**Court of Appeal Case No: F068393**

**COURT OF APPEAL**

**STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

---

WT CAPITAL LENDER SERVICES, a California Corporation,

Defendant and Appellant,
vs.

ANDRE TORIGIAN and TAKOOHI TORIGIAN,

Plaintiffs and Respondents,

---

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

---

# APPELLANT'S OPENING BRIEF

---


| | |
|---|---|
| ADLESON, HESS & KELLY, A PC<br>*Phillip M. Adleson, Esq. (SBN 69957)<br>Lisa J. Parrella, Esq. (SBN 230800)<br>577 Salmar Avenue, 2nd Floor<br>Campbell, CA 95008<br>408-341-0234<br>408-341-0250 Fax<br>padleson@ahklaw.com<br>*Attorneys for Appellant and Defendant, WT Capital Lender Services, a California Corporation* | POWELL & POOL, LLP<br>Don J. Pool, Esq. (SBN 166468)<br>*Matthew G. Backowski, Esq. (SBN 216517)<br>7522 N. Colonial Avenue, Suite 100<br>Fresno, California 93711-5706<br>(559) 228-8034<br>(559) 228-6818<br>mbackowski@powellandpool.com |

**Court of Appeal Case No: F068393**

**COURT OF APPEAL**

**STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

---

WT CAPITAL LENDER SERVICES, a California Corporation,

Defendant and Appellant,
vs.

ANDRE TORIGIAN and TAKOOHI TORIGIAN,

Plaintiffs and Respondents,

---

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

---

# APPELLANT'S OPENING BRIEF

---


| | |
|---|---|
| ADLESON, HESS & KELLY, A PC<br>*Phillip M. Adleson, Esq. (SBN 69957)<br>Lisa J. Parrella, Esq. (SBN 230800)<br>577 Salmar Avenue, 2nd Floor<br>Campbell, CA 95008<br>408-341-0234<br>408-341-0250 Fax<br>padleson@ahklaw.com<br>*Attorneys for Appellant and Defendant, WT Capital Lender Services, a California Corporation* | POWELL & POOL, LLP<br>Don J. Pool, Esq. (SBN 166468)<br>*Matthew G. Backowski, Esq. (SBN 216517)<br>7522 N. Colonial Avenue, Suite 100<br>Fresno, California 93711-5706<br>(559) 228-8034<br>(559) 228-6818<br>mbackowski@powellandpool.com |

TO BE FILED IN THE COURT OF APPEAL

APP-008

| COURT OF APPEAL, FIFTH APPELLATE DISTRICT, DIVISION | Court of Appeal Case Number: F068393 |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):<br>Phillip M. Adleson (Bar # 69957)<br>Lisa J. Parrella (Bar # 230800)<br>Adleson, Hess & Kelly, a PC<br>577 Salmar Avenue, 2nd Floor, Campbell, CA 95008<br>TELEPHONE NO.: (408) 341-0234 FAX NO. (Optional): (408) 341-0250<br>E-MAIL ADDRESS (Optional): padleson@ahklaw.com; lparrella@ahklaw.com<br>ATTORNEY FOR (Name): WT CAPITAL LENDER SERVICES | Superior Court Case Number: 10CECG03800<br>FOR COURT USE ONLY<br>COURT OF APPEAL<br>FIFTH APPELLATE DISTRICT<br>FILED<br>DEC 03 2013<br>By _____ Deputy |
| APPELLANT/PETITIONER: WT Capital Lender Services<br>RESPONDENT/REAL PARTY IN INTEREST: Andre Torigian and Takoohi Torigian | |
| CERTIFICATE OF INTERESTED ENTITIES OR PERSONS<br>(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE | |

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name*): WT Capital Lender Services

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest (Explain): |
|---|---|
| (1) Hanno Powell | President and CEO |
| (2) Debra Berg | Senior Vice President |
| (3) | |
| (4) | |
| (5) | |

☐ Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: November 26, 2013

Phillip M. Adleson
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)



Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Treatises**

s

## I. INTRODUCTION

This appeal concerns an award of attorney's fees against a trustee under a deed of trust who not only did nothing wrong but who did everything possible to remain neutral throughout the litigation; and whose primary litigation goal was to maintain its neutrality by not opposing the contract causes of action.

