

Tentative Rulings for Department 403

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Tentative Ruling

Re: **Burt v. Bank of New York Mellon**
Case No. 14CECG00641

Hearing Date: June 4th, 2014 (Dept. 403)

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To overrule the demurrer to the complaint, in its entirety. (Code Civ. Proc. § 430.10(e).) Defendants shall serve and file their answer within ten days of the date of service of this order.

Explanation:

Defendants have demurred to the entire complaint on the ground that it fails to state facts sufficient to constitute a cause of action. Their first argument is that plaintiffs are required to allege that they are ready, willing and able to tender the entire amount they owe under the loan in order to state a claim for wrongful foreclosure, or related causes of action.

In *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, the Court of Appeal stated, "It is settled that **an action to set aside a trustee's sale** for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579, emphasis added.)

Here, however, plaintiffs are not attempting to set aside a completed trustee's sale. They are instead trying to prevent the foreclosure sale from happening at all. Thus, the rule stated in *Arnolds Management* does not apply here, because the trustee's sale has not yet taken place.

Also, in *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, the Fifth District Court of Appeal held that a plaintiff who challenges a pending foreclosure proceeding based on alleged defects in the assignment of the note and deed of trust that render the assignment void does not have to allege tender in order to state a valid claim for wrongful foreclosure and related claims.

"Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property. [¶] Accordingly, we cannot uphold the demurrer to the wrongful foreclosure claim based on the absence of an allegation that Glaski tendered the amount due under his loan." (*Id.* at 1100, internal citations omitted.)

Here, plaintiffs have alleged that the assignment of the note and deed of trust is void because it was completed after the closing date of the trust. (Complaint, ¶¶ 21-26.) Thus, plaintiffs are not required to allege tender of the full amount due under the loan in order to support their claims. The court declines to sustain the demurrer to the extent it is based on the tender rule.

Next, defendants argue that plaintiffs have not stated a claim under Civil Code section 2923.6 because the statute only applies to "owner-occupied residential" properties (Civil Code § 2924.15(a)), and plaintiffs have admitted that their property is not residential. Plaintiffs have alleged that the County of Fresno refused to recognize their property as residential, and County records only show a "mobile home" on the property. (Complaint, ¶ 29.)

Section 2924.15(a) does not define what "residential" property is, but it does state that "'owner-occupied' means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes." (Civ. Code, § 2924.15(a).) Here, the plaintiffs have alleged that the property is their principal residence, and that it was security for the loan made for the personal, family or household purposes. (Complaint, ¶¶ 28, 62.) While the property may not be recognized as containing a residence in the County's records, the plaintiffs have adequately alleged that they are actually residing on the property, and that the loan was made to purchase their family home. Therefore, plaintiffs have sufficiently alleged that the property is "owner-occupied residential real property" for the purpose of section 2923.6(a).

Defendants also argue that plaintiffs have not alleged any actual violation of section 2923.6, because section 2923.6 only bars foreclosure proceedings when a loan modification application is pending, and here the plaintiffs admit that they did not submit their loan modification application until after the notice of default was issued.

Civil Code section 2923.6(c) states, in part, "If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent 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. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs: (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired."

Here, plaintiffs allege that they were attempting to obtain a loan modification application in June of 2013, but they did not actually receive the application until July 3rd, 2013. (Complaint, ¶¶ 38, 40.) They completed and submitted the loan modification application on July 24th, 2013 by Federal Express. (*Id.* at ¶ 40.) However, the notice of default was issued on June 21st, 2013, before the loan modification application was completed or sent out. (Request for Judicial Notice, Exhibit 3. The court intends to take judicial notice of the notice of default and the other documents attached to the

request for judicial notice as officially recorded documents.) Thus, plaintiffs cannot show that the notice of default was issued in violation of section 2923.6.

On the other hand, plaintiffs also allege that defendants issued the notice of trustee's sale on February 12th, 2014, while the loan modification process was still pending. (Complaint, ¶¶ 41-55.) The Bank appears to claim that the notice of trustee's sale was sent out after the first application for loan modification had been denied, and before plaintiffs resubmitted a new application. However, the allegations of the complaint appear to indicate that the first loan modification application was pending at the time the notice of trustee's sale was served on plaintiffs. (Complaint, ¶¶ 51, 55.) Defendants have not shown that there was a written denial of the application before the notice of trustee's sale was issued. Therefore, the plaintiffs have sufficiently alleged that the defendants violated section 2923.6 by issuing the notice of trustee's sale while the loan modification application was pending.

With regard to the second cause of action for wrongful foreclosure, defendants argue that the plaintiffs cannot show that they were injured by the alleged irregularities in the assignment process, as there was no change in their obligations under the note. They also contend that plaintiffs have no standing to allege defects in the assignment, because they were not parties to the assignment. However, the Fifth District Court of Appeal rejected these arguments in *Glaski v. Bank of America, supra*, 218 Cal.App.4th 1079.

In *Glaski*, the Court of Appeal found that the plaintiff had alleged sufficient facts to support claims for wrongful foreclosure, quiet title, declaratory relief, cancellation of instruments, and unfair business practices under Business and Professions Code section 17200 based on alleged defects in the assignment of the note and deed of trust. (*Glaski, supra*, at 1101.) The *Glaski* court found that the allegation that the assignment was made after the closing date of the trust was sufficient to show that the assignment was void, and thus the lender had no authority to foreclose on the property. (*Id.* at 1096-1097.) The *Glaski* court also rejected the argument that the borrower has no standing to challenge the assignment because the borrower was not a party to the assignment. (*Id.* at 1094-1095.)

Here, plaintiffs' allegations are similar to those in *Glaski*, since plaintiffs are alleging that the deed of trust and note were not transferred or assigned properly before the closing date for the trust. (Complaint, ¶¶ 23-25.) Therefore, under *Glaski*, the plaintiffs have stated a valid claim for wrongful foreclosure, because Bank of America and Bank of New York allegedly have no standing to foreclose on the note. Conversely, plaintiffs do have standing to assert the improper assignment, because they are alleging that the assignment is void, and not just voidable. (*Glaski, supra*, at 1094-1095.) The court in *Glaski* did not require any showing that the borrower suffered actual prejudice from the improper assignment, since the improper assignment rendered the entire assignment void. (*Ibid.*) Therefore, the court intends to overrule the demurrer to the second cause of action for wrongful foreclosure.

Likewise, the third cause of action for cancellation of the notice of default, assignment of the deed of trust, and notice of trustee's sale is also sufficiently alleged.

