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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

JAMES D. FERGUSON,

Plaintiff and Respondent,

v.

KENNETH SWANSTROM et al.,

Defendants and Appellants.

C065596

(Super. Ct. No.
08 CV 0006)

Defendants appeal from the trial court's judgment of quiet title in favor of plaintiff and cancellation of a real property installment sales agreement, a grant deed, and a purported deed of trust. They raise numerous grounds of appeal but have failed to include a reporter's transcript. We are thus left with deciding only issues of law or those apparent from the face of the pleadings. (*Kompf v. Morrison* (1946) 73 Cal.App.2d 284, 286.) So limited, we review defendants' claims they were wrongly denied a jury trial, the trial court's judgment is erroneous under the one-action rule of Code of Civil Procedure

section 726, and the court failed to provide a requested statement of decision. We affirm the judgment.¹

FACTS

By written agreement dated January 28, 2004, plaintiff agreed to sell to defendants, subject to a life estate in plaintiff, real property located in Salyer, Trinity County. The purchase price was \$90,000, payable as follows: one \$3,000 down payment due January 4, 2004, followed by monthly installments of \$300, without interest. Upon payment of all sums due under the agreement, plaintiff would convey title to defendants.

Paragraph 4 of the sales agreement provides that if defendants breach, plaintiff may, following 10 days' notice, "terminate this contract at once." Paragraph 4 also states that in the event of such a breach, plaintiff may retain all monies paid by defendants under the agreement.

On October 30, 2006, nearly three years after the parties executed the sales agreement, the parties recorded a grant deed by which plaintiff transferred title in the property to defendants, subject to his life estate. This occurred even though the sales agreement stated title would not be transferred until the full purchase price was paid.

Also on October 30, 2006, the parties recorded the first page of a short form deed of trust. This deed of trust purported to transfer title in the property from defendants to a

¹ Undesignated section references are to the Code of Civil Procedure.

trustee, with power of sale, and naming plaintiff as beneficiary, for the purpose of securing payment of a promissory note in the amount of \$90,000 for plaintiff's benefit. The deed of trust is not signed by any of the parties. No promissory note was attached, but a copy of the signed sales agreement was attached. Although recorded in 2006, the deed of trust was dated January 28, 2004, the same date affixed to the sales agreement.

The record also contains a promissory note made by defendants to plaintiff's benefit in the amount of \$90,000. The note is dated January 28, 2004, but defendants did not sign it until October 30, 2006. The sum is due and payable along the same terms contained in the sales agreement. The entire balance is due and payable upon default by defendants and election by plaintiff on 10 days' notice. There is no evidence in the record before us that this note was ever attached to a deed of trust or recorded.

Plaintiff filed this action in 2008 for cancellation of the sales agreement and the grant deed, quiet title, and declaratory relief. He alleged defendants had failed to (1) pay \$2,000 of the \$3,000 down payment; (2) provide plaintiff with a promissory note for the \$90,000 obligation; and (3) provide plaintiff with a deed of trust in a proper format. He alleged he had made written demand to defendants to cure the deficiencies on July 20 and September 7, 2007, but he received no direct response. Pursuant to the terms of the sales agreement, plaintiff elected to terminate the agreement by letter dated December 17, 2007.

Defendants, acting in pro per at trial and before us, answered and filed a cross-complaint. After the court sustained a demurrer and motion to strike against the cross-complaint, the cross-complaint was left with four causes of action: breach of an oral agreement to pay one-half of the attorney fees incurred in drawing up the deed and other papers and having them recorded; breach of an oral agreement to pay one-half of the utility bills assessed on the property, with damages totaling over \$500; specific performance of the sales agreement; and declaratory relief.

Neither in their answer nor cross-complaint did defendants plead for relief under the so-called one-action rule (§ 726, subd. (a)). That rule in general requires a creditor who holds a security interest in real property to exhaust his security in cases of debtor default, i.e., to pursue foreclosure on the lien in lieu of filing an action against the debtor personally.

