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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY NATIONAL BANK,

Plaintiff and Respondent,

v.

JEFFREY S. SUSA et al.,

Defendants and Appellants.

G050459

(Super. Ct. No. 30-2013-00646250)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Reversed and remanded.

Stutz Artiano Shinoff & Holtz and Paul V. Carelli, IV, for Defendants and Appellants.

Office of the General Counsel of City National Bank, Amy Lerner Hill, and Gail B. Greenberg for Plaintiff and Respondent.

* * *

City National Bank (the Bank) moved for summary judgment in its action against Jeffrey S. Susa and Jill Susa (the Susas)¹ for fraudulent transfer of a deed of trust.² The court granted the Bank's motion and voided the deed of trust, even though the Bank had failed to join as a defendant the beneficiary of the deed of trust.

The court erred by voiding the trust beneficiary's security interest without giving the trust beneficiary an opportunity to protect its interest. We therefore reverse the judgment and remand the case to the trial court. On remand, the court shall grant the Bank leave to amend its complaint by naming the trust beneficiary as a defendant.

FACTS

On April 29, 2013, the Bank filed a complaint against the Susas, alleging a cause of action for fraudulent transfer of a security interest. The Bank prayed for, *inter alia*, a judgment "avoiding the Deed of Trust and Security Interest."

The complaint alleged the following: The Bank has a July 2011 Nevada judgment against Jeffrey and other defendants for around \$2.6 million plus interest and costs (the Nevada judgment). In March 2012, the Bank domesticated the Nevada judgment as a California judgment. The Susas own a house in Laguna Beach (the House). Shortly after the Bank began proceedings to domesticate the Nevada judgment in California, the Susas created a security interest in the House in the amount of \$850,000 by executing a deed of trust in favor of the Breslin Trust and Walter Breslin (the Deed of Trust).

¹ For convenience and to avoid confusion, we refer to the Susas individually by their first names. We mean no disrespect.

² The word "transfer" as used in this opinion is defined in Civil Code section 3439.01, subdivision (i) as the "creation of a lien or other encumbrance."

The Deed of Trust was attached as an exhibit to the Bank's complaint. The Deed of Trust identifies the Susas as the trustor, "The Breslin Trust, Walt Breslin and Jean Breslin, Trustees" as the beneficiary,³ and "First American Title Company" as the trustee. The Deed of Trust states it secures payment of \$850,000 with interest thereon "according to the terms of a promissory note or notes of even date herewith made to [sic] Trustor, payable to order of Beneficiary, . . . (2) the performance of each agreement of Trustor incorporated by reference or contained [in the Deed of Trust,] and (3) payment of additional sums . . . which may hereafter be loaned to Trustor . . . when evidenced by a promissory note . . . secured by this Deed of Trust."

The Susas' answer alleged the affirmative defense that the Bank had "failed to join parties necessary to a final determination of the issues presented by the Complaint, thereby potentially subjecting the Answering Defendant to a multiplicity of lawsuits."⁴

The Bank moved for summary judgment.

The Susas opposed the Bank's summary judgment motion, arguing, *inter alia*, the Breslin Trust was a necessary party to the action. The Susas' separate statement did not dispute, *inter alia*, the following facts: "Walter Breslin is the father of Jack Breslin, Jeffrey's business partner and co-judgment debtor on the Nevada and California Judgments." "At the time [the Susas] executed and recorded the Deed of Trust, they were not indebted to the Breslin Trust." "No new loan or note was executed between the [Susas] and The Breslin Trust in connection with the Deed of Trust transaction."⁵

³ The Bank contends Jean Breslin was deceased at the time the Susas executed the Deed of Trust.

⁴ Jeffrey and Jill filed separate answers, but both alleged as an affirmative defense that the Bank had failed to join necessary parties.

⁵ The Breslin Trust is alternatively referred to in the record and in the parties' appellate briefs as "the Breslin Trust" and "The Breslin Trust." It is not to be confused with the Breslin Family Trust, of which Jack and Julie Breslin are the trustees and which is a cojudgment debtor in the Nevada judgment.

In the Bank's reply to the Susas' opposition to summary judgment, the Bank argued that, even without the Breslin Trust as a party to the action, the court could make a binding adjudication between the parties before it. The Bank further argued that because "the Deed of Trust states that it secures an obligation [the Susas] concede does not exist, . . . the Deed of Trust was void at its inception." The Bank concluded the court could "determine the bona fides of the Deed of Trust transaction in the absence of The Breslin Trust." The Bank also asserted that, prior to filing its summary judgment motion, it had provided the Susas' counsel "with a proposed stipulation to amend the complaint to add Walt Breslin, Trustee of The Breslin Trust as a defendant," but the Susas' counsel never signed the stipulation. Finally, the Bank requested that, if the court believed it was necessary for the Breslin Trust to be a defendant in order for the court to grant the Bank's summary judgment motion, the court (1) grant the Bank leave to amend its complaint to add Walter Breslin, as trustee of the Breslin Trust, as a defendant, and (2) order ancillary relief such as continuing the summary judgment hearing and the mandatory settlement and trial dates to allow Walter Breslin to appear and defend the action.

