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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KIMBERLY CROMWELL,
Plaintiff and Appellant,

v.

NDeX WEST, LLC et al.,
Defendants and Respondents.

A129374

(Contra Costa County
Super. Ct. No. C08-01603)

In this action for declaratory relief, quiet title, and fraud challenging respondents'¹ standing to proceed with a nonjudicial foreclosure, Kimberly Cromwell, in propria persona, appeals from a judgment pursuant to Code of Civil Procedure, section 631.8 finding in favor of respondents and ordering that they can proceed with the foreclosure sale. Cromwell raises numerous arguments challenging the court's judgment including that the evidence was insufficient to support the trial court's findings that she was in default to Deutsche on the loan; that ASC was authorized to service the loan, and that NDeX had authority to exercise the power of sale under the deed of trust. We affirm the judgment on the ground that the statutory scheme for nonjudicial foreclosures (Civil Code, §§ 2924-2924k) does not provide for a preemptive suit challenging standing to initiate a foreclosure.

¹ Respondents are Deutsche Bank National Trust Company (Deutsche), America's Servicing Company (ASC), and NDeX West, LLC (NDeX).

FACTUAL BACKGROUND

In November 2005, Cromwell obtained a loan in the amount of \$509,600 to purchase a house at 2405 Shelbourne Way in Antioch (the property). Cromwell executed a deed of trust on the property that named New Century Mortgage Corporation (NCMC) as the lender. NCMC sold the loan to The Morgan Stanley Loan Trust 2006-NC. Deutsche is the trustee for this trust and it retained ASC to service the loan.

In 2006, Cromwell failed to make her required mortgage payments. On January 7, 2008, NDeX commenced nonjudicial foreclosure on the property by recording a Notice of Default and Election to Sell under Deed of Trust. On February 12, 2008, NDeX was substituted as trustee under the deed of trust. NDeX subsequently noticed a trustee's sale of the property.

Cromwell filed a second amended complaint on January 20, 2009. She sought a declaration that respondents lacked standing to foreclose because they were not entitled to enforce the deed of trust. She also sought to quiet title against respondents' claims that they had any interest in the property. Cromwell further alleged a fraud cause of action based on misrepresentation of the terms of the loans and failure to disclose material facts.

Deutsche and ASC moved to sever trial of the legal and equitable claims. The trial court granted the motion, ruling that it would try the declaratory relief and quiet title causes of action prior to the fraud claim.

The evidence at the trial was as follows: Ronaldo Reyes, a vice president at Deutsche in the Structured Finance Group, testified that Deutsche was the trustee and document custodian for the loan in this case. He also executed the pooling and service agreement (PSA) for the loan trust—the Morgan Stanley Trust 2006-NC2—that included Cromwell's loan. The PSA authorized the trustee to convey a power of attorney to the servicer, Wells Fargo,² to service the mortgage loan. The servicer was not required to obtain the trustee's approval in order to seek foreclosure. The PSA also allowed the servicer to make loan modifications at its discretion if a borrower was in default.

² ASC is a division of Wells Fargo.

Reyes also testified that Deutsche was in possession of Cromwell's original note on the loan for the property. He further testified that the fact that the loan was within the trust gave Deutsche authority to enforce the note.

Cromwell testified that she obtained the loan for the property from NCMC in 2005. NCMC transferred servicing of the loan to ASC in 2006. In 2007, Cromwell was unable to make timely payments on the loan. She sought assistance from ASC to modify her payments. NDeX, as the agent for Deutsche, initiated foreclosure on the property. Cromwell again sought assistance from ASC to no avail.

On cross-examination, Cromwell acknowledged that she had not made the agreed upon payments on her mortgage.

At the conclusion of Cromwell's presentation of her case, respondents moved for a judgment pursuant to section 631.8, arguing that Cromwell had failed to meet her burden of proof to show that she was entitled to a declaration that Deutsche did not own the original promissory note or have an interest in the deed of trust, and that ASC did not have the right to service the loan or foreclose on the property. They further asserted that she was not entitled to quiet title on the property and had not shown that she could tender the balance due on the note. The court granted the motion, finding that Cromwell had not shown that she was entitled to declaratory relief or to quiet title. The court found that respondents were entitled to foreclose on the loan, that Cromwell defaulted on it, that notice of default was recorded, and that she had not made any payments on the loan since 2008 or shown that she had the ability to tender the sums due. Based on the court's findings, it ruled that there was no basis on which to proceed on the fraud cause of action. This appeal followed.

