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

ROBERT N. BASANTY et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA RECONVEYANCE
COMPANY et al.,

Defendants and Respondents.

H036780

(Santa Clara County

Super. Ct. No. CV143233)

I. INTRODUCTION

Appellants Robert N. Basanty, Susana Basanty, and Victoria N. Basanty filed a wrongful foreclosure action against respondents California Reconveyance Company, LaSalle Bank NA, Washington Mutual Bank FA, and JPMorgan Chase Bank NA (hereafter, collectively defendants). The trial court sustained defendants' demurrer to the first amended complaint with 10 days leave to amend. After more than 30 days had passed without appellants filing a second amended complaint, defendants filed a motion to dismiss the first amended complaint under Code of Civil Procedure section 581, subdivision (f)(2).¹ The trial court granted the motion, dismissed the action with prejudice, and entered judgment in favor of defendants.

¹ All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

Appellants contend that the judgment should be reversed because the trial court failed to exercise its discretion when the court dismissed the action under section 581, subdivision (f)(2). For the reasons stated below, we find no merit in plaintiffs' contention and therefore we will affirm the judgment.

II. FACTUAL BACKGROUND

According to the allegations in the verified complaint, in February 2007 plaintiffs Robert N. Basanty and Susana Basanty obtained a construction loan to build a single family dwelling in San Jose. When escrow closed in March 2007, the loan was refinanced with Washington Mutual Bank. The terms of the escrow transaction included conveyance of the title to plaintiff Victoria N. Basanty, Robert's parent. Payments on the loan, which was secured by a deed of trust on the property, were made by Robert and Susana.² A notice of default was recorded on the property in 2008, followed by the recording of a notice of trustee's sale in 2009.

III. PROCEDURAL BACKGROUND

A. The Pleadings

Plaintiffs filed a verified complaint on May 26, 2009, against named defendants California Reconveyance Company, LaSalle Bank NA, Washington Mutual Bank FA, and JPMorgan Chase Bank NA. They asserted a cause of action for declaratory relief regarding the allegedly invalid notice of default and notice of trustee's sale, as well as a cause of action for violation of the federal Truth in Lending Act (15 U.S.C. § 1635(a)). Among other things, plaintiffs sought rescission of the notice of default and notice of trustee' sale.

Defendants demurred to the verified complaint, arguing that plaintiffs had failed to state facts sufficient for the causes of action asserted in the complaint. Plaintiffs

² Since plaintiffs share the same surname, we will refer to them individually by their first names to avoid confusion or collectively as plaintiffs.

responded by filing a first amended verified complaint on June 30, 2010. The first amended complaint included causes of action for “quiet title,” violation of the federal Truth in Lending Act (15 U.S.C § 1635(a)), “common loan fraud,” and unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

Defendants demurred to the first amended complaint, again arguing that plaintiffs had failed to state facts sufficient for the causes of action they asserted. The record reflects that the trial court sustained the demurrer with leave to amend on November 23, 2010.³ The trial court’s order allowed plaintiffs 10 days to file an amended complaint, with a deadline of December 3, 2010. Plaintiffs did not file an amended complaint before the leave period expired.

B. The Motion to Dismiss

Defendants filed a motion to dismiss the first amended complaint under section 581, subdivision (f)(2) on the ground that plaintiffs had failed to file a second amended complaint after the trial court sustained their demurrer on November 23, 2010, with 10 days leave to amend. Defendants stated that a further amended complaint had not been filed as of January 6, 2011, the date the motion to dismiss was filed. They argued that section 581, subdivision (f)(2) authorizes the trial court to dismiss an action where the court has sustained a demurrer with leave to amend and the plaintiff fails to amend the complaint within the time specified by the court.

On February 4, 2011, plaintiffs submitted a second amended complaint that was filed concurrently with their opposition to the motion to dismiss. In their points and authorities, plaintiffs argued that their wrongful foreclosure action was meritorious and it was unlikely that defendants could show any prejudice as a result of the delay in filing the second amended complaint.

³ The record on appeal lacks a copy of a written order sustaining the demurrer to the first amended complaint without leave to amend.

At the hearing on the motion to dismiss held on February 8, 2011, the trial court noted that plaintiffs' opposition to the motion and their amended pleading were both untimely. In response, plaintiffs' counsel explained that the delay was the result of a settlement proposal that plaintiffs had made to the defendant banks. Plaintiffs' counsel stated: "So we have been waiting and waiting and waiting to see if we could resolve the case. And in that interim came in another short sale offer, which we fully documented. . . . So I was hoping the bank this time would accept it, and that's why the opposition came in late. I was waiting for them to act on our settlement proposal. [¶] . . . [¶] So we've delayed hoping we would resolve the case in a manner that would be beneficial to both sides."

