MARK DEMUCHA et al., Plaintiffs and Appellants,
v.
WELLS FARGO HOME MORTGAGE INC., Defendant and Respondent.

No. F059476.
Court of Appeals of California, Fifth District.
Filed July 5, 2011.

This case presents a classic example of the longstanding rule that "in passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action, it is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue" as "[t]hat is always the ultimate question to be determined by the evidence upon a trial of the questions of fact." (*Colm v. Francis* (1916) 30 Cal.App. 742, 752.)

The trial court dismissed this civil action after sustaining the demurrer of respondent Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. (Wells Fargo), to the first amended complaint of appellants Mark and Cheryl DeMucha. Appellants contended in the trial court, as they do on this appeal, that the allegations of their pleading were sufficient to survive demurrer. As we explain, we agree with appellants on all of their causes of action except the second (their attempt to state a cause of action for removal of a cloud on title) and the fourth (their attempt to state a cause of action for intentional infliction of emotional distress). We reverse the judgment, remand the matter to the trial court, and direct that court to overrule respondent's demurrer as to all causes of action except the second and fourth.

FACTUAL AND PROCEDURAL BACKGROUND

In their first amended complaint, appellants allege as follows. They are the owners of a home located on Fernside Court in Bakersfield. They "executed a Deed of Trust in favor of CTX MORTGAGE COMPANY, LLC, which is the company that held the mortgage on this home, which Deed of Trust was recorded" on or about November 28, 2007. In January of 2008, Wells Fargo "claimed that the mortgage on 5813 Fernside had been transferred to it from CTX MORTGAGE COMPANY, LLC," (CTX) but Wells Fargo and other unnamed Doe defendants "have all failed and refused to produce the original note or otherwise provide proof that any of the Defendants is or at any time was the holder of the original note that the Defendants, and each of them, are trying to enforce ...." The defendants "have repeatedly, beginning on or about 1/4/2008 and continuing in documents issued by the Defendants ... up to and including the month of April 2009, alleged that the mortgage on 5813

Fernside had been transferred to them and/or the entity on whose behalf they were acting, and that the Defendants ... had the right to enforce the note against 5813 Fernside, which claims were false ...."

Appellants incorporate the above-described allegations into purported causes of action entitled "Quiet Title" (first), "Action to Remove Cloud" (second), "Fraud & Misrepresentation" (third), "Intentional Infliction of Emotional Distress" (fourth), and "Slander of Credit" (fifth).

Wells Fargo demurred to appellants' first amended complaint and to each purported cause of action contained in it, and asked the court to take judicial notice of the deed of trust recorded on November 28, 2007, and of a Notice of Default recorded on January 9, 2009. The court took judicial notice of these documents, sustained the demurrer without granting leave to amend, and ordered the action dismissed. The court's order stated in pertinent part: "On September 28, 2009, the Court sustained Defendant WELLS FARGO HOME MORTGAGE, A DIVISION OF WELLS FARGO BANK, N.A.'S ["WELLS FARGO's"] Demurrer to Plaintiffs' First Amended Complaint without leave to amend.

"WELLS FARGO's Requests for Judicial Notice are granted. The Court based its ruling the Court's finding that Plaintiffs cannot allege and establish that they tendered all amounts due under the loan and based on its finding that, under established case and statutory authority, that a lender has no obligation to `possess the note' pursuant to the non-judicial foreclosure process. The Court sustained the Demurrer to the entire First Amended Complaint without leave to amend."

STANDARD OF REVIEW

Our standard of review of an order sustaining a demurrer on the ground that the complaint fails to state facts sufficient to constitute a cause of action is well settled. We review the sufficiency of the complaint de novo. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Although we are aware that a carefully worded complaint, as alleged here, can avoid disclosure of a demurrable defect known by the parties (see *Willson v. Security-First Nat. Bk.* (1943) 21 Cal.2d 705, 710), "[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions,

deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "We also consider matters that may be judicially noticed." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083, disapproved on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 50, fn. 12.)

When a demurrer is properly sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action, and leave to amend the pleading is denied and judgment is entered in favor of the demurring defendant, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

DISCUSSION

"A real property loan generally involves two documents, a promissory note and a security instrument. The security instrument secures the promissory note. This instrument `entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust (with the debtor and creditor known as the trustor and beneficiary and a neutral third party known as trustee). ... [T]he creditor is said to have a lien on the property given as security, which is also referred to as collateral.' [Citation.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235; see also *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438.)

