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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GUY HART et al.,

Plaintiffs and Appellants,

v.

NATIONSTAR MORTGAGE, LLC,

Defendant and Respondent.

B278677

(Los Angeles County
Super. Ct. No. PC056103)

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

Shaghzo & Shaghzo and Armen Shaghzo for Plaintiffs and Appellants.

Sara Hart, in pro. per. for Plaintiff and Appellant.

Guy Hart, in pro. per. for Plaintiff and Appellant.

Green & Hall, Howard D. Hall and Amanda V. Anderson for Defendant and Respondent.

A mother and her adult son, Sara and Guy Hart, assert an interest in a piece of real property whose title is in the name of another son, Don Hart.¹ The property is in foreclosure, and Sara and Guy seek to stay the foreclosure until such time as they can obtain legal title to the property and then, as owners, remedy the default by negotiating a loan modification. While their title suit against Don was pending, they brought this action against the foreclosing lender, Nationstar Mortgage LLC, seeking a declaration that Nationstar could not proceed with the foreclosure until their title dispute was resolved. The trial court concluded Sara and Guy had no right to delay the foreclosure, and granted summary judgment to Nationstar. Sara and Guy appeal; we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Property, the Note and the Deed of Trust*

The property at issue is a residence located on Via Medici; the parties refer to the property by that name. Title is in Don's name alone. At the time of purchase in 2002, Don executed a deed of trust in favor of Countrywide, a nonparty. However, Sara and Guy allege that all three of them are co-owners of the property, and it had been agreed that Sara would live in the house. According to Sara, she had agreed to put title to Via Medici in Don's name "for safekeeping."

In 2004, Don obtained a loan on Via Medici, secured by a deed of trust in favor of Bank of America, another nonparty. This appears to have been a refinance of the first mortgage. The deed of trust was recorded. Don's name is identified as the sole borrower on both the loan and the deed of trust. Nationstar is

¹ We refer to the Harts by their first names; no disrespect is intended.

the successor servicer on the loan and deed of trust. According to Sara and Guy, they agreed with Don that Sara would not pay the mortgage, but it would be paid by Don with revenues from family businesses and income-producing properties.

Don stopped making the mortgage payments on Via Medici in 2011.

2. *The Dispute Regarding Title*

A rift developed between Don on the one hand, and Sara and Guy on the other, regarding ownership of multiple business ventures and properties, including Via Medici. In 2013, the family sought to resolve these differences with the help of a family friend, Sam Pinchassi, although whether Pinchassi acted as a mediator or arbitrator is a matter of some dispute. In June 2013, Pinchassi came up with a disposition allocating the disputed properties among the family members, with cash payments due as well. Under the disposition, Sara was to receive title to Via Medici.

While Sara would be content to accept title to Via Medici, as it was her home, she disputed other terms of Pinchassi's disposition. Don agreed with the disposition, and sought to have it confirmed as an arbitration award; Guy and Sara disagreed, taking the position they had not agreed to arbitration and that Pinchassi had colluded with Don. This gave rise to litigation. (*Hart v. Hart* (Super. Ct. L.A. County, BC 519025).) In that case, Sara and Guy sought, among other relief, to quiet title to Via Medici in Sara, Guy, and Don (each having a undivided one-third interest). Don, in contrast, sought to have the Pinchassi disposition confirmed as a binding arbitration award, which would mean title to Via Medici would be awarded to Sara. In the alternative, if the court held Pinchassi's disposition non-binding,

Don sought to have title to Via Medici quieted half to him and half to Guy, with Sara excluded. On May 27, 2014, the trial court in *Hart v. Hart* concluded the Pinchassi disposition was a binding arbitration award, although no judgment was entered as other issues remained to be litigated.²

3. *Nonjudicial Foreclosure Proceedings Commence*

While the family was fighting over title in the *Hart v. Hart* case, nobody was paying the mortgage on Via Medici. On July 15, 2014, the trustee recorded a notice of default. On October 28, 2014, it recorded a notice of trustee's sale.

