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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

YINGYU FENG,
Plaintiff and Appellant,
v.
PNC MORTGAGE,
Defendant and Respondent.

A128483

(Alameda County
Super. Ct. No. RG10502943)

Appellant Yingyu Feng appeals from an order denying her request for a preliminary injunction that would have precluded respondent PNC Bank, National Association (PNC) from selling her home in a foreclosure sale. She claims the notice of default that initiated the nonjudicial foreclosure process did not comply with Civil Code section 2923.5, subdivision (b), which requires a notice of default to include a declaration that the lender or its agents contacted the borrower or diligently sought to do so in order to assess the borrower's financial situation and consider options other than foreclosure.¹

¹ All further statutory references are to the Civil Code unless otherwise specified. The declaration required by section 2923.5 may also reflect that no contact with the borrower was required if certain conditions are met. (§ 2923.5, subs. (b) & (h).)

After the trial court denied the preliminary injunction, Feng's property was sold in a nonjudicial foreclosure sale.² Because this court cannot afford any effective relief to Feng in light of the sale of the property, we shall dismiss the appeal as moot.

FACTUAL AND PROCEDURAL BACKGROUND

As alleged in the verified complaint, Feng obtained a loan of \$485,600 from PNC's predecessor in 2004. The loan was secured by a deed of trust on Feng's home in Fremont. Through August 2009, she made payments due on the loan. However, she experienced a financial downturn in 2009 and had trouble making the required payments. On November 23, 2009, the trustee under the deed of trust recorded a notice of default on behalf of PNC. The notice included a declaration, tracking the language of section 2923.5, stating that "the mortgagee, beneficiary or the mortgagee's or beneficiary's authorized agent has either contacted the borrower or tried with due diligence to contact the borrower" in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. Thereafter, on February 24, 2010, the trustee recorded a notice of sale, which was scheduled to be conducted on March 16, 2010.

On March 9, 2010, Feng filed an action in Alameda County Superior Court against various parties, including PNC, which she identified as PNC Mortgage in the complaint. In her complaint, Feng alleges that PNC and the other named defendants violated Civil Code section 2923.5 by failing to include in the notice of default a custom-drafted declaration under penalty of perjury detailing attempts by the lender to contact her to discuss alternatives to foreclosure. Feng asserts that the declaration consists of hearsay and is nothing more than a generalized "regurgitat[ion]" of the statutory language. The complaint includes causes of action for declaratory relief and for unfair business practices in violation of Business and Professions Code sections 17200 and 17500. Feng seeks a declaration that the notice of default does not comply

² At Feng's request, we take judicial notice of the trustee's deed reflecting the sale of Feng's property to U.S. Bank National Association (U.S. Bank) at a public auction held on June 8, 2010. The deed was recorded on July 29, 2010.

with Civil Code section 2923.5 and that any nonjudicial foreclosure sale based on the notice of default is void. Among other things, she seeks to enjoin PNC from going forward with any foreclosure sale until it has provided the homeowner with a custom-drafted declaration detailing attempts to contact the homeowner concerning alternatives to foreclosure.

On March 12, 2010, Feng applied for a temporary restraining order to prevent the sale of her property by nonjudicial foreclosure. Her application also sought the issuance of an order to show cause why a preliminary injunction should not issue enjoining PNC and the other named defendants from conducting a foreclosure sale of Feng's property during the pendency of the litigation. On March 15, 2010, the trial court entered a temporary restraining order and issued an order to show cause regarding a preliminary injunction.

Feng based her request for a preliminary injunction upon the contention that PNC and the other defendants had failed to comply with the requirement of section 2923.5 mandating inclusion of a declaration in the notice of default. Although she acknowledged the notice of default included a statement reciting the language of section 2923.5, subdivision (b), she argued the declaration was invalid because it was not based upon personal knowledge, contained multiple levels of hearsay, and was conclusory and generalized. She also relied on section 2923.6, which in general contains a legislative declaration that loan servicers have a duty to accept a loan modification if the anticipated recovery under such a modification exceeds the anticipated recovery through a foreclosure on a net present value basis. Although Feng sought relief for unfair business practices under Business and Professions Code section 17200, she did not request a preliminary injunction that would preclude PNC and its agents from pursuing foreclosure sales on all similarly situated properties. Rather, her request was limited to seeking an injunction preventing the sale of her property and enjoining PNC and its agents from "undertaking any action which would hinder [her] ability to manage her property or enjoy the fruits of her home."

