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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES E. NUNLEY, JR. et al.,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A., as Successor
etc.,

Defendant and Respondent.

E060909

(Super.Ct.No. RIC1312868)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas A. Peterson (retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Randall Donald White, Judges.¹ Affirmed in part, reversed in part with directions.

Law Offices of John Thomas Dzialo and John T. Dzialo for Plaintiffs and Appellants.

¹ Judge Peterson conducted the hearing and ruled on the demurrer; however, Judge White signed the judgment for Judge Peterson.

Severson & Werson, Jan T. Chilton, Michael G. Cross and Kerry W. Franich for Defendant and Respondent.

Plaintiffs and appellants James E. Nunley, Jr., and Sarah H. Nunley defaulted on a home mortgage loan. After making 10 payments on the modification agreement, defendant cancelled the agreement claiming that plaintiffs were \$10,972.25 in arrears on their property taxes. Plaintiffs sued defendant for breach of contract/specific performance and promissory estoppel. Defendant demurred and the trial court sustained the demurrer without leave to amend, entering judgment for defendant. Plaintiffs appeal, challenging the trial court's decision. We conclude the demurrer was properly sustained as to the promissory estoppel cause of action; however, the trial court abused its discretion in denying plaintiffs an opportunity to amend their breach of contract/specific performance claim.

I. FACTS AND PROCEDURAL HISTORY

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) We utilize two standards of review. “We first review the complaint de novo to determine . . . whether the trial court erroneously sustained the demurrer as a matter of law. [Citation.] Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend.” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) ““[G]reat liberality

should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]”

[Citations.] This abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citations]” (*Aubry v. Tri-City Hospital Dist., supra*, at pp. 970-971.)

In June 2008, plaintiffs obtained a \$418,383 loan to purchase a home in Beaumont, California. In exchange for the loan, plaintiffs executed a promissory note secured by a deed of trust encumbering the property. The deed of trust named Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary (solely as nominee for the lender and its successors and assigns). Although MERS did not assign its interest in the deed of trust to defendant until May 2011, defendant had serviced plaintiffs’ loan since April 2009.

By September 2009, plaintiffs were experiencing financial stress and turned to defendant for mortgage relief. Defendant offered to modify plaintiffs’ mortgage subject to its “verification that the title to the subject property is free from any defect, encumbrance, unauthorized conveyance or any other irregularity.” In the event defendant discovered any title irregularity, the modification agreement “shall not be effective, binding, or enforceable against [defendant].” Also, if a title defect was found, defendant’s offer to modify plaintiffs’ mortgage “shall be immediately revoked without further notice.”

Plaintiffs accepted defendant's offer to modify their loan and began making payments. However, in September 2010, defendant notified plaintiffs that it was canceling the loan modification and would accelerate the mortgage payments due unless they cured the default in their loan by October 7, 2010. After plaintiffs failed to cure the default, defendant initiated foreclosure proceedings. A notice of default and election to sell under the deed of trust was recorded on June 13, 2012. As of that date, plaintiffs' past-due amount was \$80,307.28.

Although defendant recorded more than one notice of trustee's sale, no sale has taken place. Prior to the date of the rescheduled trustee's sale, plaintiffs initiated this action for breach of contract/specific performance and promissory estoppel, seeking to enforce the modification agreement and prevent defendant from foreclosing on plaintiffs' home. On December 20, 2013, defendant demurred to the complaint asserting that plaintiffs, not defendant, breached the modification agreement by failing to pay the property taxes. Regarding promissory estoppel, defendant claimed that plaintiffs failed to allege the existence of any actual written forbearance agreement, and thus, this cause of action was barred by the statute of frauds. In response, plaintiffs claimed their modified monthly payments included the payment of property taxes, and that they had dismissed their prior litigation against defendant based on defendant's promise to "resolve the

issues with the previous modification, and not foreclose on the Property during this process.”²

Following briefing and argument, the trial court found that there was “absolutely no evidence in the [plaintiffs’] complaint which would even suggest that the defendant breached [the modification] contract.” Regarding promissory estoppel, the court expressed its understanding that plaintiffs’ theory was that they stopped making payments because someone at the bank told them they were in arrears. The court found that the complaint was “totally insufficient insofar as alleging any factual basis” for promissory estoppel. The court sustained defendant’s demurrer without leave to amend, and judgment was entered in favor of defendant.

Plaintiffs appeal from the judgment of dismissal, asserting the trial court erred by sustaining the demurrer.