4. *Sara and Guy's Complaint*

On December 10, 2014, Sara and Guy filed this second lawsuit against Nationstar.³ They alleged two causes of action: (1) a cause of action for declaratory relief seeking a determination of the parties' "respective rights, duties and obligations as to ownership and possession" of Via Medici, as well as a determination as to Nationstar's "contractual authority to initiate and conduct the foreclosure in light of the pending [*Hart v. Hart* action] concerning the disputed title" to the property; and (2) a cause of action for a temporary restraining order and preliminary injunction halting the foreclosure sale.

² We grant Sara and Guy's request for judicial notice of court orders in the *Hart v. Hart* case.

³ They also sued the trustee. The trustee filed a declaration of non-monetary status and indicated it agreed to be bound by whatever order the court issued regarding the deed of trust. As no party timely objected, the trustee was no longer required to participate in the action. (Civ. Code, § 2924l.)

5. *Preliminary Injunction*

A preliminary injunction was entered, enjoining the sale. The court concluded that Sara and Guy had established a probability of prevailing on the merits, given that, in the *Hart v. Hart* case, Don had conceded that Guy had a fifty percent interest in Via Medici. Sara and Guy were required to post an undertaking, which they did.

6. *Motion for Summary Judgment*

Nationstar then moved for summary judgment, arguing that it was entitled to proceed with the foreclosure as a matter of law. It was undisputed that Don was the named borrower and that he had defaulted on the loan. It was undisputed that neither Sara nor Guy was named in the deed of trust. Nationstar therefore argued that it was entitled to foreclose, regardless of the title dispute. Nationstar took the position that even if Sara and Guy ultimately obtained partial or total title to Via Medici, their title would still be subject to Nationstar's prior deed of trust and right to foreclose. As successors in title subsequent to the deed of trust, Sara and Guy's only right would be to redeem the property by paying off the loan in its entirety. As Sara and Guy concededly lacked the funds to do so, they would have no right to relief from foreclosure.

7. *Opposition to the Summary Judgment*

In opposition, Sara and Guy argued that Nationstar's motion was an attempt to argue that they lacked standing, an issue already resolved against Nationstar when the trial court granted the preliminary injunction. They argued that Nationstar had not met the legal requirements for dissolving an injunction under Code of Civil Procedure section 533, which requires a

showing of a material change in the facts or law, or that the ends of justice would be served by dissolving the injunction.

They also argued the equities of the situation. In the *Hart v. Hart* litigation, Don conceded that Sara should be awarded Via Medici, but he would not transfer title to her because she refused to accept the remainder of the Pinchassi distribution as binding. But if the foreclosure were permitted to proceed before title is resolved in the *Hart v. Hart* case, Sara (and possibly Guy) will lose the title interest they are attempting to protect in that case. They argued that “[o]nly after that interest is determined can Plaintiffs undertake steps to modify the loan.”

As to Nationstar’s argument that, as successors in title, Sara and Guy would have, at most, the right to redeem the property by paying off the debt in its entirety, Sara and Guy submitted declarations that they had sufficient funds to permit “a partial payment of the arrearage, which, in conjunction with a loan modification agreement, would prevent the foreclosure and allow [Sara] to keep [her] home.” They stated, “Requiring full tender from us prior to resolution of the issue of title in the *Hart v. Hart* action would result in a potential windfall to Don Hart should we be found to have no title to Via Medici. The loan would be brought current which would solely benefit Don Hart at our incredible expense.”

Finally, Sara and Guy suggested that they are real parties in interest in that they are closely aligned with Don and therefore have the right to assert his interests in this case, under the doctrine of third party standing.

8. *Nationstar's Reply*

In reply, Nationstar reasserted its arguments, and further noted that Sara and Guy had no authority to attempt to remake Don's loan without even joining him as a party in this action.

