Court of Appeal Case No.: F068393

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

WT CAPITAL LENDER SERVICES, a California Corporation

Defendant and Appellant,

vs.

ANDRE TORIGIAN and TAKOOHI TORIGIAN,

Plaintiffs and Respondents.

On Appeal from the Judgment of the Fresno County Superior Court
Hon. Donald Black, Judge Presiding
Superior Court Case No. 10 CE CG 03800 DSB

Respondents' Brief

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Introduction and Summary of Argument

After the Torigians prevailed in a wrongful foreclosure action against WT Capital—receiving judgment on all of their equitable claims, but not their tort claims—the trial court declared the Torigians the prevailing party under Civil Code section 1717 and Code of Civil Procedure sections 1021 and 1032. The court awarded the Torigians attorney's fees under section 1717 based on the reciprocity provisions there, applying them to the deed of trust at issue. The trial court also awarded the Torigians costs under sections 1021 and 1032. Section 1032 provides both nondiscretionary grounds for finding a prevailing party, and discretionary grounds. The trial court found no one was subject to the nondiscretionary prevailing party determination under section 1032, but found the Torigians were the prevailing party under the pragmatic view afforded the court by the discretionary prevailing party determination under section 1032.

WT Capital had filed a section Civil Code section 2924*l* declaration of nonmonetary status, to which the Torigians had objected. The trial court concluded section 2924*l* did not insulate WT Capital from fees because of the Torigians' objection. But the court also concluded WT Capital was not a neutral trustee. It had aligned itself with the beneficiary and actively litigated—not just to defend itself—but to avoid the Torigians equitable claims, as well.

The trial court properly exercised its discretion. The order awarding the Torigians fees and costs should be affirmed.

Statement of the Facts

The Torigians borrow money from Gerald Shmavonian, and then quickly pay the note in full, but Shmavonian refuses to reconvey.

Andre and Takoohi Torigian own commercial property on Blackstone Avenue in Fresno.[1] They borrowed $80,000.00 from Gerald S. Shmavonian and the note was secured by a deed of trust on the property.[2] The loan was made in February 2006,[3] and a month later, in March 2006, the Torigians issued two checks as payment in full of the loan.[4] One check was for the principal and the other for the interest that had accrued.[5]

The trustee was Chicago Title Company, and it repeatedly asked Shmavonian to reconvey, providing him the instrument with which to do so.[6] He did not.[7]

Shmavonian uses the deed of trust as a hammer against the Torigians and initiates foreclosure proceedings with help from WT Capital.

Shmavonian became upset with someone else who owed him money, and began pressuring the Torigians to help him collect or pay the debt.[8] Shmavonian began foreclosure proceedings based on the deed of trust.[9]

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[1] Volume 1 of Clerk's Transcript, pages 27-28 (abbreviated as 1 CT 27-28).
[2] 4 CT 767, 769
[3] 1 CT 29; 4 CT 769
[4] 1 CT 29-30
[5] 4 CT 779-781
[6] 4 CT 769; 5 CT 1068-1069
[7] 4 CT 745; 14 CT 3269
[8] 1 CT 30
[9] 1 CT 30-31

Shmavonian sought the assistance of WT Capital, and although it was not the named trustee on the deed of trust, it commenced foreclosure proceedings.[10] As soon as he received the notice of default, Andre Torigian assembled his evidence—particularly the two checks—and went to WT Capital's office.[11] He went to the office two times, and provided WT Capital with the proof the debt had been paid.[12]

WT Capital concluded the debt was still owed, based on its communications with Shmavonian.[13] It substituted itself in as trustee, and continued foreclosure proceedings.[14]

The Torigians institute legal proceedings to stop the foreclosure.

The Torigians sought legal help. The Torigians' counsel wrote to WT Capital, provided it with the documents demonstrating the loan had been paid, but WT Capital would not revoke the notice of default.[15]

The Torigians filed a complaint against Shmavonian, WT Capital, and WT Capital's senior vice-president, Debra Berg.[16] The Torigians also filed an application for a temporary restraining order,

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[10] 4 CT 783
[11] 4 CT 733
[12] 4 CT 733 - 734
[13] 4 CT 799
[14] 5 CT 1113; 4 CT 801
[15] 4 CT 787-799
[16] 1 CT 26 et seq.

which was granted.[17] The preliminary injunction was granted, as well.[18]

WT Capital filed a declaration of non-monetary status under Civil Code section 2924*l*.[19] The Torigians' late objection was allowed after an unopposed motion for relief.[20] The court concluded there was sufficient factual basis for objecting to the declaration, particularly given WT Capital's defense that the checks the Torigians offered as proof of payment were actually payment on some "other" loan.[21] Discovery reflected that:

- WT Capital had no documentary evidence of anther loan;[22]
- WT Capital had not investigated the Torigians claim they had paid the loan.[23]

And, as it turned out, WT Capital was actively litigating the matter, even at that point, which was before the Torigians' April 15, 2011, objection to WT Capital's declaration of nonmonetary status.[24]

After demurrers and motions to strike, the operative complaint—the Third Amended Complaint—alleged the following causes of action against WT Capital:

- Quiet title;[25]

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[17] 1 CT 86
[18] 1 CT 92
[19] 1 CT 130
[20] 2 CT 472
[21] 2 CT 211
[22] 2 CT 211
[23] 2 CT 212
[24] 3 CT 501; 17 CT 3950-3963; 17 CT 4019-4028

- Declaratory relief;[26]
- Slander of Title;[27]
- Negligence;[28] and,
- Injunction.[29]

A number of other causes of action were pleaded against Shmavonian or Berg.[30]

All of the defendants, including WT Capital, answered the complaint.[31] After discovery, WT Capital filed a motion for summary adjudication on the tort claims, only.[32] The court granted the motion.[33]

The Torigians prevail at trial and obtain an award of attorney's fees; WT Capital appeals the attorney's fees order but not the judgment.

