Filed 3/29/18 Amaca Investments, Inc. v. U.S. Bank National Assn. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AMACA INVESTMENTS, INC. et al., Plaintiffs and Appellants, v. U.S. BANK NATIONAL ASSOCATION, as Trustee, etc., Defendant and Respondent.	B270028 (Los Angeles County Super. Ct. No. BC531458)

APPEAL from summary judgment and an order of the Superior Court of Los Angeles County, Dalila Corral Lyons, Judge. Affirmed.

Law Office of Nick A. Alden and Nick A. Alden for Plaintiffs and Appellants.

Wright, Finlay & Zak, Jonathan D. Fink and Kathryn A. Moorer, for Defendant and Respondent.

This is a breach of contract case, albeit one that arises from non-judicial foreclosure proceedings. Plaintiff and appellant Amaca Investments (Amaca) fell behind on its mortgage payments, and defendant and respondent U.S. Bank, as trustee for a securitized mortgage instrument, began the process of foreclosing on Amaca's property. A détente ensued when U.S. Bank and Amaca entered into a forbearance agreement that obligated U.S. Bank to refrain from taking further steps to foreclose on Amaca's property so long as Amaca made payments in agreed-upon amounts by the 15th day of future months. Amaca subsequently made several payments after the agreed-upon due dates, and U.S. Bank foreclosed on the property. Amaca sued, claiming its payments had been timely and U.S. Bank had therefore breached the forbearance agreement. The trial court entered summary judgment for U.S. Bank. Apart from arguments made for the first time on appeal—which we reject as waived—we are asked to decide whether summary judgment must be reversed because there is a material dispute of fact as to whether Amaca's payments were timely made. We also consider whether the trial court erred in denying Amaca's motion to (a) file a cross-complaint when no other complaint was pending and (b) amend its operative complaint *after* the trial court's summary judgment ruling.

I. BACKGROUND

A. The Loan and Forbearance Agreement

In 2007, Amaca obtained a loan from Greenpoint Mortgage Funding Inc. by executing a promissory note secured by a deed of trust on a parcel of real property located in Los Angeles. The

note, originally assigned to Aurora Bank, FSB, f/k/a Lehman Brothers Bank, FSB (Aurora), was eventually assigned to U.S. Bank.

Amaca applied for a modification of the loan in 2009, which was granted the following year. In 2011, Amaca fell behind on its payments, and went into default.

In 2012, Amaca and U.S. Bank (through its loan servicer) entered into a forbearance agreement that obligated Amaca to repay the amounts past due, and to continue making payments currently due under the note. In return, U.S. Bank agreed to forbear from exercising its rights and remedies under the note and deed of trust.

More specifically, the forbearance agreement provided in pertinent part that Amaca was to "strictly and timely comply with each and every obligation . . . including, without limitation: [c]ommencing on April 1, 2012 along with a $25,000 down payment toward the arrears, timely make all payments set forth in the payment schedule" that specified "[p]ayments due by 15th." U.S. Bank agreed to forbear from pursuing its remedies with respect to Amaca's default "[s]ubject to [Amaca's] strict and timely compliance with each and every obligation . . . set forth in this Agreement . . . ." The forbearance agreement stated "[t]ime is of the essence in the performance of all terms and conditions and other obligations under th[e] Agreement." It also provided that the "[f]ailure of Borrower to perform any one or more of its obligations set forth in this Agreement within the time herein specified shall terminate Lender's obligations under the terms and conditions of th[e] Agreement."

B. Amaca's Late Payments and U.S. Bank's Foreclosure

It is undisputed Amaca did not make its November 2012 payment on or before November 15. Amaca received a letter from Ocwen Loan Servicing (Ocwen) dated November 27, 2012, providing "Notice of Intent to Terminate Forbearance," urging Amaca to make a payment or to contact Ocwen to "resolve the breached terms and conditions of your forbearance agreement." The letter also informed Amaca that failure to remit its past due forbearance payment would result in termination of the forbearance agreement. Amaca did not make the payment due on November 15 until November 30, 2012. According to U.S. Bank, Ocwen placed that late payment in a suspense account and later returned it to Amaca because it was not timely made. According to Amaca, it never received any returned funds from the November 30, 2012, payment.