Following a hearing held on April 20, 2010, the trial court denied Feng's application for a preliminary injunction. In the order denying the preliminary injunction, the court stated that Feng had "not shown a probability of success on the merits of her claims." The court reasoned that "[t]he declaration in the notice of default satisfies the requirements of Civil Code section 2923.5." The court further stated: "[Feng] has not provided sufficient evidence that Civil Code sections 2923.5 or 2923.6 were violated. [Feng] likewise has not shown a probability of success on her UCL [Business and Professions Code section 17200] claim. Any UCL claim predicated on a violation of Civil Code sections 2923.5 and 2923.6 fails, and [Feng] has not sufficiently alleged a fraudulent or unfair practice. Moreover, the verified complaint lacks allegations of ongoing wrongful business conduct or a pattern of such conduct to support an unfair competition claim."

On May 12, 2010, Feng filed a notice of appeal from the order denying her request for a preliminary injunction. Less than a month later, on June 8, 2010, the trustee sold Feng's property in a nonjudicial foreclosure sale to U.S. Bank, which was the beneficiary under the deed of trust, for the unpaid debt of more than \$504,000.

Notably, there is nothing in the record to reflect that Feng took any action to stay the trustee sale after she filed her notice of appeal. For example, there is no record of her seeking a writ of supersedeas or other stay pending consideration of her appeal. Nor did she file a petition for a writ of mandate in this court. Instead, it was only after the property had already been sold that she requested this court to stay any unlawful detainer proceedings that might lead to her eviction from the property she formerly owned. This court denied the stay request without prejudice to the filing of a proper request for a writ of supersedeas or other appropriate relief in accordance with the California Rules of Court. No such renewed request was filed.

According to the parties to this appeal, the new owner of the property, U.S. Bank, brought a separate action against Feng for unlawful detainer and damages. Feng claims the unlawful detainer action "has been effectively stayed pending adjudication of

the issues in this matter.” In her reply brief, Feng clarifies that the owner of the property has “exercised good judgment and . . . decided to wait until at least the conclusion of this appeal before moving forward” with its eviction of Feng.

DISCUSSION

Feng’s appeal is from an order denying a preliminary injunction. The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

It is unnecessary for us to reach the merits of Feng’s appeal of the order denying a preliminary injunction. As we explain, the sale of the property in a nonjudicial foreclosure sale has rendered this appeal moot.

“An appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief. [Citation.]” (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479.) The policy underlying the rule is that the Court of Appeal “decide[s] justiciable controversies and will normally not render advisory opinions. [Citations.]” (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1179.) Like other appeals, an appeal from an order involving a preliminary injunction is subject to dismissal for mootness. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10.) For example, in *Finnie v. Town of Tiburon*, the plaintiffs sought a preliminary injunction to prevent a special election from taking place. (*Id.* at p. 7.) After the trial court denied the preliminary injunction, the election took place as scheduled. (*Id.* at p. 9.) The Court of Appeal dismissed the appeal from the trial court’s order as moot, observing that a ruling on any injunction in the postelection period “would be purely academic.” (*Id.* at pp. 11, 18.)

Here, the event the preliminary injunction was intended to prevent was the sale of the property by nonjudicial foreclosure. During the pendency of the appeal, that event occurred—the property was sold. Therefore, even if this court were inclined to

reverse the trial court's order, we could not afford Feng any effective relief. The purpose of a preliminary injunction cannot be served because the status quo has already been irreversibly changed. Consequently, any opinion addressing the merits of the appeal would be purely advisory.

Nevertheless, Feng argues that her appeal is not moot because a decision by this court "will have an enormous impact" on the separate action that U.S. Bank has brought against her for unlawful detainer and damages. However, she fails to explain what that impact might be. In her reply brief, she claims that U.S. Bank is awaiting the results of this appeal on the matter of the "toxic foreclosure sale purchase," perhaps suggesting that the foreclosure sale could be set aside if PNC were found to have violated section 2923.5.

As a number of courts have explained, the only available remedy for a violation of section 2923.5 is to *postpone* the foreclosure sale so that the lender can comply with that statute's requirements. (See *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214 (*Mabry*); see also *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1616 [following *Mabry*]; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526 [following *Mabry*].) After a foreclosure sale has already taken place, the statute provides no relief. (*Stebley v. Litton Loan Servicing, LLP, supra*, at p. 526; see also *Mabry, supra*, at p. 235.) "There is nothing in section 2923.5 that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale." (*Mabry, supra*, at p. 235.) Thus, even if we were to agree with Feng's proposed construction of section 2923.5 and conclude that PNC violated that statute, our conclusion would have no effect on the validity of the foreclosure sale or upon U.S. Bank's title to the property. Consequently, there is no reason to believe that this appeal will have any effect upon the separate unlawful detainer action filed by U.S. Bank.

Feng contends that, even if the issues raised in her appeal are moot, we should nonetheless entertain the appeal because it presents issues of great public interest. She

relies on the principle that “[o]n issues of great public interest, [appellate courts] have the inherent discretion to resolve the matter despite events which may render the matter moot. [Citations.]” (*Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 745-746, fn. 3.)

