KIM P. HUYNH, Plaintiff and Appellant,
v.
FIRST NATIONAL BANK OF SOUTHERN CALIFORNIA,
Defendant and Respondent.

No. D070873.

Court of Appeals of California, Fourth District, Division One.

Filed December 13, 2017.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2014-00039131-CU-OR-CTL, Joan M. Lewis, Judge. Affirmed.

The Feldman Law Group and Gregory S. Cilli, for Plaintiff and Appellant.

Mulvaney Barry Beatty Linn & Mayers, John A. Mayers, Kelly Ann Tran and Christopher B. Ghio, for Defendant and Respondent.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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NARES, Acting P. J.

Plaintiff Kim P. Huynh appeals a judgment of dismissal entered against her after the trial court sustained without leave to amend the demurrer of defendant First National Bank of Southern California (the Bank). Huynh contends the court erred because she pleaded sufficient facts in her first amended complaint or proposed second amended complaint to state a cause of action. We conclude the court did not err and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Huynh was the president and secretary of Pivotal Educational Enrichment Centers, PEEC, Inc. (Borrower). Borrower assigned its claims in this matter to Huynh. In 2004, the Bank loaned Borrower the principal amount of

$934,700 (the Loan) evidenced by a promissory note (the Note).[1] The Note was secured by real property in El Cajon, California (the Property). Further, the Note provides that "Borrower is in default under this Note if Borrower does not make a payment when due under this Note," or if Borrower failed "to do anything required by this Note and other Loan Documents." Under the Note, the Bank had a number of rights and remedies at its disposal if Borrower defaulted, including the right to take possession of any collateral.

The deed of trust securing the Note states as follows: "Upon an Event of Default under this Deed of Trust, Beneficiary [(the Bank)] may declare the entire indebtedness secured by this Deed of Trust immediately due and payable by delivery to Trustee [(the Bank)] of written declaration of default and demand for sale and of written notice of default and of election to cause to be sold the Property, which notice Trustee shall cause to be filed for record." An event of default included Borrower's failure to make any payments when due under the Note.

In 2008, Borrower was struggling or unable to make its Loan payments. The parties entered in a change in terms agreement, deferring loan payments for six months and extending the Note's maturity from July 2029 to January 2030. The agreement recites that "except as expressly changed" by the agreement, all other terms and conditions of the Note "remain unchanged and in full force and effect."

In March 2009, the Bank started the process to nonjudicially foreclose on the Property by recording a "Notice of Default and Election to Sell Under Deed of Trust."

In late December 2009, the parties agreed again to modify the Loan's repayment terms by entering into a forbearance and modification agreement (FMA or forbearance agreement). Huynh acknowledged that the Loan was "in default for Borrower's failure to make the payment due November 1, 2008 and all payments subsequent thereto." Further, the FMA states that as a result of Borrower's default, the Bank recorded the notice of default and gave notice of a sale of the Property. The FMA recites that the Bank was entering the forbearance agreement "for the sole purpose of allowing the Borrower an additional opportunity to repay the Loan without" the Bank's "immediate exercise of default rights."

Under the FMA, the Bank agreed to postpone the foreclosure sale of the Property if a number of conditions were met. Of relevance here, the FMA provides: "If Borrower timely makes all payments required under this Agreement and the Loan Documents through the December 1, 2010 payment, *upon written request from Borrower, [the Bank] will rescind its Notice of Default recorded against the Property.* This agreement to rescind the Notice of Default in no way constitutes a waiver or relinquishment of any other rights or remedies belonging to [the Bank]." (Italics added.) The parties explicitly agreed that the Bank's granting of the forbearance and acceptance of any payments during the forbearance period did "not constitute a cure of the default." The forbearance period, or period in which Borrower was required to make timely payments and comply with all of the other terms and conditions set forth in the FMA, ran from January through December 2010. The FMA could only be amended in a writing signed by Borrower, the Loan guarantors, and the Bank.

In September 2010, the Bank published a notice of sale of the Property. Huynh e-mailed an executive vice president of the Bank, Michael Cooney, asking him to send her a letter confirming that the Bank would not be imminently selling the Property. In his response letter, Cooney indicated that the publication of a foreclosure sale was done as a matter of course for the Bank to maintain an "active foreclosure" and that the Bank could then postpone the sale for up to one year before another publication of sale would be required. Cooney's letter further stated: "The Bank and you are under a forbearance agreement for the loan to [Borrower]. As long [as] there are no defaults under the forbearance agreement, the Bank will not take the property to sale and will keep postponing the sale accordingly. If you complete the forbearance period without any defaults, the Bank will cancel the foreclosure completely. The forbearance period is scheduled to conclude in January of 2011."