The court granted the Bank's summary judgment motion and entered judgment in favor of the Bank "based on a finding that the Deed of Trust . . . is a nullity and was void at its inception because it does not secure any existing, underlying obligation and constitutes a fraudulent transfer."

DISCUSSION

The Court Erred by Voiding the Deed of Trust Despite the Breslin Trust's Nonjoinder as a Defendant

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A plaintiff moving

for summary judgment bears the burden of persuasion that each element of the cause of action has been proved, and there is no defense thereto. (*Ibid.*) An appellate court independently reviews a trial court's grant of a summary judgment motion. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.)

The Susas contend the judgment must be reversed because Walter Breslin, as trustee of the Breslin Trust, was an indispensable party. They argue the beneficiary of a deed of trust is a necessary party in an action to void the trust deed as fraudulent, because the relief sought by the plaintiff necessarily impairs the beneficiary's rights.

The Bank disagrees, arguing the court properly ruled the Breslin Trust was not an indispensable party because the Deed of Trust "was void at its inception [so that] no interest in Walt Breslin or The Breslin Trust ever arose." The Bank explains: "The record demonstrates that pursuant to its express terms, the deed of trust at issue in this case purports to secure an obligation that [the Susas] concede does not exist and thus was void *ab initio*."

But, although *the Susas* may have conceded the nonexistence of the promissory note referenced in the Deed of Trust, *the Breslin Trust* has made no such concession (nor has it been heard from at all, due to its nonjoinder as a defendant). Theoretically, a secured lender has a far greater interest in preventing the voiding of its security interest than does the debtor/borrower.⁶ The Bank put "the cart before the horse" by asking the court to rule the Deed of Trust was void without giving the Breslin Trust an opportunity to be heard. (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1300.) Had the Breslin Trust been joined as a defendant, it might have produced the underlying promissory note described in the Deed of Trust or it might have demonstrated it took the Deed of Trust "in good faith and for a reasonably equivalent value" (Civ. Code, § 3439.08, subd. (a)).

⁶ For this reason, we reject the Bank's contention the Susas adequately represented and defended below the Breslin Trust's interest in the Deed of Trust.

Whether joinder of a trust deed beneficiary should be viewed as permissive, as opposed to compulsory, depends on the remedy sought by the plaintiff in the fraudulent conveyance action. (*Diamond Heights Village Assn, Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 304.) Here, because the relief sought by the Bank was avoidance of the Deed of Trust, the governing statute in this case is Code of Civil Procedure section 389, which concerns compulsory joinder and indispensable parties, rather than Code of Civil Procedure section 379, which concerns permissive joinder of defendants. This conclusion is dictated by the plain language of Code of Civil Procedure section 389, subdivision (a), which provides: “A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.”

The Bank has never asserted the Breslin Trust was not subject to service of process or that the Breslin Trust’s joinder would deprive the court of subject matter jurisdiction. Under both prongs of Code of Civil Procedure section 389, subdivision (a), the Breslin Trust was an indispensable party. Given that the Bank sought the avoidance of the Deed of Trust, complete relief could not be accorded without the joinder of the Breslin Trust as a defendant, and in its absence, the Breslin Trust’s ability to protect its security interest was impeded. (*Ibid.*)

“The controlling test for determining whether a person is an indispensable party is, “Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. [Citation.]” [Citation.] More recently, the same rule is stated, “A person is an indispensable party if his or her rights must necessarily be affected by the judgment. [Citations.]” [Citation.]” (*Tracy Press, Inc. v. Superior Court, supra*, 164 Cal.App.4th 1290, 1298.) More specifically, it has long been “the general rule that beneficiaries are necessary parties to an action affecting the security of the deed of trust.” (*Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 461.)

Finally, the Bank argues that, because the Susas failed to “follow through with their agreement” to stipulate to the addition of the Breslin Trust as a defendant in this case, equity demands that the Susas cannot now complain about the nonjoinder of the Breslin Trust. At issue here, however, is not fairness to the Susas, but rather fairness to the Breslin Trust.

Accordingly, the court abused its discretion by voiding the Deed of Trust despite the nonjoinder of the Breslin Trust as a defendant. (*Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 568 [court’s ruling on whether party is indispensable reviewed for abuse of discretion].)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court. On remand, the court shall grant the Bank leave to amend its complaint by naming the Breslin Trust as a defendant. Defendants shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.