

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN HENRY TORRES,

Plaintiff and Appellant,

v.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, et al.,

Defendants and Respondents.

2d Civil No. B234224
(Super. Ct. No. 56-2011-00394476-CU-
OR-SIM)
(Ventura County)

John Henry Torres lost his house in a March 2011 foreclosure sale. His complaint in the present action attempts to vacate his "wrongful eviction" after the foreclosure sale by asserting causes of action for fraud, negligence, breach of fiduciary duty, cancellation of instruments and conspiracy to commit fraud against the law firm, mortgage guarantor, realtors, title company, loan servicer, and other individuals involved in the foreclosure and eviction. Respondents The Wolf Law Firm and Kajal Islam filed a special motion to strike the complaint as a SLAPP. (Code Civ. Proc., § 425.16.)¹ Respondents Federal National Mortgage Association (Fannie Mae), Nelda J. Amador, Michael Tebo and Joan Anderson (the Fannie Mae Respondents) filed a demurrer contending the complaint duplicated another pending lawsuit (the prior action) filed by Torres concerning the same foreclosure. (*John Henry Torres v. Flagstar Bank, FSB, et*

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

al., No. 56-2011-0039-821.) The trial court sustained the Fannie Mae Respondents' demurrer without leave to amend, dismissed the complaint without prejudice and struck the first amended complaint. It also granted the Wolf Law Firm and Mr. Islam's motion to strike under section 425.16. Appellant contends the trial court erred. We affirm.

Facts

In March 2007, appellant and his wife executed a deed of trust in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary and nominee for the lender, Flagstar Bank, FSB (Flagstar). The deed of trust secures a promissory note for \$385,000 and covers a single family home in Simi Valley (the Property). In June 2010, MERS assigned its beneficial interest under the deed of trust to Flagstar, and Flagstar assigned its interest to Fannie Mae. At the same time, PLM Lender Services, Inc. (PLM) was substituted as the new trustee under the deed of trust. The assignments were recorded in June 2010 and March 2011, respectively. The substitution of trustee was recorded in January 2011.

A notice of default was recorded with respect to the property on June 22, 2010. A notice of trustee's sale was recorded on January 4, 2011. The property was sold to Fannie Mae at the trustee's sale on March 2, 2011. The trustee's deed upon sale was recorded on March 4, 2011.

Appellant filed his complaint in the prior action in February 2011. (*John Henry Torres v. Flagstar Bank, FSB, et. al.*, Case no. 56-2011-00390821.) It names Flagstar, MERS, PLM and a number of individuals as defendants and alleges that the deed of trust is void, that the defendants engaged in fraud, that they had no "standing" to foreclose and that title to the property should be quieted in appellant. Appellant later filed a first amended complaint adding Fannie Mae and Cynthia Torres as defendants. It asserted causes of action for cancellation of the promissory note, fraud, cancellation of instrument/wrongful foreclosure, cancellation of a voidable contract, injunctive relief, declaratory relief, slander of title and quiet title.

While the prior action was pending, appellant filed the present action. It names as defendants The Wolf Law Firm, Kajal Islam, Fannie Mae, PLM, Quantum

Realtors Westlake Village and several of the same individuals who were named as defendants in the prior action. The present action alleges causes of action for fraud, negligence, breach of fiduciary duty, cancellation of instruments and conspiracy to commit fraud. Each claim is based on appellant's allegation that the foreclosure was fraudulent because the assignments of the deed of trust and substitution of trustee were improper. Appellant alleges no facts explaining why these actions were improper or fraudulent.

The Wolf Law Firm and Kajal Islam were retained to represent Fannie Mae in the unlawful detainer action it filed against appellant after Fannie Mae purchased the property at the foreclosure sale. They filed a special motion to strike the complaint under section 425.16 because all of the causes of action alleged against them arose out of their constitutionally protected activity in pursuing the unlawful detainer action against appellant. Appellant filed no opposition to the motion. The trial court concluded that respondents' conduct in serving a notice to quit was a protected activity for purposes of section 425.16. It granted the motion to strike because appellant did not carry his burden to demonstrate that he has a probability of succeeding on the merits of his claims.

Fannie Mae and three of the individual defendants demurred to the complaint on the ground that it was barred by the prior action and failed to state any cause of action. The trial court sustained respondents' demurrer without leave to amend. It reasoned that the "gravamen of Plaintiff's prior action involves the same primary right and/or injury as in this suit, i.e., the alleged illegal foreclosure of the subject property and eviction of Plaintiff and his two children from said property. . . . Plaintiff is suing all Defendants in the prior action for wrongful foreclosure and eviction. . . . In this action, Plaintiff seeks compensation from the same Defendants for the same alleged illegal foreclosure and eviction initiated by the Wolf Firm, as agents for

Defendants. . . . As both involve the same primary right, the present action case against the same Defendants must be abated." It also struck appellant's first amended complaint.²

Appellant appears to contend the trial court erred in sustaining the demurrer without leave to amend and in granting the special motions to strike under section 425.16. His opening brief, however, contains no statement of facts or legal argument. Instead, appellant repeatedly asserts that the assignment of the deed of trust "has no notice of default[,]" in violation of California Civil Code sections 2924, 3294 and 1095. As a consequence, his home "was foreclosed on illegally and the judges involved have ignored [California Civil Code section] 2924. My home was foreclosed on without a notice of default." This factual assertion appears to be incorrect. The assignments of the deed of trust, substitution of trustee and notice of default were attached as exhibits to appellant's complaint and are included in the record on appeal.