This case involves an $80,000 promissory Note secured by a deed of trust on a commercial property (a gas station). Respondents, Andre Torigian and Takoohi Torigian, were the borrowers and trustor under the Deed of Trust ("Respondents" or "Borrowers"). Gerald Shmavonian was the payee of the note and beneficiary under the deed of trust (the "Beneficiary" or "Shmavonian"). After the note matured the Beneficiary executed a declaration of default and foreclosure instructions to WT Capital Lender Services, a California Corporation, ("WT" or "Appellant") to commence a nonjudicial foreclosure. Based upon these instructions, WT recorded a Notice of Default ("NOD"). Shortly thereafter, Respondents informed WT that they had paid the Note off, providing various documents (including cashed checks) to support their position. The Beneficiary denied that the loan had been paid off. WT informed the Respondents that it could not act as "judge and jury" to resolve disputes between the Borrowers and Beneficiary. (4 CT 799.)

Respondents filed a lawsuit. (1 CT 26-25.) Attempting to remain neutral, WT immediately filed a Declaration of Nonmonetary Status ("DNMS") under Civil Code § 2924*l*. Although Respondents did not timely object to WT's DNMS, they were ultimately allowed to file a late objection. Based upon Respondents' belated objections, WT was compelled to answer all causes of action.

Although WT defended itself on the monetary claims, it did everything possible to remain neutral as between the Borrowers and the Beneficiary in the litigation on the contract causes of action. WT prevailed on summary adjudication as to all of Respondents' monetary claims against it.

The trial was bifurcated with the monetary claims being heard by a jury against the Beneficiary only; followed by the trial court ruling on the equitable, non-monetary claims. WT did not appear at the trial on the monetary claims, and appeared, but intentionally did not oppose Respondents' claims in the court trial on the equitable claims. Respondents prevailed on their damages claims against the Beneficiary and the trial court entered judgment in favor of Respondents against the Beneficiary and WT on the quiet title, declaratory relief and injunctive claims.

On competing post-trial motions for attorney's fees filed by WT and Respondents, the trial court denied WT's motion for attorney's fees and

granted Respondents' motion; awarding Respondents $120,834.50 in attorney's fees jointly and severally against WT and the Beneficiary. The trial court ruled that even though WT was the prevailing party on the slander of title and negligence claims, it was not entitled to its attorney's fees because those claims were torts, thus were not covered by Civil Code § 1717 because they were not "on the contract" (i.e., the Deed of Trust).

The trial court erred in applying Code of Civil Procedure § 1021 and Civil Code § 1717 under the undisputed facts of this case because the attorney's fees provision in the Deed of Trust was broad enough to cover the monetary tort causes of action upon which WT was the undisputed prevailing party. The trial court further abused its discretion in finding that certain acts of WT, as foreclosure agent/substitute trustee, showed that WT opposed Respondents' claims for equitable (non-monetary) relief even those acts were either permitted by law or were induced and compelled by Respondents' own actions including choosing to involve WT in the equitable causes of action by objecting to WT's DNMS.

WT appeals from both the post-judgment orders denying WT's motion for attorney's fees and costs and granting Respondents' motion for attorney's fees and costs.

## II. ISSUES ON APPEAL

1. In light of the comprehensive legislative framework

governing nonjudicial foreclosures of deeds of trust (triparte relationship), where the trustee serves a DNMS or otherwise remains neutral in litigation between Respondent (trustor) and Beneficiary and where the trustee was found to have done nothing wrong, did the trial court err in failing to separately determine whether Respondents prevailed against the Beneficiary and/or WT (trustee) for the purposes of Civil Code § 1717 and under Civil Code § 1021 et seq.?

