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

SCOTT L. STEEVER et al.,

Plaintiffs and Appellants,

A131377

v.

**(Sonoma County
Super. Ct. No. SCV246207)**

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

_____ /

Appellants Scott L. Steever and Eleanor P. Steever appeal contending the trial court erred when it denied their request for a preliminary injunction to prevent respondent Wells Fargo Bank, N.A., from foreclosing on certain real property they own. We conclude the trial court did not abuse its discretion and will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellants own a house located on Fairway Drive in Rohnert Park. In September 2005, appellants signed a \$615,000 promissory note that was secured by a deed of trust on the property. Subsequently, the note and deed of trust were assigned to respondent Wells Fargo Bank, N.A., as trustee for Carrington Mortgage Loan Trust.

Appellants were unable to make their loan payments and on July 1, 2009, the trustee under the deed of trust recorded a notice of default.

Carrington Mortgage Services, LLC (hereafter Carrington) is the servicer of appellants' loan and on September 4, 2009, appellants and Carrington executed a forbearance agreement that gave appellants the opportunity to cure their default. Under the terms of the agreement, appellants were required to make six forbearance payments in specified amounts between September 10, 2009 and February 10, 2010 on or before the 10th day of each month. The agreement also stated that Carrington was not waiving its right to receive all future payments under the note and deed of trust on a timely basis.

Appellants made their September 2009 payment on time but did not complete their October 2009 payment until October 13, 2009. Accordingly, on October 26, 2009, the trustee under the deed of trust recorded a notice of sale.

On November 3, 2009, appellants filed the complaint that is at issue in the current appeal. As amended it includes causes of action for breach of contract and breach of the covenant of good faith and fair dealing, negligence, declaratory relief, and injunctive relief. Appellants alleged that Wells Fargo, Carrington, and the trustee under the deed of trust¹ violated the forbearance agreement when it elected to proceed with the trustee's sale.

On November 5, 2009, appellants applied for preliminary injunction and sought a temporary restraining order to prevent Wells Fargo from proceeding with the trustee's sale. The trial court granted the temporary restraining order but stated as a condition that appellants must make "all payments when due" under the September 4, 2009 forbearance agreement.

Appellants made payments under the forbearance agreement in November 2009, December 2009, and January 2010, but failed to timely make their final payment paying only \$2,607 of the required \$9,207 by February 10, 2010.

After many continuances, the hearing on appellants' request for a preliminary injunction was conducted on October 6, 2010. By that point appellants had made

¹ Unless more specificity is needed, we will refer to the defendants collectively as Wells Fargo.

additional payments of \$2,200, \$1,200, and \$1,000 on April 5, 2010 and a payment of \$1,709.90 on July 12, 2010 but no other payments under the note. After hearing the evidence presented, the trial court declined to grant the preliminary injunction explaining its decision as follows:

“Plaintiffs have failed to complete the Forbearance Agreement and have again fallen deeper into debt. Pursuant to the Court’s granting on November 5, 2009 of a Temporary Restraining Order, Plaintiffs were required by the Court’s order to continue making all payments when due under the Forbearance Agreement. The plaintiffs made payments pursuant to the Forbearance Agreement until January 2010. The final payment of the Forbearance Agreement was due February 10, 2010, in the amount of \$9,207.00. The Plaintiffs made a payment of \$2,607.00, but no further payments in February as required by the Forbearance Agreement or the Court’s order.”

The court also declined to grant the injunction because it was unlikely appellants would prevail on any of the causes of action they had alleged.

II. DISCUSSION

Appellants contend the trial court erred when it denied their request for a preliminary injunction.

The trial court is granted broad discretion to decide whether it is appropriate to grant a preliminary injunction and its ruling will be reversed on appeal only where the trial court abused its discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) As a general rule, the court’s decision on whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from granting or denying interim injunctive relief. (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443.) But this standard is subject to several exceptions, one of which is applicable here. An injunction is an equitable remedy and one of the most fundamental principles of equity jurisprudence is that one who seeks equity must do equity. (*Dool v. First National Bank* (1929) 207 Cal. 347, 351; see also 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 6, pp. 286-287 & cases cited therein.)

