BOODE v. DE PERALTA et al

21CV45714

MOTION TO BE RELIEVED AS DEFENSE COUNSEL

This is an action to establish record of an unwritten easement between adjoining lands. Before the Court this day is a motion by defense counsel to withdraw.

An attorney may withdraw as counsel of record if the client breaches the agreement to pay fees, insists on pursuing invalid claims or an illegal course of conduct, or when other conduct by the client renders it unreasonably difficult for the attorney to do his job, including when there is a breakdown in the attorney-client relationship. If the attorney does not have the client's consent, he or she must proceed by way of noticed motion consistent with CCP §§ 284 and 1005, CRPC 1.16 and CRC 3.1362. The motion must be verified, must utilize the designated Judicial Council forms MC-051 – MC-053, and must set forth sufficient detail to permit a trial court to discharge its duty of inquiry regarding the grounds for the motion. (See *Flake v. Neumiller & Beardslee* (2017) 9 Cal.App.5th 223, 230; *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1134-1136; *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592-593.)

Counsel indicates that there has been "an irremediable breakdown" between counsel and clients; while this is but a conclusion, not a proffer of evidentiary facts in "sufficient detail" supporting the request to withdraw, this Court takes a very liberal approach to accepting attorney's assertions of breakdowns with clients at face value.

However, counsel has not adequately demonstrated proper service. All papers in support of the motion must be served on the client *and all parties*. With regard to service on the client, it must be personally delivered or mailed to the client's "current" address (as confirmed within last 30 days). CRC 3.1362(d)(2) requires the attorney to serve the papers on the client at an address which was *actually confirmed* to be accurate within the preceding 30 days. If address cannot be confirmed, and counsel can show due diligence, service can be made to the client's last known address and on the clerk of the court. (CCP §1011(b) and CRC 3.252.) Here, counsel indicates that there was return receipt received from the referenced address, but no copy was provided. Separately, counsel indicates that the address was confirmed via "the attorney client agreement," which is insufficient since that agreement was presumably signed at least four months ago when counsel first appeared in the action. Moreover, no proof of service as to plaintiff has been provided.

In addition, CRC 3.1362(e) requires counsel to lodge a proposed order with the motion, and there is no proposed order lodged.

Finally, a proper motion to withdraw may be denied when it is reasonably foreseeable that the client would suffer prejudice, such as when the unrepresented client would be unable to fairly respond to dispositive motions. (CRPC 1.16(d); *Mossanen v. Monfared* (2000) 77 Cal.App.4th 1402, 1409.) Here, counsel concedes that the clients are already delinquent in responding to the Second Amended Complaint. Since no answer has ever been filed, the clients are potentially in a position to be defaulted. Counsel cannot depart the case under such precarious circumstances without first protecting the clients from harm.

Motion DENIED WITHOUT PREJUDICE to refiling. The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.

FOSTER v. IRBC2 PROPERTIES LLC et al

21CV45573

DEFENSE DEMURRER TO FAC; MOTION TO EXPUNGE

This is a wrongful foreclosure case. The operative pleading herein is the First Amended Complaint filed 08/22/22, which contains the following seven (7) causes of action: wrongful foreclosure; cancellation of instruments; slander of title; intentional and negligent infliction of emotional distress; unfair business practices; accounting; and declaratory relief. Before the Court are the following motions, which were previously stayed pending resolution of a related action in bankruptcy court:

1. Motion to expunge lis pendens filed by defendant IRBC2 Properties;
2. Demurrer by:
    a. Orion Financial and Connie Riggsby (1st – 5th COAs);
    b. IRBC2 Properties and Park Tree Investments (1st – 4th COAs);
    c. FCI Lender Services (1st – 7th COAs);
    d. Real Time Resolutions (6th COA); and
    e. 2005 Residential Trust 3-2 by Wilmington Savings Fund Society (1st – 7th COAs).

