

TENTATIVE RULING

Judge Denise deBellefeuille
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CIVIL LAW & MOTION

Alta Community Investment III et al vs Patricia Ottoboni	
Case No:	1370195
Hearing Date:	Thu Jul 29, 2010 9:30

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Nature of Proceedings: Demurrer

Defendant’s Demurrer to Complaint for Unlawful Detainer is sustained without leave to amend on the grounds that plaintiffs have failed to state a cause of action.

This is the second unlawful detainer action brought by plaintiffs Alta Community Investment III, LLC and Buena Holding Company, LLC “as 50% as Tenant in Common” against defendant Patricia Ottoboni.

Plaintiffs purchased the property commonly known as 1014 Debra Drive, Santa Barbara, California, at a foreclosure sale on May 11, 2010. Defendant, the foreclosed prior owner of the property, remains on the property. Plaintiffs have brought this unlawful detainer action to take possession of the property.

Defendant demurs to the complaint asserting plaintiffs’ failure to plead essential elements of a cause of action for unlawful detainer. In particular, defendant asserts the following pleading defects by both general and special demurrers:

- (1) Although plaintiffs attach the trustee’s deed upon sale of the property, plaintiffs neither expressly incorporate that deed into the pleadings by reference nor assert perfected title by purchase at a foreclosure sale except in conclusory terms; plaintiffs also inaccurately pleading the date of the foreclosure sale; and,
- (2) Although plaintiffs allege having served a three-day notice to quit, the notice attached to the complaint (which is not expressly incorporated by reference) is defective as being ambiguous and uncertain.

Plaintiffs’ allegation of title is paragraph 3 of the complaint:

“On 5/11/09, Plaintiff became the owner of real property by purchasing said property at a foreclosure sale. Title under this sale has been duly perfected. Said foreclosure sale and all

preceding notices and actions were done in compliance with CC 2924 et. seq.” (Note, Although plaintiffs are captioned as two separate entities, the complaint refers to plaintiffs in the singular.)

In addition to this allegation in paragraph 3, plaintiffs, on page 3 of the complaint, set forth an “Exhibit List” which lists as exhibit 2 a “deed.” Immediately following the verification of the complaint is a two page document entitled “Trustee’s Deed Upon Sale,” which on its face appears to be a deed conveying the property at issue to the plaintiffs at a trustee’s sale on May 11, 2010.

Plaintiffs’ allegations of notice are set forth in paragraphs 8 and 9 of the complaint:

“8. On June 17, 2010, Plaintiff caused to be served on the Defendant(s) a written notice in compliance with the Code of Civil Procedure, Section 1161a & b et seq., requiring and demanding that Defendant(s) quit and deliver up possession of the Premises to Plaintiff within three (3) days after service of the notice upon them.

“9. More than three (3) days have elapsed since the service of said notice, but Defendant(s) have failed and refused, and continues to fail and refuse, to quit and deliver up possession of the premises, Defendant(s) now being in possession thereof.”

In addition to these allegations, plaintiffs attach as exhibit 3 to the complaint a two page document, the first page of which is entitled “Notice to Quit” and the second page of which is entitled “Declaration of Service of Notice by Registered Process Server.”

A demurrer is a proper response to a complaint in unlawful detainer. (Code Civ. Proc., § 1170.) “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.]” Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6 [internal quotation marks omitted].)

Defendant’s first objection is that plaintiffs have failed to adequately plead title. “The complaint shall: ... (2) Set forth the facts on which the plaintiff seeks to recover.” (Code Civ. Proc., § 1166, subd. (a).) An action in unlawful detainer is proper where “the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected.” (Code Civ. Proc., § 1161a, subd. (b)(3).) In this case, plaintiffs have pleaded ownership by purchase at a foreclosure sale.

Defendant asserts that plaintiffs needed to plead more than the conclusory statements of the facts of sale. Plaintiffs’ allegations are sufficient on this point. “The complaint is phrased largely in the language of the sections of the code under which the action is brought. Ordinarily it is sufficient to frame a pleading in the language of the statute germane to the action.” (Quinn v. Mathiassen (1935) 4 Cal.2d 329, 332.) There is no doubt as to plaintiffs’ claim of title: the deed is attached as an exhibit, even if it is not incorporated expressly by reference. The erroneous date set forth in the allegation is similarly not fatal to plaintiffs’ action in unlawful detainer. On the face of the complaint either date is sufficient to plead that plaintiffs had perfected title by the time notice to quit was served on the defendant. The erroneous date in the allegation is a simple typographical error. Plaintiffs have adequately

pleaded title.

