

FILED
May 13, 2016
Court of Appeals
Division I
State of Washington

No. 74535-2-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID EBENAL and BONITA EBENAL, husband and wife; and
their marital community, Appellants

v.

ELLEN B. KLYCE, a single individual; and THOMAS C.
DASHIELL, a single individual, Respondents

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

The Superior Court granted summary judgment to Plaintiffs-Respondents based on a misreading of the California statute of frauds. Respondents had nominally secured their loans with a junior lien on real property which was already overliened, in a blatant attempt to take advantage of a real-estate exemption to California usury law. But where they elected to bring an action only on the notes, ignoring their sham deeds of trust, their oral modification of the notes was effective, and the Superior Court should not have held otherwise as a matter of law. This case should be remanded for further development and trial.

II. ASSIGNMENTS OF ERROR

Appellants assign the following errors:

1. The trial court erred by granting Respondents' motion for summary judgment and entering judgment thereon.

ISSUE AS TO ASSIGNMENT OF ERROR 1:

Does the California Statute of Frauds prevent an oral forbearance agreement on a promissory note, which was not part of an agreement for the sale of real property? *No.*

III. STATEMENT OF THE CASE

This action arose out of a deal to transfer a claim in the receivership of Hunter Hospitality, LLC, pending in King County Superior Court. One of its creditors had a convertible preferred interest in Hunter Hospitality, LLC with a face value of \$775,000. CP 29. After Hunter Hospitality, LLC failed, that creditor, not wanting to wait indefinitely until the receiver made distributions, sold its claim to another investor, Appellant David Ebenal. Mr. Ebenal offered to sell the claim to Respondent Ellen Klyce and to Lillian Dashiell. Ms. Dashiell's father and later her assignee, Respondent Thomas Dashiell, a California attorney, represented her and Ms. Klyce. CP 31, RP 5. They structured the deal as a recourse loan of approximately \$425,000 (after closing costs and fees) from Respondents to Appellants, payable under two promissory notes from Appellants to Ms. Klyce and Ms. Dashiell (one note to each) totaling \$775,000, which notes were secured by and required to be paid from the \$775,000 preferred-interest claim, and which were callable against Appellants only if the Receiver had not paid out on the preferred-interest claim by December 31, 2014. CP 19-21, 29-31.

If the delayed-recourse loans had only been secured by the preferred interest claim or other personal property, they would have run afoul of California usury law. To take advantage of an exception to that law for brokered real estate loans, Mr. Dashiell, a licensed California real

estate broker, had his clients take additional, nominal consideration in the form of third liens on certain real property controlled by the Ebenals. Although there was no remaining equity for the liens to realistically attach to, and the intent of the statute is clearly to protect real property purchase or development loans, the notes specify that they are exempt from the usury statute as loans securing real property arranged by a licensed, compensated, real-estate broker.¹ CP 21, 31.

The receivership proceedings dragged on and spawned satellite litigation, and the preferred-interest claim that was expected to satisfy the notes has still not been paid out. CP 37. Before and after December 31, 2014, Mr. Ebenal was in frequent contact with Mr. Dashiell to ask for forbearance and to reassure Mr. Dashiell that he was pursuing the claim in the receivership and related actions. CP 38. Mr. Dashiell is not licensed to practice in Washington and has not appeared in this action, but he continued to discuss the loans with Mr. Ebenal on behalf of himself and Ms. Klyce. CP 37-38.

Finally, on or about August 31, 2015, in one of their many telephone conversations, Mr. Ebenal offered to give Mr. Dashiell more control over the claim litigation, including full access to work together

¹ If there is a remand, Respondents expect to pursue discovery as to whether Mr. Dashiell acted properly in treating these transactions as brokered real estate loans, for purposes of the California usury statute.

with Mr. Ebenal’s counsel on filings, if Mr. Dashiell would “extend the payment date out to June 1, 2016.” CP 38. Mr. Dashiell agreed. *Id.*

In October 2015, however, Respondent filed a motion for summary judgment based on the original terms of the notes. The Ebenals defended on the grounds that the loan terms had been either modified or waived by Mr. Dashiell acting for both Respondents. CP 32-38. Respondents did not deny the conversation had taken place as reported by Mr. Ebenal. But they replied that (a) as a factual matter they disagreed that Mr. Dashiell had ever been negotiating on Ms. Klyce’s behalf; (b) there was no written settlement agreement; and (c) modification or forbearance was ineffective under the California statute of frauds, Cal. Civ. Code § 1624. CP 41-48.² The Superior Court heard argument on these points on November 14, 2015, and ruled that the case of *Secrest v. Security National Mortgage Loan Trust*, 167 Cal. App. 4th 544 (2008) governed the legal issue based on the Statute of Frauds and required summary judgment in favor of Respondents. RP 28.

