Shalant v. World Savings Bank

2003 | Cited 0 times | California Court of Appeal | April 2, 2003

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Defendants World Savings Bank and Golden West Savings Association Service Co. (collectively referred to as Bank) obtained a summary judgment in their favor, which judgment was upheld on a prior appeal by plaintiffs Joseph and Frances Shalant (Shalant). (Shalant v. World Savings Bank (Nov. 22, 2002, B155647) [nonpub. opn.].) Bank then filed a motion seeking attorney fees of $88,482.75 against Shalant under Civil Code section 1717. The trial court denied the motion for attorney fees, and Bank appealed. We affirm the order denying attorney fees because the action in which Bank prevailed was not an action on a contract within the meaning of Civil Code section 1717. Though we affirm the order, we deny Shalant's motion for sanctions for prosecution of a frivolous appeal because this appeal does not meet the standard for sanctions under In re Marriage of Flaherty (1982) 31 Cal.3d 637.

FACTUAL AND PROCEDURAL BACKGROUND [1]

In 1995, Gilbert and Lana Varela executed a note and deed of trust in favor of Bank in connection with the purchase of a residence in Covina. Around the same time, the Varelas borrowed an additional $40,000 from Shalant, who was a longtime friend of Mrs. Varela's father. Shalant's loan was secured by a second trust deed on the Varela's residence. By late 1998, the Varelas were in the midst of marital dissolution proceedings and had defaulted on both trust deeds. In May 1999, Bank recorded a notice of non-judicial foreclosure sale, set for June 24, 1999. On June 22, a stipulation and order between the Varelas and Bank, and signed by the court, was entered in the dissolution action. The stipulation provided for a postponement of the trustee's sale to July 1, 1999, that Gilbert Varela would pay $7,500 to Bank by June 30, 1999, and that if payment was not timely made, Bank may proceed to the trustee's sale on July 1, 1999.

On June 24, 1999, at the time and place originally scheduled for the foreclosure sale, a public declaration was made that the sale had been postponed to July 1, 1999. Varela did not make the required payment and Bank proceeded with the foreclosure sale on July 1, 1999. Shalant did not appear at the sale and his junior interest was extinguished. According to Shalant, Bank purchased the property at the sale for about $322,606, and then on July 26, 1999, opened escrow to sell the

property for $370,000 to a buyer who had been negotiating with the Varelas to purchase the property prior to foreclosure. When Shalant learned of the foreclosure sale, he offered to make Bank whole by purchasing the residence for the amount of the Varela debt, including interest and costs. Bank told Shalant it would consider his offer, but then Bank sold the property to the buyer who had negotiated with the Varelas.

In June 2000, Shalant filed the instant action against Bank. The second amended complaint (complaint) contained a single cause of action for special damages of $34,875 and punitive damages. The special damages represented the amount of principal and interest remaining unpaid on Shalant's loan to the Varelas at the time of the foreclosure sale. Shalant alleged that Bank "intentionally out of greed violated the notice and stay requirements of Civil Code section 2924g when it conducted the July 1, 1999 foreclosure sale after entering into the June 22, 1999 Stipulation and Order with the Varelas to postpone the foreclosure." (Further statutory references are to the Civ. Code.) Shalant's theory of liability was that under section 2924g, subdivision (d), the June 22 stipulation effected a stay of proceedings until June 30, 1999, thereby prohibiting foreclosure from taking place less than seven days after June 30 absent express direction, and the provision in the stipulation that Bank may proceed to sale on July 1 if Varela did not make timely payment did not constitute such express direction.

Shalant also alleged that as a direct result of Bank's violation of section 2924g, Shalant was not given adequate notice of the foreclosure sale at which his security interest in the residence was wiped out. Shalant alleged that had he received adequate notice, either he would have made the $7,500 payment or he would have participated in the July 1 foreclosure sale. Shalant's complaint sought special and punitive damages and costs. Shalant did not seek attorney fees or allege the breach of any contract. Shalant's complaint also did not seek to set aside the foreclosure sale or seek any other form of equitable or injunctive relief.

After filing an answer, which did not seek any affirmative relief or attorney fees from Shalant, Bank moved for summary judgment on the ground that the foreclosure sale was timely under the provisions of section 2924g. The court granted summary judgment in favor of Bank, and Shalant appealed. In an unpublished decision filed on November 22, 2002, we affirmed the judgment. (Shalant v. World Savings Bank, supra, B155647.)