II. DISCUSSION

A. Breach of Contract/Specific Performance

Here, plaintiffs attempted to state an action for specific performance of a written contract. To do so, plaintiffs must allege: “(1) A specifically enforceable type of contract, sufficiently certain in its terms [citation]. [¶] (2) Adequate consideration, and a just and reasonable contract [citation]. [¶] (3) The plaintiff’s performance, tender, or excuse for nonperformance [citation]. [¶] (4) The defendant’s breach [citation]. [¶]”

² The complaint actually alleges that defendant “agreed to cancel the trustee sale and to completely *review* the status of PLAINTIFFS’ 2009 loan MODIFICATION.” (Italics added.) On appeal, plaintiffs retract their use of the word “resolve” and return to using the word “review.”

(5) Inadequacy of the remedy at law [citation].” (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 785, pp. 203-204.) Plaintiffs allege that they entered into a written loan modification agreement in November 2009. They further allege that they are “in complete compliance with the written modification agreement including making each and every monthly payment of \$2,911.00 in full and in timely fashion until and including August of 2010.” The complaint asserts that defendant, in September 2010, sent to plaintiffs a “‘Notice of Intent to Accelerate’ ostensibly showing that PLAINTIFFS were \$10,972.25 in arrears despite having made all of their prescribed payments in full and on time.” The complaint then alleges that thereafter defendant initiated foreclosure proceedings.

As such, the complaint alleges a written contract with sufficiently certain terms—plaintiffs’ performance and defendant’s breach. The only element missing from the cause of action is that the remedy at law is inadequate. (Under the facts as pled, the legal remedy is implicitly inadequate.)

While plaintiffs do not challenge defendant’s right to terminate the modification agreement upon their default, they assert that the \$2,910 monthly payment prescribed in the loan modification included an amount for real estate taxes, namely, \$604.45 (\$2,910 [monthly payment] minus \$2,305.55 [principal & interest portion]). Defendant’s response is equivocal. At the trial level, defendant claimed that plaintiffs’ \$2,910 modified payments “did not include any portion for escrow and thus, the county taxes went unpaid resulting in a default.” On appeal, defendant denies that it “foreclosed because of a \$10,000 tax shortage.” Rather, defendant notes that the facts “are not

revealed by the current record.” According to defendant’s reply brief, plaintiffs “were three months behind on the payments due under their loan modification. In addition, they had accrued late fees and had a negative escrow balance. The \$10,539.15 arrearage stated in [defendant’s] September 2010 Notice of Intent to Accelerate . . . was comprised of those amounts. It was not a tax arrearage” Considering the contradictory arguments offered by defendant at the trial level and on appeal, it appears that there is a defect in the complaint which may be corrected via amendment.

What the evidentiary facts will turn out to be, we do not know. But on demurrer, that is not our issue. “[I]t is well settled that a general demurrer admits the truth of all material factual allegations in the complaint [citation]; that the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court [citations]; and that plaintiff need only plead facts showing that he may be entitled to some relief [citation].” (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.)

While not pled with crispness, plaintiffs’ complaint, in essence, states a cause of action for specific performance of a written contract. As such, the court erred in not giving plaintiffs the opportunity to amend this cause of action.

B. Promissory Estoppel

Plaintiffs fail to state a claim for promissory estoppel. According to the complaint, defendant “agreed to cancel the trustee sale and to completely *review* the status of PLAINTIFFS’ 2009 loan MODIFICATION.” (Italics added.) Plaintiffs added that defendant’s counsel “specifically and unambiguously represented to

PLAINTIFFS . . . that [defendant] *would review* the 2009 MODIFICATION and that while *reviewing* that MODIFICATION would not foreclose on PLAINTIFFS' HOME.” (Italics added.) Plaintiffs reiterate this assertion on appeal. However, it appears from the allegations in the complaint that defendant did just that, i.e., review the modification and refrain from foreclosing on plaintiffs’ home until that review was complete.

Promissory estoppel does not lie where the promisor has not broken his promise. It applies when an injustice arising from reliance and action upon a promise can be avoided only by enforcing the promise. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) Defendant never promised plaintiffs to resolve the issue of the alleged deficiency. Instead, defendant promised to review the modification and not foreclose on plaintiffs’ home while conducting such review.³ Nothing in the complaint establishes that plaintiffs did not receive the benefit of defendant’s promises. No foreclosure was initiated while a review was conducted. Plaintiffs have not met their burden of showing defendant broke any promise.

Moreover, plaintiffs have failed to show how they could meet their burden if given the chance to amend their complaint. (*San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 606.) Accordingly, the trial court did not err in sustaining the demurrer to this cause of action without leave to amend.

³ Plaintiffs admit that, as of the filing of their opening brief on August 28, 2014, they continued to occupy the home.

III. DISPOSITION

The judgment is affirmed in part and reversed in part. The portion of the judgment sustaining defendant’s demurrer to the promissory estoppel cause of action is affirmed. The portion of the judgment sustaining defendant’s demurrer to the breach of contract/specific performance cause of action is reversed. The trial court is directed to allow plaintiffs to file a second amended complaint. The parties shall bear their own costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.