DISCUSSION

Cromwell raises several issues on appeal including that there is insufficient evidence to support the court's judgment. We conclude that the court's judgment was correct, but on a theory not advanced at the trial, albeit raised and discussed in the appellate briefs.

This court has the authority to affirm the judgment if it is correct on any theory. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 [appellate court will affirm judgment if it is correct on any theory regardless of the trial court's reasoning]; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [same].)

Cromwell's action sought to challenge respondents' standing to seek nonjudicial foreclosure of her property. Our statutory scheme for nonjudicial foreclosures, however, does not provide for a preemptive suit challenging standing. (*Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46 [*Robinson*]; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157 [*Gomes*].)

“ [Civil Code 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.’ [Citations.]” (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249.) Civil Code section 2924, subdivision (1) provides that a “trustee, mortgagee, or beneficiary, or any of their authorized agents” may initiate the foreclosure process.

The statutory scheme does not provide for a judicial action to determine whether the person initiating the foreclosure process is authorized to do so. (*Gomes, supra*, 192 Cal.App.4th at p. 1155.) “ [N]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, “[n]either appraisal nor judicial determination of fair value is required,” and the debtor has no postsale right of redemption.’ [Citation.] The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.” (*Ibid.*)

A borrower, however, is not without recourse to challenge a trustee's sale. (*Robinson, supra*, 199 Cal.App.4th at p. 46, fn. 5.) The borrower may seek to set aside the trustee's sale for irregularities that are prejudicial. (See *Angell v. Superior Court*

(1999) 73 Cal.App.4th 691, 700 [person challenging sale must show that the failure to comply with procedural requirements for a foreclosure sale caused prejudice].)

Here, Cromwell's remedy was to seek to set aside the trustee's sale of her property. Her action for declaratory relief on the issue of respondents' standing to seek nonjudicial foreclosure did not state a cause of action. (*Robinson, supra*, 199 Cal.App.4th at p. 46; *Gomes, supra*, 192 Cal.App.4th at p. 1156.) By executing the deed of trust, Cromwell agreed that the trustee had a power to sell the property upon her default and that the trustee could in turn appoint a substitute trustee.³ Cromwell's agreement to the terms of the deed of trust, granting the trustee the authority to foreclose should she default on her obligations on the loan, precluded her from pursuing a cause of action based on the allegation that respondents did not have standing or the authority to do so. (*Gomes, supra*, 192 Cal.App.4th at p. 1157.)

Even if Cromwell's theory for her declaratory relief action had merit, the court properly found that she failed to prove that respondents lacked standing to pursue nonjudicial foreclosure.

“ ‘ ‘The standard of review of a judgment and its underlying findings entered pursuant to [Code of Civil Procedure] section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment ‘are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence.’ ” ’ [Citations.]” (*Plaza Home Mortgage, Inc. v. North American Title Co., Inc.* (2010) 184 Cal.App.4th 130, 135.) “ ‘When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or

³ The deed of trust provided, “If the default is not cured on or before the date specified in the notice [of default], Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law.”

uncontradicted which will support the finding of fact.’ ” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Here, the evidence adduced at the trial demonstrated that Deutsche was in possession of the promissory note at issue in this case. It further established that Deutsche had authority to foreclose on the note, that it authorized ASC to service the loan and NDeX to initiate foreclosure, and that Cromwell defaulted on the note. As counsel for NDeX argued in support of the Code of Civil procedure section 631.8 motion, “the unrebutted, uncontroverted evidence . . . is that Deutsche Bank has physical possession of the underlying obligation endorsed in blank. It therefore owns the security interest as a matter of law and had a legal right to commence nonjudicial foreclosure based upon Ms. Cromwell’s admitted payment default.” On this record, it is clear that Cromwell was not entitled to declaratory relief or to quiet title.⁴ In light of our disposition, we need not reach the other issues raised by Cromwell.

⁴ It was undisputed that Cromwell had not tendered the amount due on the loan. To bring an action to quiet title, a plaintiff must allege he or she has paid the debt owed on the property. (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649 [“[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured’].)

DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.