2. Did the trial court abuse its discretion in determining that WT "opposed" Respondents' equitable causes of action based upon WT's failing to do, or refraining from doing, acts not required by the comprehensive legislative framework governing nonjudicial foreclosures (e.g., failure to resolve disputes, failure to rescind the NOD, or failure to reconvey)?

3. Did the trial court err in its ruling on the attorney's fees and costs motions by imposing judicially-created duties on the trustee beyond those found in the comprehensive legislative framework governing nonjudicial foreclosures?

4. When Respondents served an objection to WT's DNMS and WT was compelled to respond, did the trial court abuse its

discretion determining that WT's response and participation in the lawsuit constituted "opposition" to Respondent's equitable causes of action?

5. In denying WT's motion for attorney's fees, did the trial court apply the wrong legal standard by applying only Civil Code § 1717 and by failing to review the broad attorney's fees provision to determine if it covered tort actions subject to Code of Civil Procedures §§ 1021, 1032, 1033.5(a)(10) and 1034?

6. Under Code of Civil Procedure §§ 1021 et seq., did the trial court apply the incorrect law in determining "prevailing party" for awarding attorney's fees and costs? If not, did the trial court abuse its discretion in applying the law under those sections?

7. Did the trial court err in failing to apply the applicable law under Civil Code § 1717 (including the decision of Huckell v. Matranga (1979) 99 Cal.App.3rd 471) to its determination of the prevailing party for the purpose of attorney's fees under Civil Code § 1717?

8. Did the trial court abuse its discretion in determining the prevailing party under Civil Code § 1717?

9. Did the trial court err in finding that WT was not entitled to attorney's fees because the contract or contractual relationship had "expired" due to performance?

## III. STANDARD OF REVIEW.

On appeal the court reviews a determination of the legal basis for an award of attorney fees de novo as a question of law. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677.) The determination of whether the proper legal standard was applied is reviewed under an abuse of discretion standard. (*SC Manufactured Homes, Inc. v. Canyon View Estates, Inc.* (2007) 148 Cal.App.4th 663, 673.)

## IV. STATEMENT OF FACTS.

The facts of this case are not disputed. In February of 2006, Respondents borrowed $80,000 from Gerald Shmavonian. The loan was evidenced by a "Note Secured by Deed of Trust" ("Note") dated February 2, 2002. The Note provided for monthly interest-only payments ($666.67) with the entire balance of principal and interest becoming due on February 8, 2007 ("Maturity Date"). (4 CT 767, ("TAC"[1]) Exh. A.)[2] The Note was

[1] Respondents' operative complaint was the Third Amended Complaint, referred to herein as "TAC".

secured by a deed of trust recorded on February 8, 2006 ("Deed of Trust") encumbering commercial property (gas station) commonly known as 4206 N. Blackstone Avenue ( "the Property"). (4 CT 769-777, Exh. B.) The Deed of Trust provided that Respondents were the "trustor", Chicago Title Company was the original named "trustee", and Shmavonian was the named beneficiary. (Id.)

On July 7, 2010, the Beneficiary retained WT to act as foreclosure agent to initiate and process a nonjudicial foreclosure and then to become the substitute trustee of record to conclude the foreclosure. (5 CT 1097-1098 ¶¶ 6 - 8 & Exh. A, at 5 CT 1101-1103.) On July 16, 2010, the Beneficiary executed a "Declaration of Default and Instructions to Foreclose" under penalty of perjury in which he made a number of representations to WT regarding the Note and he declared that Respondents had defaulted on the Note. (5 CT 1097-1098 ¶ 7 & Exh. A, at 5 CT 1101-1103.) Pursuant to both the Beneficiary's "Declaration of Default and Instructions to Foreclose" and the Deed of Trust, on July 26, 2010 WT, as

---

[2] The Clerk's Transcript shall be cited as "CT" and the Reporter's Transcript shall be cited as "RT". Citations to the record will be cited by record type "CT" or "RT") and volume number (e.g., "5") followed by followed by the page, line numbers and paragraph, where applicable e.g., 5 CT 5:1-8, ¶ 4.

