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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ACADEMY PARTNERS LLC,

Plaintiff and Appellant,

v.

LED LEASING LLC et al.,

Defendants and Respondents.

A143120

(Marin County
Super. Ct. No. CIV 1203013)

Academy Partners LLC (Academy) and Alan Brayton, its principal owner and manager, each held secured promissory notes on real property being developed by LED Leasing LLC (LED). LED defaulted on the loans and Brayton foreclosed his senior lien and acquired the property at a trustee's sale. The foreclosure eliminated Academy's junior lien and Academy filed this action asserting a single cause of action for breach of promissory note.

The trial court granted defendants' motion for summary judgment. The court held that Academy and Brayton are effectively a single creditor, so that Academy's contract claim is barred by the established law precluding a creditor with both a senior and junior lien on the same real property from conducting a nonjudicial foreclosure on the senior lien and then pursuing a deficiency judgment as a sold-out junior lienor. (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1541, 1544.) The court then denied Academy's motion for leave to amend its complaint to assert a cause of action for fraud under the mistaken belief that the identical claim was already pending in a separate

action. We shall affirm summary adjudication of the breach of promissory note cause of action but reverse the denial of leave to amend.

Statement of Facts

The underlying transactions

The critical facts are undisputed. Brayton is a personal injury lawyer specializing in asbestos litigation. Brayton formed Academy in 2001 to invest in real estate. Academy has two members: Brayton and Matthew Fleumer. Fleumer is the chief financial officer in Brayton's law firm. Fleumer is charged with selecting and managing investments for Academy and does so from the offices of Brayton's law firm. Brayton has contributed all of Academy's capital other than a nominal \$100 investment by Fleumer. Fleumer holds a one percent ownership interest in Academy, established at formation, but the company has never declared a profit. Fleumer testified at his deposition that he has never received any profit distributions or salary for his work at Academy and managed its investments because Brayton "asked [him] to." He understood his work for Academy to be "additional duties as assigned for Al Brayton." Fleumer said his role is to find investment opportunities for Brayton, who then decides whether to invest in the proposed project. While Fleumer is designated as the president of Academy, "Brayton always made the final call on initial investments for Academy" and Brayton's approval is obtained on every significant decision.

Defendant LED is a real estate development company owned and managed by defendant Jay Bronson. In October 2006, LED purchased the Olema RV Resort and Campground in Marin County (the property) with the intention of converting the property into condominiums. The acquisition was financed by three separate loans, each secured by a trust deed on the property. A bank loan for \$2.25 million was in first position. Brayton made a personal loan in the amount of \$730,000, secured by a second deed of trust. Brayton testified at his deposition that Bronson had recently helped him recover money from a failed project so he decided to "reinvest" the money with him. A third party, Interest Income Partners, LLC (IIP), loaned LED \$1,777,000, secured by a third deed of trust. LED later executed a second promissory note to IIP for \$1,829,737.50 (the

IIP note), in satisfaction of the initial promissory note, secured by the same third deed of trust.

The condominium conversion proved infeasible and LED decided to sell the property. LED said it needed additional money to fund repairs and improvements to prepare the property for a profitable sale. Between March 2007 and February 2008, Brayton made a series of unsecured loans to LED totaling \$950,000. The initial secured and unsecured loans were funded with Brayton's personal funds.

In early 2008, the IIP note was in default and IIP was threatening to foreclose. LED asked Brayton to buy the note to prevent foreclosure and he agreed to do so. Fleumer testified that buying the note seemed the best way to protect Brayton's investments to date, "including the monies that were not secured." Brayton paid IIP \$2 million for its promissory note and assignment of the third deed of trust. The payment was made from Brayton's general business account — the same account used to fund the loan secured by the second deed of trust in Brayton's name—but the third deed of trust was assigned to Academy. Fleumer booked Brayton's \$2 million payment used to acquire the IIP note as a capital contribution to Academy.

Brayton continued to make personal unsecured loans to LED and, by February 2011, the combined principal amount of unsecured loans exceeded \$2.6 million. LED failed to upgrade and sell the property. Brayton decided to foreclose and considered whether to foreclose on the second deed of trust—the one securing his personal note of \$730,000—or the third deed of trust securing Academy's \$1.8 million note. The decision was his alone; Fleumer's consent was not sought. Brayton decided it would be "more advantageous" to foreclose on his personal deed of trust. He acknowledged that he thought that by foreclosing on his personal deed of trust, he would acquire the property subject only to the bank loan and that there was "a possibility" that Academy, as a wiped-out junior lienor, could recover against LED. In June 2012, Brayton foreclosed on his second deed of trust through a nonjudicial trustee's sale, purchasing the property with a credit bid of \$10,000.