Despite a rather sizable stack of papers, there is but one central issue in this litigation, to wit: did California TD Specialists have legal authority to conduct a nonjudicial foreclosure sale of plaintiff's residence by Wilmington Savings Fund Society FSB on behalf of 2005 Residential Trust 3-2. Because the issue falls within a narrow, and presently underdeveloped, area of law, a detailed review of the averments is necessary to determine if in fact plaintiff has adequately stated any claim sufficient to survive the present pleadings.

Background Facts (as alleged and deduced from incorporated exhibits)

On or about 08/08/02, plaintiff acquired via grant deed, for a reported $25,000, a half-acre lot in the Copper Cove subdivision of Copperopolis, overlooking Lake Tulloch, designated APN 067-022-005, and commonly referred to as 4928 Pueblo Trail, Copperopolis, California (hereinafter "subject property"). Soon thereafter, plaintiff completed construction thereon of a 2,831 square foot residence with four bedrooms and 3 bathrooms, using funds he borrowed from IndyMac Bank. The amount of the loan is unknown, but according to plaintiff there was a balance of roughly $256,000.00 when the foreclosure occurred.

On or about 07/06/06, plaintiff secured a home equity line of credit from Countrywide Bank in the amount of $450,496.00 (designated as *Loan No 9160017686*). The note for

this line of credit (hereinafter “HELOC”) was secured by a deed of trust to the subject property (hereinafter “HELOC-DOT”) with the power of sale in favor of MERS as Countrywide’s nominated beneficiary.

On or about 06/27/12, there was recorded against the property an assignment of the HELOC-DOT **from** MERS (assignor) **to** The Bank of New York Mellon (assignee) fka The Bank of New York, as successor trustee to JPMorgan Chase Bank as trustee on behalf of the Certificateholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-G (hereinafter “Mellon”).

On or about 08/30/16, plaintiff was informed via letter that Ditech Financial LLC’s right to collect on plaintiff’s loan was being transferred to Real Time Resolutions. At that time, it was reported that plaintiff had a principal balance owing of $491,446.00.

On or about 05/13/17, Real Time Solutions transferred servicing obligations for plaintiff’s HELOC from itself to FCI Lender Services, effective 06/01/17.

On or about 09/12/17, there was recorded against the subject property assignments of the HELOC-DOT as follows:

- Instrument 2017-010309: **from** Mellon (assignor) **to** 2005 Residential Trust 3-1 by Wilmington Savings Fund Society FSB (assignee);
- Instrument 2017-010310: **from** 2005 Residential Trust 3-1 by Wilmington Savings Fund Society FSB (assignor), **to** 2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB (assignee).

Both assignments were executed by Connie Riggsby, albeit wearing different hats (VP of Orion Financial, and VP of CTF Asset Management). While these assignments were taking place, plaintiff sent an inquiry to FCI Lender Services, Inc., seeking information regarding his arrears. Two days later, FCI Lender Services, Inc., responded, acknowledging its role as the current servicer on plaintiff’s HELOC.

On or about 04/10/18, plaintiff made his last ever payment toward his HELOC arrears. Also that day, there was recorded against the subject property (1) a Substitution of Trustee, executed by *2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB*’s designated administrator Park Tree Investments, swapping out Service Link in favor of California TD Specialists; and (2) a Notice of Default, reflecting a current arrears of $220,267.36.

On 07/11/18, plaintiff filed suit against California TD Specialists, FCI Lender Services, and 2005 Residential Trust 3-2. (See 18CV43398.)

On or about 08/01/18, California TD Specialists caused to be recorded against the subject property a Notice of Trustee’s Sale for an estimated accrued debt of $710,657.61.

On 07/01/19, plaintiff filed a Request for Dismissal without prejudice of 18CV43398, a day or two after service of a demurrer to his operative First Amended Complaint.

On or about 09/05/19, California TD Specialists caused to be recorded against the subject property a Trustee's Deed Upon Sale, indicating that the foreclosing beneficiary (2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB) secured the property with a full-credit bid of $716,395.00.

On or about 10/16/19, there was recorded against the property a quitclaim deed from new owner 2005 Residential Trust 3-2 by Wilmington Savings Fund Society FSB, to new buyer IRBC2 Properties, LLC.