foreclosure agent, recorded a Notice of Default. (5 CT 1098 ¶ 9 and Exh. B, at 5 CT 1105-1106; 4 CT 731 (TAC) ¶ 22 and Exh. E.) The NOD recited that Respondents were in breach for failure to pay at maturity the $80,000 principal balance along with accrued interest and that, as of July 22, 2010, the amount necessary to cure the default was $115,595.52. (Id.)[3]

Respondents alleged that after receiving the NOD by certified mail, they went to WT's offices to advise WT that the loan had been paid and provided copies of cancelled loan checks to an employee of WT. (4 CT 733 (TAC) ¶ 24:11-15.) Respondents represented that on or about March 6, 2006 they paid the Beneficiary $80,000, along with accrued interest fully paying the amount due and owing under the Note. (5 CT 731-732 (TAC) ¶¶ 16 & 17; 1 CT 29-30 ¶¶ 16 &17.)

On August 3, 2010, shortly after Respondents informed WT of their claim that the Note was paid off, Debra Berg, an officer of WT spoke with the Beneficiary regarding Respondents' claim. (5 CT 1098 ¶11, Exh. C.) The Beneficiary told Debra Berg (WT's employee) that the payment Respondents made was as to a different loan he had made to them. (Id.)

---

[3] Because the default declared by the beneficiary was for failure to pay at maturity, the amount to cure (reinstate) and the amount to redeem (payoff the loan) were the same.

Respondents admitted that they had obtained multiple loans from the Beneficiary. (6 CT 1316:21-23; 6 CT 1380: 19-24.) It is undisputed that no reconveyance deed had been recorded and the Deed of Trust was of record. (4 CT 731 ¶19; 1 CT 30 ¶¶ 18-19; 5 CT 1098 ¶ 12; 6 CT 1352:17-24; 6 CT 1390;19-21.) Respondents alleged that even though they had repaid the loan, the Beneficiary had told them he would not reconvey their Deed of Trust because Respondents had introduced the Beneficiary to Armen Korian who was in arrears to the Beneficiary on an unrelated loan. (4 CT 731 (TAC) ¶19:12-14; 1 CT 30 ¶ 19:12-14.)

On or about August 19, 2010, Respondents received another certified NOD. (4 CT 733 ¶ 25:19-20.)[4] Respondents then went to WT's offices and spoke with Ms. Debra Berg. WT made it clear that the Beneficiary had assured WT that the loan was still due and owing and the foreclosure proceeding was proper, and that its role as was not to be a finder of fact or to determine disputes between Respondents and the Beneficiary or to rescind or stop the foreclosure based solely on an alleged dispute. (4 CT 733-734; (TAC) ¶ 25:21-6 & ¶ 26; 4 CT (TAC) 799, Exhibit I.)

---

[4] Under Civil Code § 2924b, NODs are mailed to certain entitled persons within 10 days and then they are also mailed to entitled persons one month after the NOD is recorded.

Respondents hired legal counsel who between August 29, 2010 and October 18, 2010, wrote letters to the Beneficiary (copied to WT), demanding that he reconvey the Deed of Trust, and separately wrote and e-mailed WT demanding that WT rescind the NOD or suspend the foreclosure sale. (4 CT 734-735 (TAC), ¶¶ 26-31 Exhs. C, D, F, G, H.) On or about October 18, 2010, WT responded in writing stating that it did not represent the Beneficiary in a legal capacity; that it had informed the Beneficiary of Respondents' claims; that he had assured WT that the foreclosure proceeding was proper, and that WT's role "…as trustee under the deed [of] trust in this matter is not to be a finder of fact or make a determination between disputing parties of whether a loan is properly chargeable." (4 CT 799 (TAC), Exh. I.)

On October 21, 2010, the Beneficiary executed an Authorization to Publish Notice of Trustee Sale in which he instructed WT to proceed with the publication of the Notice of Sale. (5 CT 1098, ¶ 13, Exh. D.)