The Demurrer

Standard of Review

We independently review the trial court's ruling sustaining a demurrer without leave to amend. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5.) While we accept as true the complaint's properly pleaded factual allegations, we do not assume the truth of contentions, deductions or legal conclusions. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer should be sustained where the complaint fails to allege facts sufficient to state a cause of action, or discloses a defense that would bar recovery. (§ 430.10; *Balikov v. Southern California Gas Co.* (2001) 94 Cal.App.4th 816, 819-820.) Although leave to amend is to be liberally granted, the trial court has discretion to sustain a demurrer without leave to amend where there is no reasonable probability that its defects could be cured by amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) We will affirm a trial court's decision to deny leave to amend unless that decision is

² Prior to the hearing, appellant filed a first amended complaint that purports to allege 20 causes of action against most, but not all, of the same defendants named in the original complaint. All of the claims alleged in the first amended complaint related to the foreclosure sale and appellant's subsequent eviction from the property.

arbitrary, capricious or exceeds the bounds of reason. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731.)

Abatement

"A single cause of action cannot be the basis for more than one lawsuit." (*Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853, 856.) A plaintiff may not "split" a cause of action by filing multiple lawsuits based on the violation of the same primary right. (*Crowley v. Katleman* (1994) 8 Cal.App.4th 666, 681-682.) "The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action. (*Lord v. Garland* (1946) 27 Cal.2d 840, 848; *Lawyers Title Ins. Corp. v. Superior Court* (1984) 151 Cal.App.3d 455, 458. . . .) The defendant may assert the pending action as a bar . . . by demurrer" (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574; see also § 430.10, subd. (c).)

Appellant's present action alleges that respondents wrongfully foreclosed on his property. His prior action alleges exactly the same thing. The present action alleges the violation of the same primary right as that at issue in the prior action. The defect cannot be cured by amendment. Accordingly, the trial court properly sustained the demurrer without leave to amend.

The Motion to Strike

The Wolf Law Firm and Kajal Islam (the Law Firm Respondents) filed a motion to strike the complaint under section 426.16, the Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The complaint alleges that the Law Firm Respondents conspired with the other respondents to wrongfully foreclose on the property and evict appellant from his house. The Law Firm Respondents contend this qualifies as a SLAPP because they are being sued for engaging in the protected activity of pursuing an unlawful detainer action against appellant.

The anti-SLAPP statute provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court

determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) As we recently explained, this statute "was enacted 'to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056) To that end, the statute is liberally construed." (*California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036.)

We independently review the trial court's order denying the motion to strike. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1367.) Like the trial court, our review includes two steps. "First we decide whether the challenged claims arise from acts in furtherance of the defendant's right of free speech or right of petition under one of the four categories set forth in section 425.16, subdivision (e). [Citation.] In doing so, we 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' " (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 272.) If we find that appellant has made this showing, we then must consider whether respondents have demonstrated a probability of prevailing on their claims. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

A cause of action arises from protected activity where the conduct underlying the cause of action was itself "an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning."

(*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) As our Supreme Court has affirmed in the recent past, "The prosecution of an unlawful detainer action indisputably is protected activity within the meaning of section 425.16. [Citations.] 'The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.' (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19 . . .)" (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281.)

Appellant's complaint alleges the legal conclusion that the Law Firm Respondents conspired to "steal" appellant's house by using fraudulent documents to evict appellant from the property. But their only connection to the property is that they were the attorneys representing Fannie Mae in its unlawful detainer action against appellant. Prosecuting an unlawful detainer action is a protected activity. (*Id.*) Section 425.16 requires that the complaint be stricken unless appellant demonstrates a probability of succeeding on the merits of his complaint. Appellant failed to do so. He filed no opposition at all to the motion to strike. The trial court correctly granted the Law Firm Respondents' motion to strike.

Conclusion

The order sustaining the demurrer of respondents Federal National Mortgage Association, Nelda Amador, Michale Tebo and Joan Anderson without leave to amend, and dismissing without prejudice the complaint against them is affirmed. The order granting respondents' The Wolf Law Firm and Kajal Islam's special motion to strike pursuant to Code of Civil Procedure section 425.16 is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David Worley, Judge
Superior Court County of Ventura

John Henry Torres, in pro per, Appellant.

The Wolf Firm, Eric Dean and Hassan Elrakabawy, for The Wolf Firm and
Kajal N Islam. Respondents.

Palmer, Lombardi & Donohue; Roland P. Reynolds and Alison R. Kalinski,
for Federal National Mortgage Association, Nelda J. Amador, Michael Tebo and Joan
Anderson, Respondents