The parties have a great deal to say about whether Wells Fargo must "possess the note" or "produce the note" in order to enforce the note. We see nothing in the statutes governing nonjudicial foreclosure (see Civ. Code, §§ 2924 through 2924k; and *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830-832) expressly mentioning possession of or production of a note as a prerequisite for initiating foreclosure.[1] At the beginning of the nonjudicial foreclosure process, "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part of parcel thereof is situated, a notice of default." (Civ. Code, § 2924, subd. (a)(1).)

According to the first amended complaint, however, Wells Fargo is not a trustee, mortgagee or beneficiary. Wells Fargo is, according to the pleading, an entity which "falsely and fraudulently claim[s] to hold title to and/or the right to enforce the note."

A. QUIET TITLE

Appellants seek to quiet title against any adverse claims of Well Fargo. "Quiet title claims are governed by California Code of Civil Procedure § 761.020, which requires that five elements be set out in a `verified complaint': (1) a description of the property, both legal description and street address; (2) the title of the plaintiff, and the basis for that title; (3) the adverse claims to the plaintiff's title; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the plaintiff's title against the adverse claims. Cal. Civ. Proc. Code § 761.020(a)-(e)." (*Briosos v. Wells Fargo Bank* (2010) 737 F.Supp.2d 1018, 1031; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 663, p. 90.) Those elements all appear in the first amended complaint. Wells Fargo argues that the pleading does not allege facts showing the basis for the plaintiff's title. But it does. It alleges that the plaintiffs "are and were rightful owners of a home located at 5813 Fernside Court, Bakersfield, CA ... pursuant to a Grant Deed that was recorded on 11/28/2007." Wells Fargo then argues that the pleading does not allege the adverse claims to plaintiff's title. But it does. It alleges that Wells Fargo "claimed that the mortgage on 5813 Fernside had been transferred to it from CTX Mortgage Company, LLC." It further alleges that Wells Fargo is "trying to enforce" the note signed by the plaintiffs, that Wells Fargo has "repeatedly ... alleged" that it "had the right to enforce the note against 5813 Fernside" and that these "claims were false."

The court took judicial notice of the deed of trust. The document identifies the "Borrower" as the DeMuchas, and "CTX MORTGAGE COMPANY, LLC," as the "Lender" and "Trustee." The "beneficiary under this Security Instrument" is "Mortgage Electronic Registration Systems, Inc." or "MERS," as nominee for Lender CTX.[2] Thus, Wells Fargo was not a party to the original transaction and was not mentioned in the deed of trust. There are no allegations that Wells Fargo was a nominee, successor, assignee, or agent of CTX or MERS under the deed of trust. Appellants allege in essence that Wells Fargo is an interloper with no interest in the property. What the actual facts are we do not know. Evidence, when it is received, might perhaps

ultimately show that Wells Fargo does indeed have some interest in the note and/or deed of trust that it is now trying to enforce. But that interest does not appear on the face of the first amended complaint or in any matter of which the court took judicial notice.

Wells Fargo argues that the demurrer was properly sustained because appellants did not allege tender of all amounts due on the note appellants allege they signed. This might be correct if appellants were attempting to quiet title as against the lender, CTX, or MERS, as its nominee. "[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured." (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649; see also *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475; and *Briosos v. Wells Fargo Bank, supra,* 737 F.Supp.2d at p. 1032.) The first amended complaint does not allege, however, that Wells Fargo is a mortgagee or a lender or a trustee on the deed of trust, or that it has any connection whatsoever to the November 2007 loan and deed of trust. Wells Fargo cites a number of cases holding that a plaintiff attempting to attack a trustee's sale must allege tender of payment of amounts due on the loan, but appellants are not attempting to attack any trustee's sale and there is no allegation that any trustee's sale has taken place.

A deed of trust is not valid without a note. Transfer the note, and the deed of trust follows, not vice versa. "[A] deed of trust is a mere incident of the debt it secures and ... an assignment of the debt `carries with it the security.' [Citations.]" (*Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553; see also *Lewis v. Booth* (1935) 3 Cal.2d 345, 349 ["A lien is but an incident of the debt secured, and cannot be transferred apart therefrom. A transfer of the debt carries with it the lien"].) We think a fair reading of appellants' complaint is that the note they signed was never transferred or assigned to Wells Fargo from CTX, that the deed of trust securing the debt therefore does not secure any debt owed to Wells Fargo, and that Wells Fargo therefore has no right to initiate nonjudicial foreclosure proceedings against appellants. Wells Fargo points to nothing in the first amended complaint alleging that Wells Fargo holds any interest in the note secured by the deed of trust. Wells Fargo argues that it is a "creditor," but points to nothing in the first amended complaint so alleging.

