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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CARLOS M. GONZALES et al.,

Plaintiffs and Appellants,

v.

COUNTRYWIDE HOME LOANS, INC. et al.,

Defendants and Respondents.

F061867

(Super. Ct. No. 617314)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl W. Johnson, III, Judge.

Law Offices of Michael Linn and Michael Linn for Plaintiffs and Appellants.

Bardellini, Straw & Cavin, Lee P. Bardellini and Helen V. Powers for Defendants and Respondents.

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Plaintiffs obtained a preliminary injunction, enjoining defendants, Countrywide Home Loans, Inc., Bank of America, Recontrust Company, N.A. (Recontrust), and Mortgage Electronic Registration Systems, Inc. (MERS), from proceeding with a trustee's sale of real property in which plaintiffs claim an interest. The court issued the injunction on condition that plaintiffs make monthly payments of \$1,283.67 to Bank of America during the pendency of the action. Plaintiffs appeal, challenging the condition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are set out in the verified second amended complaint and the declarations submitted in support of and opposition to the motion for preliminary injunction. Plaintiff, Carlos Gonzales, on behalf of himself and plaintiff, Ernestina Valladarez, hired defendant, Erica Burdg (Burdg), a licensed real estate agent and loan officer, to assist him in purchasing and obtaining financing to purchase a residence. On May 18, 2002, Gonzales entered into a written purchase agreement with the sellers, Gary and Kathy Thorne, to purchase a residence for \$155,000. Burdg falsely represented to Gonzales that his loan application had been denied. Burdg recommended to Gonzales that he allow her husband, David Burdg (David), to be substituted into the contract as a "co-buyer" so that Gonzales could qualify for a loan; Gonzales would be responsible for paying the down payment and the monthly mortgage payments. Burdg also promised that, once Gonzales recovered from a temporary work disability, she would help him obtain a replacement loan to retire David's loan; at that time, David would promptly transfer title to the property to Gonzales. Gonzales delivered a check for approximately \$22,000 to David for the down payment. He made monthly payments of \$1,283.67 to the lender or David until June 2005.

Burdg and her associates used forged documents to obtain a loan for David. David took title to the property. Gonzales and his family took possession on July 15, 2002, and have continued in possession to the present. In June 2005, Gonzales requested

that the Burdgs transfer title to the property to him. They refused, claiming plaintiffs were tenants, held no legal interest in the property, and would be evicted if they did not continue to pay \$1,283.67 per month in rent.

In September 2005, the Burdgs sold the property to Burdg's son, Carlos Obando, Jr.; Obando obtained a loan of \$292,500 from Platinum Capital Group for the purchase. At some point prior to September 25, 2005, the Burdgs filed an unlawful detainer action against plaintiffs, based on a fake monthly rental agreement. On September 27, 2005, plaintiffs filed an action against the Burdgs for fraud and to quiet title; they recorded a notice of pendency of action. The Burdgs cross-complained against plaintiffs for ejectment and waste. The two actions were consolidated; the fraud complaint and the cross-complaint were dismissed prior to trial; the unlawful detainer action was tried and resulted in a November 30, 2006, judgment that the Burdgs were not entitled to possession of the property.

On November 1, 2006, the Platinum Capital note was paid off when Obando refinanced with a new loan from Decision One Mortgage Company, LLC (Decision One). Decision One encumbered the property with two trust deeds. Countrywide purchased one of the Decision One notes for about \$288,000.

In January 2007, Obando stopped making the payments on the loans. On May 2, 2007, Countrywide, operating as Recontrust, issued a notice of default and election to sell the real property in a trustee's sale. On July 24, 2007, plaintiffs filed the complaint in this action; the current pleading, the second amended complaint, alleges ten causes of action, including fraud, declaratory relief, and quiet title. On August 9, 2007, plaintiffs sought a temporary restraining order to prevent the trustee's sale of the property. The court issued a temporary restraining order, but denied the motion for a preliminary injunction. In July 2008, the Burdgs commenced bankruptcy proceedings.

On August 10, 2010, Countrywide again recorded a notice of trustee's sale. After obtaining a temporary restraining order, plaintiffs moved for a preliminary injunction.