According to Huynh, Cooney's letter somehow excused Borrower from the FMA's written request requirement to obtain a rescission of the Bank's notice of default, and Borrower did not make such a written request. Huynh was allegedly not in default under the FMA during the final three months of 2010. The Bank did not cancel its foreclosure proceedings.

In February 2011, the parties entered into another change in terms agreement (CITA). The CITA deferred Borrower's payments on the Note's principal and interest, property taxes, and legal and foreclosure fees for about one

month, but otherwise maintained the original terms and conditions of the Note.

In October 2011, the Bank recorded a notice of trustee's sale with respect to the Property. According to Huynh, the recording was wrongful because Borrower was no longer in default and the Bank was required to record a new notice of default.

Subsequently, Borrower filed a Chapter 11 bankruptcy petition in bankruptcy court. The bankruptcy court granted the Bank relief from the automatic stay with respect to the Property. The Bank proceeded with a nonjudicial foreclosure sale of the Property. In 2014, Huynh initiated her lawsuit against the Bank.

In June 2015, Huynh filed her first amended complaint (FAC) against the Bank, asserting causes of action for (1) negligence, (2) wrongful foreclosure, (3) breach of contract, and (4) breach of the implied covenant of good faith and fair dealing.[2] The Bank responded by filing a demurrer, arguing that the FAC did not allege facts sufficient to state a cause of action. In Huynh's opposition to the demurrer, she made no arguments to support the viability of her causes of action, but argued instead that the court should grant leave to amend so she could add certain factual allegations. She concurrently submitted a proposed second amended complaint (SAC) to the court, which attached exhibits "A" through "G" consisting of various loan documents and two new communications dated in September 2010 between Huynh and Cooney. The Bank filed a reply, Huynh filed a supplemental opposition to the Bank's demurrer, and the Bank filed a reply to Huynh's supplemental opposition. The court held a hearing on the Bank's demurrer, in which it considered the factual allegations pleaded in the FAC and proposed SAC. After taking the matter under submission, the court granted the Bank's demurrer without leave to amend and entered judgment in the Bank's favor.

Huynh filed a timely appeal.

DISCUSSION

A. *Standard of Review*

We review de novo an order sustaining a demurrer without leave to amend. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) The issue is whether, assuming the truth of all well-pleaded facts and those subject to

judicial notice, the complaint alleged facts sufficient to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We disregard contentions, deductions or conclusions of fact or law. (*Ibid.*) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, 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. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. *The Trial Court Properly Sustained the Bank's Demurrer Without Leave to Amend*

Based on our review of the record, the FAC and proposed SAC fail to allege sufficient facts to state a cause of action, beginning with the first asserted cause of action for negligence. **To state a cause of action for negligence, a plaintiff must plead the existence of a cognizable legal duty on defendant's part and a breach of that duty.** (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 740 (*Das*).) Here, Huynh alleged the Bank had a duty to update its records to indicate the Loan was no longer in default and to record a new notice of default prior to recording the 2011 notice of trustee's sale. We conclude the Bank had no such duty to record a *new* notice of default because Borrower defaulted on the Loan by March 2009, **the Bank recorded a notice of default, and Borrower neither cured the default nor made a written request to rescind the notice of default.**

In reviewing the FAC and proposed SAC, we properly disregarded Huynh's contentions or unsupported conclusions that Borrower was no longer in default by 2011. In December 2009, Huynh acknowledged that Borrower's default was the cause for the Bank to record a notice of default. Furthermore, neither the FAC nor proposed SAC sufficiently alleges that Borrower complied with the terms of the FMA to be entitled to a rescission of the notice of default. At best, Huynh alleged that Borrower was not in default "during the last three months of 2010." However, under the FMA, Borrower was required to timely make specified payments every month beginning January 1, 2010, until December 1, 2010, at which point, "*upon written request from Borrower*, [the Bank] will rescind its Notice of Default

recorded against the Property." The FAC and proposed SAC do not allege that Borrower made all its timely payments in 2010 or that Borrower made a written request to rescind the notice of default. Thus, the Bank had no duty to rescind the notice of default.

Huynh's argument to the contrary is entirely premised on a misreading of the September 2010 letter from Cooney. Fairly read, that letter merely reiterated and/or paraphrased the terms of the FMA, namely, the Bank would not foreclose on the Property if Borrower timely made all payments during the forbearance period. The letter did not amend the FMA, which required any amendment to be signed by all parties to the FMA. The letter did not excuse Borrower from making a written request to rescind the notice of default. The letter did not amend the Note. Accordingly, Borrower remained in default under the Note, and the Bank had no duty to reflect a different status in its records. The Bank also had no duty to record a new notice of default since it already recorded a notice of default in 2009 pursuant to the deed of trust.

