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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DONNA KEULEN,

Plaintiff and Appellant,

v.

WELLS FARGO BANK,

Defendant and Respondent.

2d Civil No. B242122
(Super. Ct. No. CV108306A)
(San Luis Obispo County)

Donna Y. Keulen, appellant, brought an action against Well Fargo Bank, N.A., respondent, challenging the nonjudicial foreclosure sale of her residence in Paso Robles (the residence). Notice of the sale was published in the Paso Robles Press. Appellant appeals from the judgment entered in respondent's favor after the trial court granted its motion for summary judgment. Appellant contends that there are triable issues of fact (1) whether the Paso Robles Press is a newspaper of general circulation within the City of Paso Robles, and (2) whether the doctrine of promissory estoppel applies. We affirm.

Factual and Procedural Background

In 2001 appellant and her now deceased husband, Albert E. Keulen, took title as joint tenants to the residence. In 2004 the Keulens obtained a loan of \$116,979 from Lancaster Mortgage Services, Inc. The loan was evidenced by a promissory note, which

was secured by a deed of trust on the residence. The note and deed of trust were assigned to respondent.

Starting in October 2009, appellant stopped making monthly payments on the loan. Appellant alleged that she had applied for a loan modification, and respondent had advised her "to stop making payments . . . and to contact [respondent] in October [2009], as soon as the first payment was missed, as a condition to qualifying for consideration of a loan modification." Respondent denied giving such advice.

Respondent initiated foreclosure proceedings. On January 26, 2010, notice of default was recorded. On April 27, 2010, notice of trustee's sale was recorded. The sale was set for May 17, 2010. On May 17, 2010, the sale was postponed to July 1, 2010.

Appellant alleged that on May 12, 2010, respondent had told her over the telephone that she "had been approved for a loan modification" and "that the foreclosure . . . had been suspended for all purposes." But Mary Ellen Brust, respondent's Vice President of Loan Documentation, declared that on May 12, 2010, respondent had informed appellant's agent, Gwen Erskine, that it "was waiting for investor approval of [appellant's request for] modification and "that the foreclosure sale . . . set for May 17, 2010, would be postponed pending investor approval" Brust further declared that on June 2, 2012, respondent had informed appellant by both telephone and letter that her request for modification had been denied.

On July 1, 2010, Cal-Western Reconveyance Corporation (Cal-Western), the trustee under the deed of trust, sold the residence to James Martin for \$116,510. Appellant alleged that she had received no advance notice of the sale date. She had "relied at all times . . . on the representations of [respondent] that the Trustee sale had been suspended for all purposes in light of the approved loan modification."

Appellant filed an action against respondent, Cal-Western, and James Martin. The operative complaint consists of causes of action to set aside the sale, to cancel the trustee's deed, and to quiet title to the residence.

Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists only if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850, fn. omitted.)

On appeal we conduct a de novo review, applying the same standard as the trial court. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.) Our obligation is " ' ' "to determine whether issues of fact exist, not to decide the merits of the issues themselves." ' ' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1228.) We must " 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

Although we conduct a de novo review, "[w]e must presume the judgment is correct" (*Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1376.) Thus, "[o]n review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

*Whether the Paso Robles Press Is a Newspaper of
General Circulation within the City of Paso Robles*

Notice of the trustee's sale was required to be published "in a newspaper of general circulation published in the city in which the property . . . is situated, . . . or in case no newspaper of general circulation is published in the city . . . , in a newspaper of general

circulation published in the county in which the property . . . is situated." (Civ. Code, § 2924f, subd. (b)(2).) Notice of the trustee's sale was published in the Paso Robles Press. Appellant contends that there are triable issues of fact whether the Paso Robles Press met the statutory requirements.

The record on appeal includes a certified copy of a superior court judgment decreeing "that the 'PASO ROBLES PRESS' is a newspaper of general circulation within the City of El Paso de Robles and the County of San Luis Obispo." The judgment was entered on July 1, 1952. The trial court ruled that this judgment was binding on the parties.

