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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ORIT YOUNESSIAN,
Plaintiff and Appellant,

v.

JOHN F. LUNDY, et al.,
Defendants and Respondents.

A131074

(San Francisco County
Super. Ct. No. CGC07469062)

In this action challenging a non-judicial foreclosure sale of certain real property, plaintiff Orit Younessian appeals from a judgment in favor of respondents John F. Lundy and Nancy A.M. Lundy, Trustees of the 2001 Lundy Family Trust dated May 3, 2001, and Standard Trust Deed Service Company, after the court granted their motion for summary judgment. Appellant contends she is entitled to reversal and a new trial on the sole ground that respondents' motion for summary judgment was untimely served in violation of Code of Civil Procedure, section 437c, subdivision (a) (hereafter section 437c(a))¹. We disagree, and accordingly, affirm the judgment.²

¹ All further unspecified statutory references are to the Code of Civil Procedure. Section 437c(a) states, in pertinent part, that notice of a summary judgment motion and the moving party's supporting papers "shall be served on all other parties to the action at least 75 days before the time appointed for hearing. However, if the notice is served by mail, the required 75-day period of notice shall be increased by five days if the place of address is within the State of California"

² We dismiss appellant's appeal from the order denying her motion for a new trial because it is not separately appealable. (See § 904.1, subd. (a).) The issues relating to the denial of the motion for a new trial will be considered on the appeal from the

FACTS

On July 21, 2010,³ respondents' summary judgment motion papers were given to the post office for regular mail delivery to appellant at a California address. Service was complete when the papers were deposited with the postal service. (§ 1013, subd. (a).) Because the motion papers were regularly mailed in California, respondents were required to schedule the summary judgment hearing no earlier than 80 days after service. (§ 473c(a).) Saturday, October 9 was the 80th day after July 21, and respondents set the hearing for Monday, October 11, the 82nd day after service. The notice of motion informed appellant the hearing was scheduled for "9:30 a.m. on October 11, 2010, or as soon thereafter as the matter can be heard." Before the motion papers were filed, the superior court clerk contacted respondents to advise them that October 11 was a court holiday. The court clerk asked if respondents would like the hearing moved to the next court day, October 12. Respondents agreed. The court's register of actions indicates respondents' motion papers were filed with the court on July 22, and a hearing was "set for Oct-12-2010 at 9:30 a.m. in Dept 302." Respondents notified appellant of the new hearing date by an amended notice of motion sent by overnight delivery on July 27.

Appellant did not file a substantive opposition on the merits. Instead, she filed "a special objection" on the ground the summary judgment motion was untimely and therefore the court lacked jurisdiction to hear it. Appellant contended respondents' service of the amended notice of motion restarted the statutory notice period for scheduling a hearing. Appellant had "not responded on the merits so as to not possibly constitute a waiver of the untimeliness objection and lack of jurisdiction." In reply,

judgment. (§ 906.) The judgment under review does not mention defendant Fidelity National Title Company. However, appellant may appeal from the judgment that is final as to her claims against respondents. (*Desaigoudar v. Meyercord* (2003) 108 Cal.App.4th 173, 182, fn. 2.)

³ All further dates refer to the 2010 calendar year.

respondents argued that the service of the motion papers on July 21 gave appellant 82 days' notice in compliance with section 437c(a), and the amended notice advising of the rescheduled hearing date gave her even more time to oppose the motion.⁴ Respondents further noted appellant had "not even attempted to argue any prejudice."

At the October 12 hearing, the court considered appellant's special objection. Appellant argued that once respondents filed an amended notice of motion "all the dates should have been resubmitted and started from scratch and [they were] not." In response, the court stated its understanding of the circumstances, specifically that respondents had served their motion papers on July 21 for a hearing on October 11. At some point respondents realized October 11 was a court holiday so they renoticed the motion. They had already served all the papers in a timely fashion on July 21, and appellant had had the motion papers for about 82 days from the time respondents first served them. When the court asked respondents' counsel if its understanding was correct, counsel replied, "Yes, that is your correct, Your Honor." The court then ruled the motion was timely served. Appellant asked the court to consider two cases, *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 (*Carlton*), and *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1267 (*Robinson*), arguing that "those two actual rulings . . . will really point out exactly the issue [sic] that I am in right now." The court replied it had "enough insight into the issue," and ruled that the motion for summary judgment would be "granted. There was no opposition filed." In its written order, the court granted the motion for summary judgment, finding "that no substantive opposition was filed," there was "no triable issue of material fact on any of the causes of action asserted by" appellant, and respondents were "entitled to judgment as a matter of law." A judgment in favor of respondents was filed on October 12. Appellant filed a motion for a new trial, renewing her arguments

⁴ Section 437c, subdivision (b)(2), reads, in pertinent part: "Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise."

stated in her special objection. Respondents opposed the motion. The court denied appellant's motion, finding no grounds existed for a new trial. Appellant timely appeals.