Based on the same events and the Bank's purported duty to record a "new" notice of default prior to selling the Property, Huynh asserted a cause of action for wrongful foreclosure. As we have discussed, the **BANK HAD NO DUTY TO RECORD A SECOND NOTICE OF DEFAULT.** (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 927 [recording a notice of default starts the nonjudicial foreclosure process]; Civ. Code, § 2924g, subd. (c) [actual sale of property may be postponed and rescheduled by giving a new notice of sale].) Huynh has not identified any illegal or fraudulent conduct that could form the basis for a wrongful foreclosure cause of action. (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561-562 [wrongful foreclosure cause of action requires an illegal, fraudulent, or willfully oppressive sale of real property rendering the foreclosure entirely unauthorized].)[3]

Huynh makes no arguments on appeal directed toward her contract-based claims. In any event, she did not sufficiently state facts to support her contract causes of action, which were based on the same set of facts and the assertion that the Bank needed to record a new notice of default prior to foreclosure. As we have explained, **the Bank recorded a notice of default in 2009 and had no duty to record a new one.**

On appeal, Huynh argues that the proposed SAC states a claim for equitable estoppel against the Bank based on Cooney's September 2010 letter.

Specifically, Huynh asserts the Bank should be estopped from enforcing the requirements under the FMA that (1) an amendment must be in writing and signed by the Bank, Borrower, and guarantors, and (2) Borrower must make a written request to have the notice of default rescinded. **An equitable estoppel ordinarily consists of four elements: (1) the party to be estopped must know the facts; (2) it must intend that its conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) she must rely upon the conduct to her injury**. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 756.)

Huynh has not pleaded sufficient facts to state a claim for equitable estoppel. Cooney's letter is attached to the proposed SAC as an exhibit, and it cannot be reasonably read as a variance from, or modification of, the FMA. Rather, Cooney was confirming the existence of the forbearance agreement. In addition, Huynh signed the FMA and cannot claim ignorance of its requirements. Huynh has not set forth any wrongful conduct by the Bank, which was entitled to foreclose on the Property as a consequence of Borrower's default.

Relying on *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 712 (*La Jolla Group*), Huynh argues that the 2011 CITA required the Bank to record a new notice of default prior to selling the Property because any existing default under the Loan prior to the CITA was "cured by virtue of the CITA." We disagree.

In *La Jolla Group,* the borrowers tendered a loan payment sufficient to cure their default on a home mortgage loan and have their loan reinstated. (*La Jolla Group, supra,* 129 Cal.App.4th at pp. 709, 712.) The bank mistakenly failed to stop a scheduled auction of the mortgaged home. (*Id.* at p. 709.) Since the default had been cured, the bank's proceeding with a foreclosure sale was invalid. (*Id.* at p. 712; see generally Civ. Code, § 2924c, subd. (a)(1)-(2) [if default stated in notice of default is cured, beneficiary in the deed of trust shall rescind the declaration of default].)

This case is entirely distinguishable. Borrower expressly acknowledged in the parties' forbearance agreement that the Loan was in default and that the Bank's granting of the forbearance did *not* cure the default. Likewise, the 2011 change in terms agreement, which merely deferred certain payments

for one month, did not cure Borrower's default. Indeed, the 2011 CITA states that "except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation(s), remain unchanged and in full force and effect." As we have discussed, Huynh failed to plead sufficient facts to support that Borrower cured the longstanding default on the Loan. Accordingly, the Bank was not required to issue a new notice of default prior to the foreclosure sale.[4]

Finally, Huynh does not argue on appeal she could plead additional facts to state a cause of action that are not already included in the proposed SAC, which was supposed to cure the defects in the FAC. The trial court did not abuse its discretion in sustaining the Bank's demurrer without leave to amend. (*Das, supra*, 186 Cal.App.4th at p. 745 ["Because appellant has effectively received one opportunity to amend her complaint and she has not suggested on appeal how she would amend if given the opportunity, we discern no abuse of discretion."].)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the Bank.

HALLER, J. and IRION, J., concurs.

[1] The Bank's predecessor-in-interest, First National Bank of North County, made the loan, but the Note by its terms includes the parties' successors and assigns.

[2] Huynh also pleaded a cause of action for unjust enrichment, but later conceded that it should be dismissed. She did not include an unjust enrichment cause of action in her proposed second amended complaint.

[3] Huynh argues on appeal that the trial court erred in relying on *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112 (*Karlsen*) for the proposition that Borrower was required to tender the balance of the outstanding debt in order to state a wrongful foreclosure cause of action. Assuming the court relied on *Karlsen*, we have no need to discuss the point because we did not rely on *Karlsen* and have independently concluded that Huynh failed to state a cause of action for wrongful foreclosure.

[4] We have no need to address Huynh's argument that she sufficiently pleaded damages since we have concluded she failed to sufficiently plead other required elements of the asserted causes of action.