Filed 8/25/04 Huston v. Supportkids CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THOMAS L. HUSTON et al., Plaintiffs and Appellants, v. SUPPORTKIDS, INC. et al., Defendants and Respondents.	C044876 (Super. Ct. No. CV20215)

Plaintiffs sought damages and equitable relief concerning actions taken by defendants to enforce an alleged child support obligation. Plaintiffs appeal the trial court's dismissal of their complaint after it sustained defendants' demurrer without leave to amend. We reverse.

FACTS AND PROCEDURAL HISTORY

In their complaint, plaintiffs allege they own in fee real property located in Tracy, San Joaquin County, California. On November 25, 2002, defendants recorded a "Notice of Lien" at the San Joaquin County recorders office. The Notice of Lien placed

a lien on plaintiffs' property in the amount of $72,030.65, plus interest.

Plaintiffs assert they do not owe the sum of $72,030.65 pursuant to any child support order entered on February 5, 1990, in Essex County, Massachusetts under case number 88W0323. Rather, they allege plaintiff Thomas Huston's child support obligation arising from the Massachusetts action was modified to $12.00 per week on August 29, 1994, pursuant to a stipulation of the parties in that action.

At some point in time, defendants also served on plaintiff Thomas Huston's employer a "document purporting to be a wage attachment or similar document." A court did not issue the document. As a result of this document, Huston's employer allegedly withheld wages from him in amounts that exceeded those allowed in any order or judgment.

In early 2003, plaintiffs requested that defendants quitclaim to them any lien or interest in their real property and release the Notice of Lien. Defendants refused. Plaintiffs brought this action seeking to quiet title in their Tracy property, and seeking damages for slander of title, abuse of process, intentional infliction of emotional distress, and conversion.

Defendants filed a demurrer, claiming the complaint failed to state a cause of action. In support of their demurrer, defendants asked the trial court to take judicial notice of three documents: (1) the Notice of Lien recorded by defendants with the San Joaquin County recorder on November 25, 2002; (2)

an order and income assignment dated February 9, 1990, issued by the Essex Probate and Family Court of Massachusetts; and (3) a stipulation and order dated August 29, 1994, between plaintiff Thomas Huston and his opposing party in Essex County, Massachusetts action number 88W0323.

At the hearing on the demurrer, plaintiffs requested leave to amend their complaint to add a cause of action under Civil Code section 3412 to remove a cloud from title. The trial court, without discussion, sustained the demurrer without leave to amend and awarded judgment of dismissal in favor of defendants. The court made no express ruling on defendants' requests for judicial notice.

On appeal, plaintiffs claim the trial court erred because: (1) it refused to grant plaintiffs leave to amend as requested; and (2) plaintiffs stated valid causes of action for quieting title, abuse of process, conversion, and intentional infliction of emotional distress.

DISCUSSION

I

Standard of Review and Judicially Noticeable Facts

"'Where a trial court sustains a demurrer without leave to amend, we review such action under the abuse of discretion standard. [Citations.] If there is a reasonable possibility that the pleading can be cured by an amendment, the trial court's ruling will be reversed. [Citation.] [¶] On review, we examine the Complaint's factual allegations to determine whether they state a cause of action on any available legal

theory. [Citation.] We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation] and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]' [Citation.]" (*Crystaplex Plastics, Ltd. v. Redevelopment Agency* (2000) 77 Cal.App.4th 990, 993; see also *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

We take judicial notice of the November 25, 2002, Notice of Lien pursuant to Evidence Code section 452, subdivision (h). The existence and authenticity of the Notice of Lien are facts that are not reasonably subject to dispute, are capable of immediate and accurate determination, and are consistent with the allegations of the complaint. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 [court can take judicial notice of recorded deed].) We decline, however, to take judicial notice of the truth of the matters stated in the Notice of Lien that are disputed by the complaint.

The Notice of Lien states in pertinent part: "This lien results from a child support order, entered on 02/05/1990 by Essex County MA tribunal number 88W0323. [¶] As of 11/15/2002, the obligor [plaintiff Thomas L. Huston] owes unpaid support in the amount of $72,030.65. . . . [¶] . . . This lien attaches to all non-exempt real and/or titled personal property of the above-named obligor which is located or existing within the state/county of filing . . . . [¶] . . . [¶] All aspects of

this lien, including its priority and enforcement, are governed by the law of the State where the property is located. An obligor must follow the laws and procedures of the State where the property is located or recorded to contest or challenge this lien. This lien remains in effect until released by the claimant [Pamela Snow] or in accordance with the laws of the State of filing."