Appellant asserts that the trial court concluded that she "lacked standing to challenge the legality of the notice published in the Paso Robles Press." The court actually concluded that, because of the binding effect of the 1952 judgment, appellant "cannot attack [in this proceeding] . . . the standing of the Paso Robles Press as a newspaper of general circulation." We agree. Government Code section 6025 provides, "All publications made in a newspaper during the period it was adjudged to be a newspaper of general circulation are valid and sufficient."¹

Appellant contends that the judgment does not apply to the "present Paso Robles Press" because it "is not the same newspaper which petitioned the Superior Court for status as a newspaper of general circulation in 1952." This issue was not properly before the trial court on the motion for summary judgment. In the "present" Paso Robles Press's proof of publication of notice of trustee's sale, the newspaper's principle clerk, Autumn Boggs, certified under penalty of perjury that in 1952 the newspaper had been adjudicated a newspaper of general circulation. Respondent was entitled to rely on the 1952 judgment, the present newspaper's use of the name "Paso Robles Press," and Boggs's certification.

The Paso Robles Press's status as a newspaper of general circulation could be challenged only by a motion to vacate the 1952 judgment pursuant to section 6024. (See *Press Democrat v. Sonoma County Herald Recorder* (2012) 207 Cal.App.4th 578, 582

¹ All further statutory references are to The Government Code.

[pursuant to section 6024, "the Press Democrat moved to vacate the judgment establishing the Herald Recorder as a newspaper of general circulation".) Section 6024 provides in relevant part: "(1) The decision and judgment may be vacated, modified or set aside by the court on its own motion, or on the motion of any person, whether a party to the original proceeding or not upon: [¶] (a) A verified statement of facts being made to the court. [¶] (b) Ten days' notice to the petitioner [the newspaper]. [¶] (c) A satisfactory showing made to the court that the newspaper has ceased to be a newspaper of general circulation."

In a proceeding commenced by a motion to vacate the 1952 judgment pursuant to section 6024, the Paso Robles Press would have an opportunity to fully litigate the matter. No such opportunity existed in appellant's action against respondent because the Paso Robles Press was not a party to the action.

Whether Doctrine of Promissory Estoppel Applies

Appellant maintains that the doctrine of promissory estoppel applies here. She argues that there are triable issues of fact (1) whether respondent promised to grant her a loan modification and suspend foreclosure proceedings, and (2) whether she reasonably and detrimentally relied on that promise.

"The doctrine of promissory estoppel 'make[s] a promise binding under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange.' [Citation.] 'Under this doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.' [Citation.] 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.'" [Citation.] (*Garcia v. World Sav., FSB* (2010) 183 Cal.App.4th 1031, 1040-1041.) "[A] promissory estoppel claim generally entitles a plaintiff to the damages available on a breach of contract claim. [Citation.]" (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 231.) "The elements of promissory estoppel are (1) a clear promise, (2) reliance, (3) substantial

detriment, and (4) damages 'measured by the extent of the obligation assumed and not performed.' [Citation.]" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

Appellant notes that, in *Aceves v. U.S. Bank, N.A.*, *supra*, 192 Cal.App.4th 218, "the Appellate Court found that when the lender promised a loan modification and then foreclosed on the [borrower's] property anyway, that [the borrower] stated a cause of action for promissory estoppel." But the doctrine of promissory estoppel is of no avail to appellant because she did not allege a cause of action for promissory estoppel. The operative complaint alleged causes of action to set aside the sale, to cancel the trustee's deed, and to quiet title to the residence. In any event, "[b]ecause this is not a case where the homeowner paid the funds needed to reinstate the loan before the foreclosure, promissory estoppel does not provide a basis for voiding the deed of sale or otherwise invalidating the foreclosure. [Citations.]" (*Id.*, at p. 231.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

Law Offices of Timothy L. McCandless, Timothy L. McCandless, for
Appellant.

Jan T. Chilton, Jon D. Ives; Severson & Werson, a Professional
Corporation, for Respondent.