Filed 4/26/17 Maxwell v. Deutsche Bank National Trust CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MORRIS S. MAXWELL et al.,

Plaintiffs and Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY et al.,

Defendants and Respondents.

A142562

(San Mateo County
Super. Ct. No. CIV526697)

Plaintiffs Morris S. Maxwell and Shawn R. Maxwell (plaintiffs) sued defendants Deutsche Bank National Trust Company, as Trustee, and OneWest Bank N.A. (OneWest) (together, defendants) after defendants foreclosed on their home in San Mateo County, California. They seek reversal of the trial court's order that plaintiffs pay defendants $17,685 in attorney fees as sanctions under Code of Civil Procedure section 128.7 for filing their lawsuit for an improper purpose, as well as reversal of the trial court's order sustaining defendants' demurrer to plaintiffs' complaint without leave to amend. Plaintiffs make a variety of arguments, including that the trial court should not have ordered sanctions against them because they were merely following their counsels' advice in filing suit and should have allowed plaintiffs leave to amend their complaint. We conclude plaintiffs' arguments lack merit and affirm the rulings appealed from. We deny defendants' motion for sanctions under California Rules of Court, rule 8.276.

BACKGROUND

In February 2014, plaintiffs, represented by counsel, filed this action against defendants. Plaintiffs alleged that Deutsche Bank had illegally foreclosed on residential real property they owned in San Mateo, California (property) and sold it to a third party in August 2013[1] without ever obtaining an interest in the property or the subject loan.[2]

Specifically, plaintiffs alleged the property was subject to a deed of trust that secured an $830,000 loan they obtained from IndyMac Bank, F.S.B. (IndyMac) in 2007. In 2008, IndyMac ceased operations and was put into receivership by its conservator, FDIC, and in 2009 entered into a "Loan Sale Agreement" with OneWest. Deutsche Bank subsequently claimed to have properly obtained an assignment of this deed of trust and of the note, but plaintiffs contended this did not occur. Rather, IndyMac "[e]ither . . . sold its interest in [plaintiffs'] loan prior to it being closed or it was acquired by the FDIC. If IndyMac sold its interest in the loan prior to being closed none of the recorded documents reflected such a transaction. Alternatively, if IndyMac held the loan when it was closed in 2008 none of the recorded documents reflected a proper or legal transfer of interest to Deutsche Bank." Therefore, "Deutsche Bank was not legally assigned the Note and/or Deed of Trust, and has no legal authority to exercise the power of sale . . . ." Based on these allegations, plaintiffs sued for: (1) the setting aside of the trustee's sale of the property; (2) declaratory relief; (3) slander of title; and (4) wrongful foreclosure.

Defendants demurred to the complaint. They argued plaintiffs' claims were barred by the doctrine of res judicata and also failed on their merits as a matter of law. Defendants contended plaintiffs had filed five previous lawsuits[3] based on allegations identical to those in the present suit, all as part of an "unsuccessful harassment of [defendants] with this repeated groundless action." The first four of these suits were dismissed with prejudice and the fifth was

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[1] Plaintiffs also sued this third party purchaser, which was not a party to the rulings appealed from and is not a party to this appeal.

[2] Plaintiffs also alleged certain technical defects in the notice of default.

[3] These lawsuits were a 2009 state court action that relied on the exact same facts as plaintiffs' latest suit; a 2012 bankruptcy adversary proceeding; a 2013 state court action; a 2013 federal court action; and a September 2013 state court action.

voluntarily dismissed by plaintiffs just before the court issued a tentative ruling sustaining defendants' demurrer with prejudice as barred by the doctrine of res judicata. In the most recently dismissed suit, a federal judge warned plaintiffs that they should not file any further suit based on the same occurrences because it would be barred by the doctrine of res judicata and expose plaintiffs to sanctions.

Defendants also contended plaintiffs had not paid the mortgage for almost five years; the property was properly sold to a third party on August 28, 2013; and the third party had recently obtained a judgment for possession of the property in an unlawful detainer action.

