JOSE R. CARNERO et al., Plaintiffs and Appellants,
v.
NATIONAL DEFAULT SERVICING CORPORATION, Defendant and Respondent.

No. H041745.

Court of Appeals of California, Sixth District.

Filed September 20, 2018.

Appeal from the Santa Clara County, Superior Court No. 1-13-CV-255256.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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ELIA, Acting P. J.

Plaintiffs Jose and Marta Carnero appeal from a judgment of dismissal following an order sustaining without leave to amend the demurrer brought by respondent National Default Servicing Corporation (NDSC) and imposing sanctions on plaintiffs under Code of Civil Procedure section 128.7. Plaintiffs raise several issues in their appellate brief, but only those pertaining to the judgment in this action are cognizable—namely, that (1) the lawsuit, which alleged violations of the Homeowner Bill of Rights Act (HBOR) had merit; (2) the allegations of the complaint were not barred by res judicata or collateral estoppel; and (3) the superior court improperly imposed sanctions on them. We will affirm the judgment.

Background

Plaintiffs have represented themselves throughout the past nine years of litigation over perceived abuses in the lending practices applicable to their ownership of their San Jose residence. On October 1, 2009 they brought an action in the federal district court against various corporate defendants, including NDSC and Mortgage Electronic Registration Systems (MERS), for violations of the Truth In Lending Act (TILA). In November 2010 the

federal district court granted a motion to dismiss the second amended complaint without leave to amend as to the moving defendants, but as to defendants who did not move for dismissal, including NDSC, the court granted the motion without prejudice "for failure to prosecute."

Also in October 2009, just after filing the federal action, plaintiffs initiated a lawsuit in state court, again for alleged TILA violations by NDSC and others, in *J. Carnero et al. v. EMC Mortgage Corp. et al.,* Santa Clara County Superior Court No. 1-09-CV-154682. After a hearing in June 2011, the superior court sustained demurrers to the third amended complaint and dismissed the action. That judgment was not appealed.

In June 2012 plaintiffs filed another action against NDSC in superior court, alleging wrongful foreclosure, quiet title, fraud, unfair business practices, and equitable estoppel, and requesting declaratory relief and an accounting. On May 21, 2013 the court sustained NDSC's demurrer to the second amended complaint, and one month later it dismissed the lawsuit. That case is on appeal in *Carnero et al. v. National Default Servicing Corp.,* (Sept. 19, 2018, H039922) [nonpub. opn.].

The instant action was filed on October 28, 2013, this time against both NDSC and MERS.[1] Plaintiffs sought damages, declaratory relief, and an injunction for alleged violations of the HBOR—specifically, former section 2923.55,[2] section 2924.12, and 2924.17. NDSC filed its demurrer to the complaint on March 21, 2014,[3] asserting plaintiffs' failure to allege facts to support their claims, the bar of res judicata, and the inapplicability of the HBOR. NDSC also sought $6,941.50 as sanctions under Code of Civil Procedure section 128.7, based on the asserted "frivolous nature" of plaintiffs' factually and legally unsupportable claims, which were brought solely "to hinder and unreasonably delay" the foreclosure process.

On July 25, 2014, over plaintiffs' vigorous opposition, the superior court sustained the demurrer and granted NDSC's motion for sanctions. The court ruled that the complaint was barred by res judicata and collateral estoppel, because it contained allegations of wrongful conduct that were similar to those of the third amended complaint in case No. 1-09-CV-154682, which had resulted in a final judgment. The court also addressed the substance of plaintiffs' claims, finding them to be without merit. Among its reasons was that the HBOR was not retroactive to the alleged misconduct of NDSC.[4] The court further determined that sanctions were justified, because plaintiffs

had pursued a plainly meritless action "for an improper purpose, namely, to harass NDSC, cause unnecessary delay[,] and needlessly increase the costs of litigation." Noting plaintiffs' express vow not to pay even if sanctions were awarded, the court granted NDSC $3,841.50 to deter plaintiffs' oppositional stance. From the ensuing judgment of dismissal on September 23, 2014, plaintiffs filed this timely appeal.

