Filed 4/11/11 Gillies v. California Reconveyance Co. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DOUGLAS GILLIES,

Plaintiff and Appellant,

v.

CALIFORNIA RECONVEYANCE CO. et al.,

Defendants and Respondents.

2d Civil No. B224995
(Super. Ct. No. 1340786)
(Santa Barbara County)

Plaintiff is the owner of real property subject to a foreclosure. He files in propria persona a complaint against the bank and trustee. The complaint attempts to state causes of action for declaratory relief, injunction, quiet title and damages. The trial court sustained the defendants' demurrer without leave to amend. Plaintiff appeals the ensuing judgment. We affirm.

FACTS

Douglas Gillies's first amended complaint alleges as follows:

Gillies is the owner of a single family residence in Santa Barbara. In August 2003, he borrowed money from Washington Mutual Bank. The loan is secured by a deed of trust on his residence.

First Cause of Action

On August 12, 2009, the California Reconveyance Company (CRC), as trustee under the deed of trust, mailed Gillies a notice of default. Gillies alleged on information and belief that the notice was not recorded. The failure to record the notice violated Civil Code section 2924, subdivision (a)(1).[1]

Second Cause of Action

The notice of default does not comply with section 2923.5. The section provides that a notice of default may not be filed until 30 days after a mortgagee, beneficiary or authorized agent has contacted the borrower to assess the borrower's financial situation and explore options to avoid foreclosure. Subdivision (b) of the section requires a notice of default to include a declaration that the mortgagee, beneficiary or authorized agent has so contacted the borrower. The declaration contained in the notice of default is insufficient in that it states disjunctively, "the beneficiary or its authorized agent declares that it has contacted the borrower[.]" The declaration does not specify whether the borrower or its agent contacted the borrower or made the declaration.

Third Cause of Action

Section 2923.52 prohibits lenders from giving a notice of sale until at least 90 days following 3 months after the filing of the notice of default. A lender may be exempt from the 90-day extension of time. Section 2923.54, subdivision (a)(2) requires the notice of sale to include a declaration from the mortgage loan servicer stating: "Whether the timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55."[2]

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[1] All statutory references are to the Civil Code unless otherwise stated.

[2] (§§ 2923.52, 2923.54 & 2923.55 were added by Stats. (2009-2010, 2d Ex. Sess.) ch. 5, Assem. Bill 7, § 3, eff. May 21, 2009, and repealed by their own terms, operative Jan. 1, 2011; see also 2009 Cal. Legis. Serv.(2009-2010 2d Ex. Sess.), ch. 5, Assem. Bill 7.)

JPMorgan Chase Bank, National Association (Chase) is identified in an exhibit attached in the notice of sale as the loan servicer. Ann Thorn, identified as Chase's First Vice President declared: "Pursuant to California Civil Code Section 2923.54, the undersigned loan servicer declares as follows: [¶] "3. It has obtained from the commissioner a final or temporary order of exemption pursuant to Section 2923.54 that is current and valid on the date the notice of sale is filed; and [¶] 4. The timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or Section 2923.55."

The notice of sale was served 96 days after the notice of default. Thorn's declaration does not specify whether the exemption from the timeframe in section 2923.52 was pursuant to section 2923.52 or 2923.55.

Fourth and Fifth Causes of Action

The fourth cause of action petitions for an injunction to prevent sale of the residence. The fifth cause of action is for quiet title. It alleges the defendants have no right, title, lien or interest in the residence.

Chase and CRC (collectively Chase) demurred to the first amended complaint. Chase requested that the trial court take judicial notice of the following: (a) the Office of Thrift Supervision order directing the FDIC to act as receiver for Washington Mutual; (b) the purchase and assumption agreement between the FDIC, as receiver for Washington Mutual, and Chase; (c) the notice of default recorded August 13, 2009; and (d) the notice of sale recorded November 18, 2009.

The trial court granted Chase's request to take judicial notice, and sustained Chase's demurrer without leave to amend.

DISCUSSION

I

Because this case comes to us on demurrer, we accept as true all of the complaint's allegations of material facts. (*Al Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1312.) But we do not accept as true contentions, deductions or conclusions of fact or law. (*Moore v. Regents of University of*

California (1990) 51 Cal.3d 120, 125.) We also read the complaint as though it included matters of which the trial court has properly taken judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) If it appears the plaintiff is entitled to any relief, the complaint will be held good. (*Chase Chemical Co. v. Hartford Acc. & Indemn. Co.* (1984) 159 Cal.App.3d 229, 242.)

II

(a)

The trial court properly sustained the demurrer to Gillies's first cause of action. The complaint alleged the notice of default was not recorded as required by section 2924, subdivision (a)(1). The trial court properly took judicial notice that the notice of default was recorded on August 13, 2009.

(b)

The trial court properly sustained the demurrer to the second cause of action. Gillies complained that the declaration made pursuant to section 2923.5, subdivision (b) was defective. The subdivision requires a declaration that the mortgagee, beneficiary or authorized agent has contacted the borrower to assess the borrower's financial situation and explore options to avoid foreclosure. Gillies objected that the declaration given here was in the disjunctive, and simply tracked the statutory language. Thus it does not specify who contacted the borrower or who made the declaration.