On or about October 25, 2010, the Beneficiary executed a Substitution of Trustee which was recorded on October 25, 2010, substituting WT in as trustee under the Deed of Trust. (5 CT 1099, ¶14, Exh. E.) Acting upon instructions from the beneficiary, on October 27, 2010, WT recorded a Notice of Trustee's Sale ("NOS") setting the sale for November 17, 2010. (5 CT 1099 ¶ 15, & Exh. F, at 5 CT 1116.)

On October 28, 2010, Respondents filed their lawsuit against the Beneficiary (Shmavonian), WT, as trustee, and one of WT's employees, Debra Berg. (1 CT 26-45.)

## V. STATEMENT OF PROCEDURE.

After filing their complaint, Respondents moved for a temporary restraining order and preliminary injunction to enjoin the foreclosure sale. (1 CT 86-88.) WT did not oppose Respondents' motion and the preliminary injunction was granted. (1 CT 89-91; 1 CT 157-166.)

Respondents' Verified Complaint alleged causes of action for quiet title; declaratory relief; slander of title; violation of Civil Code § 2941 (failure to reconvey); negligence; injunctive relief; civil conspiracy; accounting; breach of contract; breach of the covenant of good faith and fair dealing; conversion; and trespass to chattels. (1 CT 26-45.) On November 29, 2010, WT (and Berg) filed and served a Declaration of Nonmonetary Status pursuant to Civil Code § 2924*l*(a)&(b) ("DNMS") and filed a demurrer to the negligence, quiet title and declaratory relief claims and filed a motion to strike the punitive damages requested in the complaint. (1 CT 104; 1 CT 97-99; 1 CT 130-132.)

On January 6, 2011, Respondents filed a motion for relief from default under Code of Civil Procedure § 473(b) to allow them to serve an untimely objection to the DNMS pursuant to Civil Code § 2924*l*(c). (1 CT

167-375.) Even though there was no merit to Respondents' objection to WT's DMNS, WT did not oppose the motion. (17 CT 4032:15-16; 20 CT 4771:8-10.) On April 12, 2011, the court granted Respondents relief from their failure to timely object to WT's DNMS. (2 CT 469-475.)

On January 31, 2011, the Beneficiary defendant, representing himself in pro per, answered Respondents' complaint asserting that the payments made by Respondents were on other loans he had made to Respondents and not on the Note secured by the Blackstone Property. (2 CT 399.) He also filed a cross-complaint against Respondents. (2 CT 412-415.)

Respondents filed their First Amended Verified Complaint ("FAC") on March 21, 2011 and WT filed its demurrer to the negligence, slander of title and conspiracy causes of action alleged in the FAC, on April 22, 2011. (2 CT 416-458; 3 CT 524-595.) The trial court erroneously overruled WT's demurer to the slander of title and negligence causes of action. (3 CT 601-602.)

Respondents withdrew their Second Amended Verified Complaint, and filed a Third Amended Complaint ("TAC") by stipulation on July 13, 2011. (3 CT 609-713; 4 CT 714-805.) Respondents' objection to the DNMS compelled WT to file a verified answer to the TAC on September 2, 2011 which again asserted its intention to remain neutral in the dispute

between Respondents and the Beneficiary. (4 CT 818-831, at 827-828, 15th Affirmative Defense.) The Beneficiary answered the TAC on September 13, 2011, putting in issue many of the issues in Respondents' TAC. (4 CT 835-849.) The TAC alleged causes of action against WT for slander of title and negligence ("monetary claims") and for quiet title, declaratory relief and injunction only ("equitable claims"). (4 CT 723-764.)

Ultimately, Ms. Berg filed a motion for summary judgment as to the TAC which was granted in full. (12 CT 2800-2805.) In the furtherance of its intention to not oppose the equitable (non-monetary) causes of action, WT *did not* file a motion for summary judgment or for summary adjudication on the equitable causes of action. (6 CT 1263-1285; 6 CT 1297, fn.1.) WT did file a motion for summary adjudication of the remaining monetary claims asserted against it in the TAC (i.e., slander of title and negligence) which was granted in full on July 27, 2012. (6 CT 1146-1405; 12 CT 2799-2805.) The trial court's ruling on WT's motion for summary adjudication on the monetary causes of action show that Respondents' objections to the DNMS were without merit.