The matter proceeded to trial, after which the court entered judgment in favor of the Torigians against Shmavonian and WT Capital in all respects.[34] Notice of entry of judgment was served on February 19, 2013.[35] No appeal was filed from the judgment.[36]

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[25] 4 CT 738
[26] 4 CT 740
[27] 4 CT 742
[28] 4 CT 747
[29] 4 CT 749
[30] 4 CT 745, 751, 753, 755, 757, 759
[31] 4 CT 806 et seq.; 4 CT 818 et seq.
[32] 6 CT 1286-1287
[33] 12 CT 2799- 2800
[34] 14 CT 3269 et seq.
[35] 14 CT 3266
[36] 1 CT 10-11

Both the Torigians and WT Capital filed motions for attorney's fees and filed cost bills.[37] The court granted the Torigians' motion for fees, denied WT Capital's motion for fees, and struck WT Capital's cost bill.[38]

In denying WT Capital's fee motion, the court focused on the Torigians having "achieved [their] main litigation objective."[39] The court also pointed out that the tort claims alleged against WT Capital arose not from the contract (the deed of trust) but after the deed of trust had expired.[40]

The order was entered on August 21, 2013,[41] notice of entry was served on August 29, 2013,[42] and the notice of appeal was filed on October 15, 2013.[43]

Standard of Review

The trial court's determination of a "prevailing party" under Civil Code section 1717 is reviewed for abuse of discretion. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 348-349.) The court of appeal must defer to the trial court's decision unless it is "unreasonable." (*Hunt v. Fahnestock* (1990) 220 Cal.App.3d 628, 633.) Thus, absent a clear showing of abuse of discretion, the trial court's

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[37] 14 CT 3363, 3275, 3282; 17 CT 4039
[38] 20 CT 4967 et seq.
[39] 20 CT 4945
[40] 20 CT 4945
[41] 20 CT 4941
[42] 20 CT 4967
[43] 20 CT 4994

determination as to which party "prevailed" in an action—and is entitled to attorney's fees under section 1717—will not be disturbed on appeal. (*Harvard Inv. Co. v. Gap Stores, Inc.* (1984) 156 Cal.App. 3d 704, 715, fn.8.)

Similarly, what constitutes a reasonable amount of attorney's fees is discretionary. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623.) An experienced trial judge is the best judge of the value of the services rendered in a matter before the court; the trial court's decision will not be disturbed unless the appellate court is convinced that it is clearly wrong. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

Argument

I. The trial court did not abuse its discretion in concluding the Torigians were the prevailing parties, entitled to fees.

Under the American rule, attorney's fees are not recoverable unless authorized by statute or the parties' agreement. (Code Civ. Proc., § 1021; *Lewis v. Alpha Beta Co.* (1983) 141 Cal.App.3d 29, 33.) Civil Code section 1717 provides a reciprocal right to attorney's fees by all parties to a contract where the contract accords a right to fees to one party, but not the other, when the action is one to "enforce" the contract. (Civ. Code, § 1717; *Campbell v. Scribbs Bank* (2000) 78 Cal.App.4th 1328, 1336 - 1337.) To achieve this purpose, section 1717 expresses that the "prevailing party" on an action on a contract "*shall be entitled* to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a), emphasis added.)

Breach of contract actions are not the only actions that are "on the contract" – defending an action by arguing a contract was not formed is also an action on contract. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 868; see also, *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545, citing *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865.) An action on the contract includes one seeking a declaration of rights from a contract. (*City & County of S.F. v. Union Pac. R.R. Co.* (1996) 50 Cal.App.4th 987, 1000 [expired lease agreement quoted by one party, and which controlled the parties' relationship and their dispute; litigation was an action on contract]; *Milman v. Shukhat, supra,* 22 Cal.App.4th at 545 [attempt to enforce forged deeds of trust; litigation was action on contract].) And in particular, section 1717 applies in actions for declaratory relief regarding rights or obligations under deeds of trust. (*Milman v. Shukhat, supra,* 22 Cal. App.4th at 545.)

The prevailing party is defined as "the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b).) Section 1717 "must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed." (*Hsu v. Abarra, supra,* 9 Cal.4th at 870 – 871.)

When there is a simple, unqualified decision in favor of a party on the only contract claim in the action, the court must deem that party the prevailing party. (*Hsu v. Abarra, supra,* 9 Cal.4th at p. 865- 866.) The court has no discretion to deny attorney's fees if one

party is clearly the prevailing party on the contract—fees are a matter of right. (*Id.* at pp. 872, 875-876.)

In *Hsu v. Abarra, supra,* 9 Cal.4th at p. 877, the Supreme Court explained that in determining litigation success, the court should consider whether the party achieved its main litigation objective. "For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Ibid.*) And, "when one party obtains a 'simple, unqualified win' on the single contract claim presented by the action, the trial court may not invoke equitable considerations unrelated to litigation success...." (*Ibid.*)

A. The Torigians prevailed on the contract.

The deed of trust—the only contract at issue—contains an attorney fee provision for disputes regarding actions that affect the security or the rights and powers of the trustee or beneficiary:

> To protect the security of this Deed of Trust, Trustor agrees: ...
>
> (3) To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any action or proceeding in which Beneficiary or Trustee may appear, and in

> any suit brought by Beneficiary to foreclose this Deed.[44]

In *Valley Bible Center v. Western Title Ins. Co.* (1983) 138 Cal.App.3d 931, 932, this court reviewed identical language from an attorney fee provision in a deed of trust and concluded this language applies to actions by the trustor challenging the beneficiary's and trustee's rights under the deed of trust. If the trustee and beneficiary prevailed in an action, they could have collected attorney's fees and costs from the trustor, and so, under section 1717, "what is sauce for the goose is sauce for the gander": Because the beneficiary and trustee would have been entitled to fees had they prevailed, the trustors were entitled to fees when they prevailed. (*Ibid.*) Other courts have reached the same conclusion. (See, e.g., *Kachlon v. Markowitz, supra,* 168 Cal.App.4th at 348, citing *Valley Bible Center v. Western Title Ins. Co., supra,* 138 Cal.App.3d at pp. 932–933, *Wilhite v. Callihan* (1982) 135 Cal.App.3d 295, *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463, *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, and, *Huckell v. Matranga* (1979) 99 Cal.App.3d 471; and see, *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756-757 [trustors were potentially liable for the debt plus *attorney's fees* if defendants had prevailed, invoking reciprocal considerations under section 1717].)