On December 9, 2010, the court granted the motion, enjoining the trustee's sale, but conditioning the order on plaintiffs' payment of \$1,283.67 per month to Countrywide's successor in interest, Bank of America. Plaintiffs appeal from that order, challenging the payment condition.

DISCUSSION

I. Appealability

Defendants, Countrywide, Recontrust, MERS, and Bank of America (collectively Countrywide) contend plaintiffs are challenging only the aspect of the preliminary injunction order requiring them to make payments to Countrywide in order to continue the injunction. Countrywide asserts the portion of the order imposing conditions on issuance of the preliminary injunction is not separately appealable. Where a judgment or order is severable, however, a party may appeal from a distinct and independent part of the judgment or order, without affecting the finality of the remainder. (*Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 804-806.) “[In] order to be severable, and therefore [separately] appealable, any determination of the issues so settled by the judgment ... must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed.... Perhaps another way of saying it would be that the judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as a result of an appeal cannot affect the determination of the remaining issues of the suit...” [Citation.]” (*Id.* at p. 806.)

The notice of appeal indicates plaintiffs appealed from the order granting the preliminary injunction on conditions. An order granting a preliminary injunction is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) Plaintiffs' briefs present arguments challenging the portion of that order imposing a payment condition, the only portion of the order that is adverse to plaintiffs' interests. The portion of the order imposing a payment condition may be affirmed or reversed without affecting the remainder of the

preliminary injunction order. Thus, it is severable. We reject Countrywide's contention that an appealable order is lacking.

II. Standard of Review

“Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. [Citations.]” (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) “Discretion is abused when a court exceeds the bounds of reason or contravenes uncontradicted evidence. [Citation.]’ [Citation.]” (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402.) In granting a preliminary injunction, the trial court may impose terms and conditions designed to prevent prejudice to the enjoined party. (*Bennett v. Lew* (1984) 151 Cal.App.3d 1177, 1186; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶¶ 9:672 to 9:674, p. 9(II)-42 (rev. #1, 2010).)

III. Equitable Estoppel

Plaintiffs contend Countrywide should be equitably estopped, under the doctrine of election of remedies, from obtaining payments from plaintiffs because Obando has been ordered to make restitution to Countrywide in the criminal proceeding in which he pled nolo contendere to offenses arising out of the transactions alleged in this case. Plaintiffs assert that, if they are required to make payments to Countrywide in order to maintain the preliminary injunction, Countrywide will obtain a double recovery for its loss.

The record contains no restitution order. Plaintiffs assert the order was entered on July 22, 2011, five months after their notice of appeal was filed. “It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] This rule preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation.

However, the rule is somewhat flexible; courts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment [citations] or when subsequent events have caused issues to become moot [citation].” (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.) Plaintiffs do not ask the court to consider a post-order change in legislation or an event that would cause their challenge to the order to become moot. Rather, they are asking this court to consider a subsequent order in a related criminal proceeding that they contend would create error in the preliminary injunction order issued in this case. This is inappropriate.

Additionally, plaintiffs attempt to place the restitution order before the court by means of a request for judicial notice. That request, however, is made in their opening brief. A request for judicial notice must be made in a separate motion. (Cal. Rules of Court, rule 8.252(a).) Placing such a request in an appellate brief is insufficient (*Canal Ins. Co. v. Tackett* (2004) 117 Cal.App.4th 239, 243), and we decline to consider it.

Plaintiffs did file a separate motion for judicial notice, requesting notice of several documents, including the July 22, 2011, minute order in the criminal action against Obando, which reflects his plea of nolo contendere to certain criminal charges and includes a restitution order. The motion was filed after plaintiffs’ reply brief was filed, and specifically states it is made in support of the reply brief’s argument that Bank of America was not a bona fide encumbrancer for value. Plaintiffs’ separate motion is made “on the grounds that the documents assist in proving that Bank of America as successor to Countrywide Home Loans, Inc. is not a bona fide encumbrancer for value.” Judicial notice is not requested in order to demonstrate that the order conditioning the preliminary injunction on plaintiffs’ payments to Countrywide will result in a double recovery by Countrywide because of the restitution order. Further, plaintiffs’ motion for judicial notice states: “Since the banks are not [bona fide purchasers] and they were always aware that Obando, Jr. was not an ‘owner-occupier’ ab initio, it appears likely that the ‘victim restitution’ as ordered by the criminal division trial court will never actually have

to be paid by Obando, Jr. This is because [the] banks were unindicted co-conspirators who knowingly and wrongfully encumbered the home.” By their own admission, then, it is unlikely the restitution order will result in a double recovery. We also note that the minute order proffered by plaintiffs does not reflect any amount to be paid, nor does it specify to whom restitution is to be made.

