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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

STEPHEN D. KEENAN, SR.,

Plaintiff and Appellant,

v.

ONEWEST BANK, FSB, et al.,

Defendants and Respondents.

C075499

(Super. Ct. No.
34-2012-00123747-CU-BT-GDS)

Plaintiff Stephen D. Keenan, Sr., appeals in pro. per. from a trial court judgment dismissing his third amended complaint following the successful demurrers of defendants OneWest Bank, FSB (OneWest) individually and doing business as IndyMac Mortgage Services (IndyMac), and Deutsche Bank National Trust Company (Deutsche Bank). Keenan's third amended complaint alleged causes of action for breach of a modified loan agreement and wrongful foreclosure.

OneWest, through its agent NDeX West, LLC, (NDeX West) initiated a nonjudicial foreclosure on Keenan's home after Keenan failed to make payments under a

modified loan agreement.¹ IndyMac had rejected payment as insufficient because it did not include amounts due for taxes, insurance, and mortgage insurance. At the time of the trustee's sale, the total amount of unpaid debt and costs was \$346,174.17. The original loan amount was \$314,000.

Keenan filed a petition in bankruptcy after entering into the modified loan agreement. However, the property was abandoned in the bankruptcy proceeding, meaning it was formally relinquished from the bankruptcy estate. (*Caltalano v. Commissioner of Internal Revenue* (9th Cir. 2002) 279 F.3d 682, 685.) Keenan's complaint for breach of contract and wrongful foreclosure was based on the premise that federal law and his bankruptcy discharge relieved him of the obligation to pay insurance, mortgage insurance, and taxes to the lender as required under the terms of his modified note and deed of trust.

The trial court disagreed, sustaining the demurrers of defendants without leave to amend, and dismissing the action. Keenan argues again that he was not required to pay mortgage insurance, and that he was not required to pay property taxes to the lender. As a result, he argues the demand for such amounts and resulting foreclosure of the property when he refused to pay them was a breach of contract and a wrongful foreclosure. We find no support for Keenan's claims, and shall affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from a judgment of dismissal following an order sustaining demurrers, we accept as true all material factual allegations of the third amended complaint, unless refuted by matters judicially noticed. (*Poseidon*

¹ NDeX West filed a declaration of nonmonetary status pursuant to Civil Code section 2924l. No objection was served, thus NDeX West was not required to participate any further in the action and is not subject to any monetary award. (Civ. Code, § 2924l, subd. (d).) NDeX West is not a party to this appeal.

Development, Inc. v. Woodland Lane Estates, LLC (2007) 152 Cal.App.4th 1106, 1110.) If facts appearing in the exhibits to the complaint conflict with the alleged facts, the facts in the exhibits take precedence. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447, superseded by statute on another ground as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521.)

In March 2007 Keenan borrowed \$314,000 from Quicken Loans to purchase a home in Elk Grove, California. The loan was secured by a deed of trust naming Orange Coast Title Co. as the trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary acting solely as the nominee for the lender and the lender's successors and assigns.²

In 2009, Keenan entered into a loan modification agreement with IndyMac, the loan servicer. The loan modification agreement increased the principal amount of the loan to \$325,604.87, which included amounts that Keenan was then in arrears. Keenan was to pay monthly principal and interest payments under the modified agreement of \$660.45 for principal and interest plus an unspecified estimated monthly escrow payment. The modified agreement provided "[t]he monthly payments for principal and interest, stated above, do not include required payments for taxes and insurance, which may be substantial. Your monthly requirements for taxes and insurance will change periodically during the term of your mortgage." The modification also provided: "Except as modified by this Agreement, all terms and provisions of the Note . . . remain in full force and effect."³ The deed of trust securing the note also provided: "Borrower

² The trial court sustained the demurrer of MERS to Keenan's first amended complaint without leave to amend, and Keenan did not appeal from the judgment of dismissal in favor of MERS. Thus, although the parties treat MERS as if it were a party to this appeal, it is not.

³ Only portions of the original note were attached to the complaint.

shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum to provide for payment of amounts due for: (a) taxes and assessments . . . (c) premiums for any and all insurance required by Lender . . . and (d) Mortgage Insurance” “Periodic Payments” referred to the regularly scheduled payment of principal and interest.

Keenan filed a petition under chapter 7 of title 11 of the United States Code (11 U.S.C. § 101, et. seq; hereafter Bankruptcy Code) on December 31, 2009. The bankruptcy estate’s interest in the property was abandoned on February 10, 2010. Keenan’s discharge was entered on April 19, 2010, and the bankruptcy case was closed on April 23, 2010.