Plaintiffs opposed defendants' demurrer, arguing their claims were not barred by the doctrine of res judicata because the claims were not ripe until the foreclosure occurred on August 28, 2013. Plaintiffs contended the foreclosure distinguished their present suit from their previous ones, which were filed before the foreclosure sale occurred.

The court sustained defendants' demurrer without leave to amend, finding plaintiffs' claims were barred by the doctrine of res judicata and also failed to state facts sufficient to constitute any cause of action. The court recognized "that it matters little if the order herein stated is posted in ALL CAPS, for the reality is that Plaintiffs refuse to accede to the power of the Courts to issue final rulings on issues surrounding this immediate litigation. Without any doubt whatsoever, this case is barred in its entirety based upon the doctrine of res judicata."

On March 26, 2014, defendants served on plaintiffs a motion for sanctions against plaintiffs and their attorney under Code of Civil Procedure section 128.7. On April 26, 2014, defendants filed their motion with the court. The court, after considering the parties' arguments, granted the motion and awarded defendants the monetary sanctions they requested, $17,685, from plaintiffs, but not from plaintiffs' counsel. The court recounted plaintiffs' years of litigation in federal and state court and wrote: "Just as in every other proceeding involving the foreclosure of Plaintiffs' home, [this] case was barred by the principal [*sic*] of res judicata, as Plaintiffs' claims had been fully litigated in both State and Federal Bankruptcy court.

"Irrespective of multiple court orders dismissing their claims, Plaintiffs continue to abuse the process of the courts by filing unmeritorious actions. . . . [Federal District Court]

Judge Orrick dismissed their claim and warned them that any future litigation involving the foreclosure of their property could subject them to sanctions . . . .

" . . . The Court agrees that Plaintiffs must be deterred in some fashion such that they finally put an end to the abusive manner in which they have utilized the courts during the past six years . . . .

"It is evident to not only this court but the federal court as well that the purpose of [plaintiffs'] continued pursuit of these claims is not because there is any legal recourse, but rather it is their intention to delay the foreclosure and impending abandonment of their former home, harass the Defendants, and frustrate the justice system. While they have waged a paper war with their creditors, they have continued to live in the home for more than 56 months without making any mortgage payment. The Defendant, in defending consecutive actions including this one, has incurred more than $100,000 in legal fees. In his 1/27/14 order denying One West/Deutsche Bank's motion for Rule 11 sanctions, Judge Orrick stated: 'The plaintiffs are warned that they should not file any further suits based on the occurrences underlying this action and all their previously dismissed actions—any such suit is barred by res judicata or collateral estoppel, will certainly be frivolous, and will undoubtedly render them liable for sanctions.' "

Plaintiffs filed timely appeals both from the court's sustaining of defendants' demurrer and the court's sanction order. During the pendency of this appeal, defendants moved for sanctions against plaintiffs under California Rules of Court, rule 8.276 for filing a frivolous appeal. We notified plaintiffs of our consideration of this motion and received a letter brief from them opposing the motion. We took the motion and a related motion requesting judicial notice under submission to decide in conjunction with this appeal.

DISCUSSION

I.

Plaintiffs' Claims That the Trial Court Erred in Awarding Monetary Sanctions Against Them Under Code of Civil Procedure Section 128.7, Subdivision (b) Lack Merit.

Plaintiffs argue the trial court erred in ordering them to pay monetary sanctions of $17,685 under Code of Civil Procedure section 128.7 (section 128.7), subdivision (b)

because plaintiffs were represented by counsel; defendants did not give them sufficient time and notice to address the issues defendants raised before filing their sanctions motion with the court; the court should not have sanctioned them for their previous lawsuits because this time their attorney made the decision to file suit; and the amount the court ordered them to pay was excessive. Each of these claims lacks merit.

