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Ordered Not Published
Previously published at: 232 Cal.App.3d 1546
(Cal. Rules of Court, Rules 976, 977, 979)

(Cite as: 284 Cal.Rptr. 194)

Court of Appeal, Sixth District, California.
GREAT AMERICAN FIRST SAVINGS BANK,
Plaintiff and Respondent,
v.
BAYSIDE DEVELOPERS, Defendant and Appellant.
No. H007229.

Aug. 6, 1991.

Lender brought action for specific performance of rents and profits clause in a deed of trust and for appointment of a receiver. The Superior Court, Santa Clara County, No. 630248, Peter G. Stone, J., ordered the receiver discharged after approving the receiver's account, and granted summary judgment to the lender on its original complaint and its amended complaint to determine competing claims to some of the proceeds. Borrower appealed. The Court of Appeal, Cottle, J., held that: (1) a receiver appointed to enforce the rents and profits clause of the deed of trust was not authorized to sell encumbered property, and (2) the lender violated the "one form of action" rule by seeking the appointment of a receiver and applying the proceeds from the receiver's sales to the lender's debt and then seeking nonjudicial foreclosure on the remaining security.

Judgment reversed and case remanded.

***195** Sandra Naisbitt Rowell, Redwood City, for defendant and appellant.

Benjamin R. Levinson, Cupertino, for plaintiff and respondent.

COTTLE, Associate Justice.

Bayside Developers (Bayside) appeals the summary judgment entered in favor of plaintiff Great American First Savings Bank (Bank). (Code Civ.Proc., § 437c.) In this action for specific performance of a rents and profits clause of a deed of trust, and appointment of a receiver, Bayside asserts that it raised triable issues of fact relating to: 1) the nature of the funds collected by the receiver, 2) the propriety of the real estate sales by the receiver and Bank's acceptance of the sale proceeds, 3) the propriety of nonjudicial foreclosure on some lots after the judicially-approved sale of others, and 4) the entitlement of other defendants to monies remaining in the receivership account. We conclude the trial court erred in granting summary judgment, and reverse the judgment.

FACTS

Bayside borrowed $10,600,000 from and signed a promissory note in favor of Bank in April 1984. The purpose of the loan was the development and construction of a townhouse project called Country Club Townhomes in San Jose. Bayside gave Bank a promissory note secured by a blanket deed of trust covering all the lots in the project. By a release price agreement, Bank agreed to release each lot from the blanket deed of trust as it was sold, on payment of a set amount, with the excess or profit going to Bayside.

The project was not completed on time. In August of 1986 when the project was less than half completed, Bayside defaulted on its note. Bank agreed with Bayside to extend the note on certain conditions, and Bank adjusted the amount to be paid to it for release of each unit. Also as part of this September 1986 agreement, Bayside warranted that there were no other outstanding liens on the property. After executing the agreement, the general partners of Bayside apparently borrowed

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money from the Bielenbergs and from Cevolani, securing their notes with deeds of trust against the property. Later these junior deeds were reconveyed and extinguished, and later still recorded again. Bank through its vice president Burke reminded the general partners that other liens were not permitted. The junior deeds of trust were again reconveyed and extinguished.

On May 18, 1987, Bank recorded a notice of default against the real property because Bayside had failed to pay the matured loan. On June 1, 1987, Bank filed an action for specific performance of the rents and profits clause of the deed of trust, and petitioned the court to appoint a receiver. Bank did not mention in the complaint that ***196** it would like the receiver to have authority to sell the finished town homes. Bank also sought a temporary restraining order restraining Bayside from "stripping" the model homes of furniture, which was hypothecated as additional security by a chattel mortgage. Bayside had built 32 of the proposed 70 condominium units. Most of the finished units had been sold, but sale escrows were pending on nine completed units. The remainder of the real property not already released from the deed of trust was raw undeveloped land.

On Bank's ex parte request, the superior court appointed the Tri-Pacific Lending Corporation receiver of the rents and profits. Prior to the subsequent order to show cause hearing regarding confirmation of the appointment of the receiver, Bayside filed papers stating it had no objection to the appointment of a receiver. The court confirmed Tri-Pacific as the receiver and it posted a bond with the court. The order authorized the receiver to close pending escrows and to pay senior obligations as they became due. The receiver was also authorized to collect rents and to preserve and maintain the property.

