VICTOR H. RODRIGUEZ et al., Plaintiffs and Appellants,
v.
BANK OF AMERICA, N.A. et al., Defendants and Respondents.

No. E063895.

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

Filed April 14, 2017.

APPEAL from the Superior Court of San Bernardino County, Super.Ct. No. CIVDS1402855, Michael A. Sachs, Judge. Affirmed.

Rodriguez Law Group and Patricia Rodriguez for Plaintiffs and Appellants.

Reed Smith LLP, Kasey J. Curtis and Elena O. Gekker for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

OPINION

CODRINGTON, Acting P. J.

I

INTRODUCTION

Plaintiffs Victor H. Rodriguez and Angelita B. Rodríguez appeal from a judgment entered after the court sustained without leave to amend a demurrer to their first amended complaint (FAC). The issues on appeal involve foreclosure proceedings brought against plaintiffs by defendants ReconTrust Company and Bank of America. Based on our independent review, we affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

In August 2007, the Rodríguezes obtained a home mortgage in the amount of $400,000, secured by a deed of trust on real property located in Fontana, California. The deed of trust identified the Rodríguezes as the borrowers, Home Loan Center, Inc., dba Lending Tree Loans, as lender, T.D. Service Company as trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary "acting solely as a nominee for Lender and Lender's successors and assigns." The deed of trust provided that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender. . . ."

In June 2010, MERS, as beneficiary, substituted defendant ReconTrust as trustee and assigned its interest in the trust deed to defendant Bank of America. ReconTrust then recorded a notice of default in the amount of $44,935.73 in June 2010. In October 2010, ReconTrust recorded a notice of trustee's sale. ReconTrust recorded second and third notices of trustee's sale in November 2011 and February 2013. No foreclosure sale occurred.

In February and March 2012, the Rodríguezes had applied to Bank of America for a loan modification. The bank denied their request for modification in December 2012. The Rodríguezes sought a second review in January 2013, which was denied in June 2013. The Rodríguezes immediately requested a third loan modification review and Bank of America continued to ask for additional documents until January 2014.

Plaintiffs filed their original complaint in March 2014, asserting causes of action for violations of Civil Code section 2924.11 and Business and Professions Code section 17200, et seq. They alleged that Bank of America violated HBOR[1] by improperly denying them a loan modification and by engaging in "dual tracking," causing a notice of trustee's sale to be recorded while their loan modification review was pending, and also engaging in deceptive business practices in violation of the Unfair Competition Law (UCL).

In response to defendants' demurrer, plaintiffs filed a first amended complaint (FAC), adding causes of action for violation of Civil Code sections 2934a, subdivision (b), and 2924, subdivision (a)(6), and cancellation of written instruments. Based on the same claims of improper denial of loan modification, plaintiffs asserted that defendants did not establish "a single point of contact" as part of the loan modification review process. Plaintiffs also challenged ReconTrust's authority to execute and record a notice of default, contending that

ReconTrust was improperly substituted as trustee by MERS, did not hold the note and the deed of trust, and did not have authority to act on behalf of the beneficiary. Finally, plaintiffs sought cancellation of the foreclosure documents on the grounds they were fraudulently executed by individuals without authority to do so.

Defendants demurred again, arguing that MERS, as beneficiary under the trust deed, executed the trustee substitution on June 22, 2010, making ReconTrust duly authorized to record the notice of default on June 24, 2010. Defendants also contended that any claimed violations of HBOR were moot because the 2013 notice of trustee's sale had expired 365 days after its recording date pursuant to Civil Code section 2924g. Defendants also again requested judicial notice of recorded public documents and court records.

The trial court granted defendants' request for judicial notice and sustained the demurrer to all causes of action without leave to amend. Specifically, the court found that the claim for violation of section 2924.11, subdivision (a) was moot because "[t]he date of the trustee sale has passed and plaintiffs do not identify any facts showing that the defendants have set any new date without complying with the requirements of 2924(g) or that the trustee sale has, in fact, occurred." The court also agreed with the defendants that the plaintiffs' second cause of action for violation of the UCL was not sufficiently pleaded because it was "conclusionary and fail[ed] to state specific facts demonstrating that the defendants actually violated any statute or engaged in any unfair or fraudulent practice. [¶] Additionally the amended complaint fail[ed] to state facts showing that the plaintiff suffered any actual injury."

The court also found that ReconTrust was authorized to act as trustee and record the notice of default. The court noted that even if ReconTrust "had not been substituted in as trustee at the time it recorded the notice of default, it was nevertheless authorized to commence the nonjudicial foreclosure proceeding as agent for the beneficiary MERS. [¶] In fact, the June 22nd, 2010, notice of default expressly states that Recontrust was acting as agent for the beneficiary." Lastly, the court found no law or facts to justify cancelling the foreclosure documents.

In not granting leave to amend, the court stated: "If the plaintiffs were here, I would conduct an inquiry as to each of these causes of action as to whether plaintiff could offer any facts to me that would suggest I should give them a chance to amend their pleading, but nobody is here." The court entered a judgment of dismissal.

