

Court of Appeals Affirms Judgment Against Disbarred Newport Beach Attorney

A disbarred Newport Beach attorney sued our client, a bank, claiming the bank wrongfully foreclosed on his million dollar home. The disbarred attorney alleged that he walked into one of the bank's branches and tried to tender a cashier's check for \$9,619.29. The bank supposedly refused to accept the cashier's check and then foreclosed on his million dollar home. When Houser & Allison obtained a copy of the cashier's check during discovery, it immediately noticed there were problems with the check. The check appeared to be bogus. Houser & Allison's suspicions were confirmed when the actual cashier's check was obtained. The actual check was not the \$9,619.29 check to the bank, but rather a \$119.34 check made payable to a phone company.

Even though Houser & Allison uncovered the fake check, the disbarred attorney and his wife continued with the lawsuit claiming the bank wrongfully foreclosed on their home. The disbarred attorney and his wife came up with additional arguments relating to whether or not the bank complied with the statutory requirements of issuing, recording, and mailing the Notice of Default and Notice of Sale. However, the Court of Appeals affirmed the judgment against the disbarred attorney and his wife stating, "Although strict compliance with statutory requirements is often stated as the general rule, it is more correct to state that the requirements must be carefully satisfied, but if they are substantially complied with, minor technical digressions will not invalidate the sale."

All other claims brought by the disbarred attorney and his wife were also rejected by the Court of Appeals. See below for the complete opinion by the Appellate Court.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES CHRISTOPHER WOODWARD
et al.,

Plaintiffs and Appellants,

v.

WASHINGTON MUTUAL BANK, FA et
al.,

Defendants and Respondents.

G031422

(Super. Ct. No. 01CC01837)

OPINION

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Motion for judicial notice. Judgment affirmed. Motion denied.

James Christopher Woodward, in pro. per., and Jane G. Woodward, in pro. per., for Plaintiffs and Appellants.

Lawrence W. Stevens, Barbara A. Potashnick; Houser & Allison, Eric D. Houser and Kimberly J. Gallagher for Defendants and Respondents Washington Mutual Bank, FA and California Reconveyance Company.

Ezer Williamson & Brown and Mitchel J. Ezer for Defendant and Respondent Smales Family Trust.

Plaintiffs James Christopher Woodward and Jane G. Woodward appeal from a summary judgment in favor of defendants Washington Mutual Bank FA, California Reconveyance Company (collectively bank), and Smales Family Trust (Smales) after bank sold residential real property owned by plaintiffs pursuant to a power of sale in a deed of trust. Plaintiffs contend there were irregularities in a repayment agreement, the notice of default, and the notice of sale, thereby rendering them void or unenforceable. They also assert several procedural defects in the motion for summary judgment and a motion for reconsideration, including the court's refusal to continue the motion for summary judgment and evidentiary rulings. Finding none of these claims persuasive, we affirm the judgment.

Bank requested that we judicially notice documents from an earlier writ petition filed by plaintiffs. We deny the request since the documents are irrelevant to our determination of this appeal.

FACTS

Plaintiffs obtained a real estate loan from Home Savings of America, FSB and executed a note and trust deed in its favor. Bank acquired the note and trust deed in its merger with Home Savings. After plaintiffs defaulted on the loan in December 1999, bank recorded a notice of default and served it on plaintiffs in April 2000. When plaintiffs failed to cure the default, bank served and recorded a notice of sale set for August 8.

Prior to the sale date, plaintiffs and bank entered into a repayment agreement whereby bank agreed to postpone the foreclosure sale if plaintiffs paid the arrearages over the 11-month time period set out. Plaintiffs made the first payment and the sale date was continued. When the second payment was not made, bank sold the

property at foreclosure. The Shorecliff Trust U.D.T. 9/15/00, F.O.F. as trustee purchased the property at the sale and shortly thereafter sold it to Smales.

Plaintiffs then sued defendants for breach of contract, fraud, negligent misrepresentation, intentional infliction of emotional distress, cancellation of the trustee's deed and grant deed, quiet title, an accounting, and to set aside the trustee sale. One of plaintiffs' contentions was that they had tendered the second payment but that bank had refused it because it was due on Sunday but not paid until Tuesday, the first business day after a legal holiday. Plaintiffs also alleged bank failed to comply with the notice requirements of the foreclosure statute, specifically, that the notice of default and notice of sale were improper.