A. Section 128.7

Section 128.7 authorizes a court to award sanctions, including monetary sanctions, against a party and/or a party's counsel in certain circumstances. Section 128.7, subdivision (b) states in relevant part: "By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

"(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[4]

Section 128.7 further provides that if the court determines that subdivision (b) has been violated, it may impose an appropriate sanction upon the attorneys or parties who committed the violation or are responsible for it. "[S]anctions under section 128.7 are not limited to the filing of papers that violate all of the requirements of subdivision (b). The subdivision requires that 'all of the following conditions [be] met.' A violation of any of them may give rise to sanctions." (*Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967.)

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[4] Section 128.7, subdivision (b) states two other implied certifications, which are not at issue in this appeal. They are: "(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery," and "(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

Imposition of sanctions under section 128.7 is subject to certain conditions. (§ 128.7, subd. (c).) These include a so-called "safe harbor" provision that requires the motion not be filed with or presented to the court until at least 21 days after the party against whom sanctions are sought is served with the motion, so that that party has an opportunity to withdraw or appropriately correct the challenged paper, claim or contention (*id.*, subd. (c)(1)); *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 424 [referring to the "safe harbor" provision].)

The court also must limit any sanction imposed for violation of section 128.7, subdivision (b) "to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated." (§ 128.7, subd. (d).) A sanction "if imposed on motion and warranted for effective deterrence" may include "an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (*Ibid*.) "Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b)." (*Id.*, subd. (d)(1).)

We review de novo issues regarding the legal interpretation of section 128.7. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 76–77.) We review the trial court's determinations about the propriety of sanctions for abuse of discretion. A court may sanction a party if the moving party shows that the conduct involved was "objectively unreasonable." (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440.) We review such determinations for abuse of discretion. (*Id*. at p. 441.)

B. Section 128.7 Gives the Trial Court Authority to Order Represented Parties to Pay Monetary Sanctions for Litigating for an Improper Purpose.

Plaintiffs first argue the trial court erred in awarding monetary sanctions against them because of the last subdivision we have quoted above, namely that "[m]onetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b)." (§ 128.7, subd. (d)(1).) The court did not err. Defendants moved for sanctions not only under section 128.7, subdivision (b)(2) regarding unwarranted claims and contentions, but also under section 128.7, subdivision (b)(1), which prohibits litigating "primarily for an improper purpose, such as to harass or to cause unnecessary delay or

needless increase in the cost of litigation." Specifically, defendants stated in their notice of motion that they were doing so on the grounds that (1) "the claims and contentions in the complaint are not warranted by existing law or a non-frivolous argument for the extension, modification, or reversal of existing law," *and* (2) "this is [plaintiffs'] sixth lawsuit against defendants and, thus, is part of a pattern and scheme to harass defendants and needlessly increase legal costs." In their supporting brief, defendants specifically argued they were entitled to sanctions under section 128.7, subdivision (b)(1) because plaintiffs had filed their complaint for an improper purpose.

The trial court made clear in its ruling that it was ordering plaintiffs to pay monetary sanctions for litigating for an improper purpose. The court stated, "It is evident to not only this court but the federal court as well that the purpose of [plaintiffs'] continued pursuit of these claims is not because there is any legal recourse, but rather it is their intention to delay the foreclosure and impending abandonment of their former home, harass the Defendants, and frustrate the justice system."

Plaintiffs do not contend the trial court was barred from imposing monetary sanctions against represented parties under section 128.7, subdivision (b)(1). And in fact, case law makes clear that the court could do so. For example, as defendants point out, in *Burkle v. Burkle*, 144 Cal.App.4th 387 (2006), the appellate court affirmed sanctions awarded against a represented party (as well as her attorneys) in a marriage dissolution proceeding. She filed a separate civil action against her husband and two accounting firms for their purported violation of a stipulation and order issued in the dissolution proceeding. The family court ordered monetary sanctions against her for filing the separate civil action for an improper purpose. (*Id*. at p. 391.) On appeal, she contended the family court should not have sanctioned her because her attorneys made the decision to file the separate civil action; the appellate court disagreed, concluding the family court could issue these sanctions under section 128.7, subdivision (b)(1)'s "improper purpose" provision. (*Burkle*, at pp. 402–403; see also *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 466–467 [affirming sanctions for violations of subdivision (b)(1) against both a party and attorney because, given that section 128.7 states that monetary sanctions cannot be awarded against a represented party