Pending the appeal of the summary judgment and in January 2002, Bank filed a motion in the trial court for attorney fees and costs, seeking reasonable attorney fees in the amount of $88,482.75. Bank maintained that it was entitled to attorney fees under the provisions of its note and trust deed on the Varela property and pursuant to the reciprocity provisions of section 1717. [2] Bank argued that Shalant's suit for wrongful foreclosure constituted a challenge to the validity of foreclosure of a senior lien, so Shalant, though not a signatory to the Varela note and trust deed, essentially was asserting the rights of the trustors (i.e., the Varelas) under the note and trust deed and thus stood in their shoes or was subrogated to the rights and duties of the trustors.

Shalant opposed the motion on the grounds that Shalant did not sue Bank for breach of any contract, but for violation of statutory provisions. Shalant also argued that even if the terms of the Varela note and trust deed are imposed on him, the instant litigation was outside the scope of those documents.

At the February 13, 2002 hearing on the motion, the court denied Bank's motion for attorney fees. The court stated that under the rule set out in Leach v. Home Savings & Loan Assn. (1986) 185 Cal.App.3d 1295 (Leach), "the signator[y] defendant can only recover attorneys' fees against a nonsignatory plaintiff if the plaintiff would have been able to recover fees against the defendant; that is, if the plaintiff prevailed, and here, plaintiff would not have been able to recover attorneys' fees given that they were nonsignatories to the note and trust deed, per [section] 1717. [¶] . . . [¶] In addition, I think another distinction that supports both that case and this case is the plaintiff was not attempting to enforce the trust deed and the note . . . . So the underlying agreement, that would be the promissory note and the deed of trust, don't even come into play really."

Bank filed timely notice of appeal from the order denying the motion for attorney fees. Bank's principal contentions on appeal are that the trial court misapplied Leach, that the note and trust deed were the "controlling contractual documents" in this litigation, and that Shalant's position in this litigation was like that of a trustor who, upon an unsuccessful challenge to foreclosure proceedings, is liable for attorney fees and costs under the provisions of the note and trust deed.

DISCUSSION

On appeal, we review whether there is a legal basis for an award of attorney fees de novo as a question of law. (Sessions Payroll Management, Inc. v. Noble Construction Co. (2000) 84 Cal.App.4th 671, 677 (Sessions Payroll Management).) "Whether a party is entitled to attorneys fees for the purpose of invoking Civil Code section 1717 depends not on the evidence adduced at trial or some interim proceeding, but on the pleadings." (Manier v. Anaheim Business Center Co. (1984) 161 Cal.App.3d 503, 508.)

"Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them. (Code Civ. Proc., § 1021; Real Property Services Corp. v. City of Pasadena (1994) 25 Cal.App.4th 375, 379 [(Real Property Services)].)" (Sessions Payroll Management, supra, 84 Cal.App.4th at p. 677.) "As a general rule, attorney fees are awarded only when the action involves a claim covered by a contractual attorney fee provision and the lawsuit is between signatories to the contract." (Real Property Services, supra, 25 Cal.App.4th at pp. 379-380.) "The first issue (the claims issue) essentially involves interpreting the parties' contract, and requires the court to examine the language of the contractual clause to determine whether the nature of the claims asserted by plaintiff fall within the intended scope of the attorney fee clause." (Super 7 Motel Associates v. Wang (1993) 16 Cal.App.4th 541, 545.)

Under some circumstances, the reciprocity principles in section 1717 will be applied in actions

involving signatory and nonsignatory parties. (Real Property Services, supra, 25 Cal.App.4th at p. 380.) A party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party and the agreement reflects that intent. (Sessions Payroll Management, supra, 84 Cal.App.4th at p. 680.) "Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (Real Property Services, supra, 25 Cal.App.4th at p. 382.)

The instant action asserted a tort claim for damages, based on the negligence per se doctrine, for violation of section 2924g. "The negligence per se doctrine is codified in Evidence Code section 669, under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Galvez v. Frields (2001) 88 Cal.App.4th 1410, 1420.) The doctrine applies to negligence in business transactions resulting in injury to economic interests as well as to personal injury actions. (Nowlon v. Koram Ins. Center, Inc. (1991) 1 Cal.App.4th 1437, 1442, fn. 4.)