The litigation.

In June 2012, two days after the foreclosure, Academy sued LED and Bronson for breach of the promissory note for combined principal and interest totaling \$2.7 million. Academy alleged it was a “sold-out junior lienor” that lost its security by a senior lienor’s foreclosure, thus freeing it of the legal obligation imposed by antideficiency statutes to look to the security. Academy identified the senior lienor as Brayton without reference to the fact that Brayton is Academy’s principal owner and manager.

In August 2013, Brayton, as an individual, filed a separate action against LED and Bronson to recover on his unsecured loans totaling \$2.6 million plus interest. The original complaint stated a cause of action for breach of book account but was amended in November 2013 to add claims for constructive fraudulent transfer and fraud. The first amended complaint alleges that Bronson falsely represented that the loans from Brayton were necessary to make property improvements and repairs when “Bronson was actually using the majority of the . . . borrowed funds for his personal benefit.”

In December 2013, defendants LED and Bronson moved for summary judgment in this action. Defendants asserted that a lender whose debt is secured by a deed of trust on real property generally must proceed against the security and may not sue to collect on the note alone. “There is an exception for a sold-out junior lien holder” “[b]ut that exception does not allow a lender with two loans, secured by separate deeds of trust on the same property, to foreclose on the senior one and then, as a sold-out junior lien holder, pursue a money judgment on the junior debt. That tactic is precluded by California’s antideficiency and one-action laws.” Defendants argued that Academy and Brayton were essentially a single lender with “a substantially complete unity of interest, and a complete unity of decision-making authority.”

In February 2014, about a week before Academy’s opposition to the summary judgment motion was due, Academy filed a motion for leave to file a first amended complaint. Academy sought to “add a cause of action for fraud based upon additional facts discovered and/or highlighted” during the deposition of Bronson taken three weeks previously. Academy maintained that it recently learned that, “in addition to Academy’s

status as a wiped out junior lienor, Academy was also fraudulently induced to purchase the promissory note in the first place.” Academy submitted a proposed amended complaint alleging it purchased the IIP promissory note in reliance upon Bronson’s representations that all of Brayton’s “unsecured loan funds would only be used to improve the property and that those improvements would quickly lead to a value for the property that would exceed the total [combined value of the] unsecured and secured loans plus interest” when, in fact, Bronson was misappropriating the funds for personal use. Academy alleged it “began to suspect” that Bronson’s representations “may have been untrue” a “few months” after March 2011 but “it was not until after Bronson’s deposition of January 21, 2014 that the full extent of Bronson’s misrepresentations were discovered.”

Defendant’s summary judgment motion was heard on March 4, 2014, two weeks before the scheduled hearing on Academy’s motion to amend its complaint. The court ruled that defendants were entitled either to summary adjudication of the cause of action for breach of promissory note or, if leave to amend was later denied, to summary judgment. The court explained its ruling as follows: “ ‘A single creditor that, at the time of foreclosure, has both a senior and junior lien on the same real property cannot conduct a nonjudicial foreclosure on the senior lien, then pursue a deficiency judgment as a sold-out junior lienor. [Citations.]’ (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1541, 1544.)” The court concluded that “the second note owned by Brayton personally, and the third note, owned by plaintiff Academy Partners, were for all intents and purposes owned by the same creditor.” Therefore, Brayton could not foreclose on one note and sue on the other; his exclusive remedy was acquisition of the property securing both notes.

On March 18, 2014, the court denied Academy leave to amend its complaint to assert a fraud cause of action, finding that Academy inexcusably delayed filing its motion and that the delay was prejudicial to defendants. The court noted that Academy did not ask to add a claim for fraud until February 2014, two months after defendants moved for summary judgment. Yet, Academy admitted it suspected fraud in 2011 and its principal,

Brayton, sued defendants for fraud in November 2013. The court asserted that Academy failed to “explain why it could not seek leave to amend earlier,” either when fraud was first suspected in 2011 or, at the latest, when Brayton filed his individual fraud claim in 2013.

The court reasoned that “allowing the amendment would create an identical, parallel action to Brayton’s individual action, which is totally unnecessary.” The court found the proposed amended complaint to allege “the same misrepresentations” asserted by Brayton’s action and concluded that Academy’s proposed claim was duplicative. On the other hand, discovery on the single cause of action initially pleaded in this action had been completed so that permitting the amendment would require another round of discovery, increasing defense costs, and requiring a new trial date “seven months hence.” The court granted defendants’ motion for summary judgment and, on August 7, 2014, entered judgment in their favor. Academy filed a timely notice of appeal.