After hearing the argument of counsel, the trial court ruled from the bench as follows: "All right. So the demurrer was sustained November 23rd[, 2010]. The deadline for the new pleading was December 3rd[, 2010]. The motion was filed on January 6th[, 2011]. As I mentioned, the opposition was not timely filed. There was an opposition filed on Friday, but there's no evidence at all in the opposition either as to its late filing or the failure to file an amended pleading. [¶] So I think under those circumstances the record does fairly require me to grant the motion."

The trial court's order granting the motion to dismiss "for Plaintiffs' failure to file a further amended complaint" and dismissing the first amended complaint with prejudice was filed on February 9, 2011. Judgment in defendants' favor was entered on February 18, 2011. Thereafter, plaintiffs filed a timely notice of appeal.

IV. DISCUSSION

On appeal, plaintiffs contend that the judgment should be reversed because the trial court failed to exercise its discretion when the court dismissed the action under section 581, subdivision (f)(2). According to plaintiffs, the trial court erred in not recognizing that it had the discretion to excuse plaintiffs' untimely filing of their second amended complaint.

Defendants disagree. They argue that the trial court properly exercised its discretion under section 581, subdivision (f)(2) when, as reflected in the reporter's transcript for the hearing on the motion to dismiss, the trial court gave plaintiffs an opportunity to explain their failure to timely file a further amended complaint and determined that their explanation was not sufficient. Defendants further argue that the trial court did not abuse its discretion because plaintiffs failed to file an amended complaint for more than 30 days after the expiration of the court-ordered leave period on December 3, 2010.

We will begin our evaluation with an overview of the trial court's authority to dismiss an action under section 581, subdivision (f)(2).

A. Section 581, subdivision (f)(2)

When the trial court sustains a demurrer, section 472a, subdivision (c) provides that "the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed." Under section 581, subdivision (f)(2), "[t]he court may dismiss the complaint as to that defendant when: [¶] . . . [¶] Except where Section 597⁴ applies, after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."

Thus, a plaintiff's failure to file an amended complaint within the time specified by the trial court after a demurrer is sustained with leave to amend subjects the action to dismissal "in the court's discretion under section 581, subdivision (f)(2)." (*Leader v.*

⁴ Section 597 provides in relevant part: "[W]here the defense of another action pending or a demurrer based upon subdivision (c) of Section 430.10 is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of that other action, and the plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments." Plaintiffs do not argue that section 597 is applicable here.

Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, 613 (*Leader*.) The dismissal authorized under section 581, subdivision (f)(2) is a dismissal with prejudice. (*Cano v. Glover* (2006) 143 Cal.App.4th 326, 330.)

The applicable standard of review is abuse of discretion. “The decision to dismiss an action under section 581, subdivision (f)(2) rests in the sound discretion of the trial court and a reviewing court will not disturb the ruling unless the trial court has abused its discretion. [Citation.] It is appellant’s burden to establish an abuse of discretion. [Citation.]” (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827 (*Gitmed*.) This court has explained that “[d]iscretion is abused only when in its exercise, the trial court ‘exceeds the bounds of reason, all of the circumstances before it being considered.’ [Citation.] There must be a showing of a clear case of abuse and miscarriage of justice in order to warrant a reversal. [Citation]. A trial court will abuse its discretion by action that is arbitrary or ‘that transgresses the confines of the applicable principles of law.’” [Citations.]” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 (*Shaw*.)

Keeping the standard of review in mind, we turn to the merits of plaintiffs’ contentions on appeal.

B. Analysis

1. Failure To Exercise Discretion

At the outset, we are not convinced by plaintiffs’ argument that the trial court failed to exercise its discretion in ruling on defendants’ motion to dismiss under section 581, subdivision (f)(2).

“A trial court’s failure to exercise discretion is itself an abuse of discretion, and we review such action in accordance with that standard of review. [Citations.]” (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 (*Gray*.) Where the trial court has failed to exercise its discretion, the court’s order “cannot stand. [Citation.]” (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1099.)