On 09/02/21, plaintiff filed his second civil action, this time naming as defendants California TD Specialists, FCI Lender Services, 2005 Residential Trust 3-2 Wilmington Savings Fund, *plus* IRBC2 Properties, Park Tree Investments, Real Time Resolutions, Connie Riggsby, and Orion Financial Group.

Demurrers to First Amended Complaint

A demurrer presents an issue of law regarding the sufficiency of the allegations set forth in the complaint. The challenge is limited to the "four corners" of the pleading (which includes exhibits attached and incorporated therein), or from matters outside the pleading which are judicially noticeable. The complaint is read as a whole. Material facts properly pleaded are assumed true, but contentions, deductions or conclusions of fact/law are not. In general, a pleading is adequate if it contains a reasonably precise statement of the ultimate facts, in ordinary and concise language, and with sufficient detail to acquaint a defendant with the nature, source and extent of the claim. (CCP §§ 425.10(a), 459; in accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 236 n.10.)

Before drilling down into the individual causes of action, this Court notes that plaintiff's writing style and structure render the operative pleading difficult to intelligently navigate. Setting aside the copious number of typos and syntax issues, plaintiff's apparent need to "prove" his claims within the pleading itself misses the point of a pleading, and results in a somewhat convoluted diatribe or misplaced excerpts.

Defendants generally demur on the ground that all of plaintiff's claims fail for lack of an averment regarding his present ability and willingness to tender to defendants the amount in dispute to cure the arrears on his HELOC. However, where the wrongful foreclosure claim is based on a void assignment, tender is not a condition precedent. (See *Sciarratta v. U.S. Bank NA* (2016) 247 Cal.App.4th 552, 565; in accord, *Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 530-531.)

Plaintiff's **first** cause of action for wrongful foreclosure is not adequately stated. As previously noted, plaintiff's entire case depends on whether assignments within the chain of title were void. (Compare *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, with *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279.) Plaintiff contends that the 2012 assignment was void because MERS did not use the magic words "as nominee" in the assignment, but there is no legal authority supporting such a proposition. MERS was authorized to make the assignment as a matter of law,

and assignment of the HELOC-DOT was sufficient to empower the assignee to foreclose, whether or not the assignee also possessed the beneficial interest in the HELOC note. (See, *e.g., Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1003-1004; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440.) Plaintiff also takes issue with the 2012 assignment because it was to a securitized trust pool that allegedly closed "six years" earlier, but even if that is true that would only render the assignments voidable, not void. (See *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 811-820; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43-44.) Plaintiff takes issue with the 2017 assignments, demanding proof of Ms. Riggsby's authority – but since an assignment does not have to be in writing or recorded to be effective, a challenge to the signer's *actual* authority is beyond the scope of nonjudicial foreclosure sale challenges. (Compare *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280-281; with *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 39-40.)

Plaintiff's **second** cause of action is uncertain. Pursuant to Civil Code §3412, "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." To plead a cause of action for cancellation of instrument, plaintiff must show that he will be injured or prejudiced if the instrument is not cancelled, and that such instrument is void. (See *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1323.) An "instrument" is "a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty." (Government Code §27279.) Recordings not affecting title are not instruments. (See 5 Miller & Starr, Cal. Real Estate (3d ed. 2000) §11:6, pp. 19–35; *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1388, 1399-1400; *Ward v. Superior Court* (1997) 55 Cal.App.4th 60, 64-65.) Plaintiff identifies a number of recordings, but it is not clear to this Court if plaintiff is seeking to rescind all of those recordings, or just some of them. Presuming the former, specific factual averments are required to illuminate a basis for cancelling each recording.