Because there is no restitution order properly before this court to support plaintiffs’ argument, plaintiffs have not met their burden of establishing error in the challenged order on this ground. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 (*Pietak*).

IV. Bona Fide Encumbrancer

Plaintiffs argue they are “vendees in possession” of the property, and their interest in the property takes priority over Countrywide’s lien because Countrywide was not a good faith encumbrancer for value without notice of plaintiffs’ interest. Plaintiffs do not explain how this priority excuses them from being required to pay Countrywide for their possession of the property during the pendency of this action. “The burden of affirmatively demonstrating error is on the appellant.” (*Pietak, supra*, 90 Cal.App.4th at p. 610.) “This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.)

Plaintiffs assert: “Either Gonzales has a priority and he is entitled to exercise his rights under his May 18, 2002 executory contract exclusive of the rights of Countrywide Home Loans Inc. et al. or he does not have a priority.” Plaintiffs fail to discuss their obligations under the purchase contract. They concede in their second amended complaint and in their brief that they entered into a binding contract with the Thornes to purchase the residence for a specified price. They hired Burd to assist them in obtaining

financing; she represented they did not qualify for a loan and recommended that David be added to the transaction and obtain the loan. She promised that, when Gonzales began working again, she would help him obtain a loan to replace David's, and David would convey title to Gonzales. Plaintiffs apparently agreed to this arrangement, because they made a down payment by a check payable to David; they made monthly payments of \$1,283.67 until June 2005, and smaller payments until September 2005. Through refinancing and the sale of the property to Obando, the loan obtained by David was replaced with loans by Decision One; Countrywide purchased a Decision One note.

Plaintiffs do not claim they were unaware that David obtained a loan in order to finance their purchase of the property. They do not deny that they have received the benefit of that loan, at least to the extent that it enabled them to gain possession of the property and make a colorable claim of ownership. They do not seem to dispute that they are obligated to pay for the property in accordance with their contract for its purchase, although the details of that obligation may be currently unclear. They concede that they have paid nothing - either in loan payments or in rent - for their possession of the property for more than six years. They have identified no evidence in the record and made no argument demonstrating either that it is inequitable to require them to pay or that the amount ordered by the trial court was excessive. Plaintiffs cite no authorities establishing that, because of their claimed priority of interest, they are excused from making payments to purchase or retain possession of the property. Plaintiffs have not met their burden of demonstrating prejudicial error in the trial court's order.

V. Bankruptcy Stay

Plaintiffs contend both the order granting the preliminary injunction and Countrywide's efforts to conduct a trustee's sale violate the automatic stay in the Burdgs' bankruptcy proceeding. As plaintiffs note, the automatic bankruptcy stay (11 U.S.C. § 362) "generally prevents creditors (and other parties) from taking most actions against property of the bankruptcy estate, the debtor, and the debtor's property." (March et al.,

Cal. Practice Guide: Bankruptcy (The Rutter Group 2011) ¶ 8:1.) The debtors in the bankruptcy notice cited by plaintiffs are Erica and David Burdgs; the notice was filed in 2008.

The order plaintiffs challenge in this appeal requires them to make monthly payments to Countrywide. Plaintiffs are not the bankruptcy debtors; the money they are required to pay is not property of the debtor or the bankruptcy estate. Plaintiffs point to no evidence in the record that their residence is being claimed by the Burdgs as property of the estate. The automatic bankruptcy stay “does not apply to property in which the debtor’s interest was completely extinguished *before* the case was filed.” (March et al., Cal. Practice Guide: Bankruptcy, *supra*, ¶ 8:790.) According to plaintiffs, the Burdgs sold the property to Obando in September 2005, almost two years before the bankruptcy filing, and they no longer hold any interest in it. Consequently, plaintiffs have failed to establish that the challenged order violates the automatic stay in the Burdgs’ bankruptcy proceeding.