9. *The Court's Ruling*

The trial court granted summary judgment, adopting Nationstar's argument that Sara and Guy have no rights under the deed of trust as they are not borrowers and therefore are strangers to the contract. Even if they have a title interest in the property, as non-borrowers, they have no right to reinstate the loan, and therefore cannot stop the foreclosure. Their only theoretical remedy would be to pay off the loan in full and redeem the property, which they have conceded they cannot do. The court also rejected Sara and Guy's attempt to assert Don's rights in this action.

The court noted that its prior ruling in connection with the preliminary injunction motion was not binding as it was not a final adjudication of the rights at issue.

10. *Judgment and Appeal*

Judgment was entered in favor of Nationstar. Sara and Guy filed a timely notice of appeal. According to their reply brief, the trial court entered an order staying the foreclosure pending resolution of this appeal.

DISCUSSION

1. *Standard of Review*

“‘A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.’ [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the

complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *Nonjudicial Foreclosure*

“We begin with a general overview of the nonjudicial foreclosure process. A nonjudicial foreclosure sale is a ‘quick, inexpensive[,] and efficient remedy against a defaulting debtor/trustor.’ [Citation.] To preserve this remedy for beneficiaries while protecting the rights of borrowers, ‘sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.’ [Citation.] Under a deed of trust, the trustee holds title and has the authority to sell the property in the event of a default on the mortgage. [Citation.] To

initiate a foreclosure, ‘[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents’ must first record a notice of default. [Citation.] The notice of default must identify the deed of trust ‘by stating the name or names of the trustor or trustors’ and provide a ‘statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred’ and a ‘statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy [the] obligation . . . that is in default.’ [Citation.] After three months, a notice of sale must then be published, posted, mailed, and recorded in accordance with the time limits prescribed by the statute. [Citations.]” (*Brown v. Deutsche Bank National Trust Company* (2016) 247 Cal.App.4th 275, 280.)

“The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ [Citations.]” (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 440.)

3. *Sara and Guy Have No Enforceable Right to Prevent the Foreclosure*

Nationstar obtained summary judgment on the basis that Sara and Guy have no enforceable right to stop the foreclosure. We believe this is correct for two reasons. First, the rights claimed by Sara and Guy are at this moment speculative. Second, the rights claimed, even if not speculative, will not provide them the remedy they seek.

A. *Sara and Guy Have Only a Speculative Interest*

First, Sara and Guy have no present interest in the property. In the *Hart v. Hart* action, they assert an interest in title, but they do not have one yet. Sara and Guy obtained a preliminary injunction in this case by convincing the trial court they would necessarily obtain some level of interest on the basis that in the *Hart v. Hart* case, Don was arguing *either* for Sara to be granted Via Medici or for Don and Guy to be awarded it. But, on summary judgment, Sara and Guy conceded that these were not the only two possible outcomes of the *Hart v. Hart* litigation, and that it was possible that Don would ultimately be awarded title, just as he presently holds it. In fact, Sara and Guy explained that the possibility that Don would be awarded title was the reason they did not pay off the amount then outstanding on Via Medici, as they did not wish to give Don a windfall, should he be awarded the property. Sara and Guy simultaneously argue that their potential title to Via Medici is undisputed enough that the foreclosure should be halted until it can be finalized, but not likely enough that they are willing to cure the default in reliance on it coming to pass. Sara and Guy have cited to no authority, and independent research has disclosed none, by which a *potential* interest in property under foreclosure is a sufficient legal basis to stop that foreclosure.

For this reason, we are not persuaded by Sara and Guy's continued reliance on the trial court's initial entry of a preliminary injunction. "The granting or denying of a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy. [Citations.]" (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) It is simply the circumstance that the trial court, in balancing the respective

equities, concluded that pending a trial on the merits, the defendant should be restrained from exercising the right it claimed. (*Weingand v. Atlantic Sav. & Loan Assn.* (1970) 1 Cal.3d 806, 820.) On the fuller proceedings of summary judgment, the court concluded that Sara and Guy's interest was not as strong as they had once argued.

