notices as required by this section" and to the "[p]erformance of the procedures set forth in this article."

As to the absence of a tender, the court found that appellant was unable to pay the mortgage, that she did not tender any money to bring the loan current and that tender is required in order to ensure that the loan will not go into default again.

## DISCUSSION

Appellant limits herself to the tender issue and ignores the first two reasons the trial court gave for sustaining the demurrers. The failure to make legal argument why the first two grounds were erroneous is a waiver of these issues. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see generally 9 Witkin, Cal. Procedure, *supra*, Appeal, § 701, pp. 769-771.) We adopt the trial court's reasoning as to the first two grounds and hold that they support the order sustaining the demurrers without leave to amend.

Appellant contends that the tender rule should not be applied prior to the foreclosure sale. The rule is that the court will not give relief to the mortgagor, whether by quiet title or ejectment, unless the mortgagor offers to pay the debt, this being an

application of the rule that he who seeks equity must do equity. (*Burns v. Hiatt, supra*, 149 Cal. at p. 623; see generally 4 Witkin, Summary of Cal. Law (10th ed. 2005) Security Transactions in Real Property, § 104, pp. 898-899.) Irrespective of when the foreclosure sale takes place, the point is that it is in this action that appellant is seeking equitable relief and it is therefore now that she must do equity, i.e., make a tender to bring the loan to current.

Appellant's reliance on a federal district court decision that held that the tender rule applies only in cases when the sale has taken place is misplaced. The decisions of lower federal courts are merely persuasive, not binding (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875), and on questions of state law they are certainly not controlling (*Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 Cal. 644, 653). As we have noted, appellant's action seeks equity, and therefore it must do equity; it is immaterial whether the foreclosure has or has not taken place.

The court's ruling on the demurrers was correct.

**DISPOSITION**

The order dismissing Saxon and BNY from the action is affirmed.

**THE NOVASTAR APPEAL**

Appellant contends that summary judgment should not have been granted because whether there was an ostensible agency must be determined, as a matter of law, by the trier of fact. The second reason that it was error to grant summary judgment, according to appellant, is that it has not been shown that Steve Solgelman was not an employee of NovaStar.[2]

NovaStar's motion for summary judgment was very simple. Based on the declaration under penalty of perjury of John Holtman, an officer of NovaStar, the motion averred that Tartabull was not an employee of NovaStar, i.e., it did not provide him with an office, did not set his hours, did not pay him and did not direct his activities. NovaStar

[2] In her reply brief, appellant contends that NovaStar is liable because it approved the loan to John S. San Nicolas. Points raised for the first time in the reply brief will not be considered. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.)

also claimed that the only connection it had with appellant's property was to make a loan to John S. San Nicolas in 2005.[3]

In granting the motion for summary judgment, the trial court also struck from Williams's declaration references to Steve Solgelman on the ground that she lacked personal knowledge and that her assertion about Solgelman lacked a foundation.[4] The trial court found that Williams had not produced any facts to controvert those on which NovaStar relied and that she had not identified any triable issues of material fact.

Returning to Williams's first contention, she offers no authority for the proposition that ostensible agency is, as a matter of law, a question for the trier of fact. There is, of course, no such legal proposition. The issue, as Williams attempted to state it in her complaint, was whether Tartabull was an agent or employee of NovaStar who had participated in the conspiracy against her. The Holtman declaration squarely rebuts this claim and Williams produced no probative evidence that contradicted Holtman's declaration. All she propounded was her own declaration, which quoted Tartabull's hearsay statement that he was a broker for NovaStar.

Be that as it may, we fail to see how a loan made by NovaStar to John S. San Nicolas, whether or not brokered by Tartabull, is in any way actionable by Williams. As the allegations of the original complaint clearly reveal, the sale to John S. San Nicolas was voluntary on her part and was not in any way actionable.

Williams's contention regarding Solgelman lacks any factual foundation. References to Solgelman were struck by the trial court and she does not challenge this ruling, which was appropriate as it was not shown that she had any way of knowing anything about Solgelman. In any event, what was true of Tartabull was also true of Solgelman. Even if they assisted in the sale to John S. San Nicolas, Williams was not harmed by their conduct.

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[3] NovaStar's motion to augment the record with this declaration is granted.

[4] The allegation was that Solgelman was a loan consultant for NovaStar and that he participated in the conspiracy against Williams.

Appellant simply failed to show that there were any triable issues of material fact when it came to her action against NovaStar.

**DISPOSITION**

The judgment (order) is affirmed.

**CONCLUSION**

The judgments dismissing the actions against Chicago Title Company, Saxon Mortgage Services, Inc., BNY Mellon Performance & Risk Analytics, Inc., and NovaStar Home Mortgage, Inc., are affirmed. Respondents are to recover their costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.