Prior to the entry of judgment—in May 2014—Academy initiated a separate lawsuit, which was assigned to a different judge (*Academy II*).¹ Academy sued defendants for fraud upon the same allegations stated in Academy’s proposed amended complaint in this action. Defendants demurred to the *Academy II* complaint, alleging that it was founded on the same primary right prosecuted in this action. Defendants argued that Academy should have joined a fraud claim with its breach of promissory note claim in the present action and, having failed to do so in a timely manner, could not bring a separate action for fraud. The court overruled the demurrer, holding that “[t]he two lawsuits involve different ‘primary rights’ ” because the fraud action “does not arise out of the contract terms, but is based on the tort of deceit.” At the parties’ request, the court consolidated *Academy II* with Brayton’s individual action. The consolidated action is currently stayed pending resolution of this appeal.

¹ We grant respondents’ request for judicial notice of documents filed in *Academy II*. (Evid. Code, § 452, subd. (d).)

Despite defendants' failed demurrer in *Academy II*, Academy is concerned that a court may later determine that its breach of promissory note and fraud allegations present a single cause of action that cannot be split and separately litigated. Also, Academy says it "faces significant statute of limitations issues in that action that are not present in this one." Academy has, therefore, pursued this appeal seeking to amend its complaint to add a claim for fraud.

Discussion

"In reviewing a grant of summary judgment, we independently evaluate the record, liberally construing the evidence supporting the party opposing the motion, and resolving any doubts in his or her favor. [Citation.] As the moving party, the defendant must show that the plaintiff has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499-500.)

1. The court properly granted summary judgment.

"California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236 (*Alliance*)). "Pursuant to this statutory scheme, there is only 'one form of action' for the recovery of any debt or the enforcement of any right secured by a mortgage or deed of trust," and that action is foreclosure. (*Ibid.*; citing Code Civ. Proc., §§ 725a, 726, subd. (a).)² "The public policy objectives of the one-action rule are to prevent a multiplicity of actions and vexatious litigation against the trustor, to compel competitive bidding to test the value of all of the security for the debt, and to force the beneficiary to look to all of the security as the primary fund for payment of the debt before looking to the trustor's other assets." (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 13:194, p. 13-770, fn. omitted.)

Foreclosure "may be either judicial or nonjudicial. (. . . §§ 725a, 726, subd. (a).) In a judicial foreclosure, if the property is sold for less than the amount of the outstanding

² All further section references are to the Code of Civil Procedure except as indicated.

indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. [Citation.] However, the debtor has a statutory right of redemption, or an opportunity to regain ownership of the property by paying the foreclosure sale price, for a period of time after foreclosure.” (*Alliance, supra*, 10 Cal.4th at p. 1236.)

“In a nonjudicial foreclosure, also known as a ‘trustee’s sale,’ the trustee exercises the power of sale given by the deed of trust. [Citation.] Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, ‘[n]either appraisal nor judicial determination of fair value is required,’ and the debtor has no postsale right of redemption. [Citation.] However, the creditor may not seek a deficiency judgment.” (*Alliance, supra*, 10 Cal.4th at p. 1236.) “[N]o deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property . . . in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.” (§ 580d, subd. (a).)³

A creditor has an election of remedies: “If the creditor wishes a deficiency judgment,” he must proceed with a *judicial* foreclosure, and “his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title,” he may proceed with a *nonjudicial* foreclosure, but then “he must forego the right to a deficiency judgment. In either case the debtor is protected.” (*Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 (*Roseleaf*)). The “fair value provisions” of the one-action rule and antideficiency statutes “are designed to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies.” (*Id.* at p. 40.)

³ Additional limitations apply to purchase money loans but defendants do not invoke those limitations here. (§ 580b, subd. (a)(2).)

Brayton elected to proceed with a nonjudicial foreclosure and, having done so, lost the right to a deficiency judgment. This much is undisputed. However, Academy maintains that it is a sold-out junior lienholder entitled to pursue a deficiency judgment in its own right. The trial court properly found that Brayton and Academy are essentially a single creditor barred from recovering more than the foreclosed property.

Academy correctly states the basic principle applicable to multiple loans secured by multiple deeds of trust on the same property: A sold-out junior lienor “whose security has been rendered valueless by a senior sale” may recover on its promissory note. (*Roseleaf, supra*, 59 Cal.2d at p. 39.) The one-action rule does not apply as “[t]here is no reason to compel a junior lienor to go through foreclosure and sale when there is nothing left to sell” (*ibid.*) and the antideficiency rule does not bar recovery on a separate loan secured by the nonforeclosed junior deed of trust—“[t]here is no purpose in denying the junior his single remedy after a senior private sale” (*id.* at pp. 43-44). Were this remedy denied, the junior lienor might “end up with nothing”—neither property nor recovery on the note. (*Id.* at p. 41.) “The junior’s right to recover should not be controlled by the whim of the senior.” (*Id.* at p. 44.)