In *Kachlon v. Markowitz, supra,* 168 Cal.App. 4th at pp. 324, the beneficiary and a substituted trustee on a deed of trust commenced

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[44] 4 CT 773

nonjudicial foreclosure proceedings based on the beneficiary's representation that the trustors defaulted on a note secured by the deed of trust. The beneficiary and substituted trustee refused to dismiss the foreclosure proceeding, despite evidence of payment on the note. (*Id.* at pp. 329.) This prompted the trustor's suit for equitable relief including quiet title, declaratory relief and an injunction to enjoin the wrongful foreclosure, the same claims made by the Torigians here. (*Ibid.*) Having established that the note was paid, the appellate court affirmed the trial court's award to the trustor for attorney's fees of $180,779.70, against the beneficiary and substituted trustee, jointly and severally. (*Id.* at pp. 330-331, 333, 345 – 346.)

The *Kachlon* court affirmed the award for attorney's fees to the trustor, notwithstanding that the trustee was not liable for the trustor's tort claims under the common interest privilege, and notwithstanding that the trustee had filed a declaration of nonmonetary status under Civil Code section 2924*l* after judgment. (*Kachlon v. Markowitz, supra,* 168 Cal.App. 4th at pp. 350, 351 – 353.) The court explained the common interest privilege provides a qualified privilege from tort liability, as opposed to contract liability. (*Id.* at pp. 351.) A trustee is not immune from attorney's fees when the trustor objects to its declaration of nonmonetary status. (*Id.* at pp. 351 – 352.)

"In determining whether an action is 'on the contract' under section 1717, the proper focus is not on the nature of the remedy, but

on the basis of the cause of action." (*Kachlon v. Markovitz, supra,* 168 Cal.App.4th 316, 347.) Equitable claims arising out of rights on a note and deed of trust are "on the contract." (*Id.* at pp. 347 - 348.) Causes of action for declaratory and injunctive relief and to quiet title are actions on a contract within the meaning of Civil Code section 1717(a). (*Id.* at p. 348.)

The Torigians' main litigation objective was to save their property from wrongful foreclosure and prevent WT Capital pursuing nonjudicial foreclosure.[45] The Torigians filed their action[46] and sought an emergency restraining order to enjoin WT Capital from pursuing the trustee sale[47] in response to:

- WT Capital's claim that Shmavonian assured it there was an outstanding debt subject to foreclosure;[48]
- WT Capital's notice of an upcoming trustee sale;[49] and,
- WT Capital's recording of a substitution of trustee.[50]

All of the Torigian's equitable claims sought relief pertaining to the rights and obligations of the parties under the deed of trust.[51] the Torigians accomplished a simple unqualified win on their equitable claims, all of which derived from a dispute based on the deed of trust.

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[45] 14 CT 3154 et seq.
[46] 14 CT 3154 et seq.
[47] 14 CT 3154 et seq.
[48] 14 CT 3223
[49] 14 CT 3226
[50] 15 CT 3408
[51] 4 CT 723 et seq.

If WT Capital were to have prevailed on these equitable claims—if there were an outstanding debt or if the trustee sale had been proper—WT Capital would have been entitled to attorney's fees. Because of the reciprocity provision of section 1717, the Torigians were entitled to fees when they prevailed. Civil Code section 1717, subdivision (a) authorized, if not required, the trial court to award attorney's fees to the Torigians because they are the parties that prevailed on the contract—the deed of trust. The grounds for the attorney's fees and costs awards are Torigians' unqualified win of the equitable claims on the wrongful foreclosure action: quiet title, declaratory relief and permanent injunction.[52]

B. WT Capital was not the prevailing party.

WT Capital asserts that it was the prevailing party under Code of Civil Procedure section 1021 and should have been awarded fees. But WT Capital is in error for two reasons.

- Section 1021 does not compel a finding that WT Capital was the prevailing party. As such the court was empowered to use its discretion to determine the prevailing party.
- The trial court properly made the prevailing party determination because it concluded the torts were not on the contract, and thus not subject to fees. But the trial court also made the prevailing party determination more directly as it related to costs.

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[52] 20 CT 4941 et seq.

1. **The trial court properly exercised its discretion and found the Torigians were the prevailing party. Section 1021 does not compel a finding that WT Capital was the prevailing party.**

WT Capital cites *Skyway Aviation, Inc. v. Troyer* (1983) 147 Cal.App. 3d 604 and *Malibou Lake Mountain Club, Ltd. v. Smith* (1971) 18 Cal.App.3d 31, as support for the proposition that parties can validly agree to attorney's fees on non-contract causes of action. It is true that parties can so agree—subject to some public policy restrictions.

Fees for tort claims are not subject to Civil Code section 1717. (See, e.g., *Maynard v. BTI Group* (2013) 216 Cal.App.4th 984, 993.) For example, unless the contract expressly requires it, fees allowable for tort claims are not reciprocal and can still be awarded in the face of dismissals. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617.) When considering such fees—those available by contract, but not "on the contract"—Code of Civil Procedure sections 1021 and 1032 govern the determination. It is axiomatic that only a prevailing party may obtain attorney's fees. (*Santisas v. Goodin, supra,* 17 Cal.4th at 614.) Code of Civil Procedure section 1032 defines "prevailing party" in the absence of a contractual provision or other statute. (*Ibid.*)

Section 1032 sets out four categories of nondiscretionary prevailing parties and one category that is discretionary:

> "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor

> defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

(Code Civ. Proc., § 1032, subd. (a)(4); see, e.g., *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 975 [first prong of section 1032(a) is not discretionary; second prong is discretionary] disapproved on other grounds by *Goodman v. Lozano* (2010) 47 Cal.4th 1327.)