Bank filed a motion for summary judgment; Smales filed its own motion and joined in bank's as well. They contended that plaintiffs had failed to comply with the terms of the repayment agreement and that bank had properly given notice of and conducted the foreclosure sale. The summary judgment motions were originally set for January, but were continued several times over a period of about two months.

In opposition to the motion, plaintiffs submitted the declaration of an expert that, among other things, the notice of default was defective and the repayment agreement "violate[d] fair banking regulations." The expert also declared that bank's failure to accept plaintiffs' second payment violated "the custom and practice in the banking industry" and bank's own policies and procedures. Plaintiffs' declaration stated that they had tendered the second payment required under the repayment agreement and submitted a copy of the check as an exhibit to James Woodward's declaration.

Before the hearing, plaintiffs withdrew the designation of their expert. During discovery before the hearing, James Woodward admitted that he had not tendered the second payment and that he had fabricated the check he allegedly had tendered. Plaintiffs withdrew the exhibit containing the check and any references to it from their opposition to the motion for summary judgment.

The court granted the motions for summary judgment, finding there had been “no irregularities in the foreclosure” and that the repayment agreement was proper. It also found plaintiffs failed to make the second payment due under the agreement. Plaintiffs filed a motion for reconsideration, alleging they had not received bank’s evidentiary objections and reply to plaintiffs’ opposition to the motion. The court denied the motion because plaintiffs failed to show any new facts, circumstances, or law.

DISCUSSION

Foreclosure Requirements

Plaintiffs contend defendants failed to comply with various requirements of the foreclosure statutes, and that as a result, the sale was invalid. We disagree.

Recording Date of Notice

Plaintiffs’ first argument concerns the date the notice of default was recorded. They claim the notice was invalid because, although it was recorded on April 12, the notice sent to plaintiffs stated the recording date was April 13. In support of the motion for summary judgment, bank filed a declaration stating a copy of the notice of default had been sent to plaintiffs but failed to specifically state it was a copy of the recorded notice. Plaintiffs contend the Civil Code required that bank mail a copy to plaintiffs showing the correct recording date.

Civil Code section 2924b, subdivision (b)(1) provides that a copy of the notice of default “with the recording date shown thereon” must be mailed to the trustor within 10 business days of recording the notice. Despite its argument to the contrary, plaintiffs failed to cite and we found no cases holding that a notice of default was defective because it showed a date one day different from the actual date of recording. Although strict compliance with statutory requirements is often stated as the general rule,

it is more correct to state that the requirements “must be carefully satisfied, but if they are substantially complied with, minor technical digressions will not invalidate the sale.” (4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:182, p. 556.) In *Williams v. Koenig* (1934) 219 Cal. 656, the court held that “substantial compliance in accord with the spirit and purpose of the statute is sufficient.” (*Id.* at p. 660.) Contrary to plaintiffs’ argument, amendments to the statute after *Williams* was decided did not invalidate this principle.

The purpose of the statute in the context of plaintiffs’ case is to adequately notify them of the date of default and the time period within which to cure to avoid a sale. (*U. S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 86.) The notice sent to plaintiffs met that objective. They admit they received it. They have not pointed to anything in the record to show they were damaged in any way by not receiving a copy of the recorded notice itself or one that contained the April 12 date.

For the same reasons, we also reject plaintiffs’ related argument that the proof of service of mailing of the notice was defective under Civil Code section 2924b, subdivision (e) because it did not sufficiently identify the document served, but instead just referred to “notices,” and did not show that the envelopes were sealed and deposited in the mail with sufficient postage.

Language of the Notice of Default

Plaintiffs also complain that the notice of default did not track the exact language required by Civil Code section 2924c. They set out a laundry list of deviations, none of which are even remotely important. For example, they point out that bank used eight paragraphs instead of the “10 required,” and referred to “property” instead of “your property.” The remainder are equally trivial. As with the recording date, the bank substantially complied with the statutory requirements, and minor variations do not invalidate the notice. (*Williams v. Koenig, supra*, 219 Cal. at p. 660.)

Three-Month Period Preceding Sale

Plaintiffs additionally maintain that when the bank gave notice of the sale date on July 13, it was too early because it was before the lapse of three months from the date of recording of the notice of default. We disagree. Under Civil Code section 2924, the three-month period is the time that must elapse before the sale itself, not the giving of notice of the sale. (*Bennett v. Ukiah Fair Assn.* (1936) 7 Cal.2d 43, 46.) The sale was originally set for August 8, and it actually took place on September 15, both after the expiration of three months from the date the notice of default was recorded.