But Academy is not a true sold-out lienor. Brayton and Academy were, for purposes of foreclosure, collectively one creditor with two liens. Academy argues there is no proof that Academy is “Brayton’s alter ego such that the formality of the LLC corporate veil should be disregarded.” But the court here did not make an alter ego finding and had no need to do so. Whether a party is the same creditor with respect to two secured loans is an issue of practical control. Courts focus on whether a creditor’s right to recover as a junior lienor is “controlled by the whim of the senior.” (*Roseleaf, supra*, 59 Cal.2d at p. 44.) No outside control exists here. Academy’s right to recover as a junior lienor was controlled by its principal owner and manager who held the senior lien. Academy is virtually wholly owned by Brayton and Brayton acknowledged in his deposition that he, and he alone, decided which lien to foreclose and chose to foreclose his personal senior lien, thinking it “more advantageous.” Academy and Brayton share a unity of interest and decision-making authority and were effectively a single creditor.

It is well-established that “[a] single creditor that, at the time of foreclosure, has both a senior and junior lien on the same real property cannot conduct a nonjudicial foreclosure on the senior lien, then pursue a deficiency judgment as a sold-out junior lienor.” (*Cadlerock Joint Venture, L.P. v. Lobel, supra*, 206 Cal.App.4th at p. 1544, & cases cited therein.) A leading case is *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, 66, in which a bank loaned a total sum of \$1.575 million in exchange for two promissory notes of \$1.2 million and \$375,000 secured by separate deeds of trust on the same real property. The bank later conducted a nonjudicial foreclosure on the senior lien, recovered the property, then sued the debtors on the junior note. (*Ibid.*) The court found that the antideficiency provision of section 580d bars an action where “successive loans [are] secured by a senior and junior deed of trust on the same property.”⁴ (*Id.* at p. 77.) Even if “legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured, section 580d must nonetheless be viewed as controlling where, as here, the senior and junior lenders and lienors are identical and those liens are placed on the same real property. Otherwise, creditors would be free to structure their loans to a single debtor, and the security therefor, so as to obtain on default the secured property on a trustee’s sale under a senior deed of trust; thereby eliminate the debtor’s right of redemption thereto; and thereafter effect an excessive recovery by obtaining a deficiency judgment against that debtor on an obligation secured by a junior lien the creditor chose to eliminate.” (*Id.* at p. 78.)

Academy notes that, unlike the bank in *Simon*, it acquired the junior deed of trust by assignment and maintains that a deficiency action is barred only “where a lender has *originated* successive loans against the same property.” This is incorrect. The bank in *Simon* held the liens from origination to foreclosure (*Simon v. Superior Court, supra*, 4

⁴ Some courts have suggested the one-action rule, rather than the antideficiency statute, is a better basis for barring a single creditor from foreclosing on a senior debt and obtaining a deficiency judgment on the junior debt. (E.g., *Cadlerock Joint Ventures L.P. v. Lobel, supra*, 206 Cal.App.4th at p. 1549.) We need not decide which of these interrelated provisions provides the best conceptual basis for the principle.

Cal.App.4th at p. 66) but later cases have considered situations where liens were held at different times and ruled that it is the date of the senior lienholder's sale, not the date of loan origination, that is "determinative for purposes of applying the one form of action rule or section 580d." (*Cadlerock Joint Venture, L.P. v. Lobel, supra*, 206 Cal.App.4th at p. 1547.) When a single entity originates two "loans secured by two deeds of trust referencing a single real property and soon thereafter assigns the junior loan to a different entity . . . the assignee of the junior loan, who is subsequently 'sold out' by the senior lienholder's nonjudicial foreclosure sale [may] pursue the borrower for a money judgment in the amount of the debt owed" (*ibid.*), provided the loan originator and assignee are unaffiliated and there is no collusion (*id.* at p. 1547; *Mann v. Wells Fargo Bank* (N.D. Cal. 2012) 2012 U.S. Dist. Lexis 172138). But a single entity holding a senior and junior lien at the time of the nonjudicial foreclosure may not foreclose the senior lien and sue on the junior lien. (*Cadlerock Joint Venture, L.P., supra*, at p. 1544; *Simon, supra*, at p. 77.) The reason for this distinction is plain. A single entity holding two liens at the time of foreclosure has its security on the junior lien exhausted by its *own* action in foreclosing the senior lien. The junior's right to recover is not "controlled by the whim" of an unrelated party. (*Roseleaf, supra*, 59 Cal.2d at p. 44) It does not "end up with nothing" (*id.* at p. 41) but acquires the property securing the liens. If the value of the property is less than the amount of the liens, that is a risk properly born by the creditor who has overvalued the security. (*Id.* at p. 42.)

