Filed 1/31/13 Bellis v. Aurora Loan Services 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

ARNOLD W. BELLIS et al., Plaintiffs and Appellants, v. AURORA LOAN SERVICES, LLC, et al., Defendants and Respondents.	B237633 (Los Angeles County Super. Ct. No. EC053335)

APPEAL from the judgment of the Superior Court of Los Angeles County. Laura A. Matz, Judge. Affirmed.

Arnold Bellis and Rizalina Bellis, in pro. per., for Plaintiffs and Appellants.

Green & Hall, Howard D. Hall, Michael E. Lisko and Artin Betpera for Defendants and Respondents.

* * * * * * * * * *

Plaintiffs Arnold and Rizalina Bellis obtained a real estate refinance loan secured by a deed of trust against their La Crescenta property. The deed of trust named Mortgage Electronic Registration Systems (MERS) as the beneficiary and nominee for the lender, Homecomings Financial Network. After plaintiffs defaulted on their loan, MERS executed a substitution of trustee to substitute Cal-Western Reconveyance Corporation (Cal-Western) as the trustee under the deed of trust. Cal-Western then executed and recorded a notice of default, and a notice of trustee's sale. MERS assigned the deed of trust to Aurora Loan Services, LLC (Aurora). The property was foreclosed upon, and a trustee's deed upon sale was recorded by Aurora.

Plaintiffs sued MERS, Cal-Western, and Aurora. The genesis of their claims is that the foreclosure was invalid because MERS had no "beneficial interest in the mortgage or Deed of Trust" and therefore could not execute the substitution of trustee or assign the deed of trust. Plaintiffs' complaint also alleged that any assignment was a "nullity" because MERS did not deliver possession of the note securing the deed of trust.

Aurora propounded requests for admission upon each plaintiff that went unanswered and were deemed admitted by the trial court upon Aurora's motion. Defendants thereafter moved for summary judgment, relying on plaintiffs' admissions. Plaintiffs' opposition posited that Arnold Bellis's admissions were obtained in violation of an automatic bankruptcy stay. No opposition evidence or separate statement was filed. The trial court granted the motion, and judgment was entered in favor of defendants.

On appeal, plaintiffs urge that the deemed admissions were not dispositive of their claims, reasoning that the admissions do "not preclude [plaintiffs] from relying on facts they discovered after [the date the matters were deemed admitted]." For example, plaintiffs contend that evidence submitted in support of defendants' motion shows that the substitution of trustee and assignment of the deed of trust were executed by a "robo signer." Because we find that the admissions were conclusively established, and barred plaintiffs' claims, we affirm the judgment below.

BACKGROUND

Plaintiffs obtained a real estate refinance loan of $757,000 from Homecomings Financial Network, LLC (Homecomings), secured by a deed of trust that was recorded on August 24, 2006. The deed of trust identified plaintiffs as the borrowers, Homecomings as the lender, MERS as the nominal beneficiary, and New Century Title Company as the trustee. In the deed of trust, plaintiffs granted title to their residence to the trustee, in trust, with the power of sale.

The deed of trust stated: ". . . MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

On May 26, 2009, MERS executed a substitution of trustee, substituting Cal-Western as trustee. The substitution was recorded on July 15, 2009. It was signed by Chris Archuleta, Assistant Secretary of MERS.

A notice of default was executed by Cal-Western on May 29, 2009, and recorded on June 1, 2009. The notice identified Cal-Western as the "duly appointed substituted trustee," and MERS as the nominee of Homecomings. Cal-Western recorded a notice of trustee's sale on September 3, 2009. A corporate assignment of deed of trust was executed by MERS as Homecomings's nominee, assigning Homecomings's interest in the deed of trust, including "all rights accrued or to accrue" to Aurora. It was recorded on November 17, 2009. Aurora bought plaintiffs' home in the foreclosure sale, and a trustee's deed upon sale was recorded January 15, 2010.