The trial was bifurcated. The monetary claims were tried before a jury as to the Beneficiary defendant only (since WT had been granted summary adjudication as to all Respondents' monetary claims). At the bifurcated trial on the nonmonetary claims, WT was compelled by a notice

to appear to attend, but did not actively participate, object to, or oppose Respondent's claims nor support the Beneficiary's claims. (20 CT 4765:1-8; 20 CT 4942:11-13.)

On January 30, 2013, the trial court entered judgment after jury trial in favor of Respondents and against the Beneficiary defendant (Shmavonian) for slander of title, violation of Civil Code § 2941 (failure to reconvey), breach of contract and breach of implied covenant of good faith and fair dealing, in the amount of $16,500. As to the nonmonetary, equitable claims which were heard separately by the court without a jury, judgment was entered against the Beneficiary defendant (Shmavonian) and WT, and in favor of Respondents for quiet title, declaratory relief and injunction. WT was ordered to record a Notice of Rescission of the Notice of Default and Notice of Trustee's Sale, and to record a full reconveyance. (14 CT 3269-3273; 4 CT 3269:24-28; 20 CT 4971:17-23.)

Post-judgment, both WT and Respondents filed motions for attorneys' fees and motions to strike or tax costs. (14 CT 3353-3390 – 15 CT3559; 15 CT 3560-3675 - 16 CT 3676-3949 - 17 CT 4041; 20 CT 4779-4934.) On August 21, 2013 the trial court denied WT's motion for attorney's fees and its motion to strike Respondents' costs and granted WT's motion to tax, in part. The trial court granted Respondents' motion for attorney's fees and their motion to strike WT's motion for costs, and

granted Respondents attorney's fees and costs against WT and the Beneficiary jointly and severally, in the amount of $120,834.50. (20 CT 4941-4963.)

This appeal followed.

## VI. LEGAL ARGUMENT

### A. The Trial Court Erred in Failing to Understand The Limited Role of the Trustee or Foreclosure Agent under a Deed of Trust and the Public Policy Created by the Comprehensive Legislative Framework Governing Nonjudicial Foreclosures.

#### (1) Role of Trustee under a Deed of Trust.

Because of the unique three-party nature of a deed of trust, the roles and the parties are different than in a normal two-party contract, and the treatment of the trustee in litigation between the trustor and the beneficiary is also different than that applied to two-party contracts.

A deed of trust is a written instrument that conveys title to real property from the trustor-debtor to a third party trustee to secure the payment of a debt owed to the beneficiary-creditor under a promissory note. The customary provisions of a deed of trust include a power of sale clause, which empowers the beneficiary-creditor to foreclose on the real property security if the trustor-debtor fails to pay back the debt owed under the promissory note. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 508; see also, 4 Miller and Starr, Cal. Real Estate (3rd Ed.), Deeds of Trusts and Mortgages, § 10.3, p. 20.)

A deed of trust requires the trustee to perform only one of two mutually exclusive duties: (1) should the trustor-debtor default on the debt, *upon instructions from the beneficiary*, the trustee may initiate foreclosure on the property for the benefit of the beneficiary-creditor; or (2) should the trustor-debtor satisfy the secured debt, *upon instruction of the beneficiary,* the trustee must reconvey title to the real property back to the trustor-debtor, extinguishing the security device. (*Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 334-335; *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 508; *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th, 677; Civ. Code § 2941(b).) The trustee may only perform the above duties upon instructions from the beneficiary pursuant to the deed of trust as limited by the comprehensive statutory framework governing nonjudicial foreclosures. (Civ. Code §§ 2924[5] and 2941(b) and 4 CT 769-777, Exh. B at 773 ¶ B (4) & B (6).)