In April 2011 Keenan sent a check to IndyMac in the amount of \$660.45. IndyMac returned the check uncashed, with the explanation that the amount did not represent the total amount due, and directed Keenan to contact the office for the amount required to bring the loan current. Shortly thereafter, Keenan reopened his bankruptcy case and filed an adversary proceeding against IndyMac, Deutsche Bank, and OneWest. The reopened case was closed on November 16, 2011.

On June 7, 2011, MERS, as nominee for Quicken Loans, assigned the deed of trust to Deutsche Bank.

A notice of default and election to sell under the deed of trust was recorded April 10, 2012, and Keenan subsequently received the notice of default. The notice of default indicated Keenan’s account was in arrears in the amount of \$23,439.82, as of April, 6, 2012, and that the amount would increase until the account became current. A trustee’s sale was set for August 16, 2012.

The property was sold to THR California, LLC, in August 2012 for \$195,400. The amount of the unpaid debt together with costs was \$346,174.17.

The subject of this appeal is the demurrer to Keenan’s third amended complaint. The trial court sustained the demurrer of MERS to Keenan’s first amended complaint,

and the subsequent judgment of dismissal was not appealed. The trial court sustained the demurrers of OneWest and Deutsche Bank to Keenan's first and second amended complaints with leave to amend.

Keenan's third amended complaint asserted two causes of action: breach of the loan modification agreement and wrongful disclosure. The breach of the modification agreement was based on Keenan's assertion that his loan payments, beginning with the April 20, 2011, payment, were improperly refused. He claimed he was not required to pay any amounts over principle and interest because the mandatory escrow for taxes and insurance had terminated by operation of law, and the demand that he pay private mortgage insurance constituted a violation of the bankruptcy stay. The wrongful foreclosure cause of action was based on Keenan's assertions that Keenan's payments were wrongfully refused, and the notice of default stated an incorrect amount owed.

On demurrer to the third amended complaint, the trial court concluded that neither Keenan's bankruptcy nor section 1639d(d) of title 15 of the United States Code relieved him of the obligation to pay taxes, insurance, and private mortgage insurance into an escrow account. Accordingly, the trial court found Keenan had failed to allege a breach of contract or wrongful foreclosure and sustained the demurrers without leave to amend.

DISCUSSION

I

Challenge to Denial of Injunctive Relief is Untimely

A few months after filing his initial complaint, Keenan moved for a preliminary injunction and temporary restraining order to prevent the foreclosure sale. Keenan argues the trial court abused its discretion when it denied injunctive relief. The trial court denied Keenan's request for injunctive relief on August 8, 2012. An order refusing to grant injunctive relief is separately appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) Keenan's attempt to challenge the order by appeal filed after the entry of the judgment of

dismissal on October 15, 2013, is untimely, and we do not address it. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110.)

II

No Breach of Modification Agreement

Keenan states, without authority, that his obligation to continue to pay for private mortgage insurance was discharged in his bankruptcy proceeding.⁴ On the contrary, the deed of trust is a lien on real property. (Civ. Code, § 2898, subd. (a).) A lien on real property passes through bankruptcy unaffected. (*Dewsnup v. Timm* (1992) 502 U.S. 410, 418 [116 L.Ed.2d 903].) Thus, before, during, and after the bankruptcy, the terms of the deed of trust remained in effect. The deed of trust provided: “Borrower shall *pay to Lender* on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum . . . to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; . . . (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums . . .” (Italics added.) Keenan’s unsupported theory that he had no obligation to continue to pay mortgage insurance premiums after his bankruptcy because the obligation was discharged in bankruptcy is simply wrong.

Keenan alleged he paid property taxes and insurance separately out of escrow. However, as shown, he was required under the deed of trust to pay such amounts to the lender, and this obligation was unaffected by the bankruptcy. Therefore, defendants’

⁴ Keenan actually cites three cases -- *Hocker v. Reas* (1861) 18 Cal. 650, *In re Fischer* (D.Alaska 1992) 136 B.R. 819, and *Brantley v. Republic Mortg. Ins. Co.* (4th Cir. 2005) 424 F.3d 392 -- none of which support his claim.

insistence on these amounts being paid as set forth in the note, note modification, and deed of trust was not a breach of the loan modification agreement.