The principle is more than a mere banality. “Under this maxim, a court will not grant equitable relief to a plaintiff unless he or she acknowledges or provides for the equitable claims or demands of the adverse party growing out of the particular controversy or connected with the same subject matter.” (13 Witkin, *supra*, Equity, § 6, p. 286.) “This is a threshold matter. Before the court can apply an equitable doctrine, it must determine whether the applicant has done equity.” (27A Am.Jur.2d (2008) Equity, § 94, p. 632, fn. omitted.)

This same principle is applied when a party seeks injunctive relief to prevent foreclosure. As a well respected treatise explains, “Courts usually require the trustor to pay or to tender payment of any amounts admittedly owed the beneficiary as a condition for granting . . . a temporary restraining order or preliminary injunction. . . . The injunction may later be dissolved if such continued payments are not made.” (Bernhardt, 1 Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2012) § 7.41, pp. 552-552.1.)

In this case the trial court granted appellants a temporary restraining order on November 5, 2009, and precluded Wells Fargo from going forward with the trustee’s sale. But as a condition the court ruled that appellants must “mak[e] all payments when due” under the September 4, 2009 forbearance agreement. Appellants *did not* make all payments when due under the September 4, 2009 forbearance agreement. They made payments in November 2009, December 2009, and January 2010, but failed to timely make their final payment paying only \$2,607 of the required \$9,207 payment by February 10, 2010. Furthermore, the forbearance agreement confirmed that appellants were obligated to make “all future” payments due under the note and deed of trust on a “timely basis.” Appellants *did not* make all their future payments on time. Indeed, other than the untimely payments appellants made under the forbearance agreement, appellants made no payments at all. The trial court considering these facts reasonably could conclude that appellants had not “done equity” and they were not entitled to further injunctive relief. We conclude the court did not abuse its discretion when it declined to grant appellants a preliminary injunction.

The arguments appellants make do not convince us the trial court erred.

First, appellants argue the court should not have relied on their failure to make the February 10, 2010 payment on time because that payment was “not a part of this action.” While the February 2010 payment might not have been part of the dispute when the complaint was filed in November 2009, it certainly became a part of the dispute when the trial court conditioned the temporary restraining order on appellants making their payments under the forbearance agreement on time. Because the very foundation of a court of equity is good conscience, “any . . . unconscientious conduct *connected with the controver[s]y to which he is a party* is sufficient justification for the court to close its doors to him” (*DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 765, emphasis added.) Unquestionably the February forbearance payment is “connected with the controver[s]y” at issue in this case. (*Ibid.*)

Next, appellants argue that even if the February 10, 2010 payment can be considered a part of this dispute “the facts surrounding the payment of this installment are enough for a court of equity to aid Appellants.” Specifically, appellants note they paid \$4,400 on April 5, 2010 and \$1,709.90 on July 12, 2010, and argue “it was the trial court’s duty to use its equitable powers to prevent a forfeiture of [their] home through foreclosure proceedings by recognizing [their] good faith attempt to pay all amounts due under the Forbearance Agreement, even if some of the payments could be considered behind.” While the trial court could have granted appellants’ request for an injunction even though they had not made all their payments on time, that is not how the court ruled. The court denied appellants’ request for an injunction and its decision was well supported by the record. The trial court did not abuse its discretion simply because a different conclusion might also have been reasonable under the facts presented. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Appellants also argue that because Wells Fargo accepted the late payments “if there were any defaults the same were thereby cured.” We need not decide whether the fact that Wells Fargo allegedly accepted some of appellants’ late payments might technically have cured their default. We simply note that because appellants failed to

comply with the court’s November 2009 order requiring them to make all their forbearance payments on time, the court acted well within its discretion when it declined to grant appellants the further equitable relief they sought.

In sum, we conclude the trial court did not abuse its discretion when it refused to grant appellants further equitable relief. Having reached this conclusion, we need not address the remaining arguments appellants have advanced, i.e., whether it is likely they would prevail on any of the causes of action they alleged. Appellants’ failure to “do equity” by complying with the conditions the court imposed in connection with the temporary restraining order was a complete defense to their request for an injunction. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446.)

III. DISPOSITION

The order denying appellants’ request for an injunction is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.