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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA BARBEE,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Respondents.

G050065

(Super. Ct. No. CIVRS1108255)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Janet M. Frangie, Judge. Affirmed.

Law Offices of Robert F. Schauer, Robert F. Schauer and Michael J. Libutti
for Plaintiff and Appellant.

McGuireWoods and Leslie M. Werlin for Defendants and Respondents.

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Plaintiff Linda Barbee appeals from the judgment following a demurrer sustained without leave to amend on her third amended complaint. Barbee sued Bank of America for itself and as successor to BAC Home Loans Servicing (BAC),¹ ReconTrust Company, N.A. (ReconTrust) and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively defendants), for cancellation of written instrument, wrongful foreclosure, and quiet title, all relating to defendants' handling of Barbee's default on the loan. The trial court determined that despite multiple attempts, Barbee had failed to state a viable cause of action. We agree and affirm.

I

FACTS AND PROCEDURAL HISTORY

We draw the facts from the complaints, the attached exhibits, and documents judicially noticed by the trial court. In April 2008, Barbee obtained a real estate loan from a company called TMG Financial Services, Inc. for \$800,000. The loan was secured by a deed of trust on certain real property in Upland (the property), and United Title Company was listed as the trustee. The deed of trust listed MERS as a beneficiary and as a nominee for the lender and its successors and assigns. In November 2009, Barbee defaulted on the loan.

On February 17, 2010, a document was signed transferring MERS's beneficial interest to BAC and substituting ReconTrust as trustee (the first assignment). The first assignment was recorded on March 16.

Also signed on February 17, ReconTrust, "as an agent for the Beneficiary," executed a notice of default and intent to sell Barbee's property. This document, recorded on February 19, warned Barbee that she was \$17,442.71 behind on her payments, an amount which would increase unless her payments became current.

¹ BAC was formerly known as Countrywide.

On June 30, MERS recorded another assignment (the second assignment), recorded on July 9, transferring beneficial interest in the property to BAC. On November 5, ReconTrust recorded a notice of trustee's sale. No sale has been conducted.

Barbee filed her original complaint in September 2011, alleging claims for breach of contract, fraud, quiet title and injunctive relief. Defendants demurred, arguing the complaint failed to state facts sufficient to constitute a cause of action. Rather than oppose, Barbee filed a first amended complaint while the demurrer was pending. The first amended complaint alleged the same claims and appears quite similar from a substantive point of view. Defendants again demurred, and the court sustained the demurrer without leave to amend on the breach of contract claim, but gave leave to amend on the fraud and quiet title causes of action.

Barbee filed her second amended complaint in April 2012, alleging claims for cancellation of written instrument, fraud, wrongful foreclosure, and quiet title. Defendants again demurred. The court sustained without leave to amend the fraud claim, and sustained and granted leave to amend on the remaining claims.

In July 2012, Barbee filed her third amended complaint and numerous exhibits. The third amended complaint is the operative complaint for purposes of this appeal. She alleged causes of action for cancellation of written instrument, wrongful foreclosure, and quiet title. In support of her first claim, Barbee alleged the signature on the February 2010 assignment from MERS to ReconTrust was forged. Therefore, she asserts the assignment was void, and ReconTrust could not conduct a valid foreclosure action. With respect to wrongful foreclosure, she alleged defendants violated Civil Code section 2923.5, subdivision (a)(1), which requires mortgagees or their agents to contact the borrower, assess their financial situation, and explore options to avoid foreclosure. She claimed this was not done correctly or in good faith, and therefore the notice of default was void. Finally, in her quiet title claim, she alleged that because the assignment was a forgery, ReconTrust was never trustee the purported transfer of a beneficial interest

to BAC was also void. Further, no sale was held within 365 days from filing the notice of default, and therefore a new notice must be recorded prior to any sale under Civil Code section 2924g, subdivision (c)(2).

Defendants filed another demurrer, offering several arguments which we shall explore in more depth below, along with a request for judicial notice of several documents. The court granted the request for judicial notice and concluded Barbee had failed to state a cause of action on any of her claims. The demurrer was sustained without leave to amend and judgment was granted in favor of defendants. Barbee now appeals.

II

DISCUSSION

A. *Standard of Review*

“In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. [Citation.] We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. [Citation.]” (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) We may also consider matters which may be judicially noticed when deciding a demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. [Citation.] We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained. [Citation.]” (*Intengan v. BAC Home Loans Servicing LP, supra*, 214 Cal.App.4th at p. 1052.)

When a demurrer 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, supra*, 39 Cal.3d at p. 318.) Barbee only offers arguments as to why the demurrer should not have been sustained as to claims in her third amended complaint — cancellation of written instrument, wrongful foreclosure, and quiet title.

