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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

CHARLES R. CRITES II,

Plaintiff and Appellant,

v.

ONEWEST BANK, FSB et al.,

Defendants and Respondents.

E053274

(Super.Ct.No. RIC10002121)

OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand-Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

The Advocates Law Firm and Francisco J. Aldana for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Andrew E. Miller and Eleanor M. Ord for Defendants and Respondents.

On March 24, 2011, the trial court issued its order sustaining the demurrer of defendants OneWest Bank, FSB; Seaside Financial Corporation; and T.D. Service

Company to plaintiff Charles R. Crites II's second amended complaint. Plaintiff then filed his notice of appeal from the judgment dismissing his complaint.

On appeal, plaintiff argues that he successfully pled various causes of action arising from defendants' foreclosure of his home in Corona. The second amended complaint attempts to allege five causes of action, entitled (1) violation of Civil Code section 2923.5, (2) fraud, (3) violation of Business and Professions Code section 17200, (4) quiet title, and (5) violation of Civil Code section 2932.5.¹

I

STANDARD OF REVIEW

A demurrer is used to test the sufficiency of the factual allegations of the complaint to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The facts pled are assumed to be true, and the only issue is whether they are legally sufficient to state a cause of action.

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether

¹ Unless otherwise stated, all further statutory references are to the Civil Code.

the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II

FIRST CAUSE OF ACTION --

ALLEGED VIOLATION OF SECTION 2923.5

Section 2923.5 applies to certain real estate transactions occurring between January 1, 2003, and December 31, 2007.² It requires the entity seeking to foreclose on a delinquent residential mortgage to satisfy certain due diligence requirements by contacting the homeowner, discussing the delinquency with the homeowner, and certifying compliance with the due diligence requirements.

In an extremely thorough opinion, our colleagues in Division Three have discussed section 2923.5 in detail. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208.) Relevant here, the court held, “. . . If section 2923.5 is not complied with, then there is no valid notice of default and, without a valid notice of default, a foreclosure sale

² By its terms, the statute was repealed effective January 1, 2013. The fact of repeal does not excuse the alleged failure of the defendants to follow the statute while it was in effect.

cannot proceed. The available, existing remedy is found in the ability of a court in section 2924g, subdivision(c)(1)(A), to postpone the sale until there has been compliance with section 2923.5. Reading section 2923.5 together with section 2924g, subdivision (c)(1)(A) gives section 2923.5 real effect.” (*Id.* at p. 223.) The court further stated that, if the lender did not comply with section 2923.5, and the foreclosure sale has already been held, the noncompliance does not affect title to the foreclosed property. (*Mabry*, at pp. 214-215.)

A. *The Allegations*

In general allegations, plaintiff alleges that he purchased property in Corona in 2005 and financed it through First Federal Bank. The loan papers state the amount of the loan as \$1,330,000. Plaintiff alleges that the declaration attached to the notice of due diligence was false and misleading, thereby voiding the notice of default. First Federal Bank was not listed on the notice of default,³ and plaintiff alleges that none of the entities listed “can prove they have the authority to conduct the foreclosure.” Plaintiff further alleges that the foreclosure sale failed to meet the requirements of sections 2924 and 2923.5 and that he had an oral contract with defendant OneWest Bank not to foreclose on the property.

³ First Financial Bank is mentioned in the notice of default only as the entity to call to ascertain the amount due. The notice of default and the notice of trustee’s sale refer to defendant Seaside Financial Corporation as the trustee and the documents are signed by defendant T.D. Service Company as the authorized agent of the beneficiary, presumably OneWest Bank. A separate exhibit shows that the First Federal Bank deed of trust was assigned to defendant OneWest Bank.

In addition to the general allegations, the alleged first cause of action alleges that defendants cannot prove that the nonjudicial foreclosure was conducted in accordance with sections 2923.5 and 2924. The complaint quotes section 2923.5 in detail, and plaintiff contends that defendants failed to follow the procedural requirements of that section.

The declaration contained in the notice of default alleges that the contact provisions of section 2923.5 were complied with. The first cause of action asserts the lack of knowledge by the person signing the declaration and concludes that various alleged deficiencies in the declaration voided it.