Plaintiff's **third** cause of action is also uncertain. Slander of title occurs when a person publishes a false statement that disparages title to property and causes pecuniary loss. To state a claim for slander of title, a plaintiff must allege (1) a publication, (2) which is without privilege or justification, (3) which is false when made, and (4) which causes direct and immediate pecuniary loss. In general, instruments recorded in connection with a nonjudicial foreclosure proceeding are privileged communications under Civil Code §2924(d) and Civil Code §47, except in those rare instances when the publication either was (1) motivated by hatred or ill will towards the plaintiff, or (2) that the defendant lacked reasonable grounds for belief in the truth of the publication and acted in reckless disregard of the plaintiff's rights. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336-1338; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335-

336.) Plaintiff references different documents, and claims that some of them were unauthorized, but fails to address the privileged nature of most of those. Moreover, since plaintiff otherwise had no ownership interest in the subject property, his slander of title claim is entirely dependent on his ability to plead a claim for wrongful foreclosure.

Plaintiff's **fourth** cause of action for intentional and negligent infliction of emotional distress fails to state sufficient facts. First, there is no independent tort of negligent infliction of emotional distress; rather, the tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. Additionally, it must be pled specifying the duty owed to plaintiff as one imposed by law, assumed by conduct or based on a special relationship. (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 205; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 532; *Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1043.) The facts pled do not support any duty owed to plaintiff. Second, the essential elements of a cause of action for Intentional infliction of Emotional Distress include: (1) extreme and outrageous conduct by the defendant; (2) with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) resulting in severe or extreme emotional distress; and (4) actually caused by the defendant's outrageous conduct. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051; *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 Cal.App.4th 1228, 1259.) To properly plead "extreme and outrageous conduct," the alleged conduct must (1) be pled with reasonable particularity and (2) be so extreme as to exceed all bounds of that usually tolerated in a civilized community and which would – to the average member of the community – arouse resentment against the actor. (*Hughes, supra*, 46 Cal.4th at 1051; *McMahon v. Craig* (2009) 176 Cal.App.4th 1502.) The Economic Loss Rule severely limits any opportunity to recover emotional distress damages in a financial arms-length scenario. (See *Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220.) Although there is an exception for recovery for emotional distress caused by property loss where there is a preexisting relationship or the harm results from an independent intentional tort (see *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, and *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525), there are no such facts alleged.

Plaintiff's **fifth** cause of action if for unfair business practices. This claim is effectively duplicative of the first cause of action for wrongful foreclosure, as both rise and fall on the same wrongdoing and carry the same nature of relief.

Plaintiff's **sixth** cause of action for accounting is uncertain. Although this is an independent cause of action, the nature of this claim is akin to discovery. In other words, the purpose of this cause of action is to secure from a party in sole possession of books the detail about what is owed on the debt. (See *Fleet v. Bank of America* (2014) 229 Cal.App.4th 1403, 1413; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 910; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) However, plaintiff does not admit to owing anyone anything on his HELOC, and in fact insists that DiTech's reference to "charging off" the debt from its own books is somehow akin to a legal debt forgiveness. Of course, since DiTech only serviced the loan, and

never had a beneficial interest in either the HELOC note or the HELOC-DOT, it had no authority to discharge the debt. Nevertheless, if plaintiff claims that he owes something, then and only then would this cause of action even be potentially colorable.

Plaintiff's **seventh** cause of action for declaratory relief is unnecessary. Although plaintiff neglected to clarify which defendants this cause of action is asserted against, a trial court has discretion not to act where the court feels it is neither necessary nor proper to do so. (CCP §1061.) For example, if there exists a straightforward civil remedy for the alleged wrong, declaratory relief is generally not warranted. (See *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433; *DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 546–547.) Moreover, if the declaratory relief claim is wholly derivative of an otherwise meritless or unsupportable claim for damages, equitable jurisdiction should be denied. (*Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800.) Here, there is no genuine need to render a declaration regarding the effect of any of the challenged assignments since those would naturally fall within the cause of action for wrongful foreclosure.

In conclusion, the operative pleading will once again need to be amended and revised, and materially truncated to include only ultimate facts supporting essential elements. The demurrers to the **1st, 2nd, 3rd, 4th, 5th and 6th** causes of action are SUSTAINED with 20 days leave to amend. The demurrer to the **7th** cause of action is SUSTAINED WITHOUT leave to amend.