WT Capital is not a prevailing party under any of the four nondiscretionary bases for cost recovery under section 1032, subdivision (a)(4):[53]

- WT Capital did not obtain a net monetary recovery: it neither asked for nor received a money judgment.
- WT Capital was not a defendant in whose favor a dismissal was entered: the Torigians did not dismiss WT Capital.
- WT Capital was not the defendant where neither plaintiff nor defendant obtained relief—the Torigians obtained relief by judgment in their favor.

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[53] 14 CT 3269 et. seq.

- WT Capital is not a defendant where the plaintiff obtained no relief against that defendant—the Torigians obtained equitable remedies against WT Capital.

When none of the four nondiscretionary grounds for a prevailing party determination apply, the trial court has the discretion to determine a prevailing party based on "a pragmatic definition of the extent to which each party has realized its litigation objectives...." (*Santisas v. Goodin, supra,* 17 Cal.4th at 622 [applying the pragmatic rule of section 1717 as explained in *Hsu v. Abbara, supra,* 9 Cal. 4th at 877, in a section 1032 context].)

As further support of its claim as a prevailing party, WT Capital asserts that the trial court failed to consider Code of Civil Procedure section 1021,[54] and reciprocity of the right to attorney's fees under the tort claims.[55]

As to reciprocity of the fees under the tort claims, WT Capital argues at one point[56] (although contradicts it at another[57]) that fees under tort claims are reciprocal: that the Torigians would have been entitled to fees on the torts had they prevailed, and so WT Capital should be entitled to fees on the torts since it prevailed on them. The deed of trust provides fees for the trustee or beneficiary only; it does not provide fees for the trustor.[58] The reciprocity afforded

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[54] AOB at 36
[55] AOB at 57
[56] AOB at 57
[57] AOB at 31
[58] 4 CT 773

under section 1717 does not apply to tort claims; it only applies to contract claims. (See, e.g., *Maynard v. BTI Group, supra,* 216 Cal.App.4th at 993-994.) As such, the Torigians ***would not*** have recovered attorney's fees if they prevailed only on the slander of title and negligence causes of action. As such, WT Capital is in error because its premise fails.

2. **The trial court considered section 1021 and properly made the prevailing party determination.**

The trial court did not fail to consider Code of Civil Procedure section 1021—it simply applied section 1717 regarding the attorney's fees because the Torigians prevailed on the contract.[59] It applied the pragmatic rule—considering which party achieved its litigation objectives—as outlined in *Santisas v. Goodin, supra,* 17 Cal.4th at 622, *Maynard v. BTI Group, supra,* 216 Cal.App.4th at 994-995 ("[defendant] may have won the battle, but plaintiff won the war" and was the prevailing party under the pragmatic rule), and Code of Civil Procedure section 1032.

a. ***The trial court concluded the tort claims did not arise from the contract and so the fee provision did not apply to the tort claims.***

The trial court concluded the deed of trust was discharged before any actions by WT Capital.[60] A lien is discharged when the obligation securing the lien is extinguished. (Civ. Code, §§ 1473,

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[59] 20 CT 4972 et seq.
[60] 20 CT 4976

2909, 2910; *Burge v. Michael* (1963) 213 Cal.App.2d 780, 786; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235.) Being a lien– a deed of trust terminates upon payment of the debt secured by the deed of trust.

A deed of trust terminates upon payment of the debt secured by the deed of trust. (*Nilson v. Sarment* (1908) 153 Cal. 524, 530 ["...upon payment of the debt, the purposes of the trust ceased, and the property at once, without any reconveyance, revested in the party or parties who had owned it before," citing, *MacLeod v. Moran* (1908) 153 Cal. 97 and *Tyler v. Currier* (1905) 147 Cal. 31.].) After payment of the indebtedness, all the trustee has is bare legal title of record, which it can be compelled to reconvey to the owner simply to make the record title clear. (*MacLeod v. Moran, supra,* 153 Cal. at 100.) A recorded deed of reconveyance, following payment on the indebtedness that was secured by a deed of trust, has "no legal effect beyond that of making the record title clear ...." (*Nilson v. Sarment, supra,* 153 Cal. 524.)

The deed of trust terminated in March 2006, when the Torigians paid off the indebtedness secured by the deed of trust by checks dated March 6, 2006.[61] As such, the jury returned a verdict for the Torigians and the trial court entered a final judgment for the Torigians on January 30, 2013.[62]

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[61] 4 CT 779, 781

[62] 14 CT 3269 et seq.

In applying section 1717, the trial court considered whether the torts were "on the contract" as that phrase is used in section 1717 jurisprudence. The court concluded the torts were not on the contract because the contract had expired at the time of the acts complained of:

> The slander of title cause of action alleged that WT's acts of recording the Notice of Default and Notice of Sale were unlawful and unprivileged because they had actual notice that plaintiffs had paid off the subject debt secured by the deed of trust. Accordingly, while the slander of title arose out of the Deed of Trust in so far as WT would not have been in the position to record the offending documents were it not for its position as Trustee, the cause of action for slander of title was not an action on the contract because the complained of conduct did not constitute a breach of the contract as the contract had expired due to performance under plaintiffs' allegations.
>
> The negligence cause of action likewise was not on the Deed of Trust, though it generally arose out of the Trustee/Trustor relationship created by the Deed of Trust. The cause of action depends of the existence of a duty of care which arises from the relationship. The relationship arises from the contract.