The prayer for relief does not seek specific relief for the alleged first cause of action. It contains a number of requests, including general, specific, and punitive damages and declaratory and injunctive relief. Plaintiff also asks that title to the property be restored to him and that defendants be ordered not to offer the property for sale or auction. He further asks that the note be reformed to reflect the present appraised value of the property and that he recover his attorney fees.

B. Sufficiency of the Allegations

Defendants argue that there is no private right of action under section 2923.5 once the foreclosure sale has occurred. *Mabry* supports this argument. (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at pp. 214-215 [“[t]he Legislature did nothing to affect the rule regarding foreclosure sales as final”].) As quoted above, the *Mabry* court also explains why the only remedy available is a presale remedy, i.e., the power to postpone

the pending sale until there has been compliance with section 2923.5. (*Id.* at pp. 221-224, 226-232.)

Another passage in *Mabry* explains why noncompliance with section 2923.5 before the foreclosure sale does not affect title after the foreclosure sale. (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at p. 235.) Plaintiff simply cannot use section 2923.5 as a cause of action to affect postsale title.

We therefore agree with defendants that the trial court properly sustained a demurrer to plaintiff's first cause of action. We also agree with defendants that the declaration did not need to be individualized. Again, *Mabry* fully explains why this is so. (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at pp. 232-235.)

C. *Wrongful Foreclosure*

On appeal, plaintiff argues that he has actually stated a cause of action for wrongful foreclosure because he mentions section 2924 in his first cause of action. Without citing authority, he argues that he just has to allege a violation of that section in order to state a valid cause of action for wrongful foreclosure.

Section 2924 section contains the procedures governing the conduct of a foreclosure sale, including who can bid, where the sale must be held, and bids prior to sale. Section 2924 generally applies to presale and sale procedures: "Before the foreclosure sale, the client still has hope of seeking injunctive relief to delay an improperly noticed foreclosure sale or one based on fraud. However, after the sale has been conducted, a client seeking to avoid foreclosure is usually out of options. If the

foreclosure sale is final, and the client's property is sold to a bona fide purchaser for value, the client will be unable to recover the property, even if the default and foreclosure sale were improperly noticed. Even if the purchaser is purported not to be bona fide, attacking a completed foreclosure sale is an extremely difficult process that may prove too costly for most clients." (Northrup & Luong, *Locked Out: In Fighting a Potential Foreclosure, the Time to Act Is Before the Sale Takes Place* (2008) 30 L.A. Law. 34, fns. omitted.)

Although we accept the complaint's factual allegations of irregularities in the foreclosure process as true for purposes of the demurrer, any such irregularities are not enough to allow the property to be restored to plaintiff. The trial court found that, since the sale here had been completed, the irregularities were insufficient to state a cause of action for wrongful foreclosure because the complaint does not contain any allegations of prejudice.

The trial court relied on *Knapp v. Doherty* (2004) 123 Cal.App.4th 76. In that case, the foreclosed homeowners sued to set aside the trustee's sale, claiming that the sale notice was never served on them or that it was served prematurely. (*Id.* at pp. 81, 89.) The trial court granted summary judgment to defendants, and the appellate court affirmed. (*Id.* at p. 81.)

Although the appellate court found that the notice was served prematurely, it found that there was no showing of any prejudicial procedural irregularity. (*Knapp v. Doherty, supra*, 123 Cal.App.4th at pp. 93-94.)

In our case, there were no allegations of prejudice. Even conceding the irregularities alleged for purposes of the demurrer, the trial court questioned plaintiff's counsel closely on the prejudice issue and presumably found no allegations of prejudice that would justify setting aside a completed sale. Since plaintiff must plead and prove an improper procedure and resulting prejudice (*Knapp v. Doherty, supra*, 123 Cal.App.4th at p. 86, fn. 4), allegations of procedural irregularities are insufficient in the absence of a showing of actual prejudice to the debtor or to the fairness of the sale. (See generally 1 Bernhardt, Cal. Mortgages, Deeds of Trust and Foreclosure Litigation (Cont.Ed.Bar), §§ 2.49, 2.63, 7.23-7.24, 7.67C.)

We therefore agree with the trial court that plaintiff did not state a cause of action for wrongful foreclosure.

III

SECOND CAUSE OF ACTION -- FRAUD

AND FIFTH CAUSE OF ACTION -- VIOLATION OF SECTION 2932.5

The complaint combines an alleged second cause of action for fraud and an alleged fifth cause of action for violation of section 2932.5.⁴

“[F]raud must be specifically pleaded. This means: (1) general pleading of the legal conclusion of fraud is insufficient; and (2) every element of the cause of action for

⁴ Defendants argue that the section applies only to mortgages, not to deeds of trust, citing *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 332-337. Since plaintiff does not offer any argument to support his alleged cause of action based on section 2932.5, we do not need to discuss the issue further.

fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect. [Citation.] ‘It is bad for courts to allow and lawyers to use vague but artful pleading of fraud simply to get a foot in the courtroom door.’ [Citation.]” (*Wilhelm v. Prey* (1986) 186 Cal.App.3d 1324, 1331.)

Plaintiff alleges that defendant OneWest Bank engaged in fraudulent behavior and that it violated section 2932.5 because the power of sale is only given to the person entitled to payment of the mortgage, and the First Federal mortgage was not properly assigned to OneWest Bank.⁵

In support of the alleged causes of action, plaintiff alleges that his note was no longer negotiable because the assignment of the deed of trust was not attached to the note, OneWest Bank intentionally misrepresented its status, the assignment was not duly acknowledged and recorded prior to the foreclosure sale,⁶ and without statutory compliance OneWest Bank had no authority to proceed with the sale. The complaint

⁵ Section 2932.5 states, “Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.”

⁶ After plaintiff’s opening brief was filed, the case of *Haynes v. EMC Mortgage Corp.*, *supra*, 205 Cal.App.4th 329, was decided. It holds that “where a deed of trust is involved, the trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest is recorded.” (*Id.* at p. 336.)

further alleges misrepresentation by defendants because of the declaration in the notice of default that they had complied with section 2923.5.

Plaintiff claims reliance on the alleged misrepresentation and concludes that defendants willfully intended to deceive him into believing that they had the authority to foreclose on the mortgage. Plaintiff also attacks other alleged defects in the notice of default and states that defendants made the intentional misrepresentations to induce his reliance on the documents and to confuse him.

While the sufficiency of the facts alleged in support of this cause of action are questionable,⁷ it is not necessary to discuss the allegations because it is clear that plaintiff has failed to plead any facts showing that he suffered any harm from the alleged misrepresentations. Certainly, there was no harm in the lender or its assignees pursuing their legal remedies due to nonpayment of the mortgage, even though it acted through agents.

As discussed above, *Mabry* makes the point clear: “There is nothing in section 2923.5 that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale. We would merely note that under the plain language of section 2923.5, read in conjunction with section 2924g, the *only*

⁷ For example, defendant alleges that the alleged misrepresentations in the notice of default were made to confuse him, but he does not allege that he was actually confused by the notice of default.

remedy provided is a postponement of the sale before it happens.” (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at p. 235.)

Defendants argue that the fraud claim fails because plaintiff has failed to demonstrate any harm: “. . . Crites cannot claim damage because he was in default and could not redeem the loan. [Citation.] The ensuing foreclosure was thus inevitable.”

We agree with defendants and the trial court: “. . . “As a general rule, there is a common law *rebuttable* presumption that a foreclosure sale has been conducted regularly and fairly.” [Citations.] Accordingly, “[a] successful challenge to the sale requires evidence of a failure to comply with the procedural requirements for the foreclosure sale *that caused prejudice to the person attacking the sale.*” [Citation.] . . . [T]he presumption must prevail when the record lacks substantial evidence of a *prejudicial* procedural irregularity. [Citation.]’ [Citations.]” (*Knapp v. Doherty, supra*, 123 Cal.App.4th at p. 96.)

Plaintiff has failed to allege sufficient facts to establish a fraud or misrepresentation cause of action. The trial court properly granted defendants’ demurrer to this cause of action.

IV

THIRD CAUSE OF ACTION -- VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200

Plaintiff realleges his earlier allegations and concludes that “[d]efendants’ practices are likely to mislead the general public, and therefore, constitute a fraudulent

business act [or] practice within the meaning of Business and Professions Code § 17200.” He relies on his earlier allegations of procedural irregularities, including the fraud allegations and the alleged violation of Civil Code section 2923.5.

In his brief, plaintiff argues that “[a] private right of action lies for [Civil Code § 2923.5(a)] under California Business & Professions Code § 17200, et seq., even if the underlying statute confers no right of action.” He cites *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561-567 (held superseded by statute in *Robinson v. HSBC Bank USA* (2010) 732 F.Supp.2d 976.) In *Stop Youth Addiction*, our Supreme Court said, “[A]s we have long recognized, it is in enacting the [Unfair Competition Law] itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs ‘specific power’ [citation] to prosecute unfair competition claims.” (*Stop Youth Addiction, Inc.*, at p. 562.) However, in *Robinson*, the court noted that the holding was superseded because “. . . Proposition 64 took away the ability of non-injured plaintiffs to sue on behalf of the general public under the UCL. [Citation.]” (*Robinson*, at p. 989, fn. 8.)

We need not discuss the issue further because it is clear that plaintiff bases his Business and Professions Code section 17200 claim on his claim of actual fraud under Civil Code section 1752. Since plaintiff’s fraud claim was insufficient to state a cause of action, it is apparent that the Business and Professions Code claim must also fail since it is based on the same allegations. Plaintiff has simply failed to plead facts demonstrating any fraudulent practices under Business and Professions Code section 17200.

FOURTH CAUSE OF ACTION -- QUIET TITLE

Under this alleged cause of action, plaintiff seeks to quiet title in himself as of the date of the trustee's sale. At that time, the allegedly void trustee's deed upon sale was issued.

In his brief, plaintiff only cites Code of Civil Procedure section 761.020. That section specifies the contents of an action for quiet title.

It is apparent from the complaint that plaintiff is seeking to use a quiet title cause of action to attack the completed foreclosure sale. His grounds for doing so are alleged procedural deficiencies in the presale documents, including alleged violations of section 2923.5.

As we have demonstrated above, however, such violations cannot be the basis for an action to set aside a completed sale. "A primary reason for California's comprehensive regulation of foreclosure in the Civil Code is to ensure stability of title after a trustee's sale. [Citation.] [¶] There is nothing in section 2923.5 that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale. We would merely note that under the plain language of section 2923.5, read in conjunction with section 2924g, the *only* remedy

provided is a postponement of the sale before it happens.” (*Mabry v. Superior Court*, *supra*, 185 Cal.App.4th at p. 235.)⁸

V

DENIAL OF LEAVE TO AMEND THE COMPLAINT

Finally, plaintiff contends that, if he stated a cause of action under any theory, the trial court abused its discretion in refusing to give him the opportunity to amend his complaint. Similarly, he contends that discretion is abused if he could have amended his complaint to state a cause of action.

“Leave to amend is properly denied when the facts are not in dispute and the nature of the claim is clear, but there is no liability under substantive law. [Citation.] [All] intendments weigh in favor of the regularity of the trial court proceedings and the correctness of the judgment. Unless clear error of abuse of discretion is demonstrated, the trial court’s judgment of dismissal following the sustaining of defendants’ demurrer

⁸ Defendants also contend that the quiet title cause of action was defective because plaintiff was required to allege tender of the debt, and he failed to do so. They cite *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707, which refers to “the equitable principle that a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee. [Citations.]”

However, *Mabry* holds that tender is not required to maintain an action under Civil Code section 2923.5. (*Mabry v. Superior Court*, *supra*, 185 Cal.App.4th at pp. 214, 225.) The difference arises from the nature of the respective actions. Section 2923.5 is a presale remedy to postpone the pending sale, while a quiet title action is used to dispose of conflicting title claims at any time.

will be affirmed on appeal [citation].’ [Citation.]” (*Wilhelm v. Pray, supra*, 186 Cal.App.3d at p. 1330.)⁹

The trial court did not abuse its discretion in denying plaintiff leave to amend his complaint for a third time. This is particularly true when plaintiff has not made any showing of the changes he would make to state any cause of action. Under the facts here, he simply cannot establish substantive liability under the law.

VI

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

KING
J.

⁹ The quote in *Wilhelm* is from *Owens v. Foundation for Ocean Research* (1980) 107 Cal.App.3d 179, 185. *Owens* was disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.