only for a violation of subdivision (b)(2), "[t]he logical inference, of course, is that monetary sanctions *can* be awarded against a represented party for a violation of subdivision[] (b)(1)"], disapproved in part on another ground in *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520.)

In short, the trial court could order monetary sanctions against plaintiffs for litigating for an improper purpose, regardless of the fact that plaintiffs were represented by counsel.

Also, as *Burkle v. Burkle* also indicates, plaintiffs' contention that their attorney decided to file the present action is of little significance under the circumstances. The court was entitled to consider plaintiffs' knowledge of the outcomes of their prior actions—and Judge Orrick's warning to them in the last federal suit in particular—in determining they should be sanctioned for filing this action for an improper purpose. And indeed, plaintiffs do not argue to the contrary.

C. Defendants Gave Plaintiffs Sufficient Time to Address the Motion Before Filing It with the Court.

Plaintiffs next argue that the court erred in ruling on defendants' sanctions motion because defendants did not follow the "safe harbor" requirements of section 128.7, in that they did not give plaintiffs 30 days to address the motion before filing it with the court and in that they purportedly only sent plaintiffs a letter threatening to move for sanctions, rather than the motion itself.

As we have discussed, section 128.7, subdivision (c) requires that a moving party give the party against whom sanctions are sought at least 21 days to address the motion before filing it with the court. The record shows that defendants did so. They served their motion (not just a letter) on plaintiffs, via plaintiffs' attorney, on March 26, 2014, and filed it with the court 26 days later, on April 21, 2014. Plaintiffs' argument that 30 days is required is based on cases citing a prior version of section 128.7. The statute was amended in 2002 to change this minimum period of time from 30 days to 21 days. (Stats. 2002, ch. 491, § 1.) Plaintiffs' "safe harbor" arguments lack merit.[5]

[5] Given our conclusion, we do not address the parties' debate over whether plaintiffs can raise a safe harbor claim on appeal without first raising it below.

D. The Amount of Attorney Fees Awarded Was Not Unreasonable.

Plaintiffs also argue the trial court abused its discretion in awarding sanctions to defendants in the amount of $17,685 in attorney fees, which they contend is excessive. We disagree.

As we have discussed, a trial court is required to limit any sanction imposed for violation of section 128.7, subdivision (b) "to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated," which may include an order directing payment to the moving party of all reasonable attorney fees incurred as a result of the misconduct involved. (§ 128.7, subd. (d).)

Plaintiffs do not show the trial court abused its discretion by ordering them to pay $17,685 in attorney fees. The court based this amount on documentation and explanations provided by defendants' counsel, who stated in a supplemental declaration that defendants' $17,685 request was based on attorney "time actually and necessarily spent in the defense of this action" and based on reasonable rates for work "performed efficiently." This work included "(1) analyzing [plaintiffs'] new complaint, which alleged the same causes of action but was drafted in a different manner than their prior complaints; (2) drafting a demurrer to the complaint and supporting documents; (3) researching substantive issues raised in the complaint including whether alleging solely post-foreclosure causes of action precludes application of *res judicata*; (3) [*sic*] drafting the reply in support [of the] demurrer, including researching and analyzing the case law cited by [plaintiffs]; (4) drafting letters demanding that [plaintiffs] dismiss this groundless lawsuit; (5) drafting the motion for sanctions and supporting documents, including researching whether the Court may issue sanctions in the event [plaintiffs] voluntarily dismiss the case on the eve of the hearing; (6) drafting the reply to [plaintiffs'] opposition to the motion for sanctions; (7) preparing for and attending the hearings on the demurrer and motion for sanctions; and (8) performing other case-management requirements." Further, attorneys had spent 91.1 hours on the case and billed fees totaling $28,657, but defendants were seeking only $17,685 because at the time they filed their motion they had estimated this would be the total amount of fees they would incur.

