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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JANE JESSICA GORTON,

Plaintiff and Appellant,

v.

ADVANTIX LENDING, INC. et al.,

Defendants and Respondents.

E056363

(Super.Ct.No. CIVVS1200564)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kirtland L. Mahlum, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jane Jessica Gorton, in pro. per., for Plaintiff and Appellant.

Bryan Cave LLP, Stuart W. Price, Sean D. Muntz, Kiersten A. Kropp and Bryan Cave for Defendants and Respondents.

I

INTRODUCTION

In February 2012, plaintiff Jane Jessica Gorton (Gorton) sued an originating

lender, Advantix Lending, Inc. (Advantix), and defendants Mortgage Electronic Registration Systems, Inc. (MERS), Bank of America, N.A., and The Bank of New York Mellon.¹ Gorton alleged there were defects in the securitization of her home loan which divested defendants of their interest in the loan. Gorton further alleged the assignment of a beneficial interest in her loan was improper.

In May 2012, the trial court sustained defendants' demurrer to the first amended complaint without leave to amend. Gorton appeals from the subsequent judgment of dismissal without prejudice. We affirm the judgment.

II

STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

Gorton's first amended complaint² alleges the following facts. On April 5, 2007, Gorton obtained an adjustable rate loan in the original principal amount of \$257,000 (Loan) from Advantix. The Loan was secured by real property located at 8995 Corto Road, Apple Valley, California. Gorton's deed of trust designated MERS as the lender's nominee and beneficiary. Advantix sold the Note and deed of trust to Countrywide Home Loans before May 1, 2007. In August 2011, MERS assigned its rights under

¹ Formerly known as The Bank of New York as Trustee for the benefit of the Certificateholders of the CWABS Inc. Asset-Backed certificates, Series 2007-9.

² Gorton titles her complaint "Amended Petition for Declaratory Relief to Quiet Title."

Gorton's deed of trust to The Bank of New York.

Gorton alleges Advantix's business license was suspended on May 1, 2009.

Gorton further alleges MERS cannot prove it has a beneficial interest in her loan because Advantix had been legally suspended before the assignment in August 2011. Therefore, Gorton seeks to quiet title to her property.

B. The Demurrer

In their demurrer to the first amended complaint, defendants argued that MERS had the legal authority to assign the deed of trust. By the terms of her note, Gorton acknowledged the right of the lender to transfer the note. Therefore Gorton's claims that the assignment by MERS was illegal were contradicted. Similar arguments by trustors have been universally rejected by courts. Additionally, even if Advantix was suspended in May 2009, it was not the servicer of her note at the time of the assignment in August 2011. Advantix sold Gorton's note to Countrywide in 2007, two years before its corporate charter was suspended. Furthermore, Gorton did not plead the required elements of a quiet title claim, notably, the title as to which a determination was sought, the basis of the title, or any adverse claims to the title. Finally, Gorton lacked standing to challenge the foreclosure because she failed to allege an offer of tender. In summary, Gorton could not plead facts sufficient to state a cause of action.

Gorton opposed the demurrer. In her opposition, she argued that defendants were not the "real parties in interest" of her loan; that MERS could not lawfully function as a beneficial interest holder of her note; that Advantix still held an interest in the property;

and that the tender requirement should not apply because a trustee's sale had not yet occurred.

At the demurrer hearing, a lawyer, Spencer Mynko, made a brief special appearance on behalf of Gorton. The trial court sustained the demurrer without leave to amend, relying principally on the issue of failure of tender. Judgment was entered in July 2012, dismissing the complaint without prejudice.

On August 16, 2012, Gorton filed a second case (No. CIVVS1203611), which is now pending in San Bernardino Superior Court, against MERS, The Bank of New York Mellon as Trustee, and Specialized Loan Servicing, LLC, the current servicer of her loan. This second case, as well as matters occurring after the trial court ruled on the demurrer, are beyond the scope of this appeal; we disregard those portions of Gorton's appellate briefs.

III

DEMURRER

A. Standard

“A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074,

1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We must affirm the judgment if the sustaining of a general demurrer was proper on any of the grounds stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)” (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81 (*Siliga*)).