---

[5] The applicable law here should be that which existed prior 2011 when all of the relevant facts occurred. Since January 1, 2011 a number of applicable Civil Code sections have been amended. Civil Code § 2924 was amended by Stats.2009-2010, 2nd Ex.Sess., c. 5 (A.B.7), § 7, eff. May 21, 2009 and by Stats.2009-2010, 2nd Ex.Sess., c. 4 (S.B.7), § 7, eff. May 21, 2009. None of these amendments should impact this case.

In this case, Respondents (trustor) signed the Deed of Trust creating the rights of the trustor, beneficiary and trustee. Paragraphs B.4 and B.6 of the Deed of Trust expressly state:

> "(4) That ***upon written request of Beneficiary*** stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note to Trustee for cancellation and retention or other disposition as Trustee in its sole discretion may choose and upon payment of its fees, ***Trustee shall reconvey***, without warranty, the property then held hereunder. . . .."
>
> [¶ B.5]
>
> "(6) That upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, ***Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee of written declaration of default and demand for sale and of written notice of default and of election to cause to be sold said property, which notice Trustee shall cause to be filed for record.*** . . .."

(4 CT 769-777, Exh. B at 773 (emphasis added).) These are the terms Respondents agreed to when they signed the Deed of Trust.

Respondents, as trustors, expressly authorized the trustee to follow the instructions of the beneficiary to commence a nonjudicial foreclosure or to reconvey the deed of trust. (See also, see Civil Code § 2924 and 2941(b).) In fact, upon receiving the declaration of default and instructions from the beneficiary, the language of the deed of trust requires that the trustee must ("shall") record the notice of default. (See, *Jenkins v. JP Morgan Chase Bank, N.A.,* (2013) 216 Cal.App.4th 497, 508.) In this case, it is undisputed that pursuant to the Deed of Trust, the Beneficiary executed a declaration of

default and that WT took its instructions from the Beneficiary. (5 CT 1097-1098 ¶¶ 6-8 & Exh. A, at 5 CT 1101-1103.)

Nothing in the Deed of Trust or in the law requires the trustee to determine if the default declared by the beneficiary is correct or to resolve disputes between the beneficiary and the trustor. Furthermore, once a NOD is recorded, the trustee *may rescind the NOD when it receives from the beneficiary "a notice of rescission"* which rescinds the declaration of default and demand for sale and advises the trustee of the date of reinstatement. (Civ. Code § 2924c(a)(2).)[6]

Similarly, a trustee has no power to reconvey a deed of trust (even if the beneficiary is paid in full) unless the trustee first receives a "request for reconveyance" from the beneficiary and the other conditions precedent in Civil Code § 2941(b) are met. (4 CT 769-777, Exh. B at 773, ¶ B (4).)

Thus a trustee or foreclosure agent performing the functions of a trustee is not authorized to rescind the NOD absent instructions from the beneficiary or based on a court order. Just as the recording of the NOD is subject to a qualified privilege, the trustee's failure to rescind without instructions from the beneficiary is similarly privileged. (*Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 343; Civ. Code § 2924d & 47.)

---

[6] The applicable version of Civil Code § 2924c is found in Stats.2001, c. 438 (S.B.958), § 3, eff. Oct. 2, 2001.

The trial court failed to understand that most of the functions of the trustee pursuant to Civil Code § 2920 et seq. may be performed by a foreclosure agent of the beneficiary or trustee and they are subject to the same rights and privileges enjoyed by trustees. (Civil Code § 2924(d), see, Civil Code §§ 2924(d) [conditional privilege]; 2924a [sale by agent]; 2924b(b)&(c) [processing NODs and notices of sale]; 2924f(b)(8)(b) [providing postponement information].)

Because the foreclosure agent or trustee is powerless to rescind a NOD or reconvey when requested to do so by a trustor (Respondents), this conduct is in compliance with the Deed of Trust and the law, and cannot constitute a failure to remain neutral or "opposition" to the trustors' positions on these matters.

