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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MOSTAFA KHWELED et al.,
Plaintiffs and Appellants,

v.

JPMORGAN CHASE BANK et al.,
Defendants and Respondents.

A136699

(Contra Costa County
Super. Ct. No. C09-03157)

Plaintiffs Mostafa Khweled and Christine Khweled (appellants) appeal after the trial court granted in part, and without leave to amend, the motion for judgment on the pleadings filed by defendants and respondents JPMorgan Chase Bank (JPMorgan) and Deutsche Bank National Trust Company (Deutsche) (jointly, respondents) and appellants then voluntarily dismissed with prejudice their sole remaining cause of action. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, appellants obtained a loan (Loan) from Washington Mutual Bank (WA Mutual) in the principal sum of \$927,000, secured by a Deed of Trust pledging real property commonly known as 5028 Westside Drive, San Ramon (subject property) as collateral to assure repayment. The Deed of Trust named California Reconveyance Company (CRC) as the trustee.

At some point thereafter, WA Mutual suffered a financial collapse and in September 2008 the Office of Thrift Supervision placed it into receivership and directed the Federal Deposit Insurance Corporation (FDIC) to act as receiver. Respondent

JPMorgan acquired certain assets and liabilities of WA Mutual, including its interest in the Loan, from the FDIC, as receiver, pursuant to the Purchase and Assumption Agreement between the FDIC and JPMorgan, dated September 25, 2008.

On March 31, 2009, an Assignment of Deed of Trust (Assignment) was recorded with the Contra Costa County Recorder's Office, as Instrument Number 2009-0067845. The Assignment transferred JPMorgan's beneficial interest in the Deed of Trust executed by the Khweleds to Deutsche, as trustee for WA Mutual Mortgage Pass-Through Certificates Series 2005-AR13 Trust.¹

Also on March 31, 2009, CRC, as trustee, recorded a Notice of Default and Election to Sell Under Deed of Trust (Notice of Default) with the Contra Costa County Recorder's Office, as Instrument Number 2009-0067846. The Notice of Default stated that as of March 30, 2009, the Loan was \$17,637.03 in arrears.

On September 1, 2009, a Notice of Trustee's Sale (Notice of Sale) was recorded by CRC, as trustee under the Deed of Trust, with the Contra Costa County Recorder's Office, as Instrument Number 2009-0210275. The Notice of Sale stated the amount of unpaid balance and other charges on the Loan was estimated to be \$971,946.20 and that a public auction of the subject property would be held on September 18, 2009. The subject property was not sold at auction as scheduled, nor has it been sold at auction at any time since that date. As far as we are aware, appellants still reside in subject property.

In November 2009, appellants filed this lawsuit against JPMorgan, CRC and others. In June 2011, appellants filed a second amended complaint (SAC) alleging six causes of action. We discuss only the first cause of action for wrongful foreclosure because that is the only one appellants pursue on appeal. As to that cause of action, appellants alleged the "non-judicial foreclosure initiated by [JPMorgan] and CRC . . . is

¹ In July 2009, a second Assignment of Deed of Trust was recorded with the Contra Costa County Recorder's Office, as Instrument Number 2009-0176645, by which JPMorgan again transferred all beneficial interest in the Deed of Trust to Deutsche, as trustee for WA Mutual Mortgage Pass-Through Certificates Series 2005-AR13 Trust. This second assignment was requested by First American Title Company and was recorded "as an accommodation only."

wrongful and fraudulent” due to “forgery and ‘robo-signing’ in the title documents,” “defects in the attempted assignments of the Deed of Trust,” and “failure to properly convey the Promissory Note.” After filing an answer, respondents moved for judgment on the pleadings.² The trial court granted the motion except as to the fifth cause of action,³ ruling as to the first cause of action as follows: “The elements of a common-law cause of action for damages for wrongful foreclosure are: (1) Trustee or mortgagee caused an illegal, fraudulent or willfully oppressive sale of real property; (2) pursuant to a power of sale contained in a mortgage or deed of trust; and (3) the Trustor or mortgagor sustained damages. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7; see 4 Witkin, Sum. of Cal. Law (10th ed. 2005) Secured Transactions in Real Property, section 168.) The trustee’s sale has not taken place. See SAC pars 28, 29.”