Pursuant to Evidence Code section 452, subdivision (d), we take judicial notice of the February 9, 1990, order and income assignment issued by the Essex County Probate and Family Court, and the August 29, 1994, stipulation and order entered in action number 88W0323.

The February 1990 order and income assignment does not expressly mention the child support order of January 5, 1990, referenced in the Notice of Lien, nor does it expressly reference case number 88W0323. However, the order states plaintiff Thomas Huston was required to pay child support payments to Pamela Snow in the amount of $166 per week until such time as $1,835 in arrears were paid off. After that time, plaintiff was ordered to pay $116 per week. The amount was to be deducted from plaintiff's employment paycheck by his employer at that time, Digital Corporation, of Maynard, Massachusetts.

With the August 29, 1994, stipulation in case number 88W0323, Huston and Snow agreed as follows:

"1. Plaintiff's [Huston] child support order shall be reduced to $12.00 per week until his reemployment.

"2. When plaintiff becomes reemployed he shall make child support payments by wage assignment in accordance with the Massachusetts Child Support Guidelines then in force.

"3. Plaintiff shall notify both counsel . . . in writing as to his current earning[s] when he becomes employed."

II

Leave to Amend

Plaintiffs claim the trial court abused its discretion when it failed to grant them leave to amend their complaint in order to add a cause of action under Civil Code section 3412. We agree.

Civil Code section 3412 provides: "A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." This statute states the substantive right to bring an equitable action to remove a cloud on title. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 630, p. 94.)

To plead a cause of action to remove a cloud on title, the plaintiff must allege his title or interest in the affected property, and he must allege the facts concerning the particular instrument, its apparent validity, and its actual invalidity. (5 Witkin, Cal. Procedure, *supra*, Pleading, §§ 631-633, pp. 95-96.)

Here, plaintiffs' complaint already pled sufficient facts to state a cause of action to remove a cloud from title. The

complaint alleged plaintiffs owned the Tracy property in fee and the Notice of Lien recorded by defendants adversely affected their title to that property. The complaint also alleged the Notice of Lien was for an incorrect amount and was based on the wrong court order. As a result of the Notice of Lien's invalidity, plaintiffs allegedly suffered harm to their pecuniary interests. These allegations adequately pled an action to remove a cloud from title.

Defendants assert the trial court correctly refused to grant leave to amend because the language of the complaint effectively admits plaintiff Thomas Huston does not contest owing child support and contests only the amount owed. That may be so, but nothing in the complaint admits the amount owed is the amount stated in the recorded Notice of Lien.

Defendants argue plaintiff Thomas Huston is pursuing his claim based on the very order he has breached. The August 29, 1994, stipulation is plaintiffs' sole basis for claiming they do not owe the amount stated in the Notice of Lien. However, that order required plaintiff Thomas Huston to pay child support in the amount required by Massachusetts' Child Support Guidelines immediately upon becoming employed. Defendants then assert, based on plaintiff's response to interrogatories, plaintiff Huston has been employed over the past 10 years and has continually failed to pay his child support obligation as it became due.

Plaintiffs' complaint effectively admits plaintiff Thomas Huston was employed at the time defendants served a wage

assignment on his current employer, but it is silent on the issue of his employment history since agreeing to the 1994 stipulation. The assertions allegedly made in the response to interrogatories do not appear on the face of the complaint, and thus were outside the scope of review on demurrer.

Moreover, the documents we have judicially noticed do not provide sufficient facts by which defendants could defeat by means of a demurrer plaintiffs' action to remove a cloud from title. They do not provide us with any fact by which we could determine as a matter of law the validity of the Notice of Lien.

Accordingly, we are left with a lien that states an amount we cannot verify as being accurate. The complaint alleges it is not accurate and we must accept that assertion of fact as true at this stage of the proceedings. Nothing in our opinion prevents the defendants on remand from attacking the action with evidence outside of the complaint by means of a proper motion for summary judgment or summary adjudication.

Because any defect in the complaint can reasonably be cured by amendment, we conclude the trial court abused its discretion in refusing to allow plaintiffs leave to add a cause of action under Civil Code section 3412. Because we reverse on this basis, we need not address plaintiffs' other points of argument.

DISPOSITION

The judgment of dismissal is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion. We award costs on appeal to plaintiffs. (Cal. Rules of Court, rule 27(a).)

NICHOLSON, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.