Amaca's president, Andymoore Adams (Adams) attempted to login to Amaca's online Ocwen account a few days later, and discovered he was no longer able to make additional payments on the loan. Adams spoke to an Ocwen customer service representative who informed him Ocwen would no longer accept Amaca's payments, and that Amaca would have to speak with a specific Ocwen employee "before working anything else out."

On December 11, 2012, Adams spoke to an Ocwen representative and informed Ocwen that Amaca also would not be able to timely make the payment due on December 15, 2012. Ocwen's records reflect Amaca later attempted to make that December payment via telephone on January 3, 2013, and Adams sent Ocwen a check around the middle of that month. Ocwen rejected the late December 2012 payment, and Amaca

acknowledges the check it sent to Ocwen in January was returned.

U.S. Bank ultimately sold Amaca's property at a non-judicial foreclosure sale in February 2013.

C. Amaca's Complaint

Amaca sued U.S. Bank in December 2013. The complaint did not allege U.S. Bank failed to comply with California foreclosure laws, nor did the complaint challenge the validity of the forbearance agreement or contend U.S. Bank waived any of the agreement's provisions requiring "strict and timely compliance." Instead, the complaint presented a single cause of action for breach of contract that asserted Amaca had "timely made" all of its payments for "May 2012 through November 2012." The complaint alleged U.S. Bank breached the forbearance agreement by refusing to accept payments from Amaca, by claiming Amaca was in breach, and by foreclosing on the property.

D. U.S. Bank's Summary Judgment Motion

U.S. Bank moved for summary judgment. The bank argued Amaca could not prevail on its breach of contract claim because (1) Amaca had not performed under the forbearance agreement by failing to make the agreed-upon payment by the 15th of November, (2) U.S. Bank had not breached the agreement because Amaca's failure to pay on time was a prior breach of the agreement and left U.S. Bank free to pursue foreclosure, and (3) U.S. Bank had not caused Amaca any damages because it was Amaca's behavior that gave U.S. Bank the right to sell the property by foreclosure. With its summary judgment motion,

U.S. Bank submitted evidence demonstrating Amaca's November payment and its December payment were both made after the 15th of the month.[1]

In opposition to summary judgment, Amaca conceded it made the payment due on November 15 on November 30 and Amaca did not address the evidence submitted by U.S. Bank regarding the late December payment. Amaca argued, however, about what constituted a "timely" payment under the forbearance agreement. Amaca contended the November 30 payment should be considered timely because a provision in the loan promissory note (not the forbearance agreement) provided that a higher interest rate would apply to any monthly installment payment delinquent by more than thirty days; in Amaca's view, this meant that any payment made within thirty days of the due date was "timely." In the alternative, Amaca argued the timeliness of a payment made after the due date was a question of fact for the jury.

Furthermore, Amaca argued that even if the November 30 payment constituted a breach of the forbearance agreement, it was not a "material" breach. Amaca contended the asserted

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[1] Specifically, U.S. Bank submitted Ocwen's service notes and transaction history regarding Amaca's account, both of which indicated Amaca did not make its November payment until November 30. U.S. Bank also submitted Amaca's discovery responses in which the company admitted the November payment was not made until November 30. Ocwen's service notes further indicated Amaca did not attempt to transmit its December payment until after December 15, and excerpts of Adams's deposition submitted by U.S. Bank indicated the check Amaca sent to Ocwen in January 2013 was returned to Amaca.

breach could not be material because U.S. Bank had not deemed certain other payments made after the 15th of earlier months in breach of the forbearance agreement, which meant U.S. Bank "had waived the breach of the November 15, 2012 payment not being made by November 15, 2012."

U.S. Bank disputed Amaca's materiality argument in its reply papers. U.S. Bank argued Amaca's materiality argument raised a theory not pled in its complaint, which alleged only that "[f]or May 2012 through November 2012, Amaca timely made all of its payments."

E. The Trial Court's Summary Judgment Ruling

The trial court granted U.S. Bank's motion for summary judgment, finding Amaca failed to comply with its obligation under the agreement to make the required payments on the 15th of each month. Because it was undisputed Amaca had not lived up to its end of the bargain with respect to the payment due on November 15, 2012, the court reasoned U.S. Bank had not breached the agreement by proceeding with foreclosure.

The trial court additionally rejected Amaca's attempt to argue U.S. Bank had effectively waived the provisions of the agreement requiring timely payments by the 15th of the month by accepting late payments in the past. The trial court reasoned this waiver theory had not been pled in the complaint—which had instead alleged only that all payments had been timely—and the court cited case law that holds the issues to be decided at summary judgment are properly limited only to those framed by the pleadings.

