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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

SATISH SHETTY,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS,
INC. et al.,

Defendants and Respondents.

2d Civil No.B269059
(Super. Ct. No. 56-2015-
00462760-CU-OR-VTA)
(Ventura County)

Satish Shetty purchased a condominium from a homeowners' association that had foreclosed on a lien for unpaid dues. When Shetty purchased the property, a preexisting debt—a mortgage loan secured by a deed of trust on the condominium—was in default. He soon received notice of a trustee's sale. Shetty now sues the beneficiary of the trust deed and its assignee to prevent them from foreclosing on the property.

Shetty has failed to show on appeal that his claims have merit. He is not a bona fide purchaser (BFP) because he purchased the property with constructive knowledge of the senior lien. He has no standing to challenge assignments of the loan instruments because he is not a party to the loan. The trial court

properly dismissed his lawsuit after granting summary judgment in favor of respondents.

FACTS

June Amaralo owned a condominium at Alamo Villas in Simi Valley (the Property). Shetty's opening brief deems as "undisputed" that Amaralo borrowed \$210,000 from American Brokers Conduit (the Loan), which is secured by a deed of trust on the Property recorded on February 22, 2007 (the 2007 DOT). The beneficiary of the 2007 DOT is respondent Mortgage Electronic Registration Systems (MERS) as nominee for the lender and the lender's nominees and assignees.¹

The Loan was securitized into the American Home Mortgage Investment Trust 2007-1 (Trust). Respondent Deutsche Bank National Trust Company (DBNTC) is the trustee of the Trust. DBNTC received Amaralo's original note evidencing the Loan on February 23, 2007. Respondent Ocwen Loan Servicing is the loan servicer for DBNTC.

In June 2013, MERS assigned the 2007 DOT to DBNTC. The assignment was recorded in Ventura County on June 11, 2014. On July 23, 2014, a Notice of Default and Election to Sell Under Deed of Trust (NOD) was recorded, listing a delinquency of \$31,574.23 on the Loan.

¹ MERS tracks mortgage loan ownership to facilitate transfers and securitization. As the trust deed beneficiary, MERS has legal title and may transfer or assign the loan, without recording it and without prior notice to the borrower. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 931, fn. 7 (*Yvanova*); *O.C. Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1336, fn. 7.) The 2007 DOT states that MERS holds legal title to the security interest granted by the borrower and may sell the Loan.

Amaralo failed to pay dues to the Alamo Villas Homeowners Association (the HOA). The HOA recorded an assessment lien against the Property on November 17, 2011, then foreclosed. A trustee's deed upon sale, recorded on June 14, 2013, conveyed the Property to the HOA for a credit bid of \$7,930.54.

By a grant deed recorded on November 4, 2014, the HOA transferred its interest in the Property to Shetty. Shetty makes blind offers to homeowner associations on distressed properties, never checking beforehand to see if there is a senior encumbrance. He stated, "I don't really look at property with respect to any debt. I just buy the property with respect to neighborhood, condition of the property."

On December 16, 2014, not long after Shetty purchased the Property, a Notice of Trustee's Sale was recorded, listing an overdue amount owing on the Loan of \$256,934.61. The trustee's sale, originally slated for January 5, 2015, was never held.

Shetty filed a complaint on January 12, 2015, and had a lis pendens placed on the Property. The first amended complaint asserts causes of action for a determination of the identity of creditors; fraud; slander of title; cancellation of instruments; Civil Code and Business Code violations; to quiet title; and for declaratory relief.

Respondents moved for summary judgment. Shetty disputed virtually all of respondents' undisputed facts, but agreed that he purchased the Property from the HOA, did not review title to the Property before his purchase, and no foreclosure sale has occurred. The court granted summary judgment and dismissed Shetty's case with prejudice.

DISCUSSION²

1. The Motion For Summary Judgment Was Not Prematurely Filed

Shetty contends that respondents' motion was premature. It was served by overnight mail on August 7, 2015, 80 days before the hearing on October 26, 2015. (Code Civ. Proc., § 437c, subd. (a) [if overnight mail is used, a summary judgment motion must be served at least 77 days before the hearing date].) He argues that the motion had to be rescheduled because it was served after he inadvertently dismissed this lawsuit: the court clerk entered the dismissal, "as requested," on July 28, 2015.

Shetty forfeited his claim. In an ex parte application, Shetty listed six hearings affected by his inadvertent request for dismissal, including the October 26, 2015 hearing on respondents' motion for summary judgment, and Shetty's own motion for summary judgment scheduled for January 4, 2016. He wrote, "[p]laintiff now seeks relief in the form of an order [to] vacate dismissal of this action, reopen this case *and reinstate all hearing and trial dates as is described above.*" (Italics added.) After expressly asking the trial court to reinstate the hearing dates for the summary judgment motions, Shetty cannot argue on appeal that the trial court erred by doing exactly what he requested.