However, prior to trial, defendants brought a motion for sanctions pursuant to the one-action rule to terminate any security interest plaintiff had in the property under the recorded deed of trust as a result of his electing to sue defendants personally and not exhaust the security. The trial court denied the motion. Defendants had asked for a statement of decision in their reply brief in support of the motion, but the trial court did not issue one.

Although defendants filed a demand for a jury trial and statement of decision, and had obtained a waiver of jury fees, the complaint and cross-complaint were heard at a court trial.

According to the court's written ruling, defendants claimed their rental payments paid in 2003 prior to executing the sales agreement in 2004 were to be credited towards the down payment. The court found insufficient evidence to support this claim, as defendants introduced no written evidence of such an agreement and the actual sales agreement made no mention of crediting prior rental payments. The court determined defendants had breached the sales agreement, and it cancelled the agreement, the recorded grant deed, and the recorded deed of trust. It quieted title solely in favor of plaintiff. It also ruled against defendants on their cross-complaint, as they introduced no evidence in support of it.

Defendants appeal. They allege 20 different grounds of appeal. However, they provide no reporters transcript. Accordingly, all grounds of appeal based on insufficiency of the evidence or which are not apparent from the face of the record are denied. We address only those alleged errors that are apparent from the submitted record or are alleged errors of law: denial of a jury trial, denial of the motion for sanctions under the one-action rule, and the court's failure to issue statements of decision.²

² Defendants filed deposition transcripts to support their factual arguments before us. However, there is no indication these transcripts were introduced at trial. They thus are outside of the record, and we do not consider them. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.)

DISCUSSION

I

Right to Jury Trial

Defendants argue they were wrongly denied their right to jury trial. We disagree, as the record fails to indicate defendants requested a jury trial at the time required by statute. We must assume they waived the right.

Because the right to jury trial exists for legal actions but not for equitable actions, the right was available in this matter only for defendants' breach of contract claims alleged in their cross-complaint. All other relief sought by plaintiff and defendants was equitable in nature.

To obtain a jury trial, the party must announce his request for one at the time the matter is first set for trial if it is set upon notice. A failure to so announce waives the right. (§ 631, subd. (f)(4).) Requesting a jury trial in an at-issue memorandum prior to the trial setting conference does not satisfy the requirement. (See *Mutual Bldg. & Loan Assn. v. Corum* (1934) 220 Cal. 282, 289-290.)

The trial date in this matter was set at a noticed trial setting conference. Defendants had earlier requested a jury trial in their at-issue memorandum, but at the trial setting conference, the court set the matter as a court trial. There is no indication in the record that defendants announced their request for a jury trial at trial setting. Due to the lack of a reporter's transcript, we must assume all facts necessary to support the court's ruling, and thus must assume no such

announcement was made at trial setting. Accordingly, defendants waived their right to a jury trial on their legal claims, and the court did not err by hearing the matter without a jury.

II

One-Action Rule

A number of grounds raised by defendants coalesce around the trial court's denial of their motion for sanctions and application of the one-action rule. Defendants claim the one-action rule applies and the trial court erred in denying their motion for sanctions. They argue a security interest was created either by means of the installment sales agreement or the deed of trust, and as a result, plaintiff's remedy was limited to foreclosure. Defendants assert plaintiff's pursuit of this action against them means that under the one-action rule, plaintiff has elected his remedy and waived the security, thereby limiting his recovery to damages.

Defendants also claim that paragraph 4 of the sales agreement allowing plaintiff to terminate the agreement and retain all payments is void, as it allegedly operates as a strict foreclosure in violation of California law. (§ 744; Civ. Code, §§ 2888, 2926, 2927.)

Plaintiff's response is many-fold. He claims defendants' arguments are barred because they failed to plead the one-action rule as an affirmative defense. He also claims defendants failed to raise much of their argument at trial, including their challenge to the sales agreement's termination provision in paragraph 4 and their claim that the sales agreement created a

security interest. To the extent defendants did raise these issues, plaintiff claims they involve issues of fact and thus cannot be decided adversely to him on this clerk's transcript appeal. Plaintiff also argues the one-action rule does not apply here because the deed of trust was invalid and did not create a security interest, and because this action seeks only cancellation and not damages.