VI. Amount of Payments

Plaintiffs contend there was insufficient evidence to support the amount the court ordered them to pay to Countrywide in order to continue the preliminary injunction. When a preliminary injunction is sought to prevent a trustee’s sale of real property, the injunction is “frequently granted, but on *conditions designed to prevent prejudice to the defendant*. The common conditions are payment of amounts not in dispute, continuing payments during litigation, keeping prior liens out of default, paying taxes and insurance, and waiving any claim that accepting payments pursuant to the conditions waives the default.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 9:674, p. 9(II)-42 (rev. #1, 2010).) The trial court’s order was consistent with plaintiffs’ position in the litigation: that they purchased the property, financed by a loan obtained through David; the monthly payments on that loan were \$1,283.67. The trial court ordered plaintiffs to pay the same amount they paid monthly without dispute during the

first three years after they contracted to buy the property. Plaintiffs have pointed to nothing in the record that indicates the amount was unreasonable. Plaintiffs have not demonstrated an abuse of the trial court's discretion.

VII. Ownership of Promissory Note

Plaintiffs assert that, “[b]ecause [defendants] failed to offer any admissible evidence that they own the promissory note underlying the trust deed encumbering [plaintiffs’] residence, they are not entitled to receive monies from [plaintiffs].” The authorities they cite do not support this point. One case (*Ferguson v. Avelo Mortgage, LLC* (2011) 195 Cal.App.4th 1618) was depublished shortly after their brief was filed. The other case, *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149 (*Gomes*), held that the trustor under a deed of trust cannot state a valid cause of action to determine whether the person or entity initiating a nonjudicial foreclosure has been authorized to do so by the trustee, mortgagee, or beneficiary. The statutory scheme governing nonjudicial foreclosures did not provide for a judicial action to make that determination and “[t]he recognition of the right to bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.” (*Id.* at p. 1155.) The court noted that the plaintiff had not asserted any factual basis for believing the party that initiated the foreclosure proceedings was not authorized to do so. (*Id.* at p. 1156.) *Gomes* did not address conditions that may be imposed on the issuance of a preliminary injunction enjoining the nonjudicial foreclosure.

Plaintiffs assert that Recontrust recorded the May 7, 2007, notice of default before it recorded the substitution of trustee that designated Recontrust as the new trustee under the deed of trust. They seem to suggest this is evidence of Countrywide’s lack of ownership of the promissory note secured by the deed of trust. They fail to explain how the belated recordation of the substitution of trustee (which plaintiffs concede bears a

date prior to the recording of the notice of default) indicates the beneficiary's ownership of the note is in doubt. Plaintiffs' argument does not demonstrate an abuse of discretion by the trial court.

VIII. Defects in Notice of Default

Plaintiffs argue in their reply brief that the notice of default was defective and therefore the order imposing conditions on the preliminary injunction should be reversed. "It is elementary that points raised for the first time in a reply brief are not considered by the court. [Citation.]" (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) We decline to consider this argument.

IX. Sanctions

Countrywide requests sanctions against plaintiffs for filing a frivolous appeal. Countrywide has not filed a separate sanctions motion as required by California Rules of Court, rule 8.276. Its only request is made in respondents' brief. Sanctions cannot be sought in a respondent's brief. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919.) The request for sanctions is denied.

DISPOSITION

The injunction order is affirmed. Defendants are awarded their costs on appeal.¹

Kane, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.

¹ We deny plaintiffs' December 20, 2011, motion for judicial notice of documents they contend support the argument that Countrywide was not a bona fide encumbrancer for value without notice, on the ground the documents are irrelevant to our decision. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6 [judicial notice cannot be taken of any matter that is irrelevant].) Our discussion concludes that, even assuming Countrywide was not a bona fide encumbrancer for value without notice, plaintiffs have not demonstrated any abuse of discretion in the trial court's conditional order.