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

AZUCENA BENTAJADO,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants and Respondents.

H036293

(Santa Clara County

Super. Ct. No. CV155303)

Azucena Bentajado appeals a judgment entered following the trial court's grant of respondent Wells Fargo Bank, N.A., et. al.'s demurrer without leave to amend.

Appellant's complaint sought declaratory relief regarding respondent's failure to comply with the notice provisions required by Civil Code, section 2923.5.¹

STATEMENT OF THE FACTS AND CASE

Appellant owns a home in San Jose on which respondent has two secured deeds of trust. The first loan is for \$1,280,000, and the second is for \$146,700. Both loans have adjustable interest rates, and were obtained in May 2007 when the home was valued at \$1.5 million.

Since 2007, appellant's home has decreased in value to approximately \$980,000. Appellant has been in default on her loan obligations since September 2008, when she stopped making payments to respondent.

¹ All further statutory references are to the Civil Code.

Respondent recorded and served a notice of default under the first deed of trust loan on December 22, 2008. Along with the notice of default, respondent included a declaration under penalty of perjury that “[o]ne of the below necessary requirements was met by [respondent]: “[Respondent] has made contact with the borrower pursuant to CA Civil Code 2923.5(a)(2). Contact with the borrower was made in person or by telephone to assess the borrower’s financial situation and explore options to avoid foreclosure. . . .”

The trustee’s sale was set for October 27, 2009 at 10:00 a.m. Appellant filed this lawsuit on October 22, 2009, alleging a single cause of action against respondent. Her suit seeks declaratory relief that respondent failed to comply with section 2923.5,² the declaration accompanying the notice of default was faulty, and any trustee’s sale of appellant’s home would be void.

After filing her complaint, appellant applied for a temporary restraining order preventing the trustee’s sale of her home on the ground that respondent failed to comply with section 2923.5. The court issued the temporary restraining order on October 23, 2009, and set the matter for a hearing on a preliminary injunction.

In December 2009, the court denied appellant’s application for a preliminary injunction, and appellant filed a notice of appeal with this court. This court denied the appeal as moot (H035052).

The trustee sale was postponed several times to March 30, 2010. Prior to the sale date, in March 2010, appellant filed a petition in the United States Bankruptcy Court under Chapter 13 of the Bankruptcy Code.

The trustee’s sale scheduled for March 30, 2010 was automatically stayed as a result of the bankruptcy petition, and will remain in effect until the case is closed or

² Section 2923.5, provides that a trustee may not file a notice of default on a loan obligation until contact is made with the borrower. Specifically, section 2923.5, subdivision (a)(2) provides, in relevant part: “A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.”

dismissed, or appellant is discharged after completing her bankruptcy plan. (See 11 U.S.C. §§ 362, subd. (c)(2), 1328, subd. (a).)

In February 2010, the court sustained respondent's demurrer to the complaint with leave to amend. Appellant filed a first amended complaint on March 9, 2010. In April 2010, respondent filed a demurrer to the first amended complaint. Appellant filed no opposition to the demurrer, but moved for a stay of the action in the trial court based on the bankruptcy proceeding.

The court denied appellant's motion for a stay, and sustained the demurrer without leave to amend.

On October 15, 2010, the court entered judgment in favor of respondent. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant brings this appeal of the judgment entered following the trial court's order sustaining of respondent's demurrer without leave to amend.

On appeal from an order sustaining a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) On appeal, "the plaintiff bears the burden of demonstrating that the trial court erred" in sustaining the demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.)

"If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th at 1074, 1081.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) "Nevertheless,

where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*Ibid.*)

Respondent asserts appellant's complaint fails to state an action for declaratory relief, because the requirements under section 2923.5 do not apply when a borrower seeks bankruptcy protection. Specifically, section 2923.5, subdivision (h)(3) provides: "[s]ubdivisions (a),(c), and (g) shall not apply if any of the following occurs: [¶] . . . [¶] (3) [a] case has been filed by the borrower under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the case, or granting relief from a stay of foreclosure."

Here, appellant filed a petition for bankruptcy protection under Chapter 13 of Title 11 of the United States Code in March 2010, and requested an extension of the automatic stay to all of appellant's creditors. As a result, the trustee sale of his home was postponed until the bankruptcy case is closed or dismissed, or appellant is discharged after completing her bankruptcy plan.³ (See 11 U.S.C. §§ 362, subd. (c)(2), 1328, subd. (a).)

Because section 2923.5 specifically precludes application of its notice provisions to cases in which the borrower has filed for bankruptcy protection, it is inapplicable to the present case. Therefore, appellant's complaint fails to allege grounds for declaratory relief, and respondent's demurrer was properly sustained. Moreover, the court did not abuse its discretion in refusing to grant appellant leave to amend the complaint. Here, because of appellant's bankruptcy petition and the subsequent inapplicability of section 2923.5, there is no "reasonable possibility the defect in the complaint could be cured by

³ Respondent Wells Fargo Bank, N.A. moved for relief from the automatic stay created by the bankruptcy proceedings to file its demurrer and proceed to judgment. The bankruptcy court held, "[a]s long as Wells Fargo pursues no affirmative claims in the state court litigation, no stay under Title 11 of the U.S. Code exists to bar Wells Fargo from defending itself and proceeding to judgment in the state court matter" that is the subject of this appeal. Therefore, although a creditor, respondent was not barred by the automatic stay from filing the demurrer in this case that resulted in judgment against appellant.

amendment” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998)
68 Cal.App.4th 445, 459.)

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.