Much of these arguments concerns legal issues. We will explain the issues in order to understand better what transpired between the parties. Ultimately, however, resolving defendants' arguments would require applying law to facts, a task we cannot undertake here because of the lack of a record. We thus must assume sufficient facts exist to support the trial court's denial of defendants' motion for sanctions under the one-action rule, and we affirm on that basis.

Under the one-action rule, the beneficiary of a deed of trust is not entitled to file multiple actions based on his note but must first either foreclose or show the security has become worthless. (§§ 726, subd. (a); 725a.)³ The rule's commonly ascribed purpose is to protect a defaulting mortgagor or trustor

³ Section 726, subdivision (a), reads in relevant part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary)" Section 725a applies the one-action rule to deeds of trust.

from being harassed by a multiplicity of actions filed against him by the mortgagee or the beneficiary. The rule accomplishes this purpose by forcing the lender to elect either a judicial foreclosure or a trustee sale as its remedy for the debtor's default. (See *Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 654.)

In addition, the one-action rule proscribes the common law remedy of "strict foreclosure," which by judicial decree vested title in the property in the mortgagee without a sale and without providing the mortgagor an opportunity to redeem when he failed to make payment. (*Warner Brothers Co. v. Freud* (1903) 138 Cal. 651, 654.) Under section 726, subdivision (a), the security is sold to produce proceeds that are used to satisfy the creditor's claim. Further monetary liability is then imposed only by a deficiency judgment if the foreclosure sale proceeds are insufficient to satisfy the debt, and only if a deficiency judgment is not barred by section 580b or any other anti-deficiency statute.

A debtor may assert the one-action rule of section 726, subdivision (a) as a defense in two different ways. First, when the creditor commences an action for damages against the debtor personally without first exhausting the security, the debtor may plead section 726, subdivision (a) as an affirmative defense. The debtor's failure to raise this affirmative defense during the action will result in a loss of the defense, and the creditor may elect the single remedy of a personal judgment

against the debtor. (*Scalese v. Wong* (2000) 84 Cal.App.4th 863, 869.)

Second, even if the debtor fails to plead the affirmative defense, he may subsequently assert the one-action rule as a sanction, which bars the lender from enforcing the security by judicial foreclosure or selling the security under a power of sale even if the security has not been exhausted. In other words, the lender is deemed to have elected the single remedy of a personal action and to have waived his security interest forever. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733-734; see generally Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 2012) ch. 4.)

In this matter, the parties dispute whether the one-action rule even applies. Plaintiff claims the rule does not apply because the debt was not secured by a mortgage or other security interest in the property. He asserts the deed of trust was not valid and did not create a security interest because it was not signed. He also argues we must presume the sales agreement did not create a security interest because whether it did is a question of fact concerning the parties' intent and thus a matter we must decide in the judgment's favor. Plaintiff also argues the one-action rule does not apply because he did not sue for damages or specific performance but only for equitable relief in the form of cancellation and quiet title.

We agree with plaintiff that the deed of trust dated January 28, 2004, and recorded October 30, 2006, did not create a security interest. This particular deed of trust is invalid.

To be a valid conveyance, a deed of trust must comply with the formalities necessary for grants of real property. In particular, the instrument must be in a writing that is signed. (Civ. Code, § 1091; *Azevedo v. Pimentel* (1932) 127 Cal.App. 299, 303-304.) This deed of trust is not signed by any of the parties, and thus is invalid.

Moreover, attaching the signed sales agreement to the deed of trust did not fulfill the requirement that the deed be signed. The sales agreement and the deed of trust are two separate agreements neither referenced nor discussed in the other. The sales agreement reflects the parties' agreement to purchase and sell the property. The deed of trust, had it been valid, would have reflected the parties' agreement to securitize the financing plaintiff was providing to defendants. The signatures on the former do not satisfy the requirements imposed by statute on the latter, as they do not establish the parties mutually consented to the terms of the deed of trust.