### (2) California's Comprehensive Legislative Framework Governing Nonjudicial Foreclosures.

As noted by the California Supreme Court in *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281 (hereafter "*IE Associates*"):

> "The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as ***strictly limited and defined by the contract of the parties and the statutes.*** [Citations.] No case holding that a trustee of a deed of trust has any additional common law duties with respect to notice has been cited or found. . . .
>
> "In short, there is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes. ***There are, moreover, persuasive policy reasons which militate against a judicial expansion of those***

> ***duties.*** The nonjudicial foreclosure statutes--an alternative to judicial foreclosure--reflect a carefully crafted balancing of the interests of beneficiaries, Trustor, and trustees. Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. ***Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation.*** . . . [Citations.]"

(Id., at pp. 287-288, emphasis added; and *Jenkins v. JP Morgan Chase Bank, N.A.,* (2013) 216 Cal.App.4th 497, 508-509; *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 440-442; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 829).

The Supreme Court in its *I.E. Associates* decision, supra, articulated two major public policies: (1) that trustees are not required to investigate and send notices except as required by statute or by the deed of trust; and, (2) that trustees, as middlemen, must have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. Notwithstanding that the comprehensive legislative framework governing nonjudicial foreclosures creates a public policy intended to strike a balance between the rights and interests of the trustor, beneficiary, and the trustee, in the case at bar, the trial court found that the trustee and foreclosure agent engaged in conduct (while perfectly legal and consistent with the Deed of Trust and statutes),

that it viewed as opposing Respondents in the litigation.

The trustee of a deed of trust is not a true trustee, and owes no fiduciary obligations to the trustor or beneficiary; he merely acts as a common agent for the trustor and the beneficiary of the deed of trust. [Citation.]" (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 508; citing *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th, 668 at 677 ; and see, *Stephens, Partain & Cunningham v Hollis* (1987) 196 Cal.App.3d 948, 955-956; *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111-1114; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

In *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, the court of appeal delineated the specific duties of a trustee:

> "Pursuant to this statutory scheme, the beneficiary-creditor under a deed of trust may declare a default and proceed with a foreclosure sale if the trustor-debtor defaults on the secured loan. (§ 2924.) To initiate the nonjudicial foreclosure process, ***the "trustee, mortgagee, or beneficiary, or any of their authorized agents," must*** record a notice of default and election to sell. (§ 2924, subd. (a)(1).) Except for one limited exception, the notice of default must be recorded for at least three months before the next step in the foreclosure process may proceed, presumably to make sure the debtor has notice of the impending sale and has time to pursue opportunities to cure the default. (§ 2924, subd. (a)(2).) After the three-month period has elapsed, a notice of sale must be published, posted, recorded and mailed 20 days before the foreclosure sale. (§§ 2924, subd. (a)(3), 2924f.)"[7]

---

[7] Many of the Civil Code sections cited were amended effective after the trial in this case. Since this foreclosure was commenced, there have been changes in Civil Code AB 278 and SB 900 (identical bills) passed in 2012

(Id., at 508-509; *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

Respondents and the trial court appear to believe that when informed of a dispute, the trustee or foreclosure agent must act as judge and jury to resolve a dispute between the trustor (Respondents) and the Beneficiary (Shmavonian) over the existence of a default or the validity of the obligation. Because of the ***exhaustive nature*** of California's legislative framework governing nonjudicial foreclosures, California appellate courts have refused to read any additional requirements into the nonjudicial foreclosure statute. (*Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 441 citing *Lane v. Vitek Real Estate Indus. Group* (E.D.Cal.2010) 713 F.Supp.2d 1092, 1098; accord, *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154–1157.)

Since the Supreme Court's 1985 decision in *I. E. Associates,* the Legislature has enacted numerous provisions furthering the public policy articulated in *I.E. Associates*, designed to protect the trustee, as a

---

commonly referred to as the Homeowner's Bill of Rights ("HOBR") aka California Foreclosure Reduction Act which provide increased duties of beneficiaries, and loan servicers and, in some instances, trustees. The HOBR provisions are irrelevant to this appeal as they became effective on January 1, 2013 after this foreclosure was commenced and because the HOBR provisions apