Jose Arzate et al vs Countrywide Home Loans Inc et al — Case No. 23CV04490
Hearing Date: — February 6, 2024
Demurrer

PARTIES/ATTORNEYS

Plaintiff	Jose Arzate, Jacqueline Arzate Able Arzate, Lindsey Arzate, and Dion Stephensen, a minor child	Daniel A. Martorella Martorella Law Group
Defendants		

TENTATIVE RULING

For the reasons discussed below, the demurrer is sustained with leave to amend. An amended pleading must be filed within 20 days of this ruling.

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1. Background

Jose Arzate and Jacqueline Arzate (the Arzates) purchased a house at 1168 Bauer Ave. in Santa Maria in 2006. They secured a loan package from Countrywide Home Loan comprised of two loans: one for $344,000, and the other for $64,000, to cover the purchase price of $300,000. The $344,000 loan was secured by a first trust deed and the $64,000 was secured by a second trust deed. This loan package type was often referred to as an 80/20 loan, or a prime and subprime loan package.

In 2008, Bank of America acquired Countrywide Home Loan amid its crisis due to its subprime lending practices. It purchased a portfolio of Countrywide's loans, including plaintiffs' 2006 loan package. It's subsidiary, BAC Home Loans Servicing, LP. a subsidiary of Bank of America, was responsible for modifying problematic subprime loans.

In 2009, the Arzates began the loan modification process, which was completed in April 2010. They believed this modification resulted in one loan secured by one trust deed thereby extinguishing the second or junior lien or modifying such through a consolidation and work out a payment plan that would be part of the first trust deed note obligation. In the summer of 2010, the Arzates began making the payments on the modified loan to the servicer on the obligation and continued to do so for 13 years. They allege that they were never advised in

that period of time that the second trust deed obligation had not in fact been modified or even that it still existed (referring to it as a "zombie" deed).

In 2023, defendant Mortgage Loan Services filed a notice of default and election to sell under the second trust deed declaring that the amount owed was $141,630.40 as of November 30, 2022. A nonjudicial foreclosure sale was conducted, for which plaintiffs never received the notices and/or servicing that is statutorily required. Defendant Mike Phillips purchased the property at the sale. He commenced an unlawful detainer against plaintiffs (Case No. 23CV02275), who allege they were not served any notice. A default judgment was entered on June 8, 2023, awarding possession to Mike Phillips. Writ of possession was issued on June 9, 2023. The Arzates, along with their adult children, Able Arzate and Lindsay Arzate, as well as Jose Arzate's minor son, Dion Stephenson, (together, plaintiffs) were evicted from their home by the Sheriff's Department. They were advised to retrieve their personal belongings later. Mike Phillips allegedly refused to cooperate with plaintiffs attempts to retrieve personal belongings.

Plaintiffs' complaint was filed on October 9, 2023 against numerous defendants that were assertedly involved in this transaction and against Mike Phillips alleging: (1) Negligence and Negligence Per Se; (2) Quiet Title Based Upon Adverse Claim to Title, False Legal Interest Per Security Instrument Second Trust Deed and Unlawful Trustee Foreclosure Sale; (3) Intentional/Negligent Misrepresentation; (4) Fraud; (5) Wrongful Foreclosure; (6) Violation of California Homeowners Bill of Rights (HBOR); (7) Violation of Business and Profession Code Section 17200 et seq., Unfair Competition and Request for Temporary and Permanent Injunctive Relief; (8) Conversion; (9) Negligent/Intentional Infliction of Emotional Distress; (10) Violation of Civil Code Section 2923.5; (11) To Void or Cancel Trustee Deed Upon Sale To Void or Cancel Assignment of Deed of Trust; (12) To Cancel Security Instrument/Second Deed Of Trust; (13) Unjust Enrichment; (14) Breach of Written Agreements; (15) Declaratory Relief.

On November 1, 2023, the court (Judge Staffel) set an Order to Show Cause why a preliminary injunction prohibiting the defendants from continuing to possess and sell, offer for sale the subject property, should not be granted. The court also granted the request for a preliminary injunction in the interim. The hearing was set for November 14, 2023. On November 14, 2023, the court continued the hearing, and extended the injunction, to December 15, 2023 and ordered the parties to meet with the Shriver Settlement Master Rick Corbo. This hearing was continued to December 18, 2023. On December 18, 2023, the court set an evidentiary hearing on the injunction for January 4, 2024. On January 4, 2024, the court denied plaintiff's request for an injunction enjoining the sale of the home and granted a temporary stay on its order until January 9, 2024.

