FOSTER v. IRBC2 PROPERTIES LLC et al

21CV45573

MOTION TO EXPUNGE; MOTION TO CONTINUE

This is a wrongful foreclosure case commenced by plaintiff after the recording of a Trustee's Deed Upon Sale following a nonjudicial foreclosure sale. Plaintiff generally contends that the foreclosing parties had no legal authority to conduct the foreclosure sale because their putative interest in the property was based on void instruments. As this Court observed in relation to the ruling on demurrer (entered 07/22/22), the right to challenge assignments set forth in *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, was limited to those assignments which were void ab initio, not those which were merely voidable. (See also *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279.) Since the operative pleading was deficient, and the related Notice of Lis pendens therefore defective, the previous cloud was ordered expunged. Plaintiff has since filed a First Amended Complaint and recorded a new Notice of Lis Pendens.

Motion to Continue – Granted in Part

On 08/29/22, defendant IRBC 2 Properties filed a motion to expunge plaintiff's new Notice of Lis Pendens. It was set for hearing on 09/30/22.

On 09/08/22, plaintiff filed a motion to continue the 09/30/22 hearing. Plaintiff offers two reasons for a continuance: (1) unavailability of his "special appearance" counsel; and (2) the re-imposition of a statutory bankruptcy stay. Both will be addressed in turn.

Plaintiff first contends that Attorney James Imperiale has been retained to represent plaintiff in this proceeding, and that he is unavailable to attend the hearing on the motion to expunge. Although this Court is always considerate of scheduling issues, this proffered justification for a continuance is insufficient for the following reasons:

1. There is nothing in the Register of Action reflecting any such representation of plaintiff, whether in toto or for any limited purpose (see B&P Code §6068, CCP §284 and CRC 1.21, 3.36);
2. There is no declaration from Attorney Imperiale attesting to his unavailability, and if that unavailability only pertains to in-person appearance as juxtaposed against an appearance by telephone per CRC 3.670;
3. There is no evidence that Attorney Imperiale advised defense counsel beforehand of any scheduling conflicts with that date. (Compare *Carl v. Superior Court* (2007) 157 Cal.App.4th 73, with *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299;

4. Since new matter cannot be raised at an appearance on 09/30/22, and given that all papers filed regarding this motion were signed by plaintiff, counsel's absence from the hearing would be harmless at best; and, finally,
5. The Court notes plaintiff has expressed that he has a limited scope attorney at every previous appearance, and at every previous appearance the Court has advised plaintiff that unless and until either a Substitution of Attorney or statement of limited scope representation is filed with the Court confirming representation, plaintiff remains in pro per and the Court views his alleged limited scope counsel as a consultant whose (un)availability does not impact scheduling of Court proceedings.

Plaintiff next contends that his unilateral request to the bankruptcy court to reopen his 2018 petition, which was ministerially granted, reimposes the standard bankruptcy case stay. Here in the 9th Circuit, it would appear that reinstatement of a bankruptcy case automatically restores the 11 USC §362 stay. (See *In re Sewall*, 345 B.R. 174, 179 (9th Cir. 2006) ["Dismissal of a bankruptcy case generally terminates the automatic stay. Reinstatement of a case restores the automatic stay."]) *Sewall* was a Chapter 13 case, and involved the timing of when that new stay went into effect. This Court is aware of contrary authority – most notably *In re Brumfiel*, 514 B.R. 637, 643 (D. Colo. 2014), which expressed that reopening a Chapter 7 petition after the subject property was already deemed abandoned does not result in an automatic restoration of the automatic stay because nothing in 11 USC §350(b) suggests that outcome. The general holding of *Brumfiel* was followed by two California district courts, also addressing Chapter 7 petitions. (See *In re Suissa*, WL11717119 (C.D. Cal. 2019), and *In re Agha*, WL739828 (E.D. Cal. 2015).) However, both California cases acknowledged that the question of whether the stay applies depends on whether the current action involving the debtor relates to property that was scheduled in the petitions and subsequently addressed by the court. Even though this present litigation is not an "action or proceeding against the debtor" (11 USC §362(a)(1)), 11 USC §362(c) provides that "the stay of an act against property of the estate continues until such property is no longer property of the estate," whereas the generic stay expires when the bankruptcy case is closed or dismissed. Thus, it will be necessary, at minimum, for the Court to be presented evidence that would allow review of the Registry of Action for the bankruptcy case, including whatever orders might exist pertaining to how the case was closed, and the disposition of the subject property, to determine whether some aspect(s) of the automatic stay exist(s).

Hearing continued to 10/21/22 at 9:00 a.m. in Dept. 2 to align with the hearing on the currently-pending demurrers. At least 10 calendar days prior thereto, both sides are invited to submit a supplemental brief (not to exceed 5 pages), plus pertinent exhibits, providing this Court any necessary information from which to determine if an automatic stay exists.