B. ACTION TO REMOVE CLOUD

An action to remove a cloud on title is authorized by Civil Code section 3412, which states: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (See also *Smith v. Williams* (1961) 55 Cal.2d 617; and 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 671-674.) "A suit to quiet title must be distinguished from an action to remove a cloud on the title alleged to have been created by a designated instrument. In a suit to remove a cloud the complaint must state facts, not mere conclusions, showing the apparent validity of the instrument designated, and point out the reason for asserting that it is actually invalid. [Citations.]" (*Ephraim v. Metropolitan Trust Company of California* (1946) 28 Cal.2d 824, 833-834 (*Ephraim*).)

Respondent correctly points out that appellants' first amended complaint does not identify any instrument claimed by appellants to be invalid. The pleading alleges that Wells Fargo and Doe defendants "are attempting to claim title based upon a false and fraudulent claim that they are entitled to enforce the note against the property." Appellants do not contend or allege that the note and deed of trust they executed are invalid, but rather only that the debt on the note is not owed to Wells Fargo. The first amended complaint does contain an allegation stating "Plaintiff ... respectfully requests an order that the instrument through which the Defendants claim title to and/or the right to enforce the note against 5813 Fernside be declared invalid and void, and that it be destroyed," but the pleading nowhere alleges what that instrument is. No cause of action to a remove a cloud on title is therefore stated. (*Ephraim, supra,* 28 Cal.2d 824.)

C. FRAUD

"The essential allegations of an action for fraud are a misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting damage." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109; see also Civ. Code, §§ 1709, 1710.) Appellants' first amended complaint alleges that on January 4, 2008, Wells Fargo "falsely and fraudulently stated, `... your loan was recently transferred from CTX Mortgage Company, LLC.... Your first payment to Wells Fargo Bank, N.A. is due 02/01/08." It further alleges: "The Defendants knew that the statements were false and fraudulent and the truth was that none of the defendants ever legally obtained the transfer of the loan that Plaintiffs

legally owed to CTX Mortgage Company, LLC. While acting in reliance upon the false and fraudulent claims of Defendants, ... plaintiff has made mortgage payments to the Defendants to his damage."

Wells Fargo argues that the pleading contains no allegation that any representation Wells Fargo made was false. It does. It alleges that Wells Fargo falsely told appellants their loan had been transferred from CTX to Wells Fargo. Wells Fargo argues that the pleading fails to allege that any misrepresentation was made with knowledge of its falsity. It does. It alleges "[t]he Defendants knew that the statements were false." Wells Fargo argues that the pleading alleges no facts showing reliance on a misrepresentation. It does. It alleges that "plaintiff has made mortgage payments to the Defendants to his damage." A cause of action for fraud has been properly stated.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) the actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Cervantez v. J.C. Penney Company, Inc.* (1979) 24 Cal.3d 579, 593 (*Cervantez*).) An attempt to collect an alleged debt by means of a false document has been held to be sufficiently outrageous to constitute an outrageous act for purposes of this tort. (*Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 641, fn. 1.) Appellants incorporate their prior allegations that Wells Fargo sent them a document falsely stating that they owed mortgage payments to Wells Fargo. Appellants further allege:

"From approximately November 2, 2008 through April 2009, the Defendants and each of them, have falsely asserted that Plaintiffs are in default in paying the loan on 5813 Fernside to the Defendants and have threatened to commence and have commenced non-judicial foreclosure proceedings against the Plaintiffs based upon false and fraudulent pretenses and without compliance with the laws necessary to commence foreclosure proceedings. "The Defendants' acts were intentional, unreasonable, and so outrageous that they exceed all bounds usually tolerated by a decent society and Defendants knew or should have known that the commission of these wrongful acts

against the Plaintiffs would be likely to cause illness, injury, and emotional distress. As a direct result of the Defendants' conduct, Plaintiffs suffered illness, injury, and emotional distress."

Wells Fargo argues that the pleading does not allege an outrageous act because "a debt collector is entitled to a qualified privilege." There is no allegation, however, that appellants owe any debt to Wells Fargo. Appellants allege that they owe nothing to Wells Fargo. Wells Fargo further contends, however, and correctly in our view, that the first amended complaint fails to allege that Wells Fargo acted with the intention of causing, or reckless disregard of the probability of causing, emotional distress. (*Cervantez, supra,* 24 Cal.3d 579.) Also, there is no allegation that Appellants' suffered serious or extreme emotional distress. While these omissions would appear to be capable of correction by amendment, they are omissions of essential elements of the cause of action, and thus the demurrer was properly sustained as to appellant's attempt to state a cause of action for intentional infliction of emotional distress.