The gravamen of Shalant's action was a statutory violation. While section 2924g deals with foreclosure proceedings, which presuppose the existence of a note and trust deed, those documents may be of historical significance to Shalant's action but are not its gravamen. None of the provisions of the note and trust deed are the basis of Shalant's theory of liability against Bank. Shalant's action did not allege the breach of any provision of the note or trust deed, did not seek to set aside the foreclosure sale, and did not seek any other equitable relief with respect to that sale. Citing section 2904, Bank contends that Shalant, in this action, is enforcing his right as a junior lienholder to redeem the property in the same manner as the Varelas and is enforcing his right to be subrogated to the benefits of the superior lien. [3] Yet this is not an action to enforce redemption or subrogation rights; this action in no way seeks to affect an interest in, or title to, the property. In fact, Shalant is not challenging the foreclosure sale and did not satisfy Bank's claims so as to be subrogated to the benefits of the superior lien. At the time Shalant filed this action, neither Shalant nor Bank had any interest in the property formerly owned by the Varelas, and Shalant's complaint did not seek to establish any interest in the property. Section 2904 is inapposite.

Bank contends that the note and trust deed are the "controlling contractual documents" in this litigation for purposes of section 1717. We disagree. Shalant's action did not allege that Shalant was a third party beneficiary of the Varela note and trust deed or base any claim for relief on a third party beneficiary theory. Rather, the complaint alleged that damages resulted from a foreclosure sale as to which Shalant did not have proper statutory notice and which sale wiped out his junior lien on the property. In other words, Shalant's action was not an action on the Varela note or trust deed, and

thus not an action "on a contract" within the meaning of section 1717.

Bank fails to establish with any relevant authority that attorney fees are recoverable under the negligence theory asserted by Shalant. Under the rule for nonsignatory plaintiffs articulated in Real Property Services, supra, 25 Cal.App.4th at page 382, because Shalant would not have been entitled to attorney fees had he prevailed on the negligence per se claim, neither is Bank. Bank argues, without citation to pertinent authority, that trustors who unsuccessfully challenge foreclosure proceedings are liable for attorney fees and that Shalant was subrogated to the rights and duties of the trustor when Shalant brought this action. Yet Shalant does not seek to invalidate the foreclosure proceedings, and the negligence theory of liability that is pleaded against Bank does not depend on principles of subrogation.

Bank also misplaces reliance on Caruso v. Great Western Savings (1991) 229 Cal.App.3d 667 (Caruso). Caruso did not deal with the application of section 1717 or the entitlement to attorney fees pursuant to a contract. Rather, Caruso addressed the issue of whether attorney fees incurred by a foreclosing senior lien holder (which fees were added to the amount of the debt and made a lien on the property) were incurred as an expense in the foreclosure process, which fees are statutorily limited under section 2924c, or whether the attorney fees were incurred in matters collateral to foreclosure (such as fees incurred to protect the security), which fees are not so limited. (Caruso, supra, 229 Cal.App.3d at pp. 676-677.) Because Shalant's litigation arose after the foreclosure sale and after Shalant's junior security interest was extinguished, any attorney fees incurred by either Shalant or Bank would not have been expended to prosecute the foreclosure or to protect the security. Caruso is inapplicable.

The claim asserted by Shalant also does not fall within the intended scope of the attorney fees clauses of the Varela note and trust deed. A section of the note captioned "Borrower's Failure to Pay as Required" provides in subsection (E): "The Lender will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses may include, for example, reasonable attorneys' fees and court costs." As explained above, this litigation is not about enforcing any provisions of the note.

Bank's reliance on paragraph 7 of the trust deed is also unavailing. That provision, captioned "Lender's Right to Protect its Rights in the Property," provides in pertinent part: "If (A) I do not keep my promises and agreements made in this Security Instrument, or (B) someone, including me, begins a legal proceeding that may significantly affect lender's rights in the Property (such as a legal proceeding in bankruptcy, in probate, for condemnation or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the Lender's rights in the Property. Lender's actions may include appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. . . . [¶] I will pay to Lender any amounts which Lender advances under the Paragraph 7 with interest . . . ." This litigation does not relate in any way to Bank's attempts to protect its security interest in the property. The attorneys fees sought by Bank were all incurred well after the foreclosure sale and when neither Shalant nor Bank had, or asserted, any interest in the

property. We conclude that the claim asserted by Shalant falls neither within the provisions of the note nor the trust deed.