DISCUSSION

We review for an abuse of discretion the court's ruling regarding the timeliness of respondents' summary judgment motion. (*Robinson, supra*, 168 Cal.App.4th at p. 1261). "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.]" (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) As to the court's denial of appellant's motion for a new trial, "we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion. [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) Appellant seeks reversal of the judgment and a new trial, arguing that she was not given the required section 437c(a) notice of the hearing on respondents' summary judgment motion. We conclude the argument is unavailing.

Contrary to appellant's contention, she is not entitled to reversal and a new trial because the trial court "misapplied an analysis as to the timeliness issue." The record demonstrates the initial hearing date of October 11 fell 82 days after respondents' motion papers had been served on July 21. The rescheduling of the hearing for October 12 moved the hearing one day later. Consequently, appellant had a full 83 days to respond to the motion. We therefore see no abuse of discretion in the court's ruling that respondents' motion was timely served. Appellant cites no case law, and we have found none, that supports her argument that the minimum notice period for the scheduling of the hearing should have been counted from the date of service of the amended notice that continued the hearing to October 12. *Robinson, supra*, 168 Cal.App.4th 1258, and *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112 (*McMahon*), are factual distinguishable. In *Robinson*, the appellate court found the trial court had abused its

discretion by “continuing the noticed hearing for only four days, in an effort to provide” the minimum notice period of 75 days. (168 Cal.App.4th at p. 1268.) In *McMahon*, the appellate court found the trial court had no authority to shorten the minimum notice period for a summary judgment motion hearing by directing the parties to provide 21 days’ notice plus an additional five days if service was by mail. (106 Cal.App.4th at pp. 114, 118.)

We also see no merit to appellant’s contention that she is entitled to reversal and a new trial because the court did not consider her special objection, and improperly treated respondents’ motion for summary judgment as unopposed. The record demonstrates the court did consider appellant’s special objection and found it was not meritorious. Regardless of the reason for appellant’s failure to file a substantive opposition, the court’s written order properly acknowledged appellant’s failure to file a substantive opposition. We are not persuaded by appellant’s argument that the filing of a substantive opposition could have been construed as a waiver of the timeliness and jurisdictional objections. As explained by the court in *Carlton*, 77 Cal.App.4th at pp. 697-698, if appellant was convinced her legal position was correct, she could have appeared at the hearing and once the court denied her special objection, she could have requested a continuance for the purpose of preparing a substantive opposition. (*Id.* at pp. 697-698.) If she made a complete record relating to both the inadequate notice of the hearing and her inability to prepare a proper response because of the inadequate notice, and the court denied the continuance, the record would have been well preserved for appeal. (*Id.* at p. 698.) Alternatively, if appellant was unwilling to take the chance that a continuance would be granted, she could have filed the “the best opposition possible under the circumstances.” (*Ibid.*) She could have included her position on the inadequate-notice issue, as well as the merits, and an explanation “as to why a more complete opposition was not able to be filed (e.g., because the defective notice of motion did not give [her] adequate time to prepare a response).” (*Ibid.*) She could then have appeared at the hearing, and objected

to the hearing taking place because she received inadequate notice of the hearing; explained to the court the prejudice she suffered by reason of the inadequate notice; and requested a continuance of the hearing so that a proper response could be filed. (*Ibid.*) If the court denied the continuance, she could have argued the motion on the merits. (*Ibid.*) Again, the record would have been well preserved for any further appeal. (*Ibid.*) In this case, appellant did not follow the suggested procedures in *Carlton*. Once the court denied her special objection, appellant neither argued she was prejudiced by inadequate notice nor requested a continuance of the hearing to submit a substantive opposition. In the absence of a request for a continuance or a showing of prejudice, the court was not obliged to continue the hearing and instruct appellant to submit a substantive opposition, as she suggests in her reply brief.

Because appellant has failed to demonstrate she is entitled to any relief on this appeal, we affirm the judgment in favor of respondents.

DISPOSITION

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed. Respondents are awarded costs on appeal.

McGuinness, P.J.

We concur:

Pollak, J.

Jenkins, J.