In light of its summary judgment ruling, the trial court entered judgment for U.S. Bank (prematurely, for reasons we next discuss) on November 30, 2015.

F. U.S. Bank's Cross-Complaint and Amaca and the Adams Cross-Defendants' Motion for Leave to Amend or File a Cross-Complaint

During the summary judgment briefing, U.S. Bank sought and obtained leave to file a cross-complaint against Amaca and its owners (the Adams cross-defendants). The cross-complaint, filed in August 2015, alleged causes of action for fraud and negligent misrepresentation because Amaca failed to disclose on its loan application that it was obligated to repay a preexisting loan to a nonparty. Amaca and the Adams cross-defendants answered the cross-complaint. When the trial court on November 30, 2015, entered judgment for U.S. Bank on Amaca's complaint, U.S. Bank's cross-complaint was still pending against Amaca.

After summary judgment, but while the cross-complaint was still pending, Amaca and the Adams cross-defendants moved to a file their own cross-complaint and Amaca sought leave to amend its complaint on which the trial court had already granted summary judgment. The Amaca and Adams cross-defendants' proposed cross-complaint, which they characterized as compulsory, sought to assert two causes of action for fraud, a cause of action for breach of contract, and a cause of action for cancellation of agreement.

U.S. Bank opposed Amaca and the Adams cross-defendants' motion for leave to file a cross-complaint and Amaca's motion to amend its complaint against U.S. Bank. At about the same time, U.S. Bank also filed a request to dismiss its cross-complaint

without prejudice (on the expectation it would moot out the request by Amaca and the Adams cross-defendants to file a cross-complaint to U.S. Bank's cross-complaint). The clerk of the superior court granted U.S. Bank's request and entered a dismissal of U.S. Bank's cross-complaint on January 8, 2016.

At a subsequent hearing on January 20, 2016, the trial court denied Amaca and the Adams cross-defendants' motions. The court concluded Amaca had no basis to amend its breach of contract complaint against U.S. Bank because it had already granted summary judgment for U.S. Bank and the motion to amend was accordingly untimely and improper. The trial court additionally concluded that Amaca and the Adams cross-defendants' request to file a cross-complaint against U.S. Bank should be denied because U.S. Bank had dismissed its cross-complaint and there was accordingly nothing left to "cross-complain" against. The trial court issued a minute order denying the motion for leave to amend the complaint or to file a cross-complaint. The order noted the cross-complaint had been dismissed on January 8 and "deem[ed the] case closed."[2]

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[2] The minute order issued by the court is not a signed order. This potentially poses a problem akin to the problem confronted by the court in *Flores v. California Department of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199 (*Flores*). (See Code Civ. Proc., § 581d.) We adopt the same approach employed by the *Flores* court to resolve it: "To promote the orderly administration of justice, and to avoid the useless waste of judicial and litigant time that would result from dismissing the appeal merely to have a judgment formally entered in the trial court and a new appeal filed, we order the trial court to enter a judgment of dismissal nunc pro tunc as of the date of the order [denying Amaca and the Adams cross-defendants' motion to amend the complaint or file a

II. DISCUSSION

Amaca asks us to consider a number of arguments that were not adequately presented to the trial court: did U.S. Bank breach the forbearance agreement by not rescinding previously-filed foreclosure notices, did U.S. Bank have standing to foreclose or have an interest in the property, did U.S. Bank comply with certain non-judicial foreclosure statutes, and is the forbearance agreement unconscionable.[3] Whether to consider issues that are not adequately raised in the trial court is a matter left to our discretion; we are not required to consider new theories even if they raise pure questions of law. (See, e.g., *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.) We decline to consider these arguments, we deem them waived (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997), and we instead decide only the two issues Amaca properly raises: whether the trial court was correct (1) in granting U.S. Bank summary judgment and (2) in denying Amaca leave to amend its breach of contract complaint and leave to file a cross-complaint against U.S. Bank notwithstanding U.S. Bank's dismissal of its cross-complaint.

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cross-complaint], and we will construe the notice of appeal to refer to that judgment." (*Flores*, *supra*, at p. 204.)