B. *Sara and Guy's Interest in Title Will Not Prevent the Foreclosure*

Even if Guy and Sara obtain the title they seek, that alone will not stop the foreclosure.

If Sara and Guy prevail in the *Hart v. Hart* case, they will obtain only (full or partial) title to Via Medici. But their title will not predate the deed of trust.⁴ Thus, they will be in the position of anyone who obtains title to a property subsequent to a deed of trust which is under foreclosure. “ ‘Real property is transferable even though the title is subject to a mortgage or deed of trust, but the transfer will not eliminate the existence of that encumbrance. Thus, the grantee takes title to the property subject to all deeds of trust and other encumbrances, whether or not the deed so provides. This means that the property may be sold on foreclosure of that deed of trust if the debt is not paid, even though the property is no longer owned by the original debtor.’ [Citations.]” (*Nguyen v. Calhoun, supra*, 105 Cal.App.4th at pp. 438-439.)

⁴ In the *Hart v. Hart* case, Sara and Guy sought to quiet title as of 2011, some seven years after the deed of trust on which Nationstar is foreclosing was recorded. At no point in either litigation did Sara and Guy attempt to reform the deed of trust to name themselves as borrowers, or suggest a factual or legal basis would exist for doing so.

Perhaps because of this result, successors in title – indeed, every person with an interest in the property – may redeem the property from the lien by paying off the entire obligation the lien secures. “Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and by such redemption, becomes subrogated to the benefits of the lien, . . .” (Civ. Code, § 2903.) “Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay.” (Civ. Code, § 2905.) Thus, if Sara and Guy obtain title to Via Medici, they could stop the foreclosure by paying off the entire obligation secured by the deed of trust. But they have conceded they lack the assets to do so.⁵ Thus, even if they obtain title, the foreclosure will proceed.

Sara and Guy argue that once they have title, they will be able to make a partial payment of the arrearage and modify the loan. But title would give Sara and Guy neither the contractual

⁵ In their reply brief on appeal, Sara and Guy argue for the first time that if they obtain title they will be able to “seek refinancing of the property to satisfy the pending loan. Since more equity in the property exists than owed, Appellants could obtain another loan in their name only and pay off Nationstar.” (Footnote omitted.) The argument is forfeited for having been raised for the first time in reply. (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 794.) In any event, there is no evidence in the record supporting either Sara and Guy’s premise regarding equity, their implied premise regarding their creditworthiness, or their conclusion regarding their ability to obtain refinancing with another lender.

nor the statutory right to do this. Paragraph 13 of the deed of trust provides that “any Successor in Interest of Borrower who assumes Borrower’s obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower’s rights and benefits under this Security Instrument.” In other words, successors in title do not automatically become successor borrowers; they must assume the obligations in writing and obtain lender approval. Without doing so, they have no rights under the deed of trust. (*Green v. Central Mortgage Company* (N.D. Cal. 2015) 2015 WL 5157479, p. *5; *Salcido v. Vericrest Financial & Summit Management* (N.D. Cal. 2013) 2013 WL 5946090, p. *3, fn. 4.) We observe California statutes provide various rights to borrowers to enable them to modify mortgages they can no longer afford. Civil Code sections 2923.5 subdivision (a)(2) and 2923.55, subdivision (b)(2) provide that a mortgage servicer must contact the borrower in order to explore options to avoid foreclosure. But these statutory rights are held only by the borrower; mere successors in title do not assume these statutory protections. (*Green v. Central Mortgage Company, supra*, 2015 WL 5157479, *4; *Salcido v. Vericrest Financial & Summit Management, supra*, 2013 WL 5946090, *2-*3.)