On January 8, 2024, plaintiffs filed a brief arguing that the automatic stay pending appeal (Code Civ. Proc. § 904.1) would stay any further proceedings in this matter. [According to this brief, plaintiffs intend to appeal the January 4, 2024 denial of the request for injunction, but are waiting for the written order. The written order was signed on January 23, 2024.] However, defendants convincingly argued that the automatic stay does not apply to an appeal from an order *denying* an injunction and they also convinced the court not exercise its discretionary power to stay its order denying the injunction. Thus, any stay on proceedings must be sought from the appellate court by writ of supersedeas. (Code Civ. Proc. § 923--appellate court's may issue stay order or writ of supersedeas pending appeal "or to suspend or modify an injunction … or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.") As of January 31, 2024, no appeal had been filed.

2. Instant Proceeding—Demurrer

On December 27, 2023, a demurrer was filed by Countrywide Home Loans, Inc.; Countrywide Financial Corporation; Bank of America Corporation; Bank of America, N.A., successor by merger to BAC Home Loans Servicing; and Recontrust Company, N.A. The demurrer hearing is on February 6, 2024. Opposition was due on January 24, 2024. No opposition has been filed as of January 31, 2024. Nor has an amended pleading been submitted. (See Code Civ. Proc. § 472—if defendant files a demurrer or motion to strike, plaintiff has a right to amend complaint without leave of court *up to the date for filing an opposition to the demurrer or motion to strike*.)

There is no provision in the Code of Civil Procedure or Rules of Court that provides a motion is deemed to be meritorious because no opposition was filed.[1] However, "[s]ome courts treat a party's failure to file opposition papers as an admission that the motion is meritorious, and therefore refuse to hear oral argument from such party. The purpose is to prevent introduction of legal theories without notice to opposing counsel and the court." (Weil & Brown*, Cal. Practice Guide: Civ. Proc. Before Trial*, ¶9:105.10 citing *Sexton v. Sup. Ct. (*1997) 58 Cal.App.4th 1403, 1410.) *Sexton* referenced Los Angeles Superior Court Rules, rule 9.15, which provided in part: "The failure to file opposition creates an inference that the motion or demurrer is meritorious." (*Id.* at 1410.)

Rule 9.15 is not binding on this court and was deleted in 2000 in any event. Nevertheless, California Rules of Court, rule 3.1113(a) provides as follows: "A party

[1] California Rules of Court rule 3.1320(f) provides that, when one party fails to appear at a demurrer hearing, the demurrer "must be disposed of on the merits" unless there is good cause to continue the hearing. (Calif. Rule Court, rule 3.1320(f).) This does not preclude the trial court from construing any failure to oppose as a concession on the merits.

filing a motion…must serve and file a supporting memorandum. The court may construe the absence of a memorandum as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported." It arguably follows that the failure to file an opposition memorandum may likewise be construed as an admission that the motion is meritorious.

Here, the complaint is 54 pages long, names 14 defendants, and contains 15 causes of action. It's in chain pleading style, with the factual predicates to each cause of action spanning the first 21 pages. This type of pleading has been criticized for creating ambiguity and redundancy. (See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179; *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605.) Defendants demur to all causes of action in which they are named defendant—12 in total—on the basis that each fails to allege facts sufficient to support the cause of action. The complexity of the complaint is amplified by the absence of any opposition, thereby putting the court in a position to be an advocate, which it declines to be. This is contrary to the policy behind Rule 3.1113. (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc*. (2011) 197 Cal.App.4th 927, 934—"Rule 3.1113 rests on a policy-based allocations of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide.")

The court accordingly sustains the demurrer on the basis that defendants argue convincingly that the causes of action fail to state facts sufficient against them and that the lack of opposition is a concession on the merits. The court nevertheless permits leave to amend ***except*** as to the 6th and 10th causes of action, which appear to be barred by Civil Code section 2924.15 (providing for application of specified provisions under the HBOR only to first lien mortgages or deeds of trust). Moreover, the court has concerns whether plaintiff can plead defendants had a legal duty to plaintiffs in this financial transaction sufficient to sustain the first cause of action for negligence but leave to amend is nevertheless permitted if plaintiff deems in good faith its warranted.

Appearances required.