Plaintiffs' first amended complaint, brought against Aurora, Cal-Western, and MERS, stated causes of action to set aside the foreclosure sale, for cancellation of instrument, quiet title, injunctive relief, and declaratory relief. The essence of the complaint is that MERS was without authority to execute an assignment of the deed of trust or the substitution of trustee. Specifically, plaintiffs complain that Commercial Code section 3301 provides that only a " 'holder in due course' of a promissory note

. . . may enforce the note" (boldfaced italics omitted), and that MERS has "no economic or beneficial interest in the deed of trust securing the Note, and therefore has no right or power to assign any rights or interest in said Deed of Trust." Further, the substitution of trustee was void and did not comply with Civil Code section 2934a, because MERS was not "the true beneficiary" (boldfaced italics omitted). Moreover, Chris Archuleta, who executed the substitution, "is not, and never was, the Assistant Secretary of MERS." Accordingly, the complaint alleged that Cal-Western, the substituted trustee, was without authority to foreclose on the property. The injunctive and declaratory relief claims contend that Aurora's post-foreclosure efforts to evict plaintiffs from the home are unlawful because Aurora has no legal interest in the property (because of the wrongful foreclosure).

On January 5, 2011, defendant Aurora propounded separate requests for admission on plaintiffs Rizalina and on Arnold. As of March 10, 2011, no responses were received. On April 8, 2011, Aurora moved to have the requests for admission deemed admitted. Plaintiffs did not oppose the motions, and the motions were granted.

Consequently, plaintiffs were deemed to have admitted these facts. They are unable to tender payment of the past due balance on their loan or the full amount owing on the loan. They are in default, and had not made payments as of February 1, 2009. The deed of trust, a copy of which was attached to the requests for admissions, was authentic. MERS was named a beneficiary under the deed of trust. MERS had the legal right to foreclose and sell the property. MERS had the legal right to take any action for the original lender, Homecomings. Plaintiffs have no evidence in support of their contention that the substitution of trustee was void. Cal-Western was substituted as trustee. Plaintiffs have no evidence that MERS's assignment of the deed of trust was void. The assignment of the deed of trust to Aurora assigned and transferred all beneficial interest under the deed of trust to Aurora. Aurora purchased the property at the foreclosure sale, and plaintiffs have "no legal or equitable right, title, estate, lien, encumbrance, claim or interest in the [subject property]."

Defendants moved for summary judgment, or in the alternative, summary adjudication, relying in large part on plaintiffs' deemed admissions. Defendants also filed a request for judicial notice of the recorded deed of trust, substitution of trustee, notice of default, notice of trustee's sale, corporate assignment of deed of trust, and the trustee's deed upon sale. Defendants contended that plaintiffs could not establish any of their causes of action, and that their claims were without legal merit because MERS had authority under the deed to trust to foreclose on the property and execute any documents on behalf of the lender, and because possession of the note is not required by law as a precondition to foreclosure. Defendants also included the declaration of Chris Archuleta, who averred that in 2009, he was "employed by Cal-Western Reconveyance Corporation . . . as a Trustee Sales Manager. [He] also held the title of Assistant Secretary of [MERS]. [¶] . . . As Assistant Secretary of MERS, I was authorized by MERS to review and execute non-judicial foreclosure documents, including substitutions of trustee, for loans secured by deeds of trust recorded against real property in the Southern California area wherein MERS was identified in the deed of trust as the beneficiary, acting solely as a nominee for the lender and the lenders [*sic*] successors and assigns." He also authenticated the substitution of trustee, confirming he signed it.

In opposition, plaintiffs contended that "no matters were deemed admitted as to plaintiff [Arnold Bellis]" because Arnold Bellis had commenced Chapter 13 bankruptcy proceedings before the hearing on the motion to deem matters admitted, and therefore the trial court lacked jurisdiction to enter the order because of the automatic stay provisions of the Bankruptcy Code. Alternatively, plaintiffs contended that the matters were deemed admitted as of April 8, 2011, and that plaintiffs *could have* discovered evidence *after* this date in support of their claims. Plaintiffs did not ask to withdraw the admissions. Plaintiffs did not file a response to the separate statement of undisputed facts or offer any evidence in opposition to the motion, except the declaration of plaintiffs' counsel, Roy C. Dickson, averring that "[o]n or about March 29, 2011, and before April 8, 2011, I telephoned [defense counsel] and

informed him that Mr. Arnold Bellis had filed a Chapter 13 Bankruptcy." A copy of the bankruptcy petition was attached to the declaration. Plaintiffs also contended that "[t]hese are all triable issues of fact that bear on whether or not Chris Archuleta was actually a true and valid Assistant Secretary of MERS" because he admitted to being employed by Cal-Western. No objection to defendants' request for judicial notice appears in the appellate record. No objections to any of defendants' evidence were filed.[1]