Bank also cites cases where attorney fees under section 1717 were awarded to a prevailing signatory defendant against a nonsignatory plaintiff. But in those cases, the nonsignatory plaintiff expressly sued for breach of contract and sought attorney fees under the provisions of the contract. In Real Property Services, supra, 25 Cal.App.4th at page 379, plaintiff sublessee sued lessor for breach of a lease on a third party beneficiary theory. And in Abdallah v. United Savings Bank (1996) 43 Cal.App.4th 1101, 1111, the nonsignatory son of a trustor plaintiff was held liable for attorney fees where the son expressly sued for breach of contract and sought attorney fees under the contract.

Not supportive of Bank's position are the cases of Saucedo v. Mercury Sav. & Loan Assn. (1980) 111 Cal.App.3d 309 (Saucedo) and Wilhite v. Callihan (1982) 135 Cal.App.3d 295 (Wilhite). In these cases, the nonsignatory plaintiffs were nonassuming grantees (i.e., successors in interest who took property subject to a senior deed of trust) and successfully sued to enjoin the trust deed holder from foreclosing or enforcing a due-on-sale clause in the note. The plaintiffs, though not signatories to the note and trust deed, were held entitled to their attorney fees under the reciprocity provision of section 1717. The courts reasoned that if the beneficiary defendants had been successful in foreclosing, they would have been entitled to recover their fees as a condition to redemption, such fees would have become part of the debt secured by the deed of trust, and the plaintiffs would have to pay off the debt, including attorney fees, to prevent foreclosure. Because the plaintiffs would have been liable for attorney fees if the defendants had prevailed, the prevailing plaintiffs were held to be entitled to their fees under the reciprocity provision of section 1717. (Saucedo, supra, 111 Cal.App.3d at pp. 314-315; Wilhite, supra, 135 Cal.App.3d at pp. 301-302.) Because the instant case is not one to enjoin a foreclosure, Saucedo and Wilhite are of no avail to Bank.

Leach, supra, 185 Cal.App.3d 1295, cited by the trial court, also lends no support to Bank's position herein. In Leach, the beneficiary of a testamentary trust sued to remove a cloud on title to real property, a trust asset, that had been encumbered by loans to the trustee. While the lender defendants prevailed on summary judgment, their request for attorneys fees under section 1717 was denied. The plaintiff in Leach was not a signatory to the note and trust deed or a successor in interest to any signatory, plaintiff would not have been entitled to attorneys fees thereunder if she had prevailed in the quiet title action and the note and trust deed contained no provisions giving her enforceable rights to attorney fees as a third party beneficiary. (Leach, supra, 185 Cal.App.3d at pp. 1306-1307.) To the extent that it may be pertinent here, Leach supports Shalant's position, not Bank's position.

Bank argues that the trial court misapplied Leach, whose circumstances are different than those here. Because our review is de novo and we review the trial court's ruling rather than its reasoning (Arreola v. County of Monterrey (2002) 99 Cal.App.4th 722, 759-760), we need not decide whether the trial court correctly relied upon Leach. Under all of the foregoing authorities, we conclude that the

trial court properly denied Bank's motion for attorney fees.

Shalant filed a motion seeking sanctions of $2,800 against Bank on the ground that the appeal is frivolous. Under the standards in In re Marriage of Flaherty, supra, 31 Cal.3d 637, we do not consider this case appropriate for imposition of sanctions.

DISPOSITION

The order is affirmed. Shalant's motion for sanctions is denied. Shalant is entitled to costs on appeal.

NOT TO BE PUBLISHED.

We concur:

ORTEGA, Acting P. J.

VOGEL (MIRIAM A.), J.

1. The background facts are taken from the opinion in the prior appeal of the summary judgment in favor of Bank. (Shalant v. World Savings Bank, supra, B155647.)

2. Section 1717 provides in pertinent part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract. . . ."

3. Section 2904 provides: "One who has a lien inferior to another, upon the same property, has a right: [¶] 1. To redeem the property in the same manner as its owner might, from the superior lien; and, [¶] 2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of its interests, upon satisfying the claim secured thereby." Bank's reliance on Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal.App.4th 8 is also misplaced, as that case dealt with competing security interests in personal property under the California Uniform Commercial Code and whether the junior lienholder was bound by an agreement by the debtor and senior lienholder to extend the statute of limitations. (33 Cal.App.4th at pp. 12, 16.)