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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MICHAEL E. HALLOCK,
Plaintiff and Appellant,

v.

CALIFORNIA EQUITY MANAGEMENT
GROUP, INC. et al.,
Defendants and Respondents.

A139945

(Contra Costa County
Super. Ct. No. MSC13-00725)

This is an appeal from judgment after the trial court sustained the demurrer of respondent California Equity Management Group, Inc. and dismissed without leave to amend the original complaint of appellant Michael E. Hallock. Appellant challenges the judgment against him on one ground: He contends the trial court erred in sustaining the demurrer to his original complaint because he filed an amended complaint prior to the hearing on demurer that superseded his original complaint and rendered the demurrer moot. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 8, 2013, respondent purchased in a publicly-held Trustee's Sale a parcel of real property located in Walnut Creek, Contra Costa County, that was formerly owned by Hallock (hereinafter, the subject property). The Trustee's Sale was noticed after Hallock defaulted on a loan secured by a deed of trust recorded against the subject property by the lender, UBS AG Tampa Branch, another named defendant in this matter, albeit not involved in this appeal.

Shortly after the sale, respondent recorded a trustee's deed as to the subject property and, when appellant and his tenants did not leave said property, initiated an unlawful detainer action against him.

On April 5, 2013, appellant then filed the original complaint in this action against respondent, among others, seeking to set aside the trustee's sale of the subject property, to rescind the trustee's deed in respondent's name, and/or to quiet title to the property in his own name.¹ The causes of action set forth in the original complaint include rescission, cancellation of void contract, quiet title, fraud, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing.

On May 10, 2013, respondent filed a demurrer to the original complaint in lieu of an answer, contending that each of appellant's causes of action failed to allege facts sufficient to state a cause of action against respondent, and that appellant would not be able to amend his complaint to state a valid cause of action. Hearing on the demurrer was set for June 2013. Appellant did not file any opposition to the demurrer.

On June 18, 2013, the day before the scheduled hearing, the trial court prepared a tentative ruling to sustain the demurrer without leave to amend. Neither party thereafter requested oral argument with respect to this tentative ruling or appeared at the next day's hearing. The trial court thus adopted the tentative ruling to sustain the demurrer without granting appellant leave to amend on the ground that the original complaint failed to state facts sufficient to constitute a valid cause of action. The trial court also noted for the record: "COUNSEL PHONED THE COURT AND STATED THAT AN AMENDED COMPLAINT WAS FILED YESTERDAY BUT THE COMPUTER SYSTEM DOES NOT SHOW THAT THE COMPLAINT WAS FILED."

The trial court then dismissed the original complaint without leave to amend and, on August 15, 2013, entered judgment in favor of respondent and against appellant. Appellant filed a timely notice of appeal on October 30, 2013.

¹ As respondent points out, appellant failed to include in the record on appeal a copy of his original complaint. Respondent thus attached a copy of the document as an appendix to the respondent's brief.

DISCUSSION

Appellant raises one argument on appeal. He contends the trial court erred in sustaining respondent's demurrer to his original complaint because there was an amended complaint on file prior to the hearing on the demurrer. Appellant thus reasons that, pursuant to Code of Civil Procedure section 472, his amended complaint superseded the original complaint as the "active" pleading in the case, rendering the demurrer moot.² (See *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 506 ["The filing of the first amended complaint render[s] [the defendant]'s demurrer moot since "an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading"']).)

Respondent counters that, in raising this claim of error, appellant has failed to present this court with an accurate and complete description of the trial court's decision, including a description of the factual or legal grounds upon which the trial court relied to sustain the demurrer and to dismiss his complaint with prejudice. Respondent further notes that, once the trial court sustained its demurrer without leave to amend, appellant made no effort whatsoever to alert the court in a timely fashion to the allegedly improper ruling, and thereby deprived it of the opportunity to address or rectify any possible error prior to this appeal.

We agree with respondent's observations regarding appellant's procedural failures. Moreover, we conclude his failures are of such magnitude to warrant rejection of his appeal without consideration of the merits. We discuss our conclusion in this regard in more precise terms below.

We first turn to appellant's failures to comply with several basic – and, indeed, mandatory – rules of appellate procedure. Consistent with respondent's observations, appellant's opening brief omits any fair and accurate discussion of the factual and legal

² Code of Civil Procedure section 472 provides in relevant part: "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party"

bases for the trial court's decision to sustain respondent's demurrer to the original complaint without leave to amend, a clear violation of California Rules of Court, rule 8.204(a)(2).³ For example, while appellant contends he filed an amended complaint on June 18, 2013, the day before the court's hearing on the demurrer, a fact that, he says, alone requires reversal of the judgment, he ignores several other facts in the record that call into question the merit of his contention.⁴ As respondent notes, in particular, the trial court's minute order from the hearing on demurrer, at which appellant made no appearance, states: "DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND. PARTIAL DISMISSAL ON THE COMPLAINT OF HALLOCK AS TO [RESPONDENT]. COUNSEL PHONED THE COURT AND STATED THAT AN

³ Former California Rules of Court, rule 14 was amended and renumbered as Rule 8.204 effective January 1, 2007. Subdivision (a) of rule 8.204 provides:

"(a) Contents

" (1) Each brief must:

" (A) Begin with a table of contents and a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited;

" (B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and

" (C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.

