

Re: Demurrer

Date: July 11, 2017

Plaintiff's action for wrongful foreclosure is factually based upon the allegation that Defendant Nationstar referred Plaintiff to Nationstar's website to monitor the status of a scheduled trustee sale for the subject property. Plaintiff alleges that the Nationstar website reflected that the property was "NOT FOR SALE". This misled Plaintiff because, contemporaneous with her review of the posting, the property was actually sold at a foreclosure sale to defendant Duke Partners II, LLC (Duke).

Plaintiff's complaint alleges a number of causes of action challenging the propriety of the sale directed at Nationstar, including fraud arising from the representation in the website that the property was not for sale. However, only the quiet title cause of action is directed at demurring party, Duke. The quiet title action incorporates all of the other allegations of the Complaint including Plaintiff's fraud allegations directed at Nationstar.

Duke's demurrer asserts that, as a bona fide purchaser, it takes free of any such claims by Plaintiff. Defendant's main argument is that Plaintiff has no basis for quieting title against Duke because, with a bona fide purchaser, the trustee's deed upon sale gives rise to a conclusive presumption of compliance with the notice requirements set out in the Civil Code.¹

The purchaser at a foreclosure sale takes title by a trustee's deed. If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. (Civ.Code, § 2924; *Homestead Savings v. Darmiento, supra*, 230 Cal.App.3d at p. 431, 281 Cal.Rptr. 367.) *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831

The Court takes judicial notice of the legal effect of the trustee's deed upon sale in this case as giving rise to a conclusive presumption that the required notices were proper. (RQFN Exhibit 11)

Taken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face. *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265

In opposition, Plaintiff asserts that the impropriety regarding the incorrect information rendered the sale void. Here the Plaintiff cites authority holding that a material defect in the notice of

¹ In addition the demurrer asserts a failure to tender and a failure to state a cause of action.

default, such as a gross misstatement of the amount in default, voids the sale. See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 99.²

In addition Plaintiff asserts that the conclusive presumption language for BFP's is limited to challenges to statutory compliance with respect to default and sales notices.

To the extent that Buyer may construe these cases as describing section 2924 's presumption as precluding *any* attack on the foreclosure sale as to a BFP—irrespective of whether the challenge relates to the Trustee's compliance with procedural requirements concerning the default and sale notices—we decline to follow such interpretation. (See 4 Miller & Starr, Cal. Real Estate, *supra*, Deeds of Trust § 10:211, p. 680 [section 2924 “presumption only applies to the propriety of the required notices, but it does not apply to other requirements of the foreclosure process”].) *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1256

Although Plaintiff's challenge to the sale is partly based upon a procedural impropriety with respect to the notice of the sale, the underlying complaint does include allegations of fraud and oppression in the sale. Although those allegations may be challenged in Nationstar's pending demurrer, they are not challenged by Duke's demurrer. The treatise by Miller & Starr provides a succinct analysis that is applicable here.

The recitals in the trustee's deed are conclusive in favor of a bona fide purchaser unless the sale is void and not merely voidable. When the property is purchased at the foreclosure sale by a third person who is a bona fide purchaser, or if the property is purchased by the beneficiary and sold to a bona fide purchaser, or financed by a bona fide encumbrancer, the presumption of compliance with the notice requirements of the statute is conclusive. When there are notice defects and the deed contains the recitals that create the conclusive presumption, the sale is merely voidable. When the sale is merely voidable, it is conclusive in favor of a bona fide purchaser in order to protect the sanctity of titles to real property and, therefore, the trustor cannot have the sale set aside based on irregularities in the foreclosure sale process, except in the case of fraud.

On the other hand, where the sale is void the trustor can avoid the sale even where title is held by a bona fide purchaser. Even then, the issue is not resolved in favor of setting aside the sale unless the trustor carries its burden of proving that the sale was void, or that the sale was voidable and the person purchasing at the sale was not a bona fide purchaser. 5 Miller & Starr, Law of Cal Real Estate §13:255 *Presumption of validity*, (4th ed.)[Underline added; footnotes omitted.]

The Amended Complaint includes a cause of action for fraudulent misrepresentation directed at Nationstar that is not challenged in this demurrer. To the extent that Plaintiff's complaint alleges

² In *Knapp*, the court ultimately concluded that the claimed procedural improprieties were immaterial. As a result the court did not reach the issue of whether the presumption established by the trustee's deed was rebuttable or conclusive. See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76 at p.86.

that there was a misrepresentation or a fraud rendering the transaction void, there is a possibility that an action for quiet title against the purchase can be maintained. Nationstar's demurrer challenging this cause of action is scheduled for August 15, 2017. Although the outcome of that demurrer may have an impact on the continued viability of the quiet title cause of action, the Court concludes that a fraud cause of action is presently stated. Moreover, Duke is a necessary party in the action because it currently holds title to the subject property. In the event that the sale is set aside as a void sale, the quiet title action is viable.

As far as the requirement of tender is concerned, Plaintiff's quiet title claim is dependent upon establishing that the transaction is void, not voidable. A void transaction would likely make it inequitable to require a tender.

Although the general rule requires a tender by the trustor when attacking the validity of a foreclosure sale, a tender is not required when it would be inequitable to require one, or where the sale is void, rather than voidable. 5 Miller & Starr, Law of Cal Real Estate Requirement of tender, § 13:256 (4th ed.)

Accordingly the demurrer is overruled.

Motion to Strike

There are no allegations that support a claim of punitive damages against the demurring defendant. Accordingly the motion to strike as to Duke is granted.