Whether the sales agreement created a security interest subject to the one-action rule presents a more complicated question. An agreement where, as here, the parties agree the seller will retain legal title to the property until the buyer pays the balance of the purchase price is commonly known as an installment land contract. Although the seller in an installment land contract does not receive a security interest in the property, his retention of title operates in effect as security, and the installment land contract is treated to an

extent as a security device. (*Venable v. Harmon* (1965) 233 Cal.App.2d 297, 300-301.)

However, unlike in cases involving mortgages or deeds of trust, courts have allowed sellers in an installment land contract to elect either foreclosure or an action to quiet title as the remedy for a buyer's failure to pay the installment payments. (See *Petersen v. Hartell* (1985) 40 Cal.3d 102, 113 (*Petersen*); *Honey v. Henry's Franchise Leasing Corp.* (1966) 64 Cal.2d 801, 805 (*Honey*).)

Here, plaintiff elected to bring an action to quiet title. Because such an election is allowed under a land installment contract such as the sales agreement before us, the one-action rule does not bar the action.

We note, however, that the seller's right under a land installment contract to quiet title is not unqualified. It is conditioned in two significant respects. First, quiet title is available so long as the buyer is provided "an absolute right to redeem the property by paying the entire balance of the price and any other amounts due." (*Petersen, supra*, 40 Cal.3d at p. 106.) Such additional amounts include interest and damages. (*Id.* at pp. 114, 117.) This requirement prevents the quiet title action from becoming a strict foreclosure.

Second, a court may not quiet title in the seller under an installment land contract unless the seller refunds the excess of the buyer's part payments over the damage caused by the buyer's breach. (*Petersen, supra*, 40 Cal.3d at p. 113; *Honey, supra*, 64 Cal.2d at p. 803.) "Such restitution is a matter of

right for the wilfully defaulting vendee who proves that the payments made to the seller exceed the amount necessary to give the seller the benefit of his bargain. [Citations.]”
(*Petersen, supra*, 40 Cal.3d at p. 113.)

Defendants assert these points by arguing plaintiff’s election of remedies acts as a strict foreclosure and the sales agreement unlawfully allows plaintiff to retain all of defendants’ payments. But here is where we run into the effect of not having an adequate record. Each of these conditions, the provision of the right of redemption and the buyer’s proof of restitution, involve questions of fact. With no record before us, we must presume plaintiff in fact provided defendants an opportunity to redeem, defendants failed to fully redeem, and as a result there was no strict foreclosure. Plaintiff alleged in his complaint that he made written demand on defendants to cure the contract deficiencies on at least two occasions in July and September 2007, and did not finally elect his remedy until December 2007. We presume the court found defendants were not denied their right of redemption, and thus the action did not act as a strict foreclosure.

We must also presume defendants were unable to prove the payments they made to plaintiff under the sales agreement exceeded the amount necessary to give him the benefit of his bargain. Accordingly, the trial court did not err in denying defendants’ motion for sanctions under the one-action rule, and subsequently in quieting title in plaintiff and cancelling the

sales agreement, the grant deed, and the purported deed of trust.

III

Remaining Arguments

Most of defendants' remaining arguments all concern matters of fact or make assertions of law that are not relevant to this appeal, and thus will not be addressed. The only argument remaining to be mentioned concerns defendants' requests for statements of decision. They contend the trial court erred by not providing statements of decision on their motion for sanctions and following trial. They are incorrect.

First, a trial court is not required to provide a statement of decision when ruling on a motion. (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 625.) Although defendants requested a statement, we presume any facts necessary to support the court's apparent and discretionary determination not to provide one.

Second, the court actually provided a statement of decision following trial in the form of its written ruling. This ruling satisfied the requirements of section 632 regarding statements of decision.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, J.

We concur:

RAYE, P. J.

MAURO, J.