III

DISCUSSION

Standard of Review

In reviewing a ruling on a demurrer, this court "independently evaluate[s] the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context." (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, overruled on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.) We treat "`the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] [The court] also consider[s] matters which may be judicially noticed.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The denial of leave to amend is also reviewed for an abuse of discretion. (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 744; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992; *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) "To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action." (*Buller,* at p. 992.)

Orders granting or denying requests for judicial notice are reviewed for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 264.) A trial court's order granting judicial notice is presumed correct. (*Yun v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.)

Violation of Civil Code Section 2934, Subdivision (a), and Cancellation of Documents

On appeal, plaintiffs have not addressed their third and fifth causes of action for violation of Civil Code section 2934, subdivision (a) and cancellation of documents. These causes of action are therefore waived: "`[I]t is appellant's burden to affirmatively show error. [Citation.] To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]' [Citation.] `Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.'" (*Multani*

v. Witkin & Neal (2013) 215 Cal.App.4th 1428, 1457; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Violations of Civil Code Sections 2923.6, Subdivision (c), 2924.11, Subdivision (a), 2924, Subdivision (a)(6), and the UCL

Plaintiffs argue that they have a valid cause of action under Civil Code section 2924.11, subdivision (a), based upon purported dual-tracking of the foreclosure proceedings while their request for a loan modification was pending. The version of Civil Code section 2924.11, subdivision (a), which plaintiffs cite will not be effective until January 1, 2018. Nor do plaintiffs have a valid cause of action under the current version of the dual-tracking statute, Civil Code section 2923.6, subdivision (c).

The current version of Civil Code section 2924.11, subdivision (a), does not mention dual-tracking. Instead, plaintiffs cite a different version that does not go into effect until January 1, 2018. (See Assem. Bill 278, 2011-2012 Reg. Sess., ch. 86, 2012 Cal. Stat.) Accordingly, plaintiffs cannot maintain a cause of action under that statute.

Even under Civil Code section 2923.6(c)—HBOR's current dual tracking provision—plaintiffs' claim still fails for two reasons. First, the Rodríguezes have not alleged facts to suggest that the provisions of Civil Code section 2923.6, subdivision (c) were triggered. Civil Code section 2923.6, subdivision (c) provides that **"[i]f a borrower submits a complete application for a first lien loan modification," the foreclosing entity "shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending," until the borrower is provided with a written determination regarding his application and the time for an appeal has expired.** Under subdivision (d), the time to appeal is thirty (30) days. (Civ. Code, § 2923.6, subd. (d).)

Civil Code section 2923.6, subdivision (g), further provides that, **"the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated . . . prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer."** This provision was included **"[i]n order to minimize**

the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay." (Civ. Code, § 2923.6, subd. (g).)

The FAC alleges no facts showing that Bank of America and ReconTrust did anything inconsistent with these provisions. According to their complaint, the Rodríguezes first applied for a loan modification in March 2012—before HBOR was enacted—but were denied a modification in December 2012. The Rodríguezes did not appeal the denial but instead asked for another loan modification review although there was no material change in their circumstances. Therefore, Civil Code section 2923.6, subdivision (c), did not apply. Second, any claim is now moot because Bank of America did not proceed with the foreclosure and the purportedly improper notice of sale has since expired.

Under Civil Code section 2924.12, the only relief available to a party pursuing a preforeclosure claim predicated upon a purported violation of Civil Code section 2923.6 is for injunctive relief to stop the allegedly improper foreclosure until the violation is cured. (Civ. Code, § 2924.12, subd. (a)(1)-(2).) Plaintiffs were pursuing preforeclosure claims, which means that the only relief they could have sought was injunctive relief to enjoin any pending foreclosure sale until the purported violation of Civil Code section 2923.6 was remedied. However, there is no pending foreclosure sale and the notice of trustee's sale expired in February 2014, 365 days after it was recorded in February 2013. (Civ. Code, § 2924g, subdivision (c)(2).) Any claim based upon allegedly improper dual tracking was moot.

The cause of action for violation of Civil Code section 2924, subdivision (a)(6), also fails for two reasons: (1) **HBOR IS NOT RETROACTIVE** and the conduct alleged occurred before 2013; and (2) there was nothing wrong with the assignment from MERS to ReconTrust. **Civil Code section 2924, subdivision (a)(6), prohibits an entity from recording or causing a notice of default to be recorded or otherwise initiating foreclosure "unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest . . . acting within the scope of authority designated by the holder of the beneficial interest."**

The current Civil Code section 2924, subdivision (a)(6), took effect on January 1, 2013. However, the recording of the notice of default occurred in 2010. Section 2924, subdivision (a)(6), is not retroactive: "[U]nless there is an `express retroactivity provision, a statue will not be applied retroactively unless it is *very*

clear from extrinsic sources that the Legislature . . . intended a retroactive application.'" (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841; *People v. Whaley* (2008) 160 Cal.App.4th 779, 794.) Nothing in the language of HBOR expressly indicates the statutes are to apply to pre-January 1, 2013 events; nor is there any indication from extrinsic sources, such as the legislative history, of retroactive application. (*Rockridge Trust v. Wells Fargo, N.A.* (N.D.Cal. 2013) 985 F.Supp.2d 1110, 1152.) The new laws enacted under HBOR, including Civil Code section 2924, subdivision (a)(6), apply only prospectively—to events occurring on or after January 1, 2013. The notice of default initiating the foreclosure process was recorded on June 22, 2010; nearly three years before HBOR went into effect. No violation of Civil Code section 2924, subdivision (a)(6) occurred.