The receiver closed escrows on the nine finished townhouses, obtaining permission in advance in each case from the court. The court order allowed the receiver to sell each lot to the buyer, pursuant to the escrow instructions. The receiver was empowered to transfer the real estate, to receive the funds, and to hold the funds in its account pending a further hearing on the distribution of the funds. The escrow instructions apparently included paying off Bank's demand of a certain amount, to reduce the debt and release the lot from the blanket deed of trust. As the sale on each unit closed, except for lots 40 and 41, Bank's demand was paid, and the receiver held the surplus. Although the court approved the sales in advance, the court did not "confirm" the sales after the fact.

Lots 40 and 41, by separate court orders, were sold free and clear of all liens, because junior encumbrances had been recorded against them. The court ordered the receiver to hold all the sales proceeds from these sales since there were multiple claimants to the funds. The trial court approved the receiver's sale of the model home furniture given as additional security, on August 17, 1987, when it approved the sale of lot 40 free and clear of liens.

After the nine units were sold, the Bank sold the remaining raw land to itself at a trustee's sale on November 25, 1987. Bank was the only bidder and it bid $1,710,000. The outstanding debt on the property at the time of the nonjudicial foreclosure sale was in excess of $4,500,000.

After the nonjudicial foreclosure, the receiver filed a final account and sought to be discharged. Bayside filed extensive opposition, raising objections including that the conduct of Bank and the receiver violated the one-form-of-action rule. After a contested hearing the trial court in its statement of decision approved the receiver's final account with some exceptions, and ordered the receiver discharged. The trial court overruled Bayside's objections. The trial court also required the receiver to pay into court $160,000 pending determination of the competing claims of liens against lots 40 and 41, and to turn over to Bank the

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remainder of $312,318.06 upon the posting of a bond. The formal order discharging the receiver was entered August 26, 1988.

Bank amended its complaint to add the claimants to the $160,000 as parties defendant and added a cause of action for declaratory relief. This amended complaint was stricken as to defendant Bayside, for reasons unclear from the record.

Bank moved for summary judgment on the original complaint and on the amended complaint. Bank contended it was entitled to the $312,318.06 already turned over to it, and also to the $160,000 held by the court. The trial court granted the motion. On appeal Bayside assigns as error the trial court's granting the motion.

STANDARD OF REVIEW

"Summary judgment is properly granted only when the evidence in support of the motion establishes that there is no triable *197 issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citations.]" (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 37, 241 Cal.Rptr. 539.) Since a motion for summary judgment raises only questions of law regarding the construction and effect of the supporting and opposing papers, we review them independently. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064, 225 Cal.Rptr. 203.) We identify the issues framed by the pleadings, determine whether moving party's showing has negated the opponent's claim, and determine whether the opposition raises a triable issue of fact. (*Id.* at pp. 1064-1065, 225 Cal.Rptr. 203.) "Doubts as to the propriety of summary judgment are resolved against granting the motion. [Citations.]" (*Fowler v. Varian Associates, Inc., supra,* 196 Cal.App.3d at p. 37, 241 Cal.Rptr. 539.)

DISCUSSION

[1] First we dispose of two preliminary matters: whether Bayside may assert on appeal triable issues of fact that other defendants raised, and whether the order discharging the receiver was a final judgment having collateral estoppel effect. As to the first matter, "[i]t is elementary that an appellant is entitled to assign for error only such proceedings in the trial court as injuriously affect him, without regard to the errors of which others might complain." (*Nichols v. Nichols* (1933) 135 Cal.App. 488, 491, 27 P.2d 414.) If defendants other than Bayside raised triable issues as to their entitlement to the funds remaining in the receivership account, that is logically irrelevant to this controversy between Bank and Bayside.

[2] Bank contends that the order discharging the receiver was a final judgment, so that Bayside is collaterally estopped from re-litigating the issues of the character of the funds collected by the receiver and of a possible violation of the one-form-of-action rule. As a general rule there can be only one final judgment in a single action. (*Nicholson v. Henderson* (1944) 25 Cal.2d 375, 378, 153 P.2d 945.) There are exceptions, and sometimes an order discharging a receiver constitutes a final judgment. "[T]he exception to the one final judgment rule depends upon three concomitant conditions: (1) a final order, (2) in a collateral proceeding, (3) which must direct the payment of money by the appellant or the performance of an act by or against him." (*Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149, 155, 8 Cal.Rptr. 107.) In *Fish v. Fish* (1932) 216 Cal. 14, 15, 13 P.2d 375, for example, in which a wife filed an action for separate maintenance and division of property, the trial court appointed a receiver. After hearing, the trial court approved the receiver's final account, fixed his compensation and that of his attorney, ordered sale of the receivership estate by a commissioner, and approved discharging the receiver. (*Id.* at p. 15, 13 P.2d 375.) The receiver urged that the order appealed from was merely interlocutory and therefore not appealable. (*Id.* at pp. 15-16, 13 P.2d 375.) The appellate court held the order was final and appealable. (*Id.* at p. 16, 13 P.2d 375.) The order was a final decree as to the collateral matter of the receivership, and directed