The principle on which Feng relies to avoid dismissal does not apply under these circumstances. Since the time the trial court issued its order denying her request for a preliminary injunction, the issues she raises on appeal were addressed at length in *Mabry, supra*, 185 Cal.App.4th 208. The decision in *Mabry* contains nine separate holdings addressing the impact of section 2923.5. (See *Mabry, supra*, at pp. 214-215.) As relevant here, the court held: (1) the declaration required by section 2923.5, subdivision (b) does not need to be under penalty of perjury; (2) a declaration satisfies section 2923.5, subdivision (b) if it tracks the language of the statute, even if it does not delineate precisely what the lender or its agents did to satisfy the statute’s requirement to contact the borrower, i.e., there is no need to provide a custom-drafted declaration; (3) section 2923.5 is not preempted by law because the remedy is limited to a simple postponement of the foreclosure sale; and (4) there is no remedy for a violation of section 2923.5 after a property has been sold in a foreclosure sale.³ (*Mabry, supra*, at pp. 214-215.) In addition, the *Mabry* court noted that section 2923.6 does not impose substantive obligations on lenders, observing that the statute “merely expresses the *hope* that lenders will offer loan modifications on certain terms.” (*Id.* at p. 222, fn. omitted.) Not only has our Supreme Court denied review of *Mabry*,⁴ but the decision has also been followed in a number of subsequent published decisions. (See *Hamilton v. Greenwich Investors XXVI, LLC, supra*, 195 Cal.App.4th at pp. 1615-1617; *Stebly v.*

³ The *Mabry* court also held section 2923.5 may be enforced by a private right of action, the borrower need not tender the full amount of mortgage indebtedness to pursue an action under section 2923.5, a violation of section 2923.5 may not be enforced in a class action, and the matter had to be returned to the trial court in *Mabry* for a factual determination of whether the lender had complied with section 2923.5. (*Mabry, supra*, 185 Cal.App.4th at pp. 214-215.)

⁴ The California Supreme Court denied review on August 18, 2010 (S184386).

Litton Loan Servicing, LLP, supra, 202 Cal.App.4th at pp. 525-527.) Indeed, as far as we are aware, no California appellate court has disagreed with *Mabry* in either a published or unpublished opinion.⁵

Therefore, although the issues Feng raises may well be of great public interest, they have already been exhaustively addressed in *Mabry*. She offers no compelling reason for us to reconsider the *Mabry* court's conclusions. Her main argument appears to be that the *Mabry* court failed to consider the rule that a nonjudicial foreclosure will not be considered valid unless the lender *strictly complies* with the statutory requirements. However, this argument begs the question of what the statute requires. The *Mabry* court did not suggest a lender need not strictly comply with the statute. Rather, based upon the language of the statute, legislative history, and concerns about federal preemption, the court in *Mabry* clarified what section 2923.5 requires. In addition, Feng contends the *Mabry* court somehow failed to appreciate the Legislature's intent to slow the large number of foreclosures in California. To the contrary, our reading of *Mabry* indicates the court was well aware of the Legislature's intent in enacting the statute. (See *Mabry, supra*, 185 Cal.App.4th at p. 219 ["section 2923.5 was enacted in 2008 as a manifestation of a felt need for urgent action in the midst of a cascading torrent of foreclosures"].)

In short, Feng has offered no reason for us to offer an advisory opinion on topics already addressed in reported decisions. We observe that sections 2923.5 and 2923.6 are due to expire by their express terms on January 1, 2013. (Civ. Code, §§ 2923.5, subd. (j), 2923.6, subd. (c).) Thus, even if we were inclined to disagree with *Mabry*—which we are not—our opinion would create confusion rather than clarity in the limited time the statute remains in effect.

⁵ To the extent there has been disagreement with *Mabry*, it has come in the form of federal trial court opinions concluding that section 2923.5 is preempted entirely by federal law, thus disagreeing with the *Mabry* court's conclusion that a remedy limited to postponement of a foreclosure sale does not run afoul of federal laws governing mortgage lending. (See, e.g., *Taguinod v. World Savings Bank, FSB* (C.D. Cal. 2010) 755 F.Supp.2d 1064, 1073-1074 [collecting federal cases finding preemption].)

Pending our review of the merits of the appeal, we deferred consideration of a number of requests for judicial notice and a motion to augment filed by Feng. Among other things, Feng asks us to take judicial notice of the legislative history of purportedly related statutes, the separate unlawful detainer case filed by U.S. Bank, the docket in the trial court action below, the pendency of an appellate case in the Sixth District, and various news articles addressing the foreclosure crisis. She also seeks to augment the record with a trial court brief addressing a demurrer and a minute order from the hearing at which the court heard her preliminary injunction request. In light of our analysis and disposition of this appeal, we now deny the various requests that were deferred pending further review, except as specifically set forth elsewhere in this opinion.

DISPOSITION

The appeal is dismissed. Respondent shall recover its costs on appeal.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.