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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

MICHAEL NUTI et al.,

Plaintiffs and Appellants,

v.

THE ROYAL BANK OF SCOTLAND, N.V., et al.,

Defendants and Respondents.

C074194

(Super. Ct. No. T104041C)

Plaintiffs Michael Nuti, Jill Nuti, Linda Nuti, and Casey DeCarlo (jointly, plaintiffs) brought this action to quiet their title to a certain parcel of property in Truckee based on assertions that “[t]he bank claiming an interest in the Property is not a creditor of the Note” and “[n]o one has a secured interest in this Property.” Ultimately, the trial court granted summary judgment in favor of three defendants -- The Royal Bank of Scotland, N.V., RBS Citizens National Association, and CCO Mortgage Corp. (collectively, the RBS defendants) -- and awarded them \$5,000 in sanctions against plaintiffs’ attorney.

On appeal, plaintiffs and their attorney raise four arguments under separate headings in their opening brief. Finding no merit in those arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs commenced this action in April 2010. In July 2011, they filed a first amended complaint that named (among others) the RBS defendants. Following two rounds of demurrers, plaintiffs filed their third amended complaint in April 2012. That complaint, which was verified, alleged three causes of action: quiet title, violation of Civil Code section 2941, and breach of contract.

The RBS defendants demurred, and the trial court sustained the demurrer to the quiet title cause of action without leave to amend, overruled the demurrer to the cause of action for violation of Civil Code section 2941, and overruled the demurrer to the breach of contract cause of action as “superfluous” because that cause of action was not asserted against the RBS defendants in that the complaint did not allege that the RBS defendants were parties to or successors to parties to the contract at issue.

In August 2012, plaintiffs moved for summary judgment or, in the alternative, summary adjudication. On the latter point, their motion sought “an order adjudicating that the American Home Mortgage Deed of Trust has been breached and should be quieted on the record title.”

In November 2012, the RBS defendants filed their answer to the third amended complaint. No verification was attached.

In January 2013, the trial court denied plaintiffs’ motion for summary judgment or summary adjudication. In its ruling, the court noted that plaintiffs’ memorandum of points and authorities was too long and that their separate statement of undisputed material facts did not comply with the California Rules of Court. The court observed that the latter defect, “alone, [wa]s sufficient to deny the motion”; however, the court also pointed out that it had previously sustained the RBS defendants’ demurrer to plaintiffs’ quiet title cause of action without leave to amend and “the only remaining cause of action

against the RBS defendants is for [violation of] Civil Code section 2941. Thus, the requested relief in the Notice of Motion for a determination that the ‘Deed of Trust has been breached and should be quieted on the record title’ is completely without merit, as no cause of action for quiet title remains.”

In February 2013, plaintiffs filed a second motion for summary judgment, specifically seeking “summary judgment in favor of Plaintiffs quieting title to their Property of a breached trust deed.”

In April 2013, the RBS defendants filed their own motion for summary judgment.

In May 2013, the RBS defendants filed a motion for sanctions based on plaintiffs’ filing of their second motion for summary judgment.

On June 7, 2013, in its tentative ruling denying plaintiffs’ second summary judgment motion, the court pointed out that the answer filed by the RBS defendants had no evidentiary value because it was unverified. Three days later, on June 10, in their opposition to the motion for summary judgment filed by the RBS defendants, plaintiffs argued (among other things) that the court should not entertain the summary judgment motion by the RBS defendants because of the lack of a verified answer. Four days later, on June 14, the attorney for the RBS defendants filed the verification, explaining that the failure to file it earlier was inadvertent. Indeed, the verification showed that it had been executed on November 9, 2012.

On June 20, 2013, plaintiffs filed an “opposition” to the late filing of the verification, as well as a motion for judgment on the pleadings or to strike the answer of the RBS defendants.

On June 21, the court issued its formal ruling denying plaintiffs’ second motion for summary judgment and granting the RBS defendants’ motion for sanctions. The court sanctioned plaintiffs’ attorney \$5,000 and directed her to complete 20 hours of MCLE credits in the area of civil substantive law and procedure. The court stated the basis for the sanctions as follows:

“In the present case, Plaintiffs’ counsel has filed a successive motion for summary judgment despite having no legal authority for filing a second motion. Plaintiffs’ counsel did not comply with Code of Civil Procedure § 1008 in that Plaintiffs’ counsel did not attempt to set forth any new or different facts to support such a request. Plaintiffs’ counsel did not obtain leave of court to file the motion. The arguments set forth were completely unmeritorious and frivolous without evidentiary support, requiring Defendants to incur substantial attorney’s fees and costs in opposing the unmeritorious successive motion and needlessly increased the cost of litigation. Additionally, the ruling on the prior motion specifically informed counsel that no cause of action for quiet title exists. Nonetheless, Plaintiffs’ counsel filed the second motion again seeking ‘summary judgment on the issue of quieting title to their property.’ Thus, the second motion was completely frivolous, without merit, and replete with procedural deficiencies.”