In short, even if Sara and Guy obtain title, they will have the right to redeem, which they have conceded they cannot exercise; they instead seek to make a partial payment and obtain a loan modification, to which they would have no contractual or statutory right.⁶

⁶ We need not address the legal issue of whether successors in title have the right to cure, which is different from redemption in that it is simply paying off the amount in default, not the

4. *Sara and Guy's Remaining Arguments Are Unavailing*

We quickly address and reject the remainder of Sara and Guy's arguments on appeal.

First, they claim, as they did in opposition to summary judgment, that they can stop the foreclosure by exercising Don's borrower's rights through the doctrine of third party standing. While, normally, a litigant must exercise its own rights, there is a limited exception in "circumstances in which three criteria are met: (1) the litigant suffers a distinct and palpable injury in fact, thus giving him or her a concrete interest in the outcome of the dispute; (2) the litigant has a close relationship to the third party such that the two share a common interest; and (3) there is some hindrance to the third party's ability to protect his or her own interests. [Citations.]" (*Matrixx Initiatives, Inc. v. Doe* (2006) 138 Cal.App.4th 872, 877.) Here, Sara and Guy can raise no triable issue of fact on the third issue – that there is some hindrance to Don's ability to protect his own interests with respect to the property. There is no hindrance. Don is fighting Sara and Guy regarding title to this and other properties; he is clearly able to protect whatever interests he chooses to pursue.

Second, Sara and Guy argue that the Pinchassi distribution confirmed in the *Hart v. Hart* litigation, is now "final," so the property is Sara's. Yet there is no final judgment in that case, and Sara and Guy have indicated a desire to appeal it once it is filed.

entire obligation. (Civ. Code, § 2924c.) Sara and Guy do not seek or argue they would exercise the right to cure; at most they want to make a partial payment on the arrears and renegotiate the loan.

Third, Sara and Guy challenge the trial court's rulings sustaining objections to their declarations in opposition to summary judgment. We need not address these rulings. Even if the objections had been erroneously sustained, the summary judgment is correct as a matter of law, and Sara and Guy's declarations, which set forth their view of the history of their agreements with Don, do not change the fact that they have no legal right to stop the foreclosure.

Fourth, Sara and Guy again argue the equities, suggesting that they cannot cure the default while Don may still be awarded title, and Don is unwilling to pay the arrearages since the *Hart v. Hart* court confirmed the Pinchassi distribution, which awarded the property to Sara. In short, they argue "All three of the owners are thus effectively precluded from resolving the arrearages for fear that the opposing party will ultimately be awarded the property." While we appreciate these concerns generally, and particularly Sara's desire to stay in her home, Sara and Guy have presented no legal basis why Nationstar – the innocent mortgage holder of a property in Don's name only – should be forced to delay its foreclosure indefinitely, while Don, Sara, and Guy continue to litigate their intra-family dispute. If the family possesses the means and the desire to cure the default, the litigants may be able to save the property from foreclosure with a reimbursement agreement among themselves.⁷ But there is simply no legal basis to deprive Nationstar of its right to

⁷ We note that in the *Hart v. Hart* litigation, Don alleged a cause of action for equitable indemnification from Sara in the event he makes any payments towards the mortgage for Via Medici and she ultimately acquires the property.

foreclosure against its defaulting debtor, while the debtor's relatives fight him over title to the property.

5. *Nationstar's Motion for Sanctions on Appeal*

On appeal, Nationstar seeks sanctions for a frivolous appeal pursued only for delay. While the appeal was indisputably pursued to delay the foreclosure, we do not believe this is an appropriate case for sanctions. The entire action was pursued to delay the foreclosure; and as the issuance of the preliminary injunction demonstrates, Sara and Don had a good faith belief their title dispute justified such a delay.

DISPOSITION

The judgment is denied. Sara and Guy are to pay Nationstar's costs on appeal. Nationstar's motion for sanctions is denied.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

HALL, J.*

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