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performance of an act against wife, the sale of property in which she had an interest. (*Ibid.*)

The order discharging the receiver was also a final, appealable judgment in *MacMorris Sales Corp. v. Kozak* (1967) 249 Cal.App.2d 998, 58 Cal.Rptr. 92. The case involved a controversy over ownership and control of a corporation. (*Id.* at p. 1000, 58 Cal.Rptr. 92.) The court appointed a receiver to manage the corporation, and ultimately approved his final account and approved compensation for the attorney appointed to assist him. (*Id.* at pp. 1001-1002, 58 Cal.Rptr. 92.) The order settling the account of the receiver was a final judgment which determined matters collateral to the main action, and was thus appealable. (*Id.* at p. 1002, 58 Cal.Rptr. 92.)

Clearly the order discharging a receiver goes to a collateral matter when the main action is one for spousal support and division of property. (*Fish v. Fish, supra,* 216 Cal. 14, 13 P.2d 375.) When the main action is a controversy over the ownership ***198** and control of a corporation, the order approving the receiver's final account and discharging him also goes to a collateral matter. (*MacMorris Sales Corp. v. Kozak, supra,* 249 Cal.App.2d 998, 58 Cal.Rptr. 92.) The exception that the order discharging a receiver is a final judgment does not apply in the instant case, however. This action is Bank's petition to appoint a receiver (to specifically enforce the rents and profits clause of the deed of trust). In this circumstance the order discharging the receiver cannot be considered "collateral" to the main action, and it was not a final judgment.

Two other reasons logically support the conclusion that the order discharging the receiver was not a final judgment. First, after entry of the order, Bank amended its original complaint, an act inconsistent with viewing the order as a final judgment on the original complaint. Second, Bank in its summary judgment motion posed as an issue for summary adjudication the following: "During the receivership, the money that was collected by the receiver was from rents, issues and profits of the town homes project." Even Bank, then, did not think that the nature of the funds collected by the receiver had already been finally determined by a final judgment.

Applying the standard of review on summary judgment motions, we first determine what issues were framed by the pleadings. Bank's original complaint placed in issue its entitlement to the appointment of a receiver, and its entitlement to the rents, issues and profits of the encumbered land. Bayside did not contest the appointment of the receiver, and indeed it was proper under Code of Civil Procedure, section 564, subdivision (8) ("by the usages of courts of equity").

The second issue posed by the pleadings was whether Bank was immediately entitled to the sales proceeds of the pending town house sales. A corollary issue is whether sales proceeds are included within the definition of "rents, issues, and profits."

Our view is that although there were no genuine disputes as to triable issues of material fact, Bank was *not* entitled to judgment as a matter of law. In other words, we conclude the trial court committed errors of law in granting the summary judgment motion.

What Bayside raised as factual disputes were not actually factual disputes but disputes related to the legal effect or the legal interpretation of those undisputed facts. For instance, Bank's fact 3 stated that the promissory note permitted no other encumbrances. Bayside disputed that fact, on the ground that the note did not forbid other encumbrances, but just allowed Bank to accelerate the note if there were any. Bank's fact 8 stated that the receivership estate consisting of rents, issues and profits, was a certain amount. Bayside disputed not the amount but the characterization of the estate as rents and profits, rather than sale

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proceeds.

Are Sales Proceeds "Rents, Issues and Profits"?
[3] In the event of Bayside's default, the deed of trust provided that: "Beneficiary [Bank] may ... by receiver ... without regard to the adequacy of any security ... collect the rents, issues and profits thereof, ... and apply the same upon any indebtedness secured hereby...." Bank's action is for specific performance of the rents and profits clause.