E. SLANDER

The tort of defamation is effected by either "libel" or "slander." (Civ. Code, § 44.) These two terms are statutorily defined (see Civ. Code, §§ 45 and 46), but it may be said, generally speaking, that libel is defamation effected through "writing" (Civ. Code, § 45) while slander is "orally uttered." (Civ. Code, § 46.) Slander is defined to include "a false and unprivileged publication, orally uttered... [¶] ...[¶] [w]hich, by natural consequence, causes actual damage." (Civ. Code, § 46.) The essential elements of a cause of action for defamation are simply that the specified false and defamatory matter was published to third persons. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 735, p. 156.)

Appellants' first amended complaint alleges: "Defendants, and each of them, from November 2008 to and including April 2009, have maliciously published statements to third parties that Plaintiffs are in default in paying the loan on 5813 Fernside to the Defendants, which statements are and were false and the Defendants knew or should have known that the statements were false at the time they published the statements. The third parties to whom the false statements were maliciously published included, but were not limited to, credit reporting agencies, which have reduced Plaintiffs'

credit ratings as a result of the publication of the false statements, to Plaintiffs' damage."

Appellants contend the required elements have been pled. We agree. Wells Fargo argues that appellants "failed to identify the allegedly defamatory statement." But they did. They alleged that Wells Fargo told third parties that appellants were in default in paying the loan to Wells Fargo. Wells Fargo argues that appellants "failed to allege that any statement about their credit was false." But they did. Appellants alleged that the statements made by Wells Fargo "are and were false." Wells Fargo then argues that "[t]ruth of the statements made is a complete defense against civil liability for defamation." This principle may or may not ultimately help Wells Fargo to defend the action on its merits, but this argument ignores the procedural reality that on a demurrer a court is "passing upon the question of the sufficiency or insufficiency of a complaint to state a cause of action" and is not determining "whether the facts stated are true or untrue." (*Colm v. Francis, supra,* 30 Cal.App. at p. 752.) Appellants' pleading alleges that the statements made by Wells Fargo "are and were false." Whether the statements made by Wells Fargo were in fact false, or instead were true, will be determined by the trier of fact upon the evidence ultimately offered and received in the case.

Wells Fargo then cites *Pavlovsky v. Board of Trade* (1959) 171 Cal.App.2d 110, which states: "Ordinarily, privilege must be pleaded as an affirmative defense. [Citation.] But where the existence of the privilege is shown on the face of the complaint, it may be raised by general demurrer." (*Id.* at p. 113.) Wells Fargo fails to identify, however, anything at all in the first amended complaint that would show the applicability of any privilege. Wells Fargo appears to just assume that it is a creditor, and that it therefore has a Civil Code section 47 privilege to make a false statement to a credit agency if the statement is made without malice. Civil Code section 47, subdivision (3), provides a privilege for "a communication without malice to persons interested therein by one who is also interested." (*Pavlovsky, supra,* 171 Cal.App.2d at p. 113.) Nothing in appellants' first amended complaint alleges, however, that Wells Fargo is appellants' creditor or that Wells Fargo has any interest in the subject loan what would enable Wells Fargo to invoke the privilege.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for that court to overrule respondents' demurrer to all causes of action except the second ("action to remove cloud") and the fourth ("intentional infliction of emotional distress"). Costs on appeal awarded to appellants.
WE CONCUR:
Kane, Acting P.J.
Detjen, J.
[1] Numerous federal district courts have held in recent years that possession of the original is not a requirement for initiating non-judicial foreclosure. (*Nool v. HomeQ Servicing* (E.D. Cal. 2009) 653 F.Supp.2d 1047, 1053; *Castaneda v. Saxon Mortgage Services, Inc.* (E.D. Cal. 2009) 687 F.Supp.2d 1191, 1201; and *Jensen v. Quality Loan Service Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 1189.) Because appellant's first amended complaint can survive a demurrer without that allegation, we need not address or resolve this issue in our decision.

[2] MERS is a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans and is a key player in the secondary mortgage market. (See *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151.) However, because MERS is not a party to this action or mentioned in the first amended complaint, we need not discuss its involvement here.