But the trial court took judicial notice of the notice of default. It shows the declaration was made by Stacy White, Assistant Secretary of CRC.

Moreover, *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, concluded that the declaration need do no more than track the statutory language. The court stated: "In light of what we have just said about the multiplicity of persons who would necessarily have to sign off on the precise category in section 2923.5, subdivision (b) . . . that would apply in order to proceed with foreclosure (contact by phone, contact in person, unsuccessful attempts at contact by phone or in person, bankruptcy, borrower hiring a foreclosure consultant, surrender of keys), and the

possibility that such persons might be employees of not less than three entities (mortgagee, beneficiary, or authorized agent), there is no way we can divine an intention on the part of the Legislature that each notice of foreclosure be custom drafted. [¶] To which we add this important point: By construing the notice requirement of section 2923.5, subdivision (b), to require only that the notice track the language of the statute itself, we avoid the problem of the imposition of costs beyond the minimum costs now required by our reading of the statute." (*Id.* at p. 235.) The declaration here is sufficient.

Gillies requests that we take judicial notice of a trial court ruling in an unrelated case. The court ruled that the notice of default contained the language required by section 2923.5. But because the declaration was not under penalty of perjury, it had "no evidentiary value concerning whether the Defendant otherwise satisfied the provisions of Civil Code Section 2923.5."

In reviewing a ruling on a demurrer we are not concerned with "evidentiary value." We are solely concerned with the allegations of the complaint. Here the complaint alleges only that the notice of default is defective in form. It does not allege that the substantive requirements of section 2923.5, subdivision (a)(2), mandating contacting the borrower, were not in fact carried out. The request to take judicial notice is denied.

(c)

The trial court properly sustained the demurrer to Gillies's third cause of action. There Gillies alleged the notice of sale was defective because it failed to specify whether the exemption from the timeframe in section 2923.52 was pursuant to section 2923.52 or 2923.55.

Section 2923.54, subdivision (a)(2) requires the notice of sale to include a declaration stating, "Whether the timeframe for giving notice of sale specified in subdivision (a) of Section 2923.52 does not apply pursuant to Section 2923.52 or 2923.55."

The subdivision simply requires the notice of sale to state whether the timeframe specified in section 2923.52 does not apply pursuant to either code section. The subdivision does not require the notice of sale to specify under which of the two code sections the mortgage loan servicer is claiming an exemption.

(d)

The fourth cause of action for injunctive relief is derivative of the first three causes of action. Thus the trial court properly sustained the demurrer to the fourth cause of action.

(e)

The fifth cause of action is to quiet title against Chase. The trial court sustained Chase's demurrer to the fifth cause of action on the ground that a mortgagor cannot quiet title against the mortgagee without paying the debt. (Citing *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707.)

Gillies argues, however, that Chase is not the mortgagee. He points out that Washington Mutual Bank is named beneficiary of the trust deed.

Here the trial court took judicial notice of the purchase and assumption agreement between the Federal Deposit Insurance Corporation (FDIC) as receiver for Washington Mutual Bank and Chase. The agreement provides that Chase purchases "all right, title and interest of the Receiver in and to all of the assets" of Washington Mutual Bank. The agreement also states that Chase "specifically purchases all mortgage servicing rights and obligations of [Washington Mutual Bank]." The agreement is maintained on the FDIC's official government website, and is not reasonably subject to dispute. Thus it contains facts that may be judicially noticed. (Evid. Code, § 452, subd. (h) [allows the court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].)

There is simply no reasonable dispute that Chase is Washington Mutual Bank's successor-in-interest as to Gillies's trust deed. The trial court properly sustained Chase's demurrer to the fifth cause of action.

III

In Gillies's brief on appeal he also alleges defects that do not appear on the face of the complaint. Ordinarily, we confine our review of a ruling on a demurrer to matters appearing on the face of the complaint and matters of which the trial court took judicial notice. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading §§ 947, p. 360 & 948, p. 362.) It is possible Gillies is arguing he could have amended his complaint. A brief discussion of the additional allegations will show an amendment would not have helped.

Gillies points out that the notice of default misspells his first name Dougl*e*s, instead of the correct "*Douglas*." But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice. Gillies's argument fails to raise a material issue.

Next, Gillies argues that the notice of default he received is not a true copy of the notice recorded by the trustee. Gillies points out: the space for the recorder's use is missing from his copy; the fist line on page 2 of the notice is justified on the left in the original and in the center on the copy; lines in the third and fourth paragraph on page two begin and end with different words in the original and copy; different fonts for the date and name of CRC are used in the original and copy; and the name and title of Stacy White are missing from the copy.

What Gillies fails to point out is any significant difference in the substance of the text of the notice. A copy does not necessarily mean a photocopy. If the text is substantially the same in the copy as the original, it qualifies as a copy.

Finally, Gillies questions whether Congress or the FDIC has the power to grant Chase the assets of Washington Mutual Bank while absolving Chase of all of Washington Mutual Bank's liabilities. Suffice it to say that Gillies cites no authority giving him standing to challenge an agreement between the FDIC and Chase.

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

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Denise De Bellefeuille, Judge

Superior Court County of Santa Barbara

Douglas Gillies, in pro. per. for Plaintiff and Appellant.

Adorno Yoss Alvarado & Smith and Michael B. Tannatt for Defendants and Respondents.