> And once again, the breach of the duty occurred after the expiration of the contractual relationship.[63]

The trial court correctly pointed out that the Torigians' tort claim against WT Capital for slander of title arose after the deed of trust expired. Similarly, the claimed breach of WT Capital's duty of care to the Torigians arose after the deed of trust expired. WT Capital commenced the nonforeclosure process in July 2010,[64] over four years after the deed of trust expired by the Torigians' March 2006 satisfaction of the loan payment obligations,[65] and while Chicago Title Company, not WT Capital, was the trustee under the deed of trust.[66]

b. But even if the torts arose on the contract, the court exercised its discretion under sections 1021 and 1032 regarding statutory costs, leaving no room for doubt it would have found the Torigians the prevailing party for attorney's fees.

After the court concluded the torts were not on the contract, it did not further analyze WT Capital's right to fees. Even if the court erred in that conclusion, the court exercised its discretion under sections 1021 and 1032 by applying the discretionary rule to statutory costs, citing *Zulehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249, 257, *Hsu v. Abbara, supra,* 9 Cal.4th at p. 877, and *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th

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[63] 20 CT 4947
[64] 4 CT 783-785
[65] 4 CT 779, 781
[66] 4 CT 769; 20 CT 4796

140, 153.) The trial court concluded WT Capital was not the prevailing party by first analyzing the non-discretionary prong of section 1032, although not referring to it expressly:[67]

> In this case, there is no party with a net monetary recovery, no defendant in whose favor a dismissal has been entered, and no defendant against whom a plaintiff failed to obtain any relief. Accordingly, costs may not be awarded as a matter of right to any party. [68]

Then the court concluded it had the discretion to award costs, and awarded them to the Torigians on the same grounds it awarded attorney's fees:

> This court has discretion to award costs as it sees fit.
>
> The court awards costs to the plaintiffs for the reasons set forth above [referring to the section 1717 analysis]. They obtained greater relief than WT in that they obtained a judgment awarding nonmonetary relief. The fact that WT ultimately stipulated to that outcome does not make WT the prevailing party.[69]

The court found that section 1032 did not require a finding that WT Capital was the prevailing party, and instead, that the discretionary rule allowed it to determine the prevailing party and

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[67] 20 CT 4957-4958
[68] 20 CT 4959
[69] 20 CT 4959

award costs as it believed was proper. The court concluded the Torigians were the prevailing party under section 1021.

Thus, the trial court concluded, under both section 1021 or section 1717, the Torigians were the prevailing party and entitled to fees and costs. The trial court did not abuse its discretion, and its order on attorney's fees should be affirmed.

C. *WT Capital was not a party to the deed of trust during acts and omissions giving rise to slander of title and negligence claims.*

The parties specifically covered by the deed of trust, executed on February 2, 2006, were the Torigians as trustors, Gerald S. Shmavonian as beneficiary, and Chicago Title Company as trustee.[70] The attorney fee provision, provided in section A(3) of the deed of trust only pertained to the trustor, beneficiary and trustee, and provided for fees in relation to protecting, "the security of this Deed of Trust."

It was not until October 27, 2010 that WT Capital recorded its substitution as trustee in lieu of Chicago Title Company.[71] Civil Code section 2934a, subdivision (a)(1), provides that the trustee under a deed of trust may be substituted for another trustee by a substitution executed and acknowledged by the beneficiary of the deed of trust and recorded in the county in which the property is located. ***"From the time the substitution is filed for record***, the new trustee shall succeed to all the powers, duties, authority and title

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[70] 4 CT 769

[71] 20 CT 4796

granted and delegated to the trustee named in the deed of trust." (Civ. Code, §2934a, subd. (a)(4), emphasis added.)

As a matter of practical necessity, there can only be one trustee at any given time. "We would create inestimable levels of confusion, chaos and litigation were we to permit a beneficiary to appoint multiple trustees, each one retaining the power to sell a borrower's property." (*Dimock v. Emerald Properties LLC* (2000) 81 Cal.App.4th 868, 876.) Until WT Capital recorded its substitution of trustee—on October 27, 2010—Chicago Title Company was the only trustee under the deed of trust. Until then, WT Capital might have been Shmavonian's agent, but it was not a party to the deed of trust.

When WT Capital became a party to the deed of trust by the October 27, 2010 recording of the substitution of trustee, the Torigians' claims for negligence and slander of title had already transpired and accrued as set forth in their verified operative complaint. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [A cause of action accrues when it is complete with all of its elements, i.e., wrongdoing, harm and causation.].) All of the acts of which the Torigians complained had occurred before October 27, 2010:

- WT Capital's officer created a spreadsheet on July 7, 2010, which falsely represented that the Torigians made only one $1,000.00 payment on the underlying promissory note, rather than the full payments in March 2006.[72]

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[72] 4 CT 731:¶ 21

- On July 26, 2010, WT Capital caused to be recorded a Notice of Default and Election to Sell Under Deed of Trust, with Trustee Sale No.: 10-10133-01, falsely representing that the Torigians defaulted on the note and owed Shmavonian $115,595.52 as of July 22, 2010, even though the loan was satisfied in March 2006.[73] In doing so, WT Capital falsely represented it was the trustee on the deed of trust when the trustee was Chicago Title Company.[74]
- Andre Torigian visited WT Capital in July/August 2010 and provided WT Capital the cancelled loan payment checks, in support that the foreclosure was wrong.[75] WT Capital's employee received copies of the March 2006 loan payment checks and remarked that Shmavonian may have forgotten that the loan was already paid.[76]
- The Torigians received a second Notice of Default around August 19, 2010, prompting Andre Torigian to pay another personal visit to WT Capital's office.[77] Mr. Torigian provided WT Capital's senior officer in charge of the foreclosure with information to confirm the loan was paid

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[73] 4 CT 733: ¶22
[74] 4 CT 733: ¶22
[75] 4 CT 733: ¶23
[76] 4 CT 733: ¶ 24
[77] 4 CT 733: ¶25

but she would not heed to the information or communicate with Chicago Title Company.[78]