Judgment was entered in Respondents’ favor on December 4, 2015. CP 50-52. This appeal timely followed.

IV. ARGUMENT

A. Standard of Review

² The Notes provide that California law governs. CP 21, 31.

This Court reviews a grant of summary judgment de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56.

B. Respondent’s Forbearance Agreement was Effective.

California freely allows oral modification of written instruments, including promissory notes, unless the note expressly provides otherwise. Cal. Civ. Code § 1698(c). And a party to a contract “may by conduct or representations waive the performance of a condition thereof or be held estopped by such conduct or representations to deny that he has waived such performance.” *Panno v. Russo*, 82 Cal. App. 2d 408, 412, 186 P.2d 452, 454 (Cal. Ct. App. 1947). Mr. Ebenal showed affirmative evidence of a modification or waiver, which should have barred summary judgment.

Respondents and the Superior Court relied on *Secrest v. Security National Mortgage Loan Trust*, 167 Cal. App. 4th 544 (2008) for the proposition that under California law, an oral modification or waiver (*i.e.*, a forbearance) of a note secured by a deed of trust on real property is within the Statute of Frauds. RP 28. But *Secrest* does not go that far. In the *Secrest* case, the defendant sought to enforce an unsigned

“Forbearance Agreement” which purportedly changed the payment amounts and extended the payout date of a note secured by a deed of trust. The Court of Appeals noted that the real-property Statute of Frauds, Cal. Civ. Code § 2922, did not apply to forbearances or to modifications of the loan terms. *Secrest*, 167 Cal. App. 4th at 552-53. Other courts, and a leading treatise on California law, it observed, had held that such forbearances need not be written. *Id.* at 554; *and see, e.g., Johnson v. Sellers*, 798 N.W.2d 690, 695 (S.D. 2011) (“Although the statute of frauds prohibits oral alteration of a written contract for the sale of land, a waiver of the time for performance is not an alteration of a written contract.”) But the deed of trust in question secured a loan for the purchase of the borrower’s home. *Secrest*, 167 Cal. App. 4th at 548. As such, the note and the deed of trust, both before and after modification, fell under a provision of the general Statute of Frauds, Cal. Civ. Code § 1624(a)(3), which expressly requires a subscribed writing for an agreement “for the sale of real property.” *Id.* at 552-53 (quoting Cal. Civ. Code § 1624(a)(3)). Since California law also provides that a modification to a contract within the Statute of Frauds must satisfy the statute, the Court of Appeals held that the note and deed of trust were not effectively modified without a subscribed, written modification agreement. *Id.* (citing Cal. Civ. Code § 1698(a)).

Here, though, the note was not part of a transaction for the purchase of real estate, so the Statute of Frauds and *Secrest* do not apply. Furthermore, when a simple forbearance agreement does not also modify the deed of trust, as in *Secrest*, the Statute of Frauds also does not apply. *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 71, 163 Cal. Rptr. 3d 804, 823 (2013) (distinguishing *Secrest*). Respondents brought forward no evidence that this particular forbearance agreement was intended to modify payment terms or the deeds of trust. Indeed, Respondents showed no concern for the deeds of trust and did not add any claim based on them in this action, since they were apparently added by Mr. Dashiell only to avoid the usury statute, not for any actual value added to the consideration for the loan. Under these circumstances, *Secrest* and the California Statute of Frauds do not apply.

Respondents' other arguments below were also without merit. Appellants were not trying to introduce a settlement agreement—Mr. Dashiell has not even appeared for Ms. Klyce in this matter—so CR 2A does not apply; and Mr. Dashiell's narrow disagreement with the facts shown by Mr. Ebenal, limited to whether Mr. Dashiell was speaking for both Respondents or only for himself, merely raises an issue of fact for trial which cannot be decided on summary judgment.

V. CONCLUSION

For the reasons set forth herein, the decision of the trial court should be vacated and the case remanded for further fact development and trial.

Dated this 13th day of May, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On May 13, 2016, I served or caused to be served a copy of the foregoing document on counsel of record for Respondents by e-mail as agreed at the following address:

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DATED this 12th day of May, 2016.

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