The demurrer of Real Time Resolutions is SUSTAINED WITHOUT leave to amend as this defendant is not alleged to have played any role in the subject foreclosure.

Plaintiff's Second Amended Complaint shall comply with all rules of pleading (including but not limited to CCP §§ 425.10(a), 457, 459, and CRC 2.112), and shall in no event exceed 15 pages (excluding exhibits), which shall comply with CRC 2.100-2.114.

Motion to Expunge

A *lis pendens* is a recorded document giving constructive notice to the world that an action is pending in the courts which may have an impact on the litigants' right or title to the property. (See *Park 1000 Investment Group II v. Ryan* (2010) 180 Cal.App.4th 795, 807; *Formula Inc. v. Superior Court* (2008) 168 Cal.App.4th 1455, 1462; *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1375-1376.) Pursuant to CCP §§ 405.22 and 405.23, a claimant filing a notice of lis pendens must follow three steps:

1. prior to recordation, serve by registered or certified mail, return receipt requested, a copy of the notice on all known owners and those with adverse claims to the property;
2. concurrent with recordation of the notice, record a proof of service consistent with CCP §1013a. if service cannot be effectuated, a declaration of due diligence is needed (§405.22);
3. immediately following recordation of the notice and proof of service, file a copy of both with the court in which the action is pending.

Pursuant to CCP §405.23, the notice of lis pendens "shall be void and invalid" as to any adverse party or owner of record unless the above requirements have been met. Plaintiff has now caused to be recorded three separate notices of pending action (2021-017023, 2022-009716, 2022-013686). Each one has enjoyed at least one technical glitch, although the most recent versions are substantially compliant.

As for the merits, pursuant to CCP §405.30, anyone with an interest in real property may move a court for an order expunging a *lis pendens*. A court "shall" grant the motion if either of the following conditions exist:

(1) The pleading upon which the lis pendens is based does not contain a real property claim (CCP §405.31); OR
(2) The claimant has not established by a preponderance of the evidence the probable validity of the real property claim (CCP §405.32).

A lis pendens may only attach in favor of cause of action which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading. (CCP §405.4.) The test to determine whether or not a cause of action is a "real property claim" turns on the adequacy of the pleadings and not evidence submitted for or against the issue. In other words, trial courts engage in a "demurrer-like" review only. (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647-648; *Park 100 Investment Group v. Ryan* (2009) 180 Cal.App.4th 795, 812. *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 911.) A cause of action for wrongful foreclosure can potentially return the plaintiff to the status ante, meaning that plaintiff would take back title to the property, subject to any unpaid encumbrances created by plaintiff. The First Amended Complaint does contain a real property claim.

Plaintiff must now present evidence sufficient to show probable validity (more likely than not) of his real property claims, which in this instance would only be the first cause of action for wrongful foreclosure (since none of the other claims would yield a change in title to the property). (See CCP §405.3 and *Ziello v. Superior Court* (1995) 36 Cal.App.4th 321, 332.) The claimant, in opposition to a motion to expunge, may rely solely on a verified complaint, based on personal knowledge. (*Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 889.) The burden of proof rests with plaintiff. (*Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, 1007; *Shah v. McMahon* (2007) 148 Cal.App.4th 526, 529.)

As noted, since plaintiff has not alleged sufficient facts to support a cause of action for wrongful foreclosure, and has not shown that any of the alleged irregularities with the foreclosure sale rose to the level of *void ab initio*, he has not demonstrated the probable validity of that cause of action. Nevertheless, since there is a risk that defendants will look to sell the property to a prospective BFP, and since there is no readily available mode of relief for plaintiff should he prevail (given that he built this house himself), this Court will permit the lis pendens to remain of record on condition that plaintiff post a bond of $30,000 within 5 business days, which reasonably covers potential market

losses and legal fees if the lis pendens proves to be meritless. (See CCP §§ 405.8, 405.34.)

The Clerk shall provide notice of this Ruling to the parties forthwith. Defendants to prepare respective formal Orders pursuant to Rule of Court 3.1312 in conformity with these rulings.