"Rents, issues and profits" is a term of art, and we think it means simply the income generated by holding on to land. Black's Law Dictionary (6th ed. 1990) defines the term as: "The profits arising from property generally. Rents collected by party in possession; the net profits." " '[P]roducts, rents, issues or profits' refer not to the property itself or to its proceeds on sale but to the income derived from the property...." (*Estate of McIntyre* (1961) 189 Cal.App.2d 498, 500, 11 Cal.Rptr. 733.) "An example would be income derived from the rental of a room, a flat, a garage, or produce raised on the land...." (*Ibid.*) The term includes rent to be collected from tenants in apartment buildings which are the subject of nonjudicial foreclosure. ***199(** *Eastland S. & L. Assn. v. Thornhill & Bruce, Inc.* (1968) 260 Cal.App.2d 259, 260, 66 Cal.Rptr. 901.) Proceeds from the sale of harvested crops growing on mortgaged land are rents, issues, and profits (*Schreiber v. Ditch Road Investors* (1980) 105 Cal.App.3d 675, 677, 678, 164 Cal.Rptr. 633), although a specific chattel mortgage on the crops may be required before the creditor may take the sale proceeds they generate. (*Cowdery v. London etc. Bank* (1903) 139 Cal. 298, 309, 73 P. 196.)

In *Turner v. Superior Court* (1977) 72 Cal.App.3d 804, 807, 140 Cal.Rptr. 475, in a foreclosure action, the superior court authorized a rents and profits receiver to sell the real property, an inn, and to sell along with it certain personal property which was not security for the debt. The predecessors-in-interest to the owners, the Turners and Cooke, executed a promissory note in favor of Great Western in the amount of $1.3 million, and the note was secured by a deed of trust on the real property including its improvements, fixtures, and the rents, issues and profits it generated. (*Id.* at pp. 807-808, 140 Cal.Rptr. 475.) In a separate quiet title action between the Turners and Cooke, the court quieted title to the inn in Cooke, but held that the Turners owned the liquor license, and certain personal property at the inn. (*Id.* at p. 808, 140 Cal.Rptr. 475.) The superior court granted the receiver's petition to take possession of the liquor license, so that he could operate the cocktail lounge, through an arrangement with the Turners. (*Id.* at p. 809, 140 Cal.Rptr. 475.) The liquor license was not hypothecated under the deed of trust. (*Ibid.*) The receiver petitioned the court for permission to sell the inn, along with that certain personal property that was not hypothecated under the deed of trust. (*Id.* at p. 810, 140 Cal.Rptr. 475.) The Turners petitioned for a writ of prohibition, seeking an order to the superior court prohibiting it from confirming the proposed sale of the inn. (*Id.* at p. 807, 140 Cal.Rptr. 475.)

The appellate court found that a rents and profits receiver, by the nature of the office, has limited powers. (*Turner v. Superior Court, supra,* 72 Cal.App.3d at pp. 812-815, 140 Cal.Rptr. 475.) The superior court acted beyond its power when it authorized the rents and profits receiver to take possession of property that was not hypothecated under the deed of trust. (*Id.* at p. 816, 140 Cal.Rptr. 475.) This property was the liquor license and certain inventories and furnishings of the inn. (*Ibid.*) The appellate court also found that the superior court's approval of the sale of the inn, including the furnishings etc. that were not part of the security, was beyond the power of the receiver and beyond the power of the court. (*Id.* at pp. 818-819, 140 Cal.Rptr. 475.) The court did not reach the issue of whether a rents and profits receiver could be authorized to sell the security. (*Id.* at p. 818, 140 Cal.Rptr. 475.)

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This case is similar to *Turner, supra,* 72 Cal.App.3d 804, 140 Cal.Rptr. 475, except that it poses the issue not reached. Bank's complaint was for specific performance of the rents, issues and profits clause by appointment of a receiver, only. The complaint did not pray for a general receiver who would have the power to sell all or part of the receivership estate. Sale of the town homes was beyond the authority of the receiver, and beyond the power of the court to authorize.

Did Bank Violate Code of Civil Procedure, section 726?

[4] Bayside contends that Bank violated the "one form of action" rule of section 726. That statute begins: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property...." This rule means that a secured creditor can bring only one lawsuit to enforce its security interest and to collect its debt. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 997, 275 Cal.Rptr. 201, 800 P.2d 557.) When the creditor sues on the obligation and seeks a personal money judgment against the debtor without seeking the foreclosure of the mortgage or deed of trust, he elects the single remedy of a personal action and waives his right to foreclose on the security. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733, 111 Cal.Rptr. 897, 518 P.2d 329.)

[5] ***200** Section 726 may be applied in two ways. The debtor may assert it as an affirmative defense, and force the creditor to exhaust the security before he seeks a deficiency from the debtor. Or, the debtor may assert the section as a sanction, as here, arguing that the creditor elected a remedy and waived his right to foreclose. (*Walker, supra,* 10 Cal.3d at p. 734, 111 Cal.Rptr. 897, 518 P.2d 329.)

