Filed 8/29/12 Visconti v. Wells Fargo Bank CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MAHA VISCONTI, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	B236278 (Los Angeles County Super. Ct. No. BC318877)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

John C. Torjesen for Plaintiff and Appellant.

Anderson, McPharlin & Conners, Michael S. Robinson and Bridget M. Moss for Defendant and Respondent.

Plaintiff and appellant Maha Visconti (plaintiff) appeals from a judgment entered after the trial court sustained without leave to amend defendant and respondent Wells Fargo Bank, N.A.'s (the bank) demurrer to plaintiff's second amended complaint.

We affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

Ownership of the Property

In 1999, Unity America Fund (Unity), a corporation owned and operated by John Visconti (John),[2] acquired ownership to property located at 1140 Calle Vista Drive (the property). Title to the property bounced back and forth between Unity and John.

In the meantime, on February 14, 2001, John and plaintiff married.

Dissolution of Marriage Proceeding

On August 21, 2006, plaintiff commenced a dissolution proceeding against John. As part of that proceeding, a standard family law restraining order (as part of the standard family law summons) was issued.

Transfer of Ownership of the Property; Line of Credit; Notice of Default

On November 29, 2007, ownership of the property was again transferred from Unity to John as "a Single man."

On January 18, 2008, John increased his line of credit with the bank to $1 million, and he secured his repayment of the loan by giving the bank his deed of trust on the property, again as a single man.

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[1] "Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.) We also consider facts that are properly judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [matters subject to judicial notice may be considered in ruling on a demurrer, along with the truth of all properly pleaded allegations in the complaint].)

[2] For convenience, we refer to certain parties by their first names. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

Four days later, record ownership of the property was transferred from John, as a single man, back to Unity.

We presume that John did not make a requisite payment on the line of credit because on May 26, 2009, a notice of default and election to sell under deed of trust was recorded.

Plaintiff's Ex Parte Application in Family Court

On July 17, 2009, plaintiff brought an ex parte application in the dissolution action that challenged, inter alia, John having obtained the $1 million line of credit from the bank. She sought "emergency relief" to "protect the community's interest in the [p]roperty." Referencing the $1 million line of credit, she averred that John obtained a $1 million loan "on the community property family residence." The trial court denied plaintiff's request, finding, in part, "no showing that the house that is subject of request for relief is a community asset."

Original Complaint and First Amended Complaint

On February 16, 2010, plaintiff initiated this action against the bank. According to the verified complaint, the bank was aware of the dissolution proceeding and should not have allowed John to obtain the $1 million line of credit secured by the property.

The bank responded to the complaint by filing a demurrer and motion to strike. In lieu of filing an opposition, plaintiff filed a verified first amended complaint. As is relevant herein, the first amended complaint alleged that the property was community property; that John was prohibited from encumbering the property; that the bank knew that John was prohibited from encumbering the property; and that the bank knew that the property was community property. Based upon the foregoing, plaintiff sought to cancel various loan documents, requested damages for negligence, and prayed for injunctive relief.

In response, the bank answered the complaint and then promptly filed a motion for judgment on the pleadings. Among other things, the bank argued that plaintiff's claims

were time-barred by the one-year statute of limitations set forth in Family Code section 1102.[3]

The trial court granted the bank's motion for judgment on the pleadings with leave to amend.

Second Amended Complaint; Demurrer and Motion to Strike; Appeal

On June 16, 2011, plaintiff filed her second amended complaint, the operative pleading. The bank responded by filing a demurrer and motion to strike.

After considering all of the parties' papers, including plaintiff's untimely opposition, and oral argument, the trial court sustained the bank's demurrer without leave to amend and granted its motion to strike in its entirety. In so ruling, the trial court found that the one-year statute of limitations contained in section 1102 applied and that plaintiff's action against the bank was untimely.

A judgment of dismissal was entered, and plaintiff's timely appeal ensued.

