

NICOLE SMITH et al., Plaintiffs and Appellants,
v.
BANK OF NEW YORK MELLON et al., Defendants and Respondents.

[No. B288006.](#)

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

Filed January 3, 2019.

Appeal from a judgment of the Superior Court of Los Angeles County, Superior Court No. PC058182. Melvin D. Sandvig, Judge. Appeal dismissed.

Law Office of Michael S. Traylor and Michael S. Traylor for Plaintiffs and Appellants Nicole Smith and Charlie Smith.

Houser & Allison, Robert W. Norman Jr., Emilie K. Edling, and Neil J. Cooper for Defendant and Respondent Bank of New York Mellon.

Wargo & French, Shanon J. McGinnis, Jeffrey N. Williams, and Scott R. Laes for Defendant and Respondent Select Portfolio Servicing, Inc.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

ROTHSCHILD, P. J.

Nicole Smith and Charlie Smith (the Smiths) appealed from an order denying their application for a preliminary injunction to enjoin a trustee's sale of their property pursuant to a power of sale provision in a deed of trust. Because the trustee's sale has taken place and the property has been sold, we dismiss the appeal as moot.

FACTUAL AND PROCEDURAL SUMMARY

On December 21, 2017, the Smiths filed a complaint in the superior court alleging 13 causes of action arising out of defendants' conduct related to a then-pending trustee's sale of the Smiths' property. The Smiths named, among other defendants, Bank of New York Mellon (BoNY), Bayview Loan Servicing, LLC (Bayview), Mortgage Electronic Registration Systems, Inc. (MERS), and Select Portfolio Servicing, Inc. (Select). The trial court granted the Smiths' application for a temporary restraining order against the trustee's sale, which had been scheduled for December 28, 2017.

On January 26, 2018, however, the court denied the Smiths' request for a preliminary injunction against the trustee's sale on the ground that the Smiths failed to establish a reasonable probability that they would prevail on the merits of their claims. The Smiths timely appealed the ruling to this court.

While this appeal was pending, the trial court sustained demurrers to the Smiths' second amended complaint without leave to amend and thereafter entered judgments of dismissal in favor of Select on August 9, 2018, and in favor of BoNY, Bayview, and MERS on September 18, 2018.^[1] The Smiths filed a notice of appeal from these judgments, commencing this court's case No. B292323.

On September 17, 2018, the Smiths filed a motion in this court for an order staying the trustee's sale. We treated the motion as a petition for writ of supersedeas and, on September 26, summarily denied the petition.

The next day, the trustee's sale that the Smiths sought to enjoin took place, and the subject property was sold to BoNY, the foreclosing beneficiary. A trustee's deed reflecting the sale was recorded on October 2, 2018.^[2]

On October 4, 2018, Select filed a motion to dismiss the instant appeal on the ground that it was rendered moot by the orders sustaining its demurrer to the second amended complaint without leave to amend.

On the same day, the Smiths filed an opposition to Select's motion indicating that the property had been sold at a trustee's sale.

On October 17, 2018, we informed the parties that, in addition to considering the ground asserted by Select, we were considering dismissing the appeal as moot because the Smiths' property was sold at a trustee's sale. We invited the parties to submit briefs addressing this issue and set the

matter for oral argument.^[3] The Smiths, Select, BoNY, Bayview, and MERS filed supplemental briefs, which we have considered.

DISCUSSION

"An appeal from an order denying a . . . preliminary injunction will not be entertained after the act sought to be enjoined has been performed.

[Citation.] `An appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief.'" ([Ragland v. U.S. Bank National Assn. \(2012\) 209 Cal.App.4th 182, 208](#); accord, [County of Los Angeles v. Butcher \(1957\) 155 Cal.App.2d 744, 746](#); see [Bisno v. Sax \(1959\) 175 Cal.App.2d 714, 730-731](#) [trustee's sale mooted plaintiff's request to enjoin trustee's sale, but did not moot request for declaratory relief].)

Here, the act the Smiths sought to enjoin—a trustee's sale of their property—has been performed. Under the foregoing authorities, the appeal from the order denying that injunction is moot and "should be dismissed." ([Ragland v. U.S. Bank National Assn., supra, 209 Cal.App.4th at p. 208.](#)) The Smiths cite no contrary authority.

The Smiths contend that the property has not been sold because it "continues to be owned by" BoNY. **Prior to the sale, however, the property was not owned by BoNY; it was owned by the Smiths, subject to a deed of trust. The trustee's sale effected a sale of the property by the trustee to the purchaser at the trustee's sale, in this case, BoNY.**

The Smiths also assert, without citation to authority, "that the perfecting of the appeal stayed the order denying injunctive relief." If by this the Smiths mean that the instant appeal prevented the respondents from proceeding with the trustee's sale, they are incorrect; the injunction they sought was prohibitory in nature, and **an order denying a prohibitory injunction is not automatically stayed by appeal.** ([Food & Grocery Bureau v. Garfield \(1941\) 18 Cal.2d 174, 177](#); see [Trede v. Superior Court \(1943\) 21 Cal.2d 630, 635](#) [**appeal from order denying injunction "does not require the defendant to refrain from doing the act of which the plaintiff complains**].)

DISPOSITION

The appeal is dismissed. Respondents Bank of New York Mellon, Bayview Loan Servicing, LLC, Mortgage Electronic Registration Systems, Inc., and Select Portfolio Servicing, Inc. shall recover their costs on appeal.

CHANEY, J. and CURREY, J.^[*], concurs.

[1] We grant BoNY's unopposed request for judicial notice (filed on Nov. 1, 2018) of the referenced judgments of the dismissal, attached as exhibit Nos. 1 and 2 to its motion. (Evid. Code, §§ 452, subd. (d), 459.) We deny Select's motion for judicial notice (filed on Oct. 23, 2018) of the exhibits attached to their motion. Exhibit No. A to Select's motion (the trial court's ruling on the demurrers and motions for sanctions) is not relevant to the issues before us. Although Select also attached exhibit Nos. B and C to their motion, it did not request judicial notice of these items and failed to support the request as required under rule 8.252(a)(2) of the California Rules of Court.

[2] We grant BoNY's unopposed request that we take judicial notice (filed on Nov. 1, 2018) of the recorded trustee's deed, attached as exhibit No. 3 to its motion. (Evid. Code, §§ 452, subds. (c) & (h), 459; [*Yvanova v. New Century Mortgage Corp.* \(2016\) 62 Cal.4th 919, 924, fn. 1](#); [*Fontenot v. Wells Fargo Bank, N.A.* \(2011\) 198 Cal.App.4th 256, 264-265.](#))

[3] The parties waived their right to oral argument.

[*] Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.