The trial court properly found that Academy's cause of action for breach of promissory note is barred by joint operation of the one action-rule—limiting a secured creditor to foreclosure (§§ 725a, 726) and the antideficiency rule—limiting a creditor using nonjudicial foreclosure to recovery of the property (§ 580d).

2. The court abused its discretion in denying leave to file an amended complaint

A cause of action for fraud in the inducement of a loan is not barred by the one-action and antideficiency rules. (*Alliance, supra*, 10 Cal. 4th at p. 1237.) Two months after defendants moved for summary judgment but before the motion was heard, Academy asked leave to amend its complaint to add such a fraud claim. As noted earlier,

the court denied Academy leave to amend, finding that Academy inexcusably delayed filing its motion and that the delay was prejudicial to defendants. Academy contends the court abused its discretion in denying leave to amend.

A trial court has discretion to allow amendments to the pleadings “in the furtherance of justice.” (§ 473, subd. (a)(1).) “This discretion should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit.” (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1047.) “The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified.” (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.)

We cannot quarrel with the court’s finding that Academy unreasonably delayed moving to amend. Academy did not ask to add a claim for fraud until February 2014 despite the fact that its proposed amended complaint admits that Academy “began to suspect” fraud no later than around June 2011 and its principal, Brayton, sued defendants for fraud on essentially the same allegations in November 2013. Nevertheless, unreasonable delay does not justify denying leave to amend “where the opposing party was not misled or prejudiced by the amendment.” (*Kittredge Sports Co. v. Superior Court, supra*, 213 Cal.App.3d at p. 1048.)

Here the trial court misunderstood the issues involved in the other pending litigation to which it referred when denying leave to amend. By denying the motion the court did not free defendants from costs and delay, as it intended, but compounded both. If not permitted to pursue the fraud claim in this action, Academy could pursue the claim either by requesting leave to join as a plaintiff in Brayton’s individual fraud action or by filing a separate action for fraud, in either case putting defendants to additional time and effort to defend the fraud claim. The court mistakenly believed that Brayton’s individual claim, asserted in the other pending action, encompasses the claim Academy seeks to assert in this action and thus that amendment was “totally unnecessary.” The court believed “allowing the amendment would create an identical, parallel action to Brayton’s individual action” but this is incorrect. This action and Brayton’s individual action

concern substantially the same facts and allegations of fraud but they involve different loans held in the name of different parties. The damages Academy seeks to recover by its proposed amendment is the \$2 million it paid to acquire the secured IIP note. The pending action by Brayton seeks to recover the \$2.6 million Brayton individually loaned LED without security.

Following the court's denial of leave to amend in this action, Academy did file a separate action asserting its fraud claim against the defendants. As indicated above, in overruling defendants' demurrer in that case, the trial court rejected the contention that Academy had improperly split a single cause of action, but the issue remains subject to a later appeal. Academy is also concerned that additional statute of limitations questions may be presented by the filing of the new action. We do not mean to suggest that the additional defenses have merit.⁵ We do say that by effectively compelling Academy to file a separate fraud action rather than amending its complaint in this action, the burdens on the defense and the court system have not been lightened. The preferable approach is to permit amendment here rather than require Academy to pursue its claim in a separate action. "[J]udicial policy favors resolution of all disputed matters in the same lawsuit." (*Kittredge Sports Co. v. Superior Court*, *supra*, 213 Cal.App.3d at p. 1047.) Allowing amendment, rather than a separate action, avoids a multiplicity of actions.

Disposition

The judgment is reversed. The order granting summary judgment shall be deemed an order granting summary adjudication of the breach of promissory note cause of action and, as such, is affirmed. The order denying leave to amend the complaint is reversed with directions to permit the proposed amendment. The parties shall bear their own costs incurred on appeal.

⁵ See *Fujifilm Corp. v. Yang* (2014) 223 Cal.App.4th 326, 333; *Sawyer v. First City Financial Corp.* (1981) 124 Cal.App.3d 390, 402-403 [Breach of contract and fraudulent inducement of contract are separate and severable causes of action that *may* be joined in one lawsuit but may also be separately litigated.]

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.

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