[3] Amaca contends these arguments were presented to the trial court when it sought leave to amend its complaint or to file a cross-complaint—i.e., after the court had already granted summary judgment for U.S. Bank. Identifying the issues at that late juncture—and in a context where the arguments were not properly before the trial court for decision—was inadequate.

The trial court's grant of summary judgment was proper. Amaca's argument U.S. Bank had waived the timeliness requirement by accepting late payments in the past was not properly before the court because it was not pled or even alluded to in Amaca's complaint. That argument aside, the forbearance agreement required strict and timely performance with its provisions, which required Amaca to make payments by the 15th of each month. It is undisputed Amaca did not make its November payment until November 30, and there is likewise no dispute that the December payment was not made until after the due date and was returned to Amaca. Summary judgment was therefore proper because Amaca could not demonstrate it had fully performed under the forbearance agreement.

The trial court also correctly denied Amaca and the Adams cross-defendants' motion to amend the complaint or file a cross-complaint. By the time the motion was heard, judgment had been entered on Amaca's complaint and U.S. Bank had voluntarily dismissed its own cross-complaint. Amaca could not amend an adjudicated complaint, and there was no basis for the filing of a cross-complaint when the complaint to which it purported to respond had already been dismissed.

A. Standard of Review

To obtain summary judgment, a moving defendant must demonstrate that one or more elements of the plaintiff's cause of action cannot be established or that a complete defense to the plaintiff's cause of action exists. (Code Civ. Proc., § 437c, subd. (p)(2); see also *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370.) We review a grant of summary judgment de novo, following the same three-step process as the trial court:

"'we (1) identify the issues framed by the pleadings; (2) determine whether the moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable, material factual issue. [Citation.] Like the trial court, we view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom. [Citation.]' [Citation.]" (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.)

B. The Trial Court Properly Granted U.S. Bank's Motion for Summary Judgment

1. Amaca cannot oppose summary judgment on a timeliness waiver theory not pled in its complaint

"Under settled summary judgment standards, we are limited to assessing those theories alleged in the plaintiffs' pleadings. (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1250[(*Conroy*)] [the materiality of a disputed fact is measured by the pleadings, which set the boundaries of the issues to be resolved at summary judgment]; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332[(*County of Santa Clara*)]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253-1259 & fn. 7[ ]; *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648[ ].) "'The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as *alleged in the complaint*. A 'moving party need not ". . . refute liability on some theoretical possibility not included in the pleadings." [Citation.]' . . . "'[A] motion for summary judgment must be directed to the *issues raised by the pleadings*. The

[papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.""" (*County of Santa Clara*, [*supra*,] at p. 332-333.) "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.'" [Citation.] '[A] plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing.' [Citations.]" (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1275 (*Falcon*).)

Amaca's complaint pleads a single cause of action for breach of contract. The complaint acknowledges that the forbearance agreement required Amaca's strict and timely compliance with its obligations, and that U.S. Bank's forbearance was subject to that strict and timely compliance. It also concedes Amaca was to pay an agreed-upon amount each month and "[t]he payments were due on the 15th of the month." Importantly, the complaint then alleges "Amaca timely made all of its payments" for May 2012 through November 2012, and "performed its obligations under the Contract by timely making all of its payments." The complaint, however, asserts U.S. Bank breached the forbearance agreement by claiming Amaca had breached the agreement, refusing to accept Amaca's December payment, and foreclosing on Amaca's property.

The complaint makes no mention of any payments made after the 15th of any month, or of U.S. Bank's reaction to any late payments. Thus, even read charitably, Amaca's complaint was founded solely on the theory that U.S. Bank breached the

forbearance agreement even though Amaca had timely performed—not on any theory that Amaca was excused from making payments by the 15th of every month because U.S. Bank's prior conduct had effectively waived its right to insist on the "strict[ ]" compliance with the timeliness obligations imposed by the forbearance agreement. Under *Conroy*, *Falcon*, and other well-established authority, this means Amaca's waiver theory was not properly before the trial court at summary judgment and U.S. Bank was (and remains) under no obligation to refute it.

2. There is no dispute that Amaca failed to perform as required by the forbearance agreement

To prevail on summary judgment, U.S. Bank was required to demonstrate Amaca could not prove at least one element of its breach of contract claim as a matter of law. U.S. Bank met that burden as to the element that requires a breach of contract plaintiff to prove he or she lived up to his or her part of the bargain.