The trial court issued a tentative ruling, granting the motion on both procedural grounds and on the merits. The trial court found plaintiffs failed to submit an opposition separate statement, and that the motion could be granted on this basis alone. The trial court also found that the deemed admissions established that plaintiffs "failed to tender and have no interest in the subject property." The court found that "bankruptcy operates to stay only actions against the bankrupt, not actions by the bankrupt, and accordingly, [there was] no error in deeming unanswered Requests for Admissions to be admitted." Also, the court found that "defendants have presented evidence that the nonjudicial foreclosure proceedings were appropriately conducted." Judgment in favor of defendants was entered on September 26, 2011. Plaintiffs' notice of appeal was filed on November 28, 2011.

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[1] Plaintiffs did not include defendants' reply brief in support of the summary judgment motion in their designation of the appellate record. Because our review is de novo, the failure to include all relevant evidence and arguments arguably precludes plaintiffs from meeting their burden on appeal, as it hampers our meaningful review of the motion. (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 212-213.) However, because plaintiffs failed to file a substantive opposition to the motion for summary judgment, and defendants did not complain about this defect on appeal (and also did not designate the reply brief in their counter-designation of the record), we will reach the merits of the motion, *post*.

DISCUSSION

1. Timeliness of the Appeal

Defendants initially contend that plaintiffs' appeal is untimely and must be dismissed because it was not filed within 60 days of the clerk's mailing of notice of entry of judgment. The clerk's notice of entry of judgment was file stamped and mailed on September 26, 2011. Defendants also mailed a notice of entry of judgment on September 28, 2011. Plaintiffs' notice of appeal was filed on November 28, 2011.

The timely filing of a notice of appeal is jurisdictional. If a notice of appeal is filed late, the court must dismiss the appeal. (*Van Buerden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) California Rules of Court, rule 8.104(a)(1) provides that the notice of appeal must be filed within the *earliest* of (1) 60 days after the clerk's service the notice of entry of judgment; (2) 60 days after a party serves notice of the judgment; or (3) 180 days after entry of judgment. Here, service of the clerk's notice of entry of judgment occurred earliest, and therefore controls. Sixty days from the clerk's notice fell on November 25, 2011. This date was a court holiday (Code Civ. Proc., § 135; Gov. Code, § 6700, subd. (*o*)), and therefore, the notice of appeal was not required to be filed until the next court day, November 28, 2011. (Code Civ. Proc., § 12a.) As such, the notice of appeal was timely.

2. Motion for Summary Judgment

"[T]he party moving for summary judgment [or adjudication] bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "[A] moving defendant . . . has two means by which to shift the burden of proof . . . to the plaintiff to produce evidence creating a triable issue of fact. The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.] Alternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause

of action." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists." (Code Civ. Proc., § 437c, subd. (p)(2).)

In opposing the motion, a party must "include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed." (Code Civ. Proc., § 437c, subd. (b)(3).) "Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (*Ibid*.) However, "it would be an abuse of discretion for a trial court to grant a summary judgment based on a failure to file a separate statement when the moving parties have not in their moving papers set forth a prima facie showing for summary judgment—i.e., have not met their 'burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law.' " (*Kojababian v. Genuine Home Loans, Inc*. (2009) 174 Cal.App.4th 408, 416.)

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f).)

Defendants' motion relied principally on plaintiffs' deemed admissions. "The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial." (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.) When a party serves requests for admissions upon another party, responses must be served within 30 days. (Code Civ. Proc., §§ 2033.010; 2033.250, subd. (a).) If a party does not timely respond to the requests, the "requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted." (*Id*., § 2033.280, subd. (b).) "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300." (*Id*., § 2033.410, subd. (a).) Even when a request is deemed admitted, a party may withdraw or amend an admission by leave of the court upon the showing that the admission was the result of mistake, inadvertence, or excusable neglect. (*Id*., § 2033.300, subds. (a) and (b).)