² Shetty appealed the dismissal following summary judgment. The "Issues on Appeal" in his opening brief does not list the denial of his request to strike respondents' answer; he belatedly argues in his reply brief that he was entitled to judgment on the pleadings because there is no properly verified answer. New issues cannot be raised in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-764.) We focus only on the summary judgment order listed in the notice of appeal.

2. *The Witness Declarations Are Admissible*

In opposition to summary judgment, Shetty objected that respondents' witnesses are incompetent; lack personal knowledge of respondents' business records; rely on hearsay; and their declarations are argumentative and conclusory. The trial court overruled Shetty's objections, finding that the witness declarations "are all sufficient on their face, and Plaintiff has not made a showing establishing otherwise."³ Evidentiary rulings are reviewed for an abuse of discretion that "exceeds the bounds of reason." (*Lockhart v. MVM, Inc.* (2009) 175 Cal.App.4th 1452, 1456; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Witness declarations must come from persons who can competently testify to included matters. (Code Civ. Proc., § 437c, subd. (d); *Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705.) A witness's personal knowledge of a matter may be shown by his or her own testimony. (Evid. Code, § 702, subd. (b).) The trial court is entitled to accept as true facts within declarants' personal knowledge. (*Estate of Kerner* (1969) 275 Cal.App.2d 785, 791.)

With respect to business records, "[t]he object of Evidence Code section 1271 is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead." (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1451.) "[I]t is presumed in the preparation

³ At oral argument, newly-hired counsel suggested that the court failed to rule on appellant's objections. On the contrary, the court wrote, "Plaintiff's evidentiary objections are all overruled, both on the merits and because Plaintiff has failed to provide a proposed order, as required by [California Rules of Court] Rule 3.1354." This satisfied the requirement that the trial court "rule expressly" on objections. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.)

of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court.” (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 961.) It is unnecessary to call as a witness each employee who prepares a business record if the court is satisfied that the source of information about business practices justifies admission of the records. (*People v. Williams* (1973) 36 Cal.App.3d 262, 275.)

As a vice-president of DBNTC, declarant Ronaldo Reyes has sufficient personal knowledge of his company’s record-keeping practices to lay a foundation for admission of its business records, under California law. (*Flintkote Co. v. Gen. Accident Assur. Co. of Can.* (N.D. Cal. 2006) 410 F.Supp.2d 875, 884-885.) Reyes is qualified even if he is not the custodian or the person who created the record. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322.)

Declarant Noemi Morales is employed by Ocwen, which appointed her by corporate resolution as an assistant secretary of MERS. In that role, Morales personally signed the assignment of the 2007 DOT to DBNTC. Morales’s declaration meets the admissibility requirements for business records because the assignment was made in the regular course of business; at or near the time of the occurrence of the event; she signed the document and testified to its identity; and Shetty produced no evidence that the assignment is untrustworthy. (Evid. Code, § 1271.)⁴ Morales has firsthand knowledge of the challenged assignment of the 2007 DOT. (*Sierra Managed Asset Plan, LLC v. Hale* (2015) 240

⁴ Shetty produced no evidence that he was defrauded because he relied on the legitimacy of the assignment. Shetty testified that he did not examine documents in the chain of title—which included the recorded assignment—before making a blind offer to purchase the Property.

Cal.App.4th Supp. 1, 8 [the person who created a business record possesses sufficient knowledge to testify].)

Declarant Crystal Kearse is employed by Ocwen as a loan analyst and has personal knowledge of the documents in the custody and control of her employer, including the assignment of the 2007 DOT, the substitution of trustee, the NOD, and the notice of trustee's sale. "The witness need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures followed." (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at p. 322.)

Shetty speculates that respondents' witnesses *might* not have personal knowledge of their employers' business procedures and records. He makes no showing that they actually lack knowledge. Given that each witness declared personal knowledge of the facts, under penalty of perjury, Shetty had to show more than his mere disbelief to refute the declarations.

3. *The Court Properly Took Judicial Notice of Recorded Documents*

Respondents asked the trial court to take judicial notice of recorded documents, including the assignment of the 2007 DOT from MERS to DBNTC (exhibit 7); the substitution of trustee bringing in Power Default Services as trustee of the 2007 DOT (exhibit 8); the NOD (exhibit 10); and the notice of trustee's sale (exhibit 11). Apart from being submitted by respondents as part of their motion, the assignment of the 2007 DOT, the NOD and the notice of trustee's sale are all appended to Shetty's pleading. (See *Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406 [exhibits attached to the pleading are given precedence over contradictory allegations].)