Plaintiffs do not challenge on appeal the trial court's decision to rely on defendants'

presentation below. Instead, they restate their own argument that defendants' requested sanction amount was unreasonable because defendants' attorneys merely "cut and paste" from similar work they had done in previous lawsuits against plaintiffs. The trial court considered these arguments below and rejected them. We conclude the trial court acted within its discretion in doing so. The work performed and attorney fees defendants incurred in the present case do not appear unreasonable, whether or not any of it was similar to previous work in other cases. We also find no error in the trial court's determination that such an award was necessary to deter plaintiffs from continuing to clog the courts with meritless litigation, given plaintiffs' repeated previous lawsuits based on the same allegations and the warning they received and ignored. Therefore, we reject plaintiffs' unreasonable fees argument.

II.

Plaintiffs' Arguments About the Court's Demurrer Ruling Also Lack Merit.

Plaintiffs argue that the trial court abused its discretion by sustaining defendants' demurrer without leave to amend. For this proposition, plaintiffs cite case law indicating that trial courts sustaining demurrers should generally give a party an opportunity to amend a complaint " 'if the plaintiff shows there is a reasonable possibility any defect identified . . . can be cured by amendment.' " (*Paragon Real Estate Group of San Francisco, Inc. v. Hansen* (2009) 178 Cal.App.4th 177, 182.)[6] None of this case law involves a court determining that a party's claims are barred by res judicata. This was the primary basis for the trial court's ruling sustaining defendants' demurrer, and plaintiffs do not show there was a reasonable possibility they could cure this defect by amendment. Thus, the trial court did not abuse its discretion by sustaining defendants' demurrer without leave to amend.

Plaintiffs also contend that the trial court erred by failing to state the grounds for sustaining defendants' demurrer as required under Code of Civil Procedure section 472d. Plaintiffs are incorrect. The court's order expressly incorporated its tentative ruling, which

[6] Plaintiffs also cite case law that discusses whether trial courts should have involuntarily dismissed lawsuits as a sanction against misconduct or in the face of other, related proceedings. (See *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491; *Traweek v. Finley, Kumble, etc. Myerson & Casey* (1991) 235 Cal.App.3d 1128.) These cases are inapposite to the circumstances of this case, which do not include such a dismissal.

set forth its reasons for sustaining defendants' demurrer.

III.

Defendants' Motion for Sanctions Is Denied.

Defendants move for sanctions against plaintiffs in the amount of $3,773 for attorney fees defendants incurred in this appeal under California Rules of Court, rule 8.276, and moved that we take judicial notice of certain recorded loan documents and numerous filings in plaintiffs' previous lawsuits that defendants have submitted in support of their motion. They argue plaintiffs' appeal is frivolous because it is from claims that are barred by the doctrine of res judicata, reargues frivolous positions for which plaintiffs have already been sanctioned, and is part of a history of repetitive filings and vexatious litigation that merits awarding sanctions.

California Rules of Court, rule 8.276 gives us the discretionary authority to award sanctions in certain cases. It states: "On motion of a party . . . , a Court of Appeal may impose sanctions . . . under rule 8.278, on a party or an attorney" for "[t]aking a frivolous appeal or appealing solely to cause delay." Such sanctions may include attorney fees. (See *Pittsburg Unified School Dist. v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal.App.4th 808, 830.)

We grant defendants' motion requesting judicial notice. We conclude there is not sufficient reason to sanction plaintiffs for their appeal under the circumstances and deny defendants' motion for sanctions.

DISPOSITION

The rulings appealed from are affirmed. Defendants are awarded costs of appeal.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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