Discussion

As noted, plaintiffs commenced this action in October 2013, invoking the HBOR. Plaintiffs claimed that the notice of default was fatally defective as a result of "robo-signing," and they cited sections 2924.12 and 2924.17 in alleging an invalid substitution of trustee and a failure by NDSC and MERS to "verify that all necessary documents are accurate." The notice of default was recorded July 8, 2009, and the substitution of trustee was recorded October 9, 2009.

The **HBOR, HOWEVER, WAS MADE EFFECTIVE JANUARY 1, 2013**. (Stats. 2012, ch. 86, §§ 9 & 20, pp. 2305 & 2311-2312; Stats. 2012, ch. 87, § 6, pp. 2319-2321.) Both the federal courts and the courts of this state adhere to the principle that "unless there is an `express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*Myers v. Philip Morris Companies* (2002) 28 Cal.4th 828, 841; see *Saterbak v. JPMorgan Chase Bank, N. A.* (2016) 245 Cal.App.4th 808, 818 [HBOR is not retroactive].)

Plaintiffs have cited neither judicial nor statutory authority indicating that in the HBOR the Legislature intended to depart from this established principle of statutory construction and application. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206; ["whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute"].) Accordingly, because the HBOR—including sections 2923.55, 2924.12, and 2924.17—was not yet effective when NDSC recorded the notice of default, NDSC cannot be held liable for violating those provisions. Plaintiffs do not contend otherwise.

Plaintiffs instead attempt to revisit past rulings and reinvigorate the claims of their previous lawsuits: They ask this court to explain its ruling denying writ relief after an unfavorable ruling on plaintiffs' motion to disqualify the

Honorable Mary E. Arand under Code of Civil Procedure section 170.1 (*Carnero et al. v. Superior Court* (*National Default Servicing Corporation*), H041167); they seek to "persuade this court to change its position on what a wrongful foreclosure means"; they explain why they did not appeal the June 2011 judgment in case No. 1-09-CV-154682; they repudiate the theory that their claims are barred by res judicata or collateral estoppel; and they discuss the effect of *Yvanova, supra,* 62 Cal.4th 919, on homeowner standing to challenge void assignments in wrongful foreclosure cases. They do not, however, address the viability of the causes of action asserted in the complaint before us, all of which are based on the inapposite HBOR. They further do not address the sanctions order, except to assert that their lawsuit "has merit," that they had not intended to increase NDSC's litigation costs, and that they are "suffering from undue harm since 2008" and cannot pay the $3,841.50 imposed as sanctions.

Because the superior court correctly determined that plaintiffs' HBOR claims cannot succeed on their merits, reversal of the judgment is not warranted. In light of this conclusion, it is unnecessary to address the parties' debate over whether res judicata or collateral estoppel applies to the current lawsuit. Likewise, we need not decide whether the lower court failed to accept as true the facts alleged in the complaint, because the pleading, properly viewed, does not state a viable cause of action.

Disposition

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J. and MIHARA, J., concurs.

[1] MERS is not before us in this appeal.

[2] All further statutory references are to the Civil Code except as otherwise indicated. Section 2923.55 is one of several sections of the HBOR that were subject to a sunset clause. Before its sunset date the statute set forth specific acts a mortgage lender or servicer was required to take before it was entitled to record a notice of default. (See Stats. 2013, ch. 76, § 15.)

[3] Plaintiffs had obtained an entry of default against NDSC in December 2013. In March 2014, however, the superior court granted NDSC's motion to set aside the default. That ruling is not before us in this appeal.

[4] The court also ruled that plaintiffs lacked standing to dispute the substitution of the trustee, rejecting the holding of *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 in favor of the contrary holding of *Jenkins v. JPMorgan Chase Bank, N. A.* (2013) 216 Cal.App.4th 497. (But see *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 935 (*Yvanova*) [in wrongful foreclosure action, borrower has standing to challenge assignment of note and deed of trust as void].) The standing issue, however, is not properly before us, as the complaint in this action does not allege wrongful foreclosure. That cause of action was asserted in the June 2012 action and is addressed in case No. H039922.