- The Torigians' attorneys corresponded with Shmavonian by August 29, 2010, letter addressed to the care of WT Capital, explaining, with supporting documentation, that the Torigians paid the underlying note and that the foreclosure was unlawful.[79] The attorneys sent WT Capital's officer and registered agent a separate e-mail correspondence on August 29, 2010, alerting WT Capital to the problems with the foreclosure.[80]
- The Torigians confirmed the foreclosure remained "active" in an October 4, 2010, telephone conversation with WT Capital's employee.[81]
- The Torigians made another effort, by October 18, 2010 letter, to communicate with WT Capital about the unlawfulness of the foreclosure proceedings.[82]
- WT Capital's officer responded by October 19, 2010 e-mail, and indicated that WT Capital would proceed with the foreclosure without ensuring that the loan was properly chargeable.[83]

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[78] 4 CT 733-734: ¶25
[79] 4 CT 787-791
[80] 4 CT 793
[81] 4 CT 734-736: ¶ 30
[82] 4 CT 795-797
[83] 4 CT 799

- On October 26, 2010, WT Capital posted a Notice of Trustee Sale with a November 17, 2010 foreclosure sale date for the real property despite the Torigians' and their attorneys' prior communications to WT Capital about the loan being paid; WT Capital recorded the Notice of Trustee Sale on October 27, 2010.[84]

The Torigians' slander of title cause of action alleged that their title was defamed by the false publications of the Notices of Default and Trustee of Sale, both recorded before WT Capital recorded the substitution of trustee, and that WT Capital refused to suspend the foreclosure sale or do a reasonable investigation after the Torigians' counsel notified WT Capital's officers on August 29, 2010 and October 18, 2010 that the loan was paid and the foreclosure was unlawful.[85] The Torigians' cause of action for negligence contended WT Capital had a duty to refrain from pursuing the foreclosure on the paid note but breached that duty by continuing to pursue the sale and noticing a sale date.[86]

WT Capital was not a party to the deed of trust when it committed the acts and omissions the Torigians complained of in support of their tort claims for slander of title and negligence. All of the acts occurred before the October 27, 2010 recording of the substitution of trustee.

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[84] 4 CT 803; 20 CT 4793
[85] 4 CT 742-745; 20 CT 4790-7796
[86] 4 CT 747 - 749

As provided by Civil Code section 2934a, subdivision (a)(4), WT Capital was not a successor to Chicago Title Company until the October 27, 2010 recording of the substitution of trustee. No agreement with WT Capital existed under Code of Civil Procedure section 1021 vis-à-vis the deed of trust when the acts constituting the Torigians' tort claims transpired. And the only time a non-party to a contract may avail itself of attorney's fees under a contract is under the reciprocity provisions of section 1717. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.)

WT Capital is not entitled to attorneys' fees in defending the negligence and slander of title claims because, (1) it was not a party to the agreement at the time the acts occurred, (2) the contract did not provide for recovery for fees on tort claims by the trustor, and (3) the reciprocity provisions of section 1717 do not apply to torts.

D. The trial court is not required to apportion attorney's fees.

A trial court is within its discretion to award a prevailing party its attorney's fees without reducing the attorney fee award to represent only fees incurred on contract causes of action, particularly where the tort and contract claims are related:

> [Attorney's] fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories. Nor is apportionment required when the issues in the fee and nonfee claims are so inextricably intertwined that

> it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units.

(*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1251, internal citations and quotations omitted; see also, *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1110 – 1111 [defendant entitled to recovery all fees because action on deed of trust was interrelated with tort and RICO causes of action]; Code Civ. Proc., § 1032, subd. (a)(4) ["When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034."].)

Here, the Torigians prosecuted their action against WT Capital based on equitable, contract-related claims for quiet title, declaratory relief and permanent injunction, and legal, tort-related claims for negligence and slander of title. While the equitable and legal claims presented different duties under the law, they were all based on the same critical fact of whether the Torigians satisfied the underlying loan.[87] Despite both Mr. Torigian and his counsel providing WT Capital with evidence that proved the loan had been paid in full—that WT Capital could not enforce the power of sale—WT Capital persisted in asserting that the foreclosure was

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[87] 20 CT 4957

appropriate.[88] Apportionment of attorney's fees was impractical due to the common facts. The trial court was within its discretion to not reduce the Torigians' attorney's fees.

II. The trial court did not misunderstand WT Capital's role.

WT Capital asserts on appeal, without authority or citation to the record, that the trial court erred by failing to understand the limited role of WT Capital as the substituted trustee on the deed of trust. Generally, WT Capital's role as a trustee is irrelevant to its liability for attorney's fees under the deed of trust except as it relates to the declaration of nonmonetary status.

But WT Capital's claims in this regard are barred because it is estopped from raising the issue now. The trial court appropriately applied the rules of nonjudicial foreclosure. And the court properly applied Civil Code section 2924*l*.

A. WT Capital is estopped from appealing the trial court's decision to allow the Torigians to object to its declaration of nonmonetary status.

The judge's understanding of WT Capital's role and its order granting the Torigians the right to object to the declaration of nonmonetary status arose as part of the underlying judgment. If WT Capital disagreed, it should have appealed the underlying judgment.

Failure to appeal results in a final judgment, and final judgments have res judicata, collateral estoppel, or direct estoppel

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[88] 4 CT 723 et seq.; 20 CT 4941 et seq.

effect depending on how the litigant attempts to resurrect the claim or issue. (See, e.g., *Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1533 [Res judicata and collateral estoppel bar relitigation of claims or issues, decided in prior proceedings]; *Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997 [direct estoppel bars relitigation of issues decided in prior proceedings on the same claims].)

But critically, WT Capital also waived the argument below—and the court concluded the Torigians had offered sufficient evidence to justify a late objection to the declaration of non-monetary status.[89] WT Capital's failure to object or offer any argument, authorities, or facts to avoid the order means WT Capital waived the argument and cannot raise it now. (*Harriman v. Tetik* (1961) 56 Cal.2d 805, 810 [mixed questions of law and fact cannot be raised for the first time on appeal].)

