1 of 2 DOCUMENTS

28th v. Crouch

CASE NOs. 30-2012-586073, 30-2012-586106

APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, ORANGE

2013 Cal. App. Unpub. LEXIS 5069

June 27, 2013, Filed

PRIOR HISTORY: [*1]

JUDGMENT ON APPEALS from the SUPERIOR COURT of ORANGE COUNTY, HARBOR JUSTICE CENTER, HONORABLE COREY S. CRAMIN, JUDGE.

JUDGES: RONALD L. BAUER, Acting Presiding Judge; CHARLES MARGINES, Judge; CRAIG GRIFFIN, Judge.

OPINION

Defendant/Tenant in these post-foreclosure unlawful detainer actions is appealing the trial court's judgments in favor of plaintiff/foreclosure purchaser.[1] Appellant's primary contention is that the trial court erred in concluding that she is not a "bona fide tenant" within the meaning of the federal Protecting Tenants at Foreclosure Act (PTFA). Among other claims. Appellant additionally contends the complaints failed to state a cause of action in unlawful detainer based on defective notice of termination and defective service of the notice of termination. Because we agree with Appellant on these contentions, the trial court judgments must be reversed and we need not consider Appellant's additional contentions.

1 Because the two cases are closely connected and most of the arguments raised are identical, we conclude that a single combined judgment in the two cases is appropriate.

The PTFA provides a member of protections for "bona fide" tenants residing in properties sold at foreclosure. [*2] Among those protections, the statute requires that the new owner honor the remaining term of any existing written lease. In this case, the record indicates that in August of 2011, Appellant entered into a lease extension with the foreclosed former owner which, if her tenancy is "bona fide," would permit her to remain in the property through August of 2013.[2]

2 We note that the extensive and bitter litigation of this matter has consumed over a year since the filing of the complaint and nearly a year and a half since the foreclosure sale. At most. Appellant's lease extension entitles her to remain on the property through August of 2013. We question whether both parties to this action would have been better served by an early resolution via settlement, rather than persisting with litigation.

The PTFA provides that a lease or tenancy shall be considered "bona fide" only if: (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent [*3] is reduced or subsidized due to a Federal, State, or local subsidy. Respondent contends Appellant's tenancy was not "bona fide" because the lease, on its face, called for "discounted" or reduced rent. However, the lease further provided that the "discounted"

rent was in exchange for the provision of numerous additional services by the tenant, including but not limited to services as property manager for the portion of the premises sometimes rented to other tenants as a vacation property, and further provided that Appellant and her family occupied only the upper portion of the premises a great deal of the time. To the extent the trial court failed to consider the value of any of the services provided by Appellant, such ruling was in error. "Rent nay not necessarily be a single specific dollar amount. It consists even of services." (*Rossetto v. Barross (2001) 90 Cal.App.4th Supp. 1, 5*.) Weil & Brown, California Practice Guide: Landlord-Tenant (Rutter Group) at section 2:153.5 cites *Rossetto, supra*, for the proposition that, "There is no rule of law requiring 'rent' to be paid in money. The consideration for the grant of a leasehold interest may be the rendition of *services* -- e.g. in [*4] the case of *employee tenants*." (Emphasis original.) If the trial court failed to take Appellant's services into consideration in determining whether Appellant was paying "fair market rent," such failure was error.

The record on appeal indicates that after Appellant's counsel argued that the legal definition of "rent" includes services as well as money, the court "tabled the discussion of rent and moved on to the other portions of the Act." Specifically, the PTFA provides that to be "bona fide," a lease must be entered prior to the "notice of foreclosure." According to thé statement on appeal, the trial court concluded the lease extension was not "bona fide" because it was entered on the same day as a notice of default. That ruling was erroneous as a matter of law. In 2010 the PTFA was amended to provide that "for purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed." In this case, "complete title" was not transferred until recording of the Trustee's Deed [*5] Upon Sale in January 2012 or, at the earliest, at the time of sale in December 2011. The 2-year lease extension was entered in August of 2011. Appellant was not precluded from "bona fide tenant" status based on entry of the lease extension prior to the "notice of foreclosure."

Respondent is correct that Appellant did not raise any claims pertaining to improper service of notice or failure of the complaint to state a cause of action until the first of her several post-judgment motions to vacate/stay the judgment. Respondent contends such defects are waived by failure to raise them earlier in the trial court. Not so. It is well established that proper service of the required notice of termination is an essential element of a plaintiff's cause of action for unlawful detainer. "A lessor must allege and prove proper service of the requisite notice. (Citations.) Absent evidence the requisite notice was properly served pursuant to *section 1162*, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany (1997) 56 Cal.App.4th 511, 513*.) Failure to state facts sufficient to constitute a cause of action is never waived and can even be raised for the first time on appeal. (*CCP section 430.80*; [*6] *Greene v. Municipal Court (1975) 51 Cal.App.3d 446, 450*.) Neither *In re Aaron B. (1996) 46 Cal.App.4th 843* nor *Arabia v. BAC Home Loan Servicing (2012) 208 Cal.App.4th 462*, cited by Respondent in support of the waiver argument, dealt with failure of the complaint to state a cause of action.

Respondent's complaint was defective in at least two significant respects: failure of the "Notice of Possession" to comply with the requirements of *Code of Civil Procedure section 1161c* for the termination of a residential tenancy following foreclosure, and failure to provide proof of proper service of the notice of termination of tenancy. The "Notice of Possession" failed to provide Appellant with notice of her rights as required by *CCP section 1161c*, including the requirement that the new owner honor the term of any remaining lease in some cases. Equally important, the proof of service of the "Notice of Possession" fails entirely to comply with the requirements of *Code of Civil Procedure section 1162*. *Section 1162* provides that the termination notices required by *sections 1161* and *1161a* may be served by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or [*7] she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence.

(3) If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail

addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

In the case of the lower unit, 119, Mr. Amster attests to having personally delivered a copy of the notice to "tenant," but fails to identify the "tenant" who was allegedly served. The proof of service says he served "the above-named tenant," though no tenant is named "above" on the Proof of Service. This is particularly significant as to the lower unit, where the record indicates that unit was often rented as a vacation rental to tenants other than Appellant and her family. The [*8] proof of service fails entirely to establish sufficient service on Appellant.

The Proof of Service for the upper unit, 119 1/2, recites that Mr. Amster "posted a copy conspicuously on the door of each structure, and mailed a true copy of this notice to tenant by first-class mail." In addition to failing to identify any tenant, this notice fails entirely to mention the absence of any "person of suitable age and discretion" with whom to leave the notice, or to state that the tenant's "place of residence and business cannot be ascertained." Particularly troublesome is that Mr. Amster states the notices as to both units were served at the same date and time, December 28, 2011, at 11:26 a.m. Assuming some unidentified "tenant" was present to be personally served as to the downstairs unit, it defies logic to suggest that no "person of suitable age and discretion" could be found on whom to serve notice as to the upstairs unit. Also curious is the statement Mr. Amster posted the notice "on the door of each structure," yet fails to identify the "structure" to which it refers. Since he says he personally served "the tenant" as to the lower unit, the reference to "each structure" as to the upper [*9] unit is highly questionable. In short, the proof of service of the "Notice for Possession" of both units fails to comply with the technical specifics of *Code of Civil Procedure section 1162*. As such, Respondent's complaints were insufficient to support judgment in its favor.

The judgments of the trial court are reversed.

/s/ Ronald L. Bauer

RONALD L. BAUER, Acting Presiding Judge

/s/ Charles Margines

CHARLES MARGINES, Judge

/s/ Craig Griffin

CRAIG GRIFFIN, Judge.