Next, this court determines if the trial court abused its discretion in denying leave to amend; the burden is on the plaintiff to show how a complaint may be amended. (*Ibid.*)

B. Bias and Discovery

On appeal, Gorton argues that the court was biased against her and did not permit her to conduct discovery that would have allowed her to amend her complaint.³ As to the issue about discovery, Gorton served defendants with the complaint on February 3 and 6, 2012. Under the Code of Civil Procedure, she was permitted to serve written discovery on defendants 10 days after service of the complaint. (Code Civ. Proc., §§ 2030.020; 2031.020; and 2033.020.) Gorton chose not to pursue any discovery before the hearing on the demurrer and she did not ask the trial court for additional time to conduct discovery.⁴ Having forfeited this issue below, she cannot assert this argument on appeal.

³ For the first time on appeal, Gorton also raises issues involving negative amortization and the Truth in Lending Act. Those issues have been forfeited below.

⁴ Furthermore, after the lower court dismissed Gorton's complaint without prejudice, Gorton was allowed to file another action, allowing her to use the discovery

[footnote continued on next page]

As to the issue regarding judicial bias, we have reviewed the record and find no such showing. The present case is distinguishable from *Murr v. Murr* (1948) 87 Cal.App.2d 511, 515, 518, cited by Gorton, in which the trial court exhibited bias by denying the plaintiff a full opportunity to present his evidence and by refusing to consider the issues presented by plaintiff to be worthy of consideration. Instead, we rely on *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218-1219, in which the appellate court approved of the trial judge's efforts to explain the American judicial system to the defendants who were Italian immigrants. The *Moulton* court described the judge's statements as "innocent and appropriate when viewed in context." (*Ibid.*)

Here, the judicial commissioner, Kirtland L. Mahlum, made admirable efforts to explain his ruling to Gorton. The commissioner explained the reasoning behind his tentative ruling and expressed sympathy for Gorton. He allowed an attorney to make a special appearance on Gorton's behalf and gave him ample time to respond. The commissioner complimented Gorton on the preparation of her complaint but concluded that she could not overcome the legal impediment of not being able to plead an offer of tender. (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) He also explained in detail why MERS, as a nominee-beneficiary, had the legal right to

[footnote continued from previous page]

process. According to the records of the superior court, a trial setting conference is scheduled for July 18, 2014, in Gorton's second case.

assign the deed of trust.⁵ Under these circumstances, Gorton has no reasons to claim judicial bias.

C. Assignment by MERS and Quiet Title

Considering the merits, we agree Gorton could not state a cause of action and the trial court did not abuse its discretion in denying leave to amend. Gorton's four causes of action to quiet title were all based on faulty theories that defendants improperly securitized her loan and that MERS has no valid interest in her loan. The trial court correctly sustained the demurrer without leave to amend because Gorton's allegations that MERS lacked authority to assign its interest were unsupported by facts or by law. (*Siliga, supra*, 219 Cal.App.4th at pp. 83-86.)

In order to state a cause of action for quiet title, a plaintiff must allege facts establishing: (1) a description of the subject property; (2) the title of the plaintiff as to which determination is sought and the basis of the title; (3) the claims adverse to the title of the plaintiff against which a determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for determination of the title of the plaintiff against adverse claims. (Code Civ. Proc., § 761.020, subs. (a)-(e).) In addition, a plaintiff seeking to quiet title in the face of foreclosure must allege tender or an offer of tender of the amount borrowed. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211

⁵ The trial court also relied on the unpublished United States District Court case, *Sacchi v. Mortgage Electronic Registration Systems, Inc.* (C.D. Cal., June 24, 2011, No. CV 11-1658 AHM CWx) 2011 U.S. Dist. LEXIS 68007.

Cal.App.4th 505, 512, citing *Karlsen v. American Sav. & Loan Assn.*[, *supra*, 15 Cal.App.3d at p.] 117; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579.) Gorton did not plead tender because she wrongly contends it was not required before a nonjudicial foreclosure has been completed.