"'It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance.'" (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602.) "'[O]ne party to a contract cannot compel another to perform while he himself is in default.' [Citations]." (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367.) Only a failure to perform that constitutes "a material breach of the contract" may discharge the other party from its duty to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277; *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863). A provision that "time is of the essence" is

generally deemed to constitute a material term of the contract, the nonperformance of which breaches the contract and excuses the other party's performance. (See, e.g., Civ. Code, § 1490; *Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 27; *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1337-1338.)

U.S. Bank demonstrated the forbearance agreement required Amaca to make payments by the 15th of each month in order to fully perform. The forbearance agreement also repeatedly emphasized the importance of strict and timely performance, and contained an express time is of the essence clause. The forbearance agreement neither contains any provisions establishing a default rate or "grace period" nor incorporates any such terms that may have been in the underlying note.

U.S. Bank provided declarations and other documentary evidence, including Amaca's discovery responses and Adams' deposition testimony, demonstrating Amaca did not make the November payment until November 30. It also submitted a declaration and exhibit establishing that U.S. Bank placed the November payment in a forbearance account, and ultimately returned it. U.S. Bank submitted authenticated customer service records from Ocwen demonstrating that although Amaca was in communication with Ocwen during the month of December and was told in early December that it was in default, Amaca did not attempt to make its December payment until January 3, via phone call, and U.S. Bank rejected that payment. This undisputed evidence accordingly established Amaca failed to perform its obligation under the agreement to make the agreed-upon payments by the date they were due.

In opposition to U.S. Bank's motion and again here on appeal, Amaca advances three arguments to the contrary, none of which is persuasive.

First, Amaca argues a term from the original promissory note establishing a default rate should be used to interpret what the forbearance agreement means when it obligates Amaca to timely comply with its obligations under the agreement. Specifically, Amaca believes that because the underlying promissory note includes a clause providing a late charge applies to payments thirty days or more past their due date, payments made under the forbearance agreement should be considered "timely" if made within thirty days of their respective due dates. The forbearance agreement, however, contains no provisions that indicate an intent to incorporate terms from the promissory note. In the absence of any such provisions, the plain language of the agreement controls: timely payments were necessary to comply with the agreement, and payments were due by the 15th.[4]

Second, Amaca argues that if a late payment constituted a breach, the materiality of the breach is a question of fact. While it is true that "[n]ormally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact" (*Brown v. Grimes*, *supra*, 192 Cal.App.4th at p. 277), the question of materiality may be resolved as a matter of law where reasonable minds could not

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[4] *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, on which Amaca relies, interpreted terms in a deed of trust containing a late payment fee clause. The case is therefore inapposite here where the forbearance agreement contains no such clause.

differ on the issue (*Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526-1527). A provision that "time is of the essence" generally constitutes a material term of the contract, the breach of which is a material breach. (See, e.g., Civ. Code, § 1490; *Gold Mining & Water Co. v. Swinerton*, *supra*, 23 Cal.2d at p. 27; *Galdjie v. Darwish*, *supra*, 113 Cal.App.4th at pp. 1337-1338.) It is undisputed that the forbearance agreement contained an express "time is of the essence" provision and repeatedly stated Amaca must timely perform its obligations. Amaca did not comply with the timely payment provisions of the agreement, and there can be no dispute the breach of those terms requiring timely loan repayment to forestall further steps toward foreclosure was a material breach of the agreement's terms.

Finally, Amaca asserts the question of whether U.S. Bank actually returned the November 30 payment to Amaca is a disputed factual issue requiring trial. In response to U.S. Bank's evidence to the contrary, Amaca submitted the declaration of its president stating Amaca never received the returned payment. Even accepting there is a factual dispute about whether the payment was returned, the dispute is not one that concerns a *material* fact such that a trial is necessary: It is undisputed Amaca failed to transmit the November payment by the date it was due, and this failure to pay by the due date is a material breach of the agreement whether or not the November payment was ultimately returned to Amaca. Moreover, even taking it as true that the November payment was not returned, Amaca has not disputed U.S. Bank's evidence showing both that Amaca did not attempt to make the December payment until January 3 at the earliest and that the late payment Amaca ultimately sent in

by check was in fact returned. U.S. Bank did not foreclose on the property until February 2013, and thus the question of the return of the November payment is not one that requires a trial to determine whether proceeding with foreclosure breached the forbearance agreement.