We find that the record in the present case does not support plaintiffs' contention that the trial court failed to exercise its discretion. Having reviewed the entire record on appeal, including the reporter's transcript of the February 8, 2011 hearing on the motion to dismiss, we agree with defendants that the trial court heard plaintiffs' explanation of their failure to timely file a further amended complaint within the time period specified by the court's order of November 23, 2010, and found that plaintiffs' explanation was not sufficient to excuse their delay.

At the hearing, plaintiffs argued that their filing delay was due to making a settlement proposal to which the defendant banks had not responded. Implicitly rejecting plaintiffs' argument, the trial court found "there's no evidence at all in the opposition either as to its late filing or the failure to file an amended pleading. [¶] So I think under those circumstances the record does fairly require me to grant the motion." Thus, the trial court exercised its discretion under section 581, subdivision (f)(2) to dismiss the action when the court determined that (1) plaintiffs' written opposition did not include any explanation for their filing delay; and (2) plaintiffs' explanation at the time of the hearing that a pending settlement proposal had caused the delay was not sufficient to excuse their failure to timely file a further amended complaint.

We also find that plaintiffs' reliance on the decision in *Harlan v. Department of Transportation* (2005) 132 Cal.App.4th 868 (*Harlan*) is misplaced. According to plaintiffs, *Harlan* "is literally a mirror image of this case and compels a reversal." We disagree.

In *Harlan*, the issue was "whether the trial court had discretion, after it sustained a demurrer, to accept the plaintiffs' late-filed amended complaint, even though plaintiffs did not move for leave to file late." (*Harlan, supra*, 132 Cal.App.4th at p. 870.) The appellate court determined that when a demurrer is sustained with leave to amend, under section 472a, subdivision (c) the trial court has the discretion to accept an amended complaint that is filed late—after the expiration of the time fixed by the trial court to file

an amended pleading—without a noticed motion for leave to amend. (*Id.* at p. 873.) The appellate court also determined that the trial court is not required to dismiss an action where the plaintiff failed to amend the pleading within the time allowed, since “section 581, subdivision (f)(2), places the decision within the court’s discretion.” (*Id.* at p. 874.)

Thus, the decision in *Harlan* is consistent with the other decisions construing section 581, subdivision (f)(2), to provide the trial court with the discretion to dismiss an action where the plaintiff fails to file an amended complaint within the time specified by the court. (See, e.g., *Leader, supra*, 89 Cal.App.4th at pp. 613-614; *Gitmed, supra*, 26 Cal.App.4th at p. 827.)

Since we have determined that the trial court did not fail to exercise its discretion when the court dismissed the action under section 581, subdivision (f)(2), we next consider whether the trial court abused its discretion.

2. Abuse of Discretion

To the extent plaintiffs argue in the alternative that the trial court abused its discretion in dismissing their action, we find that they have not met their burden to establish abuse of discretion. (*Gitmed, supra*, 26 Cal.App.4th at p. 827.)

First, plaintiffs cannot show that the trial court abused its discretion on the ground of failure to exercise discretion under section 581, subdivision (f)(2), since, as we have discussed, the trial court actually did exercise its discretion in ruling on the motion to dismiss. (See *Gray, supra*, 155 Cal.App.4th at p. 515.)

Second, plaintiffs have failed to show abuse of discretion on the ground that the trial court’s order is “arbitrary or ‘ “that transgresses the confines of the applicable principles of law.” ’ [Citations.]” (*Shaw, supra*, 170 Cal.App.4th at p. 281.) We understand plaintiffs to have argued during the hearing that they hoped to resolve the case without further litigation, and for that reason they did not timely file a second amended complaint. However, the trial court could reasonably determine that the pending

settlement proposal did not justify plaintiffs' delay, since they did not explain, in either their written opposition or their oral argument during the hearing on the motion to dismiss, why their attempt to engage in settlement negotiations with defendants prevented them from timely amending their complaint.

Finally, as we have discussed, under section 581, subdivision (f)(2), the trial court had the discretion to dismiss the action where, as here, plaintiffs failed to amend their complaint within the time specified by the court after the demurrer was sustained with leave to amend. (*Leader, supra*, 89 Cal.App.4th at pp. 613-614; *Gitmed, supra*, 26 Cal.App.4th at p. 827.) The dismissal order therefore did not transgress the applicable principles of law. (*Shaw, supra*, 170 Cal.App.4th at p. 281.)

For these reasons, the trial court did not abuse its discretion in dismissing the action under section 581, subdivision (f)(2), and we will affirm the judgment.

V. DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.*

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