In the hearing on attorney's fees, below, WT Capital went so far to characterize the objection to nonmonetary status as "false."[90] The trial court did not address the issue in its ruling, although it queried WT Capital during the hearing, expressing, "Well, I'm not sure about that," when WT Capital asserted the facts in the objection were found to have been false.[91] The court likely ignored this in its ruling because the trial court recognized the direct estoppel and waiver problems WT Capital's argument invokes, but also because the trial court knew the objection was ***not false***. The facts and

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[89] 2 CT 470-472
[90] 1 RT 9, 27, 28
[91] 1 RT 27-28

actions alleged in the objection were true; the court granted summary adjudication on the tort claims finding the acts were subject to a qualified privilege.[92]

B. *The trial court properly applied the rules of nonjudicial foreclosure.*

WT Capital's suggestion in its opening brief that its only option as trustee was to foreclose on the paid note[93] is unfounded. WT Capital cites no authority that a trustee can lawfully pursue a foreclosure on a paid note, even if instructed to do so by the beneficiary. (See, *Munger v. Moore* (1970) 11 Cal.App.3d 1, 8 [trustee liable for refusing to accept trustor's tender and pursuing wrongful foreclosure on advice of beneficiary].) Trustees are liable to trustors for illegal, fraudulent, or willfully oppressive sales under the power of sale provision in deed of trust. (*Munger v. Moore, supra,* 11 Cal.App. 3d at p. 7.)

The statutory framework for the regulation of nonjudicial foreclosure sales (Civ. Code, §§ 2924 through 2924k) has three purposes: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. (*California Golf, LLC v. Cooper* (2008) 163 Cal.App.4th 1053, 1068.) In

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[92] 12 CT 2803-2804

[93] AOB at 16-17

contrast, nothing in the statutory scheme regulating nonjudicial foreclosure suggests a policy of immunizing trustees from liability for attorney's fees. (*Kachlon v. Markovitz, supra,* 168 Cal.App.4th at p. 351.) Furthermore, parties may pursue remedies for misconduct arising out of a nonjudicial foreclosure sale when consistent with the policy behind the statutes. (*California Golf, LLC v. Cooper, supra,* 163 Cal.App.4th at 1070.)

WT Capital had the option to take no further action to prosecute the foreclosure sale, but WT Capital refused the Torigians' requests.[94] Understanding there was a bona fide dispute regarding payment on the underlying loan, WT Capital could have suspended the nonjudicial foreclosure proceedings under Civil Code section 2924g, subdivision (c)(1)(D). Alternatively, WT Capital could have commenced an action for declaratory relief, to determine its rights to foreclose under the deed of trust. Instead, WT Capital took further steps to align itself with the beneficiary, notice a trustee sale,[95] and execute and record a substitution of trustee.[96]

WT Capital discusses at great length *Huckell v. Matranga, supra,* 99 Cal.App. 3d 471, which is inapposite for four reasons:

- The trustee in *Huckell* was not pursuing a foreclosure on a paid note. The trustors there brought an action to avoid posting an indemnity body when the beneficiary did not deliver the original, cancelled note. The attorney's fee

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[94] 4 CT 799
[95] 4 CT 801
[96] 1 CT 130

award against the trustee was reversed because the trustee did nothing wrong by requiring the indemnity bond in lieu of the original cancelled note. (*Id.* at 476.)

- The court reversed the attorney fee award against the trustee because *only* the beneficiary violated Civil Code section 2941, subdivision (a). (*Id.* at 482.)
- WT Capital also cites *Huckell* to argue a trustee may be immune from attorney's fees if does not resist the trustor's action and only puts at issue matters which the trustee, "had no knowledge or which were contrary to the apparent interests of record."[97] True. But in contrast, here, the trial court concluded that in pleading and action, WT Capital was not a neutral party.[98] A true neutral would not have acted as WT Capital did here, because a trustee is a common agent of the trustor and beneficiary and owes both parties duties. (See, e.g., *Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73 Cal.App.4th 668, 677.) See further discussion in section II.C below.
- Civil Code section 1717 has been amended four times following *Huckell v. Matranga.* In then-Civil Code section 1717, the "prevailing party" was the party in whose favor final judgment was rendered. (*Huckell v. Matranga, supra,* 99 Cal. App. 3d at 482.) Civil Code section 1717 now

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[97] AOB at 40-41.
[98] 20 CT 4949

provides that the prevailing party is, "the party who recovered a greater relief in the action on the contract." Besides being factually unrelated, *Huckell* is predicated on statutory language that no longer exists.

C. *Civil Code section 2924l does not preclude the trial court's award for attorney's fees and costs against WT Capital.*

As a whole, Civil Code section 2924*l* allows a trustee to be a nominal party if all parties agree, thereby avoiding participation in litigation and liability for damages, costs, and attorney's fees. (*Kachlon v. Markovitz, supra,* 168 Cal.App.4th at p. 332, fn. 5.) When named in litigation regarding a deed of trust, if the trustee believes it has been named solely in its capacity as trustee, and not because of any wrongful acts it has committed, then it may file a declaration of nonmonetary status. (Civ. Code, § 2924*l*, subd. (a).) As long as no party objects, the trustee is not required to appear in the action and is not subject to any monetary awards or for damages, attorney's fees, or costs. (Civ. Code, § 2924*l*, subd. (d).) Civil Code section 2924*l* merely provides a limited procedure by which a trustee may avoid attorney fee liability. (*Kachlon v. Markovitz* (supra) 168 Cal.App.4th at 351.)

In contrast, the statute cannot be interpreted as suggesting a trustee may both actively participate in litigation and be insulated from a monetary award. Such an interpretation would contravene the reciprocal policy of Civil Code section 1717, by allowing a trustee to recover attorney's fees under an attorney fee provision of a

deed of trust, but not the trustor or any other party to the deed of trust. The court must reconcile statutes and seek to avoid interpretations which would require the court to ignore one statute or the other. (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 481 - 482.)

Similar to the trustee in *Kachlon v. Markovitz, supra,* 168 Cal.App.4th at 349 - 350, WT Capital attempted to characterize itself as a "neutral" trustee for its convenience, as a means to avoid liability for attorney's fees. But this argument fails for two reasons.

