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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEBRA M. HEURLIN, Plaintiff and Appellant, v. CITIMORTGAGE, INC., et al., Defendants and Respondents.	G052226 (Super. Ct. No. 30-2010-00411242) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Motion to dismiss appeal. Motion denied. Order affirmed.

Debra M. Heurlin, in pro. per., for Plaintiff and Appellant.

Locke Lord and Nina Huerta for Defendants and Respondents.

* * *

Plaintiff Debra M. Heurlin appeals from an order granting the motion of defendants CitiMortgage, Inc. (CitiMortgage) and Citibank, N.A. to dissolve a preliminary injunction enjoining them from foreclosing on plaintiff's real property. Plaintiff contends the declaration defendants proffered in support of the motion was defective because it lacked foundation and was comprised of hearsay, and thus the court should have sustained her objections. As a result, she argues, there was no evidence supporting defendants' motion. She also argues the notice of motion was defective, another ground for barring defendants' requested relief.

After briefing was completed, defendants filed a motion to dismiss the appeal as moot. The motion stated the underlying action was dismissed with prejudice as a terminating sanction against plaintiff for failure to comply with discovery. Counsel for defendants filed a declaration setting out these facts and attached copies of the court's tentative ruling and notice of ruling granting the motion to dismiss.

Plaintiff filed an opposition, challenging the underlying motion to dismiss and also arguing the motion to dismiss the appeal is not ripe since the time to appeal from the judgment has not expired. She also argued dismissal of the appeal will have the practical effect of affirming the order on appeal.

Without deciding any of these arguments, we deny the motion. We considered the appeal on the merits and concluded there was sufficient evidence to support the motion to dissolve the injunction and the notice of motion was sufficient. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2010 CitiMortgage recorded a notice of default on the deed of trust on the residence (Real Property) of plaintiff and her husband, John Heurlin, then a party to the action.[1] The Heurlins obtained a temporary restraining order barring defendants from

[1] John Heurlin was subsequently dismissed from the action as a terminating sanction for his failure to appear at his deposition.

foreclosing on the Real Property. Three months later the court issued a preliminary restraining order proscribing sale, without requiring a bond, on condition the Heurlins make timely payments of the mortgage, property taxes, and insurance, effective January 1, 2011. The court also ruled that if any payment was five days late, defendants could move ex parte to vacate the injunction.

In 2015 defendants filed a motion to dissolve the injunction. They submitted a declaration of Karen Brown (Brown) stating the Heurlins had made only nine mortgage payments through September 2011 and had failed to make 44 payments. They also failed to pay insurance and property taxes since at least 2009. CitiMortgage had paid over $25,000 in property taxes and almost $17,000 in insurance since 2010. Plaintiff did not provide any evidence to the contrary.

Instead, their opposition points and authorities stated the Heurlins had "made payments up and through 2012" and again that they had made payments "from October of 2010 through 2012."

The opposition also objected to Brown's declaration on the ground it lacked foundation and consisted entirely of hearsay. The court overruled all of the objections.

After a hearing attended by both parties, the court granted the motion based on the Heurlins' failure to comply with the conditions of the preliminary injunction. It stated defendants had shown the Heurlins failed to make 44 monthly mortgage payments, failed to make any property insurance payments for at least four years, and failed to pay any property taxes since September 2011. It found the Heurlins had failed to proffer any documentary evidence to prove they had made those payments.

DISCUSSION

1. Admissible Evidence

Defendants supported their motion with Brown's declaration. As the foundation for her statements, she stated she was a business operations analyst for CitiMortgage. She testified that in the course of her job she knew CitiMortgage had a

database of loan records of its mortgage customers. Entries in the database were made at the time the events occurred by employees with firsthand knowledge or given to them by people with firsthand knowledge. Brown also testified she knew how the records were maintained, had access to them, and had reviewed them to determine the payments plaintiff made and those missed.

Plaintiff challenges the entire declaration, arguing the court should not have admitted it because it was hearsay and lacked foundation. As a result, she contends, defendants had no evidence to support its motion.

We have no need to address these arguments. Timely payments on the mortgage, as well as for property taxes and insurance, was a condition of the preliminary injunction, and failure to do so was a ground for dissolving it. The Heurlins' admission they had failed to do, but had only made mortgage payments through 2012, by itself was a sufficient ground on which to grant the motion. (*Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1536 [party's statements in opposition papers "reliable indications of his position on the facts" and treated as admissions]; *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 7 [statement in points and authorities was judicial admission].)

Thus, even if Brown's declaration was insufficient, which we do not decide, it makes no difference to the outcome of the motion.

2. Sufficiency of Notice of Motion

The other ground on which plaintiff appeals is the claim the notice of motion to dissolve was insufficient. She contends that, although the notice stated defendants were seeking to dissolve the preliminary injunction, it referred to the date the temporary restraining order was granted, not the date of the preliminary injunction. Plaintiff maintains she was "fully entitled to rely upon the express terms of the notice" in deciding how to draft an opposition. This argument has no merit.

First, the notice refers to the preliminary injunction, both in the caption and in the description of the motion. The opposition specifically acknowledges the Heurlins knew defendants' motion was to dissolve the preliminary injunction. In the first sentence of their points and authorities the Heurlins state they opposed the motion to dissolve or modify the "extant preliminary injunction." And the substance of the opposition confirms this with reference to the preliminary injunction throughout. Further, the temporary restraining order was not even in effect at that time, having been dissolved once the injunction was issued. So this argument is weak at best and could easily be described as nothing more than gamesmanship.

Second, none of the Heurlins' authority supports their claim. They merely set out general authority required to give notice of a motion. Neither Code of Civil Procedure section 1010, California Rules of Court, rule 3.1110 nor the cases plaintiff cites bear out their argument. For example, rule 3.1110(a) states the notice must state "the nature of the order being sought." By explaining it sought to dissolve the preliminary injunction, the notice here complied. Code of Civil Procedure section 1010 requires, among other things, the notice must state "the grounds upon which it will be made." Again, the notice fulfilled this requirement.

Plaintiff's claim strict compliance is required, which may or may not be correct given specific circumstances, certainly does not apply here. At worst the notice contained a minor, technical defect the court could overlook. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1126-1127 [court may disregard failure of notice of motion to state basis for relief when motion and points and authorities clearly show nature of relief requested].) Here, contrary to plaintiff's argument, the misstatement was merely a date and the rest of the notice was quite clear defendants were seeking to dissolve the preliminary injunction.

Third, "In order to obtain a reversal based upon such a procedural flaw, the appellant must demonstrate not only that the notice was defective, but that he or she was

prejudiced. [Citations.] 'Procedural defects which do not affect the substantial rights of the parties do not constitute reversible error.' [Citation.]" (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289.) Plaintiff has not shown any prejudice.

Finally, we reject out of hand plaintiff's new argument, unsupported by authority, that this impinges on procedural due process. We decline to consider this issue raised for the first time in the reply brief. (*Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1387-1388.) In addition, this claim is forfeited for failure to include any statutory or case authority in support. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

DISPOSITION

The motion to dismiss the appeal is denied. The order is affirmed. Defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.