In March 2012, the parties entered into a settlement agreement whereby appellants agreed to dismiss their fifth cause of action for wrongful foreclosure based upon an alleged violation of California Civil Code section 2923.5, in exchange for respondents’ agreement not to foreclose on the subject property pending this appeal. On July 23, 2012, appellants filed a request for dismissal with prejudice of the fifth cause of action for wrongful foreclosure under Civil Code section 2923.5 and requested the clerk dismiss the complaint with prejudice. The clerk entered dismissal as requested on July 23, 2012. Appellants filed their notice of appeal on September 21, 2012.⁴

² CRC also filed a motion for judgment on the pleadings; the trial court granted CRC’s motion without leave to amend with judgment for CRC and costs of suit. In this appeal, appellants do not challenge the trial court’s order on CRC’s motion.

³ The court denied the motion as to the fifth cause of action because “[o]n the pleadings, the Court is unable to ascertain if defendants complied with [California] Civil Code § 2923.5.”

⁴ In light of the fact this appeal followed plaintiffs’ voluntary dismissal with prejudice of their fifth cause of action together with the complaint, we asked the parties for supplemental briefing on the issue of whether we have jurisdiction to hear the appeal. (See *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365 [general rule is that a voluntary dismissal is a ministerial act, not a judicial act, and not appealable].) The California Supreme Court has now clarified that a dismissal with prejudice does not preclude the dismissal of the case entered thereafter from being a final,

DISCUSSION

A. *Standard of Review*

A motion for judgment on the pleadings is analogous to a general demurrer. (Code Civ. Proc., § 438; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145–146; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1254.) Thus, a defendant may move for a motion for judgment on the pleadings on the grounds that “[t]he complaint does not state facts sufficient to constitute a cause of action against th[e] defendant.” (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) As in the case of a demurrer, the grounds for a motion for judgment on the pleadings must “appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice.” (Code Civ. Proc., § 438, subd. (d).) A trial court may grant a motion for judgment on the pleadings with or without leave to file an amended complaint or answer. (Code Civ. Proc., § 438, subd. (h)(1).)

On appeal, the standard of review of an order granting a motion for judgment on the pleadings is the same as that applicable to a judgment following the sustaining of a demurrer. Like a demurrer, a motion for judgment on the pleadings is confined to the face of the pleading under attack, and all facts alleged are deemed admitted. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815, 825.) We must give the complaint a reasonable interpretation by reading it as a whole, viewing all parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) “We do not, however, assume the truth of contentions, deductions, or conclusions of law. [Citation.] If a complaint is insufficient on any ground specified in a demurrer, the order sustaining the demurrer must be upheld even though the particular ground upon which the court sustained it may be untenable. [Citation.]” (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 440.) On the other hand, we are not bound by

appealable judgment. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 [dismissal that is both without prejudice and accompanied by agreement tolling statute of limitations precludes judgment from being final for purposes of appeal, in contrast to dismissal that is merely without prejudice].)

the trial court's determination, but are required to render our independent judgment on whether the complaint states a cause of action as a matter of law. (*Smiley v. Citibank, supra*, 11 Cal.4th at p. 146.) In exercising our independent judgment, we may consider judicially-noticed documents, including facts therein that are not “ ‘reasonably subject to dispute.’ ” (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, 266.)

B. The Trial Court Correctly Granted Judgment on the Pleadings

The essence of appellants' argument on appeal is that they sufficiently alleged a claim for injunctive relief to prevent the nonjudicial foreclosure sale from going forward. As we understand their argument, they no longer contend they can make a damages claim, as the trial court ruled. Rather, they assert only that they have sufficiently alleged entitlement to injunctive relief.⁵ (See R. Bernhardt, *Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation* (Cont.Ed.Bar. 4th ed. 2009) Debtor Strategies, §§ 7.22 to 7.31, pp. 538.9 to 539.)

While plaintiffs specifically alleged they were entitled to injunctive relief in paragraph 103 of their SAC (and also specifically sought injunctive relief in their prayer for relief), we conclude their claim for injunctive relief is deficient. A borrower challenging the validity of a trustee's sale in equity is required to do equity before the court will exercise its equitable powers. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424.) Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. (See *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512; see also *Intengan v. BAC Home Loans Servicing LP* (2013) 214

⁵ This is an appeal from judgment on the pleadings finding appellants' causes of action legally insufficient as stated, and we concur with the trial court's ruling that appellants cannot state a legal claim for money damages based on wrongful foreclosure as no sale has taken place and appellants still occupy the subject premises. This, in essence, leaves appellants' claim for injunctive relief untethered to a cause of action. Nevertheless, we shall entertain appellants' claim for injunctive relief because California law recognizes that equitable principles apply in the foreclosure context. (See, e.g., *Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1016.)

Cal.App.4th 1047, 1053 [noting that “tender rule is based on ‘the equitable maxim that a court of equity will not order a useless act performed . . . [¶] . . . if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs’ ”].)⁶ Here, appellants have failed to demonstrate tender and, therefore, they are not entitled to equitable relief.