On June 24, the court granted the RBS defendants’ motion for summary judgment. Two days later, on June 26, the court entered its formal order granting the motion.

On July 1, plaintiffs filed a notice of appeal in which they purported to appeal from a “[j]udgment after an order granting a summary judgment motion ,” even though no such judgment had yet been entered. We dismissed the appeal on August 1. On August 6, the trial court entered its formal order denying plaintiffs’ second motion for summary judgment and granting the RBS defendants’ motion for sanctions and also entered judgment in favor of the RBS defendants. Thereafter, plaintiffs filed a petition for rehearing of their appeal, which we treated as a request to reinstate the appeal, which we did. Accordingly, we treat plaintiffs’ notice of appeal filed July 1, 2013, as a premature appeal from the judgment entered against them in favor of the RBS defendants on August 6.

DISCUSSION¹

I

Late-Filed Verification To Answer

On appeal, plaintiffs first complain about the late-filed verification to the RBS defendants' answer. Various, they assert that: (1) the failure to file the verification along with the answer was a "fatal defect"; (2) the verification "is not compliant with the requirements of [Code of Civil] Procedure [section] 446"; (3) "the filing of the verification has no legal effect and the Answer remains unverified"; and (4) "[t]he trial court . . . made a substantial error of law when it accepted this Answer." In closing this argument, plaintiffs contend that they "seek a determination that [the RBS defendants] failed to Answer, therefore, all rulings in favor of [the RBS defendants] should be overruled as a matter of law."

"When the complaint is verified, the answer shall be verified." (Code Civ. Proc., § 446.) When a defendant has filed an unverified answer to a verified complaint, the plaintiff can move to strike the answer or move for judgment on the pleadings on the ground that the unverified answer is the equivalent of no answer at all. (*Hearst v. Hart* (1900) 128 Cal. 327, 328.) Any objection to the verification (or lack thereof), however, must be raised at the proper time or it is forfeited. (*McCullough v. Clark* (1871) 41 Cal. 298, 302.)

It has been held that when a plaintiff proceeds to trial without objecting to the lack of verification, he or she waives any right to object to the defendant's pleading error.

¹ In the discussion that follows, we do not address any arguments that may be buried in the statement of facts in plaintiffs' opening brief or that are set forth in the argument section of their brief but are not stated "under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).) We also do not address any arguments raised for the first time in plaintiffs' reply brief. Instead, we limit ourselves to the four arguments expressly set forth in the argument section of plaintiffs' opening brief under separate headings summarizing the points argued.

(Zavala v. Board of Trustees (1993) 16 Cal.App.4th 1755, 1761.) Here, plaintiffs did not wait until trial to raise the lack of verification issue, but nonetheless they did not raise the issue until more than seven months after the RBS defendants filed their answer to the third amended complaint without the verification, until after plaintiffs themselves had twice moved for summary judgment without ever having raised or mentioned the lack of verification, and until after the RBS defendants had moved for summary judgment. Even then, it was only because the trial court noted the lack of a verification in its tentative ruling on plaintiffs' second summary judgment motion that plaintiffs took note of and sought to take advantage of the issue. In doing so, however, plaintiffs still did not raise the issue properly, by means of a motion to strike the unverified answer or a motion for judgment on the pleadings. Instead, they raised the issue in their opposition to the RBS defendants' motion for summary judgment, without citing any authority that it was proper for them to do so. It was not until after the trial court had twice denied plaintiffs' summary judgment motions and days before the court issued its ruling on the RBS defendants' summary judgment motion that plaintiffs finally filed a motion to strike the answer along with a motion for judgment on the pleadings. Under all of these circumstances, we conclude that plaintiffs forfeited their right to challenge the lack of a verification, just as though they had waited until trial to raise the issue.