[6] Section 726 not only limits the creditor to one action but it also requires him to exhaust the real property security before enforcing the underlying debt. (*Wozab, supra,* 51 Cal.3d at p. 999, 275 Cal.Rptr. 201, 800 P.2d 557.) Because of this "security-first" rule, a Bank may not set off a depositor's account for the debt first, and then foreclose on the property. (*McKean v. German-Am. Savings Bank* (1897) 118 Cal. 334, 340-341, 50 P. 656; see also *Bank of America v. Daily* (1984) 152 Cal.App.3d 767, 771, 199 Cal.Rptr. 557.)

[7] The issue here is whether Bank could properly cause the receiver to sell several of the town homes, and the model townhouse furniture, while immediately collecting the proceeds and applying them to pay down the debt, and later nonjudicially foreclose on the remainder of the security. We hold the Bank could not properly do so, and that it violated section 726. Although this is a question of first impression, we find authority for our holding in treatises by real property experts. For purposes of this discussion, we think sale proceeds would be treated the same as rents and profits, the true question being whether Bank may apply these monies to the debt before it exhausts the entire primary security. According to California Real Property Financing (Cont.Ed.Bar Supp.1991) section 6.5, page 40: "A lender who chooses to file a complaint for specific performance should remain aware of the ramifications of the one-action rule of CCP § 726. The appointment of a receiver and collection of rents by such receiver by themselves are unlikely to trigger the one-action rule; *however, the disbursement of the collected proceeds to the lender in partial satisfaction of its debt* may be construed by courts as being analogous to a setoff. *California courts have previously ruled that lenders who had obtained partial satisfaction of their debts through various nonjudicial procedures (including setoff) had exhausted their ability to pursue the remedy of foreclosure because of the one-action rule. [Citations.] ... [¶] Thus, it appears that lenders should carefully consider the ramifications of the one-action rule before directing their receivers to use the proceeds of the assignment of rents to reduce their debts before the foreclosure proceeding is completed." (Emphasis added.)*

Because we find it persuasive, we quote at length

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from 4 Miller and Starr, Current Law of California Real Estate (2d ed. 1989) section 9:106, page 352, footnote 73: "No case has considered CCP § 726 when a receiver has been appointed pending a foreclosure. However, the above-referenced decisions, as well as the cases which have permitted other actions by the beneficiary that are not for the recovery of the debt, support the conclusion that the receivership is merely an action to preserve the security, and only relate to possession, and is not a proceeding for the collection of the secured debt. [¶] On the other hand, the objective of receivership is the enforcement of the security interest in the rents, which is in addition to the security in the real property. The creditor can have a receiver appointed based on a cause of action for specific performance of the assignment of rents in the deed of trust or as a remedy ancillary to a judicial foreclosure action, or both. The rents are additional security for the payment of the debt. The objective of the receivership is to collect rents to be applied to the debt in the event the foreclosure sale produces an insufficient amount to satisfy the debt. CCP § 726 applies to any action for the recovery of the debt or enforcement of a right secured by the deed of trust, and that is exactly what the receivership proceeding is intended to accomplish. These proceedings would also seem to be within the objectives of CCP § 726 to prevent a multiplicity of suits and to require the creditor to look first to the real property for satisfaction of ***201** the debt. Therefore, an action which is filed *only* for specific performance of the rents and profits clause in a deed of trust, without foreclosure of the lien, may violate CCP § 726. *However, the mere filing of the action and the appointment of a receiver would not invoke the sanctions of CCP § 726, but the application of the rents to the debt* or the recovery of a judgment in the action *may well invoke the sanctions. This effect could be avoided by the inclusion of a judicial foreclosure action and an order requiring the receiver to hold the rents pending the foreclosure* by either a judicial or nonjudicial sale." (All citations omitted; emphasis added.)

The trial court erred in granting Bank's summary judgment motion. Proceeds from the sales of the town homes are not rents and profits. Taking the proceeds from sale of the model furniture violated the "security-first" principle. Bank's application of all these sale proceeds to the debt through its action for specific performance of the rents and profits clause invokes the sanctions of section 726.

The judgment is reversed and the case remanded for proceedings consistent with the views expressed in this opinion. Issues related to reinstatement of respondent's bond shall be determined by the trial court. Costs are awarded to appellant.

AGLIANO, P.J., and ELIA, J., concur.

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