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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICKEY CABRERA,

Plaintiff and Appellant,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant and Respondent.

B231612

(Los Angeles County
Super. Ct. No. PC045651)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Mickey Cabrera, in pro. per., for Plaintiff and Appellant.

Malcolm ♦ Cisneros, William G. Malcolm, Damian P. Richard; AlvaradoSmith, John M. Sorich and S. Christopher Yoo for Defendant and Respondent.

INTRODUCTION

Plaintiff Mickey Cabrera appeals from a judgment of dismissal entered after the trial court granted the summary judgment motion of defendant JPMorgan Chase Bank, N.A. He contends the trial court abused its discretion in granting summary judgment, in that he was not given the required notice of the motion or the opportunity to conduct discovery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action on June 11, 2009, against Washington Mutual Bank and Quality Loan Service Corp., alleging causes of action for unfair competition in violation of Business and Professions Code section 17200 et seq., predatory lending practices in violation of federal law, and seeking a permanent injunction and declaratory relief. The action arose out of a loan by Washington Mutual Bank secured by real property in Sylmar owned by plaintiff.

Defendant, which acquired certain of Washington Mutual Bank's assets and liabilities as a receiver from the FDIC, answered plaintiff's second amended complaint on February 5, 2010.

On August 19, 2010, defendant filed its motion for summary judgment, which it served on plaintiff by mail that same day. The motion was to be heard November 10, 2010.

Concurrently, defendant filed and served on plaintiff by mail the declaration of William G. Malcolm and a request for judicial notice. Although these documents stated that the declaration of Eleanor M. Mendoza (Mendoza declaration) was being served concurrently, it was not served at that time.

On October 26, 2010, plaintiff filed his opposition to the summary judgment motion and objection to the request for judicial notice.

Defendant filed and served the Mendoza declaration on November 1, 2010. On November 5 it served, and on November 8 it filed, its reply in support of the motion and the supporting declaration of Damian P. Richard. In his declaration, Richard stated that the Mendoza declaration was inadvertently omitted from the moving papers. Richard requested that plaintiff stipulate to a two-week continuance of the hearing on the summary judgment motion to give plaintiff time to file supplemental opposition to the motion. Plaintiff refused to stipulate.

At the November 10 hearing, plaintiff objected to the court's consideration of the Mendoza declaration. The court continued the matter to December 9 and gave plaintiff until December 6 to file and serve his surreply addressing the declaration.

Plaintiff filed supplemental opposition to the summary judgment motion on November 24, 2010. In it, he claimed the Mendoza declaration was untimely and should not be considered and, in any event, it was irrelevant to the issues framed by the motion.

At the December 9, 2010 hearing, the trial court told plaintiff that the issue addressed by the Mendoza declaration "has been an issue in the case from the beginning, and so I would like to know what discovery was conducted by you in that regard and what, if any, efforts you made to take Ms. Mendoza's deposition after you did receive her declaration." Plaintiff launched into an explanation of the discovery he wanted to do. The court noted that the declaration was served on plaintiff a month earlier and asked, "So what have you done to attempt to get the discovery that you feel you need?" Plaintiff said he wanted to depose her and he had retained someone to conduct the deposition. He further discussed why he needed time to depose Mendoza.

Defense counsel responded that he had with him the note that was the subject of the Mendoza declaration, and the trial court did not need to rely on the declaration in order to grant the summary judgment. He added that plaintiff had been on notice since the beginning of the litigation that defendant claimed to have the note.

The trial court responded that "[i]t is a shame because I think this could have been avoided had the mistake had not occurred with respect to the declaration." In order to address the situation, it was going to vacate the trial date "and I am going to set 75 days

from November 1, since you have had the information from that point, Mr. Cabrera,” and there was discovery plaintiff could have conducted at low cost since that time.

Plaintiff requested that he could have 75 days from the current date, “[b]ecause I didn’t know whether this was going to get entered or not, and all my concentration was on this date of today.” The trial court explained that plaintiff should have been preparing for trial, despite the pendency of the summary judgment motion.

The court set January 25, 2011 as the new hearing date. It gave plaintiff until January 11 to serve opposition to the summary judgment motion. Plaintiff indicated he would set up the deposition.

Plaintiff filed supplemental opposition on January 7. In his supporting declaration, plaintiff stated that on December 29, 2010, he had served on defense counsel notice of taking Mendoza’s deposition on January 8, 2011, at the Chatsworth Courthouse cafeteria. He was unable to schedule the deposition and serve notice any sooner due to the holidays and his mother’s illness. On January 3, he received notice of objection to the deposition. The objection was that the deposition was scheduled less than 10 days after service on notice, and it was scheduled for a Saturday, when the courthouse cafeteria would be closed. Plaintiff challenged these objections, claiming he did notice the deposition 10 days before it was scheduled, and the location of the deposition “easily could have been changed.”