First, even if a trustee is truly neutral, Civil Code section 2924*l* does not immunize a trustee from attorney's fees if one of the parties objects to its declaration of nonmonetary status. (Cf., *Kachlon v. Markovitz, supra,* 168 Cal.App.4th at p. 350.)

Second, WT Capital did not take the litigation posture of a neutral or nominal party. While WT Capital used the adjective "neutral" at times, its actions spoke louder. The trial court, via direct calendar judge, observed this throughout the case[99] and it was within the trial court's discretion to award the Torigians' attorney's fees as prevailing parties under Civil Code section 1717 and Code of Civil Procedure section 1032, as explained in section I above. Where inferences drawn by the trial court were reasonable, it is irrelevant whether the evidence might also have supported the losing party's version. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598.)

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[99] 20 CT 4949-4950

WT Capital's billing statements demonstrate that it incurred $62,051.00 in attorney's fees before the Torigians objected to the declaration of nonmonetary status on April 15, 2011.[100] If Civil Code section 2924*l* applied – if WT Capital seriously believed its declaration of nonmonetary status – it was not required to participate in the litigation until May 15, 2011.[101] (Civ. Code 2924*l*, subd. (d) and (f).)

WT Capital incurred significant attorney's fees before the objection because it took an active role in the litigation. It refused to stipulate to a preliminary injunction to enjoin the sale.[102] Its first appearance was a demurrer and motion to strike, even though these pleadings were unnecessary to invoke the protection of Civil Code section 2924*l*.[103] It filed an ex parte application seeking an order from the court to stay the Torigians' discovery.[104] WT Capital engaged in discovery on the key factual issue of whether the Torigians paid off the $80,000 note Shmavonian secured against the Torigians' property.[105] In addition to written discovery, WT Capital deposed the Torigians[106] and the initial trustee[107] on the deed of trust.

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[100] 3 CT 501; 17 CT 3950-3963; 17 CT 4019-4028
[101] 2 CT 469
[102] 18 CT 4391-4392: ¶ 8
[103] 1 CT 101 et seq., 146 et seq.
[104] 21 CT 5050
[105] 18 CT 4392: ¶ 13
[106] 18 CT 4392: ¶ 13
[107] 18 CT 4392: ¶ 13

When WT Capital responded to the operative complaint by verified answer, it disputed the Torigians' claim for quiet title and denied that the Torigians' were the 100% legal and equitable owners of the real property at issue.[108] WT Capital denied that Shmavonian's enforcement of the deed of trust was wrongful.[109] WT Capital denied the Torigians' rights to declaratory relief.[110] In its prayer to its verified answer, WT Capital prayed that the Torigians receive no relief by their complaint.[111] WT Capital also raised affirmative defenses to the Torigians' equitable claims including, failure to state a cause of action, estoppel, laches, unclean hands, waiver and unjust enrichment.[112]

After the Torigians' prevailed on the first phase of the bifurcated trial on the Torigians' legal claims, the Torigians' counsel suggested during a case management conference that the equitable claims be submitted on the record, to avoid the delay associated with an unnecessary second-phase trial, but WT Capital did not agree.[113] Thereafter, the Torigians' counsel asked if WT Capital would to stipulate to the equitable claims, but WT Capital refused.[114]

Based on this record, WT Capital did not merely defend the Torigians tort claims but took the position that the Torigians did not

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[108] 4 CT 738:¶37, 822:¶37
[109] 4 CT 738-740:¶38, 822:¶38
[110] 4 CT 740-742:¶47, 823:¶47
[111] 4 CT 829
[112] 4 CT 825-826
[113] 18 CT 4393: ¶15
[114] 18 CT 4393: ¶s 17 - 18

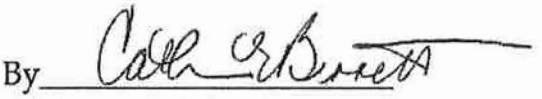
pay the underlying loan and therefore WT Capital had the right to foreclose under the power of sale clause in the deed of trust. WT Capital continuously resisted the Torigians' rights to equitable relief. Civil Code section 2924*l* does not apply because (1) the Torigians objected to WT Capital's declaration of nonmonetary status, and (2) WT Capital was not a neutral party in this action.

Conclusion

WT Capital bears a heavy burden in attempting to reverse the trial court's award for attorney's fees, and it has not shouldered that burden. The trial court's award was consistent with the requirements of Civil Code section 1717 and Code of Civil Procedure sections 1021 and 1032. The Torigians' respectfully request that the trial court's Order re: Motions for Attorney's Fees and Motions to Strike and/or Tax Costs be affirmed.

Dated: October 2, 2014

Respectfully submitted,

By 

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Certificate of Word Count

I hereby certify that the Respondents' Brief contains 8,560 words as counted by the Microsoft Word word-processing software. This word count is exclusive of the Table of Contents, Table of Authorities, and this certificate, but inclusive of all footnotes.

This certificate is prepared in accordance with California Rules of Court, Rule 8.204(c).

Catherine E. Bennett

Case No. F068393

PROOF OF SERVICE

I am employed in the County of Fresno, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 5260 N. Palm Avenue, Suite 201, Fresno, CA 93704. My email address is kcass@kleinlaw.com.

On **October 2, 2014**, I served the following document(s) described as:

Respondents' Brief

on the interested parties in this action by placing a copy thereof enclosed in sealed envelopes addressed as follows:

See Attached Service List

BY MAIL I enclosed such document in sealed envelope(s) with the name(s) and address(s) of the person(s) served as shown on the envelope(s) and caused such envelope(s) to be deposited in the mail at Fresno, California. The envelope(s) was/were mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY ELECTRONIC SUBMISSION Pursuant to the Court's e-submission page http://www.courts.ca.gov/17037.htm.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **October 2, 2014**, at Fresno, California.

Kelley Cass

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