To the extent plaintiffs challenge the verification on its merits -- i.e., on the ground that it "is not compliant with the requirements of [Code of Civil] Procedure [section] 446" -- we recognize that this was an issue they could not raise until the verification was filed, and they filed their "objection," their motion to strike, and their motion for judgment on the pleadings on this basis a week after the verification was filed. We have already determined, however, that plaintiffs forfeited their right to challenge the lack of a verification by waiting too long to raise that issue. Given this forfeiture, the RBS defendants were entitled to go forward without any verification to their answer. Under these circumstances, plaintiffs cannot complain about the validity of the

verification the RBS defendants ultimately did file because that verification was essentially superfluous at that point.

In short, we find no error with regard to the trial court's treatment of plaintiffs' belated challenges to the RBS defendants' late-filed verification to their answer.

II

Allegedly Contradictory Orders

Plaintiffs complain that in a tentative ruling the trial court issued on June 8, 2012,² the court overruled a demurrer by a different defendant (American Home Mortgage) to plaintiffs' cause of action to quiet title in the third amended complaint, but then "[o]n December 10, 2012, the lower court re-wrote what had occurred at the June 11, 2012, hearing" by stating that it had *sustained* that demurrer without leave to amend.

This argument is meritless for at least two reasons. First, the initial ruling was *tentative*. The court was free to change its ruling following the hearing on the demurrer, and that is exactly what it did. At the hearing on June 11, the attorney for the other defendant argued that the court had already sustained his client's demurrer to the quiet title action in plaintiffs' second amended complaint without leave to amend, "[s]o the plaintiffs had no right to even allege" that cause of action again in its third amended complaint. The trial court took the matter under submission, and on June 14 issued its final ruling in which it *sustained* the demurrer without leave to amend. Thus, there is no inconsistency between the court's final ruling on the demurrer and the court's later recitation of that ruling in December 2012.

² To address this argument, we grant plaintiffs' motion to augment the record to include that tentative ruling. Otherwise, we deny plaintiffs' motion to augment and their pending request to take judicial notice as the subject documents are not relevant to our resolution of this appeal.

Second, even if there were some inconsistency in the trial court's rulings with respect to this *other* defendant, plaintiffs fail to explain how that would have any bearing on their case against the RBS defendants, which are the only defendants before this court.

III

Reconveyance

So far as we can determine, plaintiffs next argue that the trial court abused its discretion and acted outside the law by failing to determine that the original lender breached the deed of trust by failing to reconvey its security interest in the property when the lender sold the promissory note that was secured by the deed of trust. Citing a provision from the deed of trust (without citing to the place in the record where the deed of trust can be found), plaintiffs contend that the lender had a duty to reconvey its interest in the property “ ‘[u]pon payment of all sums secured by’ ” the deed of trust. (Bold text omitted.) According to plaintiffs, the admission by the RBS defendants that the original lender did not record a reconveyance “creates a triable issue of fact as to whether the original lender and the defendants breached the deed of trust.”

Plaintiffs fail to explain how this argument relates to any of the rulings the trial court made in favor of the RBS defendants. Nevertheless, we consider the argument on its merits and conclude that it has none.

As part of their argument, plaintiffs cite Civil Code section 2941, which provides in pertinent part as follows: “Within 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.” (Civ. Code, § 2941, subd. (b)(1).)

Reading the deed of trust consistent with the statute, we understand that the holder of the promissory note and deed of trust -- whether the original lender or a successor -- has a duty to reconvey the security interest in the property created by the deed of trust

when the promissory note has been satisfied -- that is, when the borrower or someone acting on the borrower's behalf had paid off the loan. Plaintiffs do not point to any evidence that they, or anyone acting on their behalf, ever paid off the loan at issue here. Instead, it appears that the original lender sold or otherwise assigned its right to collect the loan payments. The assignment of the right to receive payments due under a promissory note does not result in the satisfaction of the obligation to make those payments -- it simply changes who is entitled to performance of the obligation. Thus, any obligation to reconvey the security interest in the property was never triggered here.

IV

Sanctions

Plaintiffs' attorney contends the trial court wrongfully sanctioned her for filing plaintiffs' second summary judgment motion. We find no merit in this argument.

Under Code of Civil Procedure section 128.7, subdivision (b), "[b]y presenting to the court . . . a . . . written notice of motion . . . , an attorney . . . 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.

"(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.

“(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.”

“If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.” (Code Civ. Proc., § 128.7, subd. (c).)