" (2) An appellant's opening brief must:

" (A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from;

" (B) State that the judgment appealed from is final, or explain why the order appealed from is appealable; and

" (C) Provide a summary of the significant facts limited to matters in the record."

⁴ Appellant's entire statement of fact and procedure, consisting of a single paragraph, is as follows: "The complaint could and would be amended to include the indictment of the president of [respondent California Equity Management Group, Inc.], Andrew Katakis. While appellant is hopeful that Katakis will be convicted by the jury that is currently deliberating, that is not certain, however much of Katakis' and Respondent's business practices have come to light during that trial, and if not available for collateral estoppel purposes through a conviction, may still be directly relevant as evidence uncovered."

AMENDED COMPLAINT WAS FILED YESTERDAY BUT THE COMPUTER SYSTEM DOES NOT SHOW THAT THE COMPLAINT WAS FILED.” (Underscore added.) In addition, respondent contends appellant made no mention of having filed an amended complaint at the next hearing, which was held June 26, 2013, just days later, on his motion to consolidate and to stay the related unlawful detainer case.

Respondent further contends that appellant failed to comply with the requirement in Code of Civil Procedure section 472 , the statutory basis for his claim, of serving respondent with a copy of the amended complaint prior to the hearing on demurrer. (Code of Civ. Proc., section 472 [“Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, *by filing the same as amended and serving a copy on the adverse party*”] [italics added].) According to respondent, it was not provided a complete copy of the amended complaint until July 5, 2013, when their counsel received by regular mail the missing portion of the amended complaint, the first portion of which was received by regular mail three days earlier.

Given the significance of these disputed facts to resolution of appellant’s claim on appeal, we cannot excuse his failure to present them to this court in his opening brief, much less to analyze them under the applicable law.⁵ (See, e.g., *Tutsch v. Director-General of Railroads* (1921) 52 Cal.App. 650, 653 [where the record reflects appellant filed an amended complaint the same day a demurrer to the complaint was heard and a motion to dismiss was granted, the reviewing court must assume the filing of the amended complaint occurred after the trial, and thus that the trial court correctly dismissed the matter, given appellant’s failure to establish otherwise].) Indeed, appellant’s violations of California Rules of Court, rule 8.204(a)(2), are so profound that we are left without any clear understanding of the events leading up to this appeal. Not

⁵ We need not decide the weight to be afforded respondent’s version of the facts. We simply put forth these facts to demonstrate the inability of this court to rule on appellant’s appeal given his failure to present us with an adequate portrayal of the relevant facts and law.

only does appellant's opening brief omit a proper statement of the factual and procedural background of this case, appellant opted not to file a reply brief, despite being alerted to this deficiency by respondent in the respondent's brief. It is not our role as appellate court to independently review the record to piece together what has happened in order to rule on appeal. (Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant must file an opening brief that "[p]rovide[s] a summary of the significant facts limited to matters in the record."]; see also *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 ["unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error"].) This is particularly true where, as here, the burden is placed on appellant, as the party opposing the sustaining of a demurrer with prejudice, to affirmatively demonstrate the complaint can be properly amended. (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.) Given appellant's failure to make this affirmative showing, there can be no basis for disturbing the trial court's ruling to sustain the demurrer with prejudice and to dismiss his complaint without leave to amend. (*Ibid.*; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

Finally, one additional ground exists for rejecting appellant's appeal without further analysis: He failed to take any steps whatsoever in the trial court to cure the purported error in sustaining respondent's demurrer without leave to amend. As respondent notes, appellant had several means available by which to attempt to cure or remedy the trial court's purported error, and to thereby preserve this issue for appeal. These means include, but are not limited to, appearing at the June 19, 2013, hearing on respondent's demurrer to provide notice of his filing of an amended complaint and, on that ground, to object to the hearing on demurrer; filing a motion for reconsideration pursuant to Code of Civil Procedure section 1008 or for relief from judgment or dismissal pursuant to Code of Civil Procedure section 473, subdivision (b); or filing a motion for new trial. Yet appellant took none of these steps. Nor did appellant provide this court with any explanation or reasoned basis for excusing his failures to act. Indeed, despite being confronted with respondent's forfeiture argument in the respondent's brief, as we just mentioned, appellant opted to file nothing by way of a reply. Under these

circumstances, we conclude invocation of the forfeiture doctrine is an acceptable course of action. (*People v. Simon* (2001) 25 Cal.4th 1082, 1103 [“ ‘ ‘ ‘The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal’ ” ’ ”]; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 [“The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458–459; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 37, pp. 497–500.) The rule is designed to advance efficiency and deter gamesmanship”].)

Thus, for the reasons stated, we stand by our decision to reject this appeal on procedural grounds. Given appellant’s substantial noncompliance with mandatory rules of appellate procedure, we conclude his appeal of the trial court’s ruling to sustain with prejudice the demurrer to his original complaint must fail. (E.g., *People v. Simon, supra*, 25 Cal.4th at p. 1103; see also *Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [appellate arguments are waived where appellant’s briefs are “devoid of citations to the reporter’s transcript and . . . in dramatic noncompliance with appellate procedures”]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 9:21, p. 9-6 [“appellate court can treat as *waived* . . . any issue that, although raised in the briefs, is *not supported by pertinent or cognizable legal argument or proper citation of authority*”].) Entry of judgment for respondent is thus affirmed.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.