We also reject the assertion that ReconTrust was not the holder of the note or the deed of trust at that time it recorded the notice of default. **Civil Code section 2924 "broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure."** (*Lane v. Vitek Real Estate Industries Group* (E.D. Cal. 2010) 713 F.Supp.2d 1092, 1099.) Notwithstanding that Civil Code section 2924, subdivision (a)(6), was not in existence at the time of the recordation of the notice of default, ReconTrust was authorized, as agent for the beneficiary, to initiate foreclosure pursuant to the deed of trust.

Finally, plaintiffs have no valid UCL claim. Violations of the UCL may be unlawful, fraudulent, or unfair. The unlawful prong requires a violation of underlying law or a statutory violation. Under the fraudulent prong, a plaintiff must show that "`"`members of the public are likely to be deceived"'" by the defendant's practices. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312.) Conduct under the "unfair" prong must violate some public policy "`"tethered" to specific constitutional, statutory, or regulatory provisions."'" (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.) UCL allegations "must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) To have standing under California's unfair competition laws, a private plaintiff must allege that he "has suffered injury in fact and has lost money or property" as a result of the alleged unfair practices. (Bus. & Prof. Code, § 17204; *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 360.)

Both Bank of America and ReconTrust acted correctly. When the Rodríguezes defaulted on their loan, ReconTrust, as trustee and agent for the beneficiary, recorded the notice of default and notices of trustee's sale. The Bank of America repeatedly considered the loan modification requests. The FAC does not state

"with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc., supra*, 14 Cal.App.4th at p. 619.) Instead, the FAC makes conclusory allegations that defendants acted improperly and prematurely according to a scheme "designed to defraud California consumers and enrich the Defendants" and causing "substantial harm to California consumers, including Plaintiffs." These allegations do not constitute a viable UCL claim of "unlawful, fraudulent, or unfair" conduct. Also, crucially, the Rodríguezes have not suffered any injury in fact or lost any money or property because the foreclosure sale never occurred; any claimed damages are purely speculative.

Judicial Notice

Plaintiffs contend that the trial court abused its discretion by granting defendants' request for judicial notice and wrongly accepted the truth of the matters stated in the recorded documents. Orders granting or denying requests for judicial notice are reviewed for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A., supra*, 198 Cal.App.4th at p. 264.) A trial court's order granting judicial notice is presumed correct. (*Yun v. University of La Verne, supra*, 196 Cal.App.4th at p. 787.)

A court should judicially notice exhibits that are official public records, the contents and authenticity of which "cannot reasonably be controverted." (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549; *Fontenot, supra*, 198 Cal.App.4th at pp. 264-265; Evid. Code, § 452, subd. (h).) Pursuant to Evidence Code section 453, judicial notice is mandatory "of any matter specified in Section 452 if a party requests it and: [¶] (a) Gives each adverse party sufficient notice of the request, . . .; and [¶] (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." Courts commonly take judicial notice of recorded deeds and similar instruments. (*Fontenot*, at p. 265; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 394.)

Nothing in the record shows that the trial court improperly noticed the truth of any facts in the recorded documents—copies of which were attached by plaintiffs to the FAC. The status of MERS, Bank of America, and ReconTrust was based on the designations in the deed of trust, the assignment, and the substitution respectively and "was not a matter of fact existing apart from the document itself." (*Fontenot, supra*, 198 Cal.App.4th at p. 266.) The trial court did not err in granting judicial notice.

Amendment of Complaint

In determining whether the trial court abused its discretion in denying leave to amend, this court "`must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment.'" (*Fontenot, supra*, 198 Cal.App.4th at p. 274.) Plaintiffs have the burden to show abuse of discretion. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

At the hearing on the demurrer, the trial court noted on the record that it would have conducted an inquiry into each of the causes of action and given plaintiffs a chance to explain how they could amend their pleading, except they failed to appear at the hearing. On appeal, plaintiffs still do not offer how they could successfully amend their complaint.

IV

DISPOSITION

Plaintiffs' causes of action have either been waived or fail to state a claim. The trial court correctly sustained defendants' demurrer to the FAC without leave to amend. We affirm the judgment. Defendants, as prevailing parties, shall recover their costs on appeal.

SLOUGH, J. and FIELDS, J., concurs.

[1] The Homeowner's Bill of Rights.