Here, the trial court sanctioned plaintiffs’ attorney \$5,000 and directed her to complete 20 hours of MCLE credits in the area of civil substantive law and procedure for the following reasons:

“In the present case, Plaintiffs’ counsel has filed a successive motion for summary judgment despite having no legal authority for filing a second motion. Plaintiffs’ counsel did not comply with Code of Civil Procedure § 1008 in that Plaintiffs’ counsel did not attempt to set forth any new or different facts to support such a request. Plaintiffs’ counsel did not obtain leave of court to file the motion. The arguments set forth were completely unmeritorious and frivolous without evidentiary support, requiring Defendants to incur substantial attorney’s fees and costs in opposing the unmeritorious successive motion and needlessly increased the cost of litigation. Additionally, the ruling on the prior motion specifically informed counsel that no cause of action for quiet title exists. Nonetheless, Plaintiffs’ counsel filed the second motion again seeking ‘summary judgment on the issue of quieting title to their property.’ Thus, the second motion was completely frivolous, without merit, and replete with procedural deficiencies.”

On appeal, to the extent we can decipher the argument plaintiffs’ attorney makes against the imposition of sanctions, it appears she is arguing that the trial court abused its discretion in sanctioning her for filing a second summary judgment motion because,

according to her, the first summary judgment motion “was denied on procedural grounds” -- specifically, “due to the length being too long and for not having 2 columns for the Undisputed Facts Statement.” In other words, counsel takes the position that she had the right to file a second motion because her initial motion was denied solely on procedural grounds, not on the merits.

Counsel is mistaken. First, the denial of the original motion for summary judgment was *not* solely on procedural grounds. It is true that the trial court noted that plaintiffs’ memorandum of points and authorities was too long and that their separate statement of undisputed material facts did not comply with the California Rules of Court. The court also noted that the latter defect, “alone, [wa]s sufficient to deny the motion.” However, these procedural defects were not the only reasons the trial court gave for denying the motion.

Plaintiffs’ original motion sought either summary judgment or summary adjudication. On the latter point, the motion specifically sought “an order adjudicating that the American Home Mortgage Deed of Trust has been breached and should be quieted on the record title.” As another of its reasons for denying plaintiffs’ motion, the court pointed out that it had previously sustained the RBS defendants’ demurrer to plaintiffs’ quiet title cause of action without leave to amend and “the only remaining cause of action against the RBS defendants is for [violation of] Civil Code section 2941. Thus, the requested relief in the Notice of Motion for a determination that the ‘Deed of Trust has been breached and should be quieted on the record title’ is completely without merit, as no cause of action for quiet title remains.” This was a rejection of plaintiffs’ motion for summary adjudication on *substantive* grounds, not procedural grounds.

Despite the court’s ruling regarding the unavailability of relief quieting title, plaintiffs’ second motion for summary judgment specifically sought “summary judgment

in favor of Plaintiffs quieting title to their Property of a breached trust deed.” This was in direct contravention of Code of Civil Procedure section 437c, subdivision (f)(2), which provides that “a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.” The trial court pointed this out in its ruling on plaintiffs’ second motion, specifically noting that “Plaintiffs have made no attempt whatsoever to set forth any new facts.”

Once the trial court denied plaintiffs’ attempt to quiet title to their property by summary adjudication, the foregoing provision from the summary judgment statute precluded plaintiffs from seeking summary judgment on that same basis without newly discovered facts or circumstances or a change of law. On appeal, plaintiffs’ counsel makes no attempt to show that the second motion was based on any such facts, circumstances, or law. Indeed, we cannot see how it could have been. On the first motion, the trial court rejected plaintiffs’ attempt to quiet title by summary adjudication on the ground that the quiet title cause of action was no longer part of the case because it had been eliminated by demurrer. No new facts, circumstances, or law could have resurrected that cause of action. Accordingly, plaintiffs were barred by Code of Civil Procedure section 437c, subdivision (f)(2) from seeking to quiet title by summary judgment, but that is exactly what they did. Under these circumstances, the trial court acted well within its discretion in finding that the second motion was presented primarily for an improper purpose and contained legal contentions unwarranted by existing law and in sanctioning plaintiffs’ counsel on that basis.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).) This opinion shall be forwarded to the State Bar of California.³

ROBIE, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.

³ Business and Professions Code section 6086.7, subdivision (a)(3) provides that a court shall notify the State Bar of “[t]he imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).”