Here, both plaintiffs failed to respond to defendants' requests for admissions, did not oppose defendants' motions to have the requested admissions deemed true, and did not seek leave to withdraw or amend their admissions. As a result, the admissions were conclusively established and the trial court had no discretion at the time of the motion for summary judgment to find otherwise.[2]

Therefore, plaintiffs were deemed to have admitted that they had no evidence in support of the claims made in their first amended complaint, and that their claims were unfounded. They admitted that they had no evidence the deed of trust and substitution

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[2] Plaintiffs' argument, in opposition to the motion for summary judgment, that Arnold Bellis's bankruptcy divested the court of jurisdiction to deem his requests admitted is without merit, and provides no basis to withdraw the admissions. There is no automatic bankruptcy stay of a complaint filed by a debtor. (*Shorr v. Kind* (1991) 1 Cal.App.4th 249, 254-255; *Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1377-1379.)

of trustee executed by MERS were void. Plaintiffs also admitted that MERS had the legal right to foreclose and sell the property, and that MERS had the legal right to take any action for the original lender. Further, plaintiffs admitted that the substitution of trustee substituted Cal-Western as the trustee, and that the assignment of the deed of trust transferred all beneficial interest under the deed of trust to Aurora. Plaintiffs also admitted that Aurora purchased the home at foreclosure, and that plaintiffs have "no legal or equitable right, title, estate, lien, encumbrance, claim or interest in the [subject property]."

Plaintiffs contend that the declaration of Chris Archuleta, averring that he was both an employee of Cal-Western and assistant secretary of MERS, evidences that he was a "robo signer," creating a triable issue of material fact. (See *Simmons v. Cal. Coastal Com.* (1981) 124 Cal.App.3d 790, 797 [A moving parties' own evidence, revealing triable issues of material fact, may support denial of a motion for summary judgment].) However, nothing in the declaration can be construed to create a material dispute about his authority to execute the substitution of trustee on behalf of MERS, and in any event, plaintiffs admitted that Cal-Western was effectively substituted as trustee.

Moreover, an examination of the recorded documents reveals that plaintiffs' claims are unfounded.[3] Courts have routinely rejected plaintiffs' theory that MERS is

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[3] Plaintiffs contend that the contents of the recorded documents are not subject to judicial notice. However, "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.) A trial court's ruling on a request for judicial notice is reviewed for an abuse of discretion. (*Id*. at p. 264.) It is unclear from the record whether the trial court ruled on defendants' request for judicial notice. Moreover, any objection to the trial court taking judicial notice of the recorded documents was waived by the failure to object. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, fn. 4.) Nevertheless, there is no

not authorized to assign a deed of trust or initiate a foreclosure sale. (See *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151, 1158; *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46.) Also, Civil Code section 2934a expressly provides that a trustee may be substituted by a substitution executed and acknowledged by the "beneficiaries under the trust deed, or their successors in interest." (*Id*., § 2934a, subd. (a)(1).) Lastly, there is no requirement in the comprehensive foreclosure scheme set forth in Civil Code sections 2924 through 2924k that only the holder of the original note may foreclose. (*Gomes*, *supra*, 192 Cal.App.4th at p. 1154; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-441; see also Civ. Code, § 2943, subds. (a)(4), (b)(1)-(2).)

Accordingly, we find that defendants satisfied their burden in moving for summary judgment. Plaintiffs' admissions are dispositive of the claims made in their first amended complaint. (*Brantley v. Pisaro*, *supra*, 42 Cal.App.4th at p. 1598.) Also, the recorded documents reveal no irregularity in the foreclosure process. It is of no consequence that plaintiffs could have discovered evidence in support of their claims after the admissions were deemed admitted, because they presented no evidence or response to defendants' statement of undisputed facts in opposition to defendants' motion.

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dispute about the authenticity of the recorded documents (only their legal effect), particularly in light of plaintiffs' admissions. Therefore, judicial notice was proper.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs of appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.