DISCUSSION

I. *Standard of review*

Our task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The reviewing court assumes the truth of allegations in the complaint that have been properly pleaded and determines de novo whether the complaint fails to state a cause of action. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515–516.) However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact. (*People ex rel. Lungren v. Superior Court*, *supra*, at pp. 300–301; *Moore v. Regents of University of California*, *supra*, at p. 125.) Furthermore, any allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity. (*Interinsurance Exchange v. Narula* (1995) 33 Cal.App.4th 1140, 1143.)

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[3] All further statutory references are to the Family Code unless otherwise indicated.

Similarly, we must adhere to the rule against sham pleadings. The rule against sham pleadings applies when a party has sought to avoid the defects of a prior complaint either by omitting facts that rendered the prior pleading defective or by alleging facts that are inconsistent with the allegations of previous pleadings. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 944; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877–878; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383–384.) This policy permits the court to take judicial notice of prior pleadings and to disregard as shams any unexplained and inconsistent allegations. (*Cantu v. Resolution Trust Corp.*, *supra*, at pp. 877–878; *Owens v. Kings Supermarket*, *supra*, at pp. 383–384; see also *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 [inconsistencies in pleadings must be explained].)

II. *Plaintiff's action is time-barred*

Section 1102, subdivision (a), provides: "Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered." In other words, the statute precludes one spouse from conveying interests in community real property to third parties without the other's joint execution of the deed (or lease exceeding one year). (*In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 183.) A conveyance in violation of section 1102, subdivision (a), is generally voidable by the spouse who did not join in the conveyance. (*In re Marriage of Brooks & Robinson*, *supra*, at p. 183; *Andrade Development Co. v. Martin* (1982) 138 Cal.App.3d 330, 335–336.)

Subdivision (d) provides: "No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of that instrument in the recorder's office in the county in which the land is situated." (§ 1102, subd. (d).)

In her action against the bank, plaintiff is trying to set aside the $1 million line of credit taken out by John and secured by the property. Because her theory essentially is that John encumbered community property without her authorization, her claim is governed by section 1102, subdivision (d)'s one-year statute of limitations. (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 889 ["The statute of limitations that applies to an action is governed by the gravamen of the complaint"].) Plaintiff's lawsuit against the bank was filed on February 16, 2010, more than one year after the line of credit was issued (in Jan. 2008). Accordingly, her claims against the bank are time-barred. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315–1316 [trial court may sustain demurrer on statute of limitations grounds].)

In urging us to reverse, plaintiff asserts that section 1102 does not apply because there has been no finding that the property is community property. Rather, section 2040, which is governed by either a three-year or four-year statute of limitations, applies. There are at least two problems with this argument.

First, while there may have been no finding that the property was community property, plaintiff is bound by the allegations of her prior pleading. (See, e.g., *Hendy v. Losse* (1991) 54 Cal.3d 723, 742–743 [an amended pleading that contradicts an admission in an earlier complaint will not be allowed]; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044–1045.) In her original verified complaint, plaintiff alleged that the property was community property. Again in her verified first amended complaint, plaintiff expressly alleged that the property was community property. When the timeliness issue was pointed out to plaintiff in the bank's motion for judgment on the pleadings, plaintiff sanitized her pleading by omitting any reference to the property's status as community property. But, she did so without any explanation. Under these circumstances, we are not bound to accept plaintiff's allegations in her second amended complaint as true.

Second, plaintiff offers no legal authority to support her novel proposition that section 2040 applies to the bank. By its plain terms, section 2040 restrains "parties" in a dissolution proceeding from engaging in certain activities, including encumbering any

property. (§ 2040, subd. (a)(2); see also *Gale v. Superior Court* (2004) 122 Cal.App.4th 1388, 1392–1394 [section 2040 applies to divorcing spouses].) The bank is not a party to the dissolution action; only plaintiff and John are parties to that proceeding.[4]

Because we agree with the trial court and the bank that plaintiff's action is time-barred, we need not consider the other grounds raised by the bank in support of its demurrer (and that plaintiff did not raise in her opening brief).

DISPOSITION

The judgment is affirmed. The bank is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD

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[4] That is not to say that plaintiff had no remedy. If appropriate, she could have sought a restraining order against the bank. But, the automatic restraining order against a divorcing spouse does not apply to a third party. (*Gale v. Superior Court, supra*, 122 Cal.App.4th at p. 1393.)