B. Cancellation of Written Instrument

Barbee argues that under Civil Code sections 1572 and 1573, actual and constructive fraud, that the first assignment should be voided by the court. Her argument is premised on the claim that the assignment was a forgery. Therefore, she claims ReconTrust was not effectively substituted as trustee and could not conduct any foreclosure actions.

The court found the allegations of forgery “not significant.” “In the first place, the Notice of Default which set in motion the foreclosure process in this action was executed by ReconTrust Company, as the *agent for the beneficiary*, and not as a trustee. If this Assignment was in fact void, [MERS] remained the beneficiary under the subject Deed of Trust. There is no evidence that ReconTrust could not act in this capacity and the presumption in a nonjudicial foreclosure sale is that it is presumed to have been conducted regularly. [Citation.] [¶] Secondly, a Second Assignment Deed of Trust was recorded on July 9, 2010 (prior to the foreclosure sale) making ReconTrust Company the duly authorized trustee. Importantly, Plaintiff does not challenge the second assignment on any basis. In is ReconTrust Company who conducted the foreclosure sale and recorded the Notice of Trustee’s Sale on November 5, 2010. Therefore, even assuming Plaintiff has standing to challenge the validity of the first assignment, the existence of the

second assignment and ReconTrust's actions as agent for the beneficiary would make moot any third party challenge to the first assignment."

We must agree. First, the third amended complaint asserts on its face that the signature on the first assignment is a forgery, and alleges that evidence exists to prove this. This evidence, however, is not attached as an exhibit, but the document itself is. That document includes a notary's acknowledgment that the person who signed the document is the same person who appeared before them. The acknowledgment "is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed" (Evid. Code, § 1451.) Facts appearing in attached exhibits are given precedence over inconsistent allegations in the complaint. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) Without actual evidence of forgery, Barbee's allegation is defeated by the legal presumption to which the acknowledged first assignment is entitled. Barbee also lacks standing to challenge the validity of the document as a third party without substantive rights in the contract. (*Killian v. Milliard* (1991) 228 Cal.App.3d 1601, 1605.)

Second, as the trial court concluded, ReconTrust executed the notice of default as agent of the beneficiary, not as trustee. An agent is specifically authorized to record a notice of default. (Civ. Code, § 2924, subd. (a)(1); *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1009-1010.)

Third, and as the trial court also suggested, Barbee does not and cannot allege any direct injury or prejudice as a result of the alleged defect in the first assignment. The second, unchallenged assignment was recorded shortly after the first, well in advance of the November notice of trustee's sale. The second assignment completely moots any argument regarding ReconTrust's standing to act in this capacity. With respect to the notice of sale, recorded in November 2012, any controversy regarding it is moot, as a new notice of sale would need to be recorded at this point due to the long

delay. (Civ. Code, § 2924g, subd.(c)(2) [new notice of sale required if foreclosure sale postponed more than 365 days].)

C. Wrongful Foreclosure

In this cause of action, Barbee alleges facts concerning the purportedly improper notice of default and notice of sale, and noncompliance with Civil Code section 2923.5.

Her arguments regarding the notice of default and notice of sale are again premised on the notion the first assignment was a forgery, and for the same reasons as above, the trial court properly rejected them.

With respect to Civil Code section 2923.5, subdivision (a)(2) requires a lender to contact the borrower in person or by telephone to “assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” Subdivision (b) of that section requires a default notice to include a declaration of compliance. Barbee alleges none of the defendants assessed her situation “correctly or in good faith” prior to filing the notice of default, and it is therefore void. This argument is moot because there is no current notice of sale, or an allegation that a foreclosure sale is pending. The only remedy available under Civil Code section 2923.5 is a postponement of an impending foreclosure to permit compliance. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214.) Thus, Barbee has failed to state a claim for wrongful foreclosure.

D. Quiet Title

In this cause of action, Barbee essentially restates the allegations of her other claims — the first assignment is a forgery and the notice of default and notice of sale are void. She also correctly notes that because no foreclosure sale occurred within 365 days of filing the notice of default, a new notice must be filed before any sale can take place. She therefore asks a court for a determination these documents are void, and

her “fee simple title through the Grant Deed is superior . . . to these other recorded instruments.”

This is not actually an attempt to quiet title. The only cloud on the title is the deed of trust, and she does not attack it. This is simply another attempt to seek cancellation of the first assignment, which we reject for the same reasons discussed above. There is no dispute the November 2012 notice of default may not be used to conduct a sale at this late date, and in the unlikely event that is attempted, appropriate relief can be sought at that time.

Barbee does not offer any argument that any of her claims can be saved by further amendment. The demurrer was therefore properly sustained without leave to amend.

III

DISPOSITION

The judgment is affirmed. In the interests of justice, each party shall bear its own costs on appeal.

MOORE, J.

WE CONCUR:

O’LEARY, P. J.

THOMPSON, J.