The existence and facial contents of the recorded documents were properly noticed in the trial court under Evidence Code

sections 452 and 453. (*Yvanova, supra*, 62 Cal.4th at p. 924, fn. 1.) Shetty claims that they are “false, forged, fabricated, bogus and unauthorized documents.” The exhibits were authenticated in declarations submitted in support of respondents’ motion, and respondents’ witnesses were qualified to lay a foundation for the admission of their employers’ business records. Shetty cannot defeat summary judgment with bare assertions that the recorded documents are “fabricated.” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166.) If he had evidence to support his claim, he had to present it in his opposition. (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 616-617.)

4. *Summary Judgment Was Properly Granted*

Summary judgment is granted absent any triable issue of material fact, entitling the moving party to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) It is “a mechanism to cut through the parties’ pleadings” to determine whether “trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A moving defendant must show a complete defense, or that the plaintiff cannot prove an element of their cause of action; the burden then shifts to the plaintiff to show a triable issue. (Code Civ. Proc., § 437c, subd. (p)(2).) Review is de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67-68.) We strictly scrutinize the moving defendant’s evidence, resolving doubts and ambiguities in favor of the plaintiff. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832.)

Shetty’s pleading challenges the respondents’ right to enforce the Loan and the 2007 DOT. His brief acknowledges that Amaralo is “the borrower” under the 2007 DOT and that her default on the Loan accelerated repayment of the Loan. He claims that he is a BFP of the Property.

The opening brief does not discuss any of Shetty's eight causes of action or explain why they survive respondents' motion for summary judgment. Indeed, Shetty's claim that triable issues of material fact exist is relegated to the last page and a half of his opening brief. His bare contention that "there are numerous factual disputes yet to be adjudicated" does not begin to cover the issues presented by his 111-page pleading (including exhibits).

It is impermissible to argue, as Shetty does on page 50 of his brief, that opposition papers he filed in the trial court "conclusively establish" his right to prevail. An appellant may not incorporate by reference arguments made in trial court filings, instead of briefing them on appeal. (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1162; *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290-291.) We do not locate errors, cite authority, or advocate on behalf of an appellant. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656.)

The record shows, unequivocally, that Shetty has no viable claim against respondents. He purchased the Property in 2014 from the HOA, after it foreclosed on a lien for unpaid dues. The HOA lien did *not* have priority, because it was recorded in 2011, long after the 2007 DOT was created. (Civ. Code, §§ 2898, 5680.) The HOA took title subject to the senior encumbrance. (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 356 ["the junior lienholder, like any other successful purchaser, takes the property subject to the senior lien."].) Shetty, "who purchased pursuant to the Assessment Lien, bought the property subject to [the lender's] deed of trust, as a matter of law." (*Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.)

A recorded conveyance of real property "is constructive notice of the contents thereof to subsequent purchasers." (Civ. Code, § 1213.) Shetty acquired his interest in the Property with

constructive notice of the recorded 2007 DOT, even if he failed to investigate title before making a blind purchase offer to the HOA. He cannot claim BFP status, owing to his constructive notice of the previously created mortgage interest. (*RNT Holdings, LLC v. United General Title Ins. Co.* (2014) 230 Cal.App.4th 1289, 1296; *First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1313.) Shetty's failure to investigate recorded liens on title does not exonerate him from liability to repay an existing senior debt. (*Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411, 1418-1419.) Shetty's belief that he could purchase the Property free and clear of the sizable debt owed on the senior encumbrance was a "legal miscalculation." (*Id.* at p. 1422.)

A plaintiff must establish standing to maintain a cause of action. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810.) As a non-party to the transaction creating the Loan and the 2007 DOT, Shetty has no standing to challenge transfers of the senior lien. While a borrower has standing to sue for a wrongful foreclosure on the grounds that the assignment of a note and deed of trust are void, Shetty is not "the borrower." (*Yvanova, supra*, 62 Cal.4th at p. 924 ["a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment" of a mortgage].) Here, standing is absent because the sole object is to settle the rights of a third person who is not a party to the Loan and the 2007 DOT. (*Id.* at p. 937.)⁵ Shetty agrees that he is not the borrower. And even a "borrower" cannot halt a threatened nonjudicial foreclosure by questioning the foreclosing party's right

⁵ Shetty purchased the Property from the HOA, which is also not "the borrower." Shetty is several times removed from Amaralo's loan transaction.

to proceed. (*Id.* at p. 924; *Saterbak v. JPMorgan Chase Bank* (2016) 245 Cal.App.4th 808, 814-815.)

On their face, the recorded loan documents create an encumbrance on the Property. Shetty did not refute that Amaralo defaulted on the \$210,000 Loan, nor has he shown that the 2007 DOT is void because “the grantor’s signature is forged or [] the grantor [was] unaware of the nature of what he or she [was] signing.” (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378.) Shetty did not disprove that the legal owner of the 2007 DOT, MERS, transferred it to DBNTC by way of a recorded assignment. There is no triable issue that respondents lack authority to foreclose on the Property securing the Loan.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal from appellant Shetty.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Kent M. Kellegrew, Judge
Superior Court County of Ventura

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