At the January 25, 2011 hearing, the trial court granted the summary judgment motion. It explained, “The gravamen of plaintiff’s complaint is that defendant JP Morgan did not hold the promissory note and deed of trust, originally executed by plaintiff and Washington Mutual Bank, and therefore defendant did not have the right to foreclose on the property. Defendant filed the instant motion on August 19, 2010, with a hearing date of November 10, 2010, in order to comply with the statutory notice requirements. Defendant’s original submission inadvertently failed to include the declaration of Eleanor Mendoza which established that JP Morgan was the current beneficiary of the note and deed of trust and had the documents in its possession. The Mendoza declaration was filed on November 1, 2010.”

The court continued: “In order to allow plaintiff the proper statutory notice and to give plaintiff time to conduct any discovery he deemed necessary, the hearing on the motion was continued to January 25, 2011. Plaintiff was ordered to submit any supplemental opposition to the motion by January 11, 2011. At hearings on November 10 and December 9, plaintiff expressed his intention to take the deposition of Ms. Mendoza. However, plaintiff waited until December 20, 2010, to notice the deposition and then set it for Saturday, January 8, 2011, in the Chatsworth Courthouse. The notice of deposition is defective since the courthouse is always closed on weekends and therefore the deposition could not have been conducted there. Plaintiff has failed to take advantage of the time allowed to conduct necessary discovery and no further continuances will be granted.”

The court concluded that defendant established its entitlement to summary judgment and plaintiff “failed to carry his burden to identify any triable issue of material fact.”

DISCUSSION

Service of Notice

Plaintiff first contends that the trial court should have denied the summary judgment motion because he was not provided with the requisite 75 days’ notice. In support of his contention, plaintiff relies on *Robinson v. Woods* (2008) 168 Cal.App.4th 1258. *Robinson*, however, is distinguishable.

Code of Civil Procedure section 437c, subdivision (a), provides that notice of the motion for summary judgment must be served at least 75 days before the hearing on the motion and 30 days before trial. In *Robinson*, defendants mailed notice of their summary judgment motion 76 days before the hearing on the motion, and 18 days before trial. (*Robinson v. Woods, supra*, 168 Cal.App.4th at p. 1260.) The plaintiffs opposed the motion on the grounds the motion was required to be served 80 days before the hearing if served by mail, and the motion was required to be heard at least 30 days before trial. The

opposition did not address the merits of the motion. (*Ibid.*) At the hearing on the motion, the trial court continued the hearing until the 80th day after mailing of notice, giving the plaintiffs four days to address the merits of the motion. (*Id.* at p. 1261.)

The court noted that where, as in the case before it, untimely notice is due to a statutory violation by the moving party, “the opposing party faces the dilemma of risking a loss on the motion if (1) it does not address the merits at all and the trial court declines to continue the hearing or (2) it addresses the merits to some extent but does not adequately show prejudice due to the untimely notice.” (*Robinson v. Woods, supra*, 168 Cal.App.4th at p. 1267.) In the case before it, the opposing party did not address the merits of the motion or claim prejudice from the lack of notice but simply claimed a violation of the statutory notice requirements. (*Ibid.*) The court concluded that the notice was invalid, and “the trial court had no authority to continue the hearing a mere four days. At that point, the notice period had to begin anew” (*Id.* at pp. 1267-1268.)

Here, by contrast, plaintiff did address the merits of defendant’s motion, and had the full statutory amount of time in which to do so. When he objected to consideration of the late-filed Mendoza declaration, he also addressed the merits of that declaration, arguing that it was without foundation and did not prove any facts at issue in the summary judgment motion.

The trial court nonetheless continued the hearing on the motion so that plaintiff had the full 75 days from the date the Mendoza declaration was filed in order to respond to it on its merits. He made no attempt to conduct additional discovery when served with the declaration, he delayed in attempting to conduct discovery after being given the continuance, and the notice of deposition he ultimately filed was invalid.

Under the circumstances of this case, *Robinson* did not mandate that plaintiff be given a new 75-day period to oppose the summary judgment motion at the December 9, 2010 hearing. The continuance of the hearing to January 25, 2011, 75 days from the late filing of the Mendoza declaration, did not deprive plaintiff of the statutory time period in which to respond to the merits of the motion.

Opportunity to Conduct Discovery

Plaintiff also contends that the trial court should have denied the summary judgment motion because he was not afforded the opportunity to conduct discovery. He relies on Code of Civil Procedure section 437c, subdivision (h), which provides that “[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit . . . discovery to be had”

However, “[t]he nonmoving party seeking a continuance ‘must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]’ [Citation.]” (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 190.) The party complaining of the denial of a continuance bears the burden of establishing an abuse of discretion. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.)

Plaintiff’s supplemental declaration in opposition to the summary judgment motion recounted what had occurred since the service of the Mendoza declaration on November 1, 2010. It did not set forth the facts to be obtained from a deposition of Mendoza or why those facts were essential to opposing the motion. Neither did it explain why plaintiff made no effort to obtain that information through discovery during the pendency of this action. Plaintiff failed to meet his burden of showing why a continuance was necessary. The trial court therefore did not abuse its discretion in denying his request for a continuance.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.