Because Amaca fails to raise a triable issue of material fact and U.S. Bank demonstrated Amaca could not prevail on its breach of contract claim, the trial court correctly granted summary judgment for the bank.

C. The Trial Court Properly Denied the Motion to File an Amended Complaint or a Cross-Complaint

We review the trial court's rulings on motions for leave to amend a complaint or leave to file a cross-complaint for abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242; *Clark v. Ezn, Inc.* (1997) 57 Cal.App.4th 852, 859; see also *Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 718 [trial court has only a "'modicum of discretion'" to exercise when considering a motion for leave to file a compulsory cross-complaint].)

Amaca contends the trial court should have permitted it to amend its breach of contract complaint two months after granting U.S. Bank's motion for summary judgment on that complaint.[5] To state the argument is really to refute it. "Once

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[5] Amaca also appears to argue the trial court improperly entered judgment on its complaint in violation of the one final judgment rule because U.S. Bank's cross-complaint was still pending. This argument misinterprets the one final judgment rule, which governs the appealability of actions, not whether a trial court may enter judgment on one portion of an action that

judgment has been rendered, amendment of a pleading is only possible if the judgment is first vacated, e.g., by motion for relief on the ground of 'mistake, inadvertence, surprise, or excusable neglect' [citations] or by motion for new trial [citations]." (5 Witkin, Cal. Proc. 5th Plead § 1207, After Judgment (2008); see also *Risco v. Reuss* (1941) 45 Cal.App.2d 243, 245 ["It is well settled that only under the relief afforded by section 473 of the Code of Civil Procedure can an application for leave to amend be made after judgment"]; *Issa v. Alzammar* (1995) 38 Cal.App.4th Supp. 1, 4 [reversing amendment of complaint after judgment where the judgment was not vacated prior to amendment].) The judgment had not been vacated when Amaca filed its motion, nor had Amaca even sought to vacate the judgment. The trial court correctly rejected Amaca's attempt to amend its complaint at that juncture.

Amaca and the Adams cross-defendants also argue the trial court abused its discretion by denying their request to file what they termed a compulsory cross-complaint. Although U.S. Bank's cross-complaint was pending when Amaca and the Adams cross-defendants' motion was filed, U.S. Bank voluntarily dismissed its cross-complaint prior to the hearing on the motion.[6] Once U.S.

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has been fully disposed of, while another portion proceeds. (See, e.g., *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 59.)

[6] Once U.S. Bank exercised its right to voluntarily dismiss its cross-complaint, the clerk of the court was required to enter the dismissal. (See, e.g., *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202 Cal.App.3d 921, 929-930; *Egly v. Superior Court of Los Angeles County* (1970) 6 Cal.App.3d 476, 479-480; see also Code Civ. Proc. § 581, subd. (b)(1), subd. (i).)

Bank's cross-complaint was dismissed the request by Amaca and the Adams cross-defendants to file their own cross-complaint was moot (*Malick v. American Sav. & Loan Asso.* (1969) 273 Cal.App.2d 171, 174) and the trial court "lack[ed] jurisdiction to enter further orders in the dismissed action" (*Conservatorship of Martha P.* (2004) 117 Cal.App.4th 857, 866). The trial court therefore correctly refused to permit Amaca and the Adams cross-defendants to file their own cross-complaint.

Amaca and the Adams cross-defendants' argument to the contrary is mistaken. They invoke the principle that the right to dismiss is curbed "where affirmative relief has been sought by the cross-complaint of a defendant" (Code Civ. Proc., § 581, subd. (i)), but cross-claims must actually be pending against the party for that exception to apply. Here, neither Amaca nor either of the Adams cross-defendants had asserted any cross-claims against U.S. Bank prior to U.S. Bank's dismissal of its cross-complaint, and requesting leave to file a cross-complaint does not itself qualify as seeking affirmative relief. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 11:8, p. 11-4 ["Where a prior court order is required to file a cross-complaint (see [Code Civ. Proc.,] § 428.50), plaintiff can still dismiss while the motion for leave to file is pending. I.e., plaintiff's right to dismiss is cut off only when a cross-complaint is actually *filed*"].)

DISPOSITION

The trial court is direct to enter a judgment of dismissal nunc pro tunc as of the date of the order denying the motion for leave to amend or file a cross-complaint. The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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