Defendant also asserts that the notice is legally insufficient. Defendant's argument has merit. The allegations of the complaint allege that a three-day notice was served on defendant on June 17, 2010. The allegations of the complaint do not expressly incorporate the notice. However, Code of Civil Procedure section 1166, subdivision (c)(1)(A), requires that a copy of the notice of termination served on the defendant be attached to the complaint. Such a notice is attached as exhibit 3 to the complaint. The notice served on the defendant is, as defendant points out, fatally ambiguous.

The second paragraph of the notice states: "If you are the trustor in the deed of trust described below, or if you claim an interest in the Property through the trustor of that deed of trust, within three (3) days after service of this notice, you are hereby required to deliver up possession of the Property."

The third paragraph states "Alternatively, if you are a bona fide tenant pursuant to the 'Protecting Tenants at Foreclosure Act of 2009' then within ninety (90) days after service of this notice, you are hereby required to deliver up possession of the Property."

The fourth, fifth and sixth paragraphs state: "Alternatively, if you are not a bona fide tenant pursuant to the 'Protecting Tenants at Foreclosure Act of 2009' then: [¶] If a party to the note remains on the property as a tenant subtenant or occupant, then pursuant to CCP § 1161a you are hereby required to deliver up possession of the Property within thirty (30) days after service of this notice. [¶] If a party to the note does not remain on the property, then pursuant to CCP § 1161b, you are hereby required to deliver up possession of the Property within sixty (60) days after service of this notice."

It is unnecessary to address the question of whether the notice is sufficiently certain where it requires the tenant to engage in legal research to determine if the tenant is a "bona fide tenant" under the Protecting Tenants at Foreclosure Act of 2009 (Pub.L. No. 111-22 (May 20, 2009) 123 Stat. 1632). The notice is ambiguous on its face. According to the deed attached to the complaint, defendant was the trustor under the deed of trust foreclosed upon. (Complaint, exhibit 2.) Thus, under the terms of the second paragraph of the Notice, defendant was to deliver up possession of the Property within three days.

But defendant also is a party to the note. Although the note is undefined in the notice, as the trustor under the deed of trust, ordinarily defendant would be a party to the underlying note secured by the deed of trust. (See *Holmes v. Warren* (1904) 145 Cal. 457, 463.) Defendant is further alleged to remain on the property as an occupant. (Complaint, ¶ 7.) Thus, assuming defendant is not a "bona fide tenant" as defined in the Protecting Tenants at Foreclosure Act of 2009, under paragraphs four and five of the notice, defendant is to deliver up possession of the Property within 30 days. (If defendant were not a party to the note, and also not a "bona fide tenant," paragraph six of the notice provides 60 days to deliver up possession.)

"It has long been recognized that the unlawful detainer statutes are to be strictly construed and that relief not statutorily authorized may not be given due to the summary nature of the proceedings. [Citation.] The statutory requirements in such proceedings must be followed strictly, otherwise a landlord's remedy is an ordinary suit for breach of contract with all the delays that remedy normally involves and without restitution of the demised property. [Citation.]" (*WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 526 [internal quotation

marks omitted].) Plaintiffs assume in their complaint that the three-day notice period of section 1161a is applicable. (Complaint, ¶ 8.) Section 1161a, subdivision (b) requires a “three-day written notice to quit the property.” The notice served on defendant is not unequivocally a three-day notice. The notice served on defendant provides no fewer than four different alternative notice periods, of which at least two (3 days and 30 days) apply to the defendant.

Service of the notice was on June 17. (Complaint, exhibit 3.) All of the notice periods beyond 3 days expire after this action was filed on June 23. As a result, the notice served does not comply with the requirements of the unlawful detainer statutes and may not serve as a basis for plaintiffs’ action. (*Turney v. Collins* (1941) 48 Cal.App.2d 381, 392 [notice specified removal “forthwith” and “so was wholly ineffective; it was as though it had never been made or given”].)

Because the notice served is defective and incapable of correction in this action, plaintiffs’ action must fail. The Court will sustain defendant’s demurrer without leave to amend. Plaintiffs, of course, may serve a proper notice and commence a new action in unlawful detainer based on that new notice.