Gorton's allegation that MERS claimed an invalid beneficial interest is incorrect and cannot support a quiet title action. Gorton's allegation that MERS lacked authority, and had no interest in her deed of trust was contradicted by other allegations in her complaint as well as the judicially-noticeable deed of trust signed by Gorton. (*Siliga, supra*, 219 Cal.App.4th at pp. 83-84.) California law expressly permits a lender to designate a nominee to be the beneficiary under a deed of trust and permits the recording of such instruments. (See Bus. & Prof. Code, § 10234, subd. (a).) MERS, as nominee of the lender under a deed of trust, may exercise the right to transfer its interest and assign the right to another party. (*Siliga*, at pp. 80 and 83, citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1157.) Gorton's recorded deed of trust reflects MERS is the named beneficiary. Gorton acknowledged she had designated MERS as beneficiary and nominee of her lender when she signed her loan documents. Gorton may not now assert MERS lacked that authority. Moreover, MERS had the right to assign her deed of trust because of its status as a nominee-beneficiary. (*Siliga*, at p. 83, citing *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270-271.)

Gorton's other claims about the securitization and transfer of her loan have been universally rejected: "Plaintiff has not explained how the activity of assigning mortgage loans to a trust pool gives rise to a fraud claim against MERS. Other courts in this district have summarily rejected the argument that companies like MERS lose their power of sale pursuant to the deed of trust when the original promissory note is assigned to a trust pool. See, e.g., *Hafiz v. Greenpoint Mortgage Funding, Inc.*, No. 09-1729, 2009 U.S. Dist. LEXIS 60818, 2009 WL 2137393, at *2 (N.D. Cal. July 16, 2009)." (*Benham v. Aurora Loan Services* (N.D. Cal., Sept. 1, 2009, C-09-2059 SC) 2009 U.S. Dist. LEXIS 78384.) Indeed, Gorton's allegations are also contradicted by the terms of her note, in which she acknowledged the right of her lender to transfer the note.

D. Additional Arguments

Gorton also asserts MERS's corporate charter was suspended between 2007 and 2011 and it did not have authority to assign its interest under the trust deed. Gorton has been misled by the existence of another company, using the name of MERS, which was suspended from conducting business in the state for nonpayment of taxes and enjoined from using the name Mortgage Electronic Registration Systems, Inc. Gorton offers no evidence that the real MERS entity was ever suspended from conducting business in California or, for that matter, that it was ever incorporated or sought incorporation in California. (*Mortgage Electronic Registration Systems, Inc. v. Brosnan* (N.D. Cal. Sept. 4, 2009) No. C 09-3600 SBA, 2009 U.S. Dist. LEXIS 87596, at p. 11, fn. 7.)

Advantix's corporate status is irrelevant because its corporate charter was suspended on May 1, 2009. Advantix sold Gorton's note to Countrywide in 2007, two years before Advantix was suspended. Bank of America acquired the loan as a result of its merger with Countrywide. Advantix was not involved in the assignment by MERS to Bank of New York, which occurred in August 2011, when recording was requested by Bank of America. Advantix's corporate status in 2011 was irrelevant.

Finally, California courts have unanimously ruled that a foreclosing entity does not need to produce the note: "Under California law, there is no requirement for the production of the original note to initiate a nonjudicial foreclosure." (*Castaneda v. Saxon Mortgage Services, Inc.* (E.D. Cal. 2009) 687 F. Supp.2d 1191, 1201.) Accordingly, defendants are not required to produce the note to Gorton. Gorton's contentions about purported defects in a notice of default and notice of trustee's sale and a proposed settlement in November 2012 are brand new in this lawsuit. Apparently these matters are the subject of Gorton's second lawsuit. As such, we disregard these issues in this appeal.

E. Leave to Amend

The plaintiff has the burden to show amendment could "cure the existing defects in the complaint. [Citation.] 'To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.'" (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 792.) Otherwise, a demurrer is "properly sustained without leave to amend." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 55.)

The trial court found that further amendments would be futile because Gorton's arguments that MERS lacked authority to make a transfer are refuted by a wealth of case law. On appeal, Gorton does not suggest any new facts would warrant further leave to amend except for potential violations of Civil Code sections 2924 and 2923.5, the subject of her second lawsuit, not this appeal. Even so, Gorton cannot show prejudice because she admits she was in default. (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76.)

Gorton cannot demonstrate how she could successfully amend. The trial court did not abuse its discretion in denying leave to amend.

IV

DISPOSITION

The trial court correctly sustained the demurrer to the first amended complaint without further leave to amend. We affirm the judgment. In the interests of justice, we order the parties to bear their own costs on appeal.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.