Keenan also alleged he was not required to pay into an impound account under section 1639d(d) of title 15 of the United States Code (hereafter section 1639d). Section 1639d(d) provides in part: “An escrow or impound account established pursuant to subsection (b) shall remain in existence for a minimum period of 5 years, beginning with the date of the consummation of the loan, unless and until-- [¶] . . . (2) such borrower is delinquent;” (§ 1639d(d).) Keenan argues that since he was delinquent on his loan, the requirement to pay into an impound account had terminated.

Assuming, without deciding, that Keenan’s contractual obligation to pay escrow items under the note and deed of trust was a “required” escrow account under the statute, section 1639d(d)(2) is nevertheless inapplicable to Keenan’s escrow account. The statute applies to escrow accounts “in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer.” (§ 1639d(a).) Keenan’s original loan was consummated in 2007, and the modification was consummated in 2009. Section 1639d(d)(2) was not enacted until 2010. Federal statutes are prospective unless Congress has made clear its intent that the statute operate retroactively. (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 280 [128 L.Ed.2d 229].) No such Congressional intent appears with respect to section 1639d.

Accordingly, Keenan’s third amended complaint fails to state a cause of action for breach of the modified loan agreement.

III No Wrongful Foreclosure

Keenan’s cause of action for wrongful foreclosure was based on his contention that defendants breached the loan modification agreement by insisting on payment of the impound account amounts. As discussed, this argument fails. Therefore the cause of action for wrongful foreclosure based on the argument fails.

Keenan also appears to argue that the foreclosure was wrongful because the assignment of the deed of trust to Deutsche Bank occurred after he reopened his bankruptcy case on May 26, 2011, and before the bankruptcy case was again closed on November 16, 2011. He reasons that because of the automatic stay, this voided the assignment, and resulted in every action taken thereafter to sell the property being void.⁵

It is unlikely that this court has jurisdiction to decide whether a violation of the automatic stay can be the basis for a cause of action in tort. In *Koffman v. Osteoimplant Technology, Inc.* (D.Md. 1995) 182 B.R. 115, 125, the court stated: “Allowing state tort actions based on . . . violation of the automatic stay to go forward ultimately would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme. Because such a result threatens to erode the exclusive federal authority in this area, and because it would threaten the uniformity of federal bankruptcy law, the Court finds that OTI’s state tort suits are preempted by the federal Bankruptcy Code.”

Likewise in *Brandt. v. Swisstronics, Inc.* (Bankr. D.Me. 1992) 135 B.R. 707, 708, the court held that the debtor could not assert a violation of the automatic stay in order to obtain a state law remedy. It reasoned: “The Bankruptcy Code provides a comprehensive scheme reflecting ‘a balance, completeness and structural integrity that

⁵ Keenan also argues that defendants violated the bankruptcy discharge when they reported his loan default to credit agencies. Keenan alleged this in his first amended complaint under a cause of action entitled “Violation of Bankruptcy Code Section 524.” Defendants’ demurrers to the first amended complaint were sustained with leave to amend, and Keenan amended the complaint two more times. The second amended complaint is not in the record. Keenan did not include a cause of action for violation of Bankruptcy Code section 524 in his third amended complaint, and that complaint did not allege that defendants violated the discharge by reporting his loan default to credit agencies. By amending the complaint rather than appealing the order sustaining the first or second demurrer, Keenan has waived his right to appeal this issue. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966, fn. 2.)

suggests remedial exclusivity.’ [Citation.] Since this federal statute [(the automatic stay)] is applicable here, and has its own enforcement scheme and separate adjudicative framework, it must supercede any state law remedies.” (*Ibid.*)

If we had jurisdiction, we would nevertheless find Keenan’s claim meritless. The postpetition assignment of a deed of trust that was executed at the inception of the loan does not violate the automatic stay. (*Drake v. Citizens Bank (In re Corley)* (Bankr. S.D.Ga. 2011) 447 B.R. 375, 385.) The automatic stay operates to prevent “any act to create, perfect, or enforce” a lien against property of the debtor or the estate. (11 U.S.C. § 362(a)(4) & (5).) When a trust deed to secure a loan is executed, it creates a valid lien on the property to secure the debt for which it was executed. (*RNT Holdings, LLC v. United General Title Ins. Co.* (2014) 230 Cal.App.4th 1289, 1296.) Nothing more is required to perfect a valid lien. The assignment of the deed of trust once the lien has been perfected does not involve the creation, perfection, or enforcement of a lien on of the property of the debtor or the estate, thus does not violate the stay. (*Kapila v. Atl. Mortg. & Inv. Corp. (In re Halabi)* (11 Cir. 1999) 184 F.3d 1335, 1337.)