However, appellants contend tender is not required in this case because their wrongful foreclosure claim does not concern “mere procedural irregularities” in the foreclosure process, but rather alleges that foreclosure proceedings were initiated by an entity acting without legal authority to do so. On this point, appellants assert a party may invoke the power of sale in a Deed of Trust under Civil Code section 2924, subdivision (a)(1), only if it is acting on behalf of the proper beneficiary.

Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149 (*Gomes*) discussed such a contention at length before rejecting it. In *Gomes*, plaintiff borrowed from KB Home Mortgage (KB) to finance the purchase of real estate by executing a promissory note (Note). That Note was secured by a deed of trust identifying KB as Lender and Mortgage Electronic Registrations Systems, Inc. (MERS) as beneficiary.⁷ The deed of trust granted MERS the right to foreclose and sell the subject property. Subsequently, plaintiff defaulted on his loan payments and ReconTrust (agent for MERS)

⁶ Courts have recognized four exceptions to the tender requirement: (1) “if the borrower’s action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt”; (2) “a tender will not be required when the person who seeks to set aside the trustee’s sale has a counterclaim or setoff against the beneficiary. In such cases, it is deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required”; (3) “tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale,” e.g., where party challenging the sale was not responsible for underlying debt; (4) “no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee’s deed is void on its face.” (*Lona v. Citibank, N.A.*, (2011) 202 Cal.App.4th 89, 112–113.) Appellants fail to demonstrate any of these exceptions apply here.

⁷ The Deed of Trust identified KB as the “Lender” and MERS as “acting solely as a nominee for Lender and Lender’s successors and assigns,” and stated that MERS was the beneficiary. (*Gomes, supra*, 192 Cal.App.4th at p. 1151.)

sent notice of default. Plaintiff filed suit and the trial court, thereafter, sustained without leave to amend defendants' demurrer to the first cause of action for "wrongful initiation of foreclosure," which was based on plaintiff's allegations the Note had been sold on the secondary mortgage market, the identity of the Note's beneficial owner was unknown and "the current owner of the Note did not authorize MERS to proceed with the foreclosure." (*Gomes, supra*, at pp. 1150–1153.)

On appeal from the order sustaining the demurrer, the appellate court noted the nonjudicial foreclosure scheme set forth in Civil Code sections 2924 through 2924k " 'provide[s] a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust' [citation] . . . [that] 'cover[s] every aspect of exercise of the power of sale contained in a deed of trust.' [Citation.]" (*Gomes, supra*, 192 Cal.App.4th at p. 1154.) " 'The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citation.]" (*Ibid.*) The court also stated that due to the " 'exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the [nonjudicial] foreclosure statute.' [Citations.]" (*Ibid.*) Accordingly, the court concluded that "[b]y asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, *Gomes* is attempting to interject the courts into this comprehensive nonjudicial scheme. [*G*]omes has identified no legal authority for such a lawsuit. Nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated." (*Ibid.*)

Furthermore, the *Gomes* court specifically rejected plaintiff's reliance on Civil Code section 2924, subdivision (a) as providing authority "for an action to test whether the person initiating the foreclosure has the authority to do so." (*Gomes, supra*, 192 Cal.App.4th at p. 1155.) On this point, the court observed, "Section 2924, subdivision

(a)(1) states that a ‘trustee, mortgagee, or beneficiary, or any of their authorized agents’ may initiate the foreclosure process. [N]owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action. [Citation.] [T]he 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.*; see also *Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46 [declaring agreement with “the *Gomes* court that the statutory scheme (§§ 2924–2924k) does not provide for a preemptive suit challenging standing” and holding that “plaintiffs’ claims for damages for wrongful initiation of foreclosure and for declaratory relief based on plaintiffs’ interpretation of section 2924, subdivision (a), do not state a cause of action as a matter of law”].) Accordingly, we conclude *Gomes* precludes appellants’ claim for wrongful foreclosure based on allegations under Civil Code section 2924 that foreclosure proceedings were not initiated by the correct party. In any event, the trial court took judicial notice of several recorded instruments, including the Deed of Trust naming CRC as trustee, and the Notice of Default and Election to Sell Under Deed of Trust showing it was filed by CRC on March 31, 2009. As noted *ante*, Civil Code section 2924, subdivision (a)(1) specifically provides a “trustee” may initiate foreclosure proceedings.

In sum, upon de novo review, we conclude the operative pleading fails to state a cause of action for wrongful foreclosure.

DISPOSITION

The judgment is affirmed. Appellants shall bear costs on appeal.

Sepulveda, J.*

We concur:

Margulies, Acting P.J.

Banke, J.

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