Notice of Continued Sale Date

Plaintiffs alleged in their complaint that bank breached an oral agreement to notify them of the continued sale date, and they appear to raise this as an issue on appeal. However, they fail to cite any authority or make a reasoned legal argument in support of their claim, as is required. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Even on the merits, however, the contention fails, because plaintiffs point to no evidence to show they were damaged as a result of this alleged breach. (See *First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.)

Repayment Agreement

Plaintiffs argue that the repayment agreement was invalid because bank did not sign it and because it provided for 11 postponements of the foreclosure sale when only three are allowed without giving a new notice of sale. We are not persuaded.

The repayment agreement was valid even without the bank's signature. The parties agreed to the terms which were reduced to a writing. Plaintiffs signed; the bank performed its duties under the agreement. Had the bank breached the agreement, plaintiffs would have sought to enforce it, even without bank's signature. Further, even assuming the agreement was not valid, plaintiffs fail to explain how they would be in any

better position if it were not enforced or how they have been damaged by the trial court's determination the agreement was binding.

As to continuance of the sale, the limit of three postponements does not include those made by agreement of the trustor and the beneficiary, as was the case here. (Civ. Code, § 2924g, subd. (c)(2).)

The Motions for Summary Judgment and Reconsideration

Plaintiffs raise several procedural challenges to the hearings and rulings on the motion for summary judgment and the motion for reconsideration. None of them has merit.

Plaintiffs contend the court erred when it refused to grant them a continuance of the motion for summary judgment “even with a discovery motion pending showing the need for further discovery” To warrant a continuance, a party must submit a declaration showing the ““proposed discovery would have led to “facts essential to justify opposition.”” (Scott v. CIBA Vision Corp. (1995) 38 Cal.App.4th 307, 326; Code Civ. Proc., § 437c, subd. (h).) Here, the record before us contains no declaration, and plaintiffs admitted at oral argument none had been filed. Further, plaintiffs' brief makes only the most nebulous reference to the alleged essential evidence, i.e., “documents that the Court was relying upon” Thus, there has been no showing the trial court abused its discretion in denying the continuance. (Frazee v. Seely (2002) 95 Cal.App.4th 627, 633.)

Plaintiffs complain that at the hearing on the motion for summary judgment, neither the court nor defendants' counsel “gave any indication” that the declaration of plaintiffs' expert was excluded. They allege that not until the hearing on the motion for reconsideration did they learn of it. There, the court stated, “The expert that you would have used you have withdrawn. That expert didn't exist for purposes of this motion. He wasn't there and he shouldn't have been considered.” There was no

error. Plaintiffs withdrew their own expert; the effect of that is obvious. How could they not know his testimony would not be considered? We cannot conceive of what they needed to hear from the court.

Plaintiffs also criticize the court's rulings on objections to evidence submitted in connection with the summary judgment motion, claiming they were unclear. We agree that the order granting summary judgment is somewhat confusing in specifying which of defendant's objections were sustained and which were overruled. However, at the hearing, the court explicitly ruled on Smales's objections and did not rule on bank's. More importantly, plaintiffs fail to raise any argument as to why the rulings were erroneous. As a result, they are presumed correct. (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

In a related argument, plaintiffs contend that if the court had been explicit about what evidence it was not going to consider, they would have submitted additional evidence. In opposing the motion, plaintiffs had the responsibility and the opportunity to present all the evidence to support material facts they contended were in dispute. (Code Civ. Proc., § 437c, subd. (b)(3).) Their tactical decision to withhold evidence does not entitle them to a "do-over."

Other than what had been asserted in their opposition to the motion for summary judgment, the only argument plaintiffs raised in their motion for reconsideration was that they had not received bank's reply to their opposition. For a motion for reconsideration to lie, there must be "new or different facts, circumstances, or law . . ." (Code Civ. Proc., § 1008, subd. (a).) We agree with the trial court that plaintiffs failed to make such a showing.

Miscellaneous Claims

Plaintiffs vaguely allude to whether the buyer at the foreclosure sale was a bona fide purchaser for value. As to that issue, and to the extent plaintiffs make any

other claims in their briefs, none was supported by reasoned legal argument and thus all are waived. (*People v. Stanley, supra*, 10 Cal.4th at p. 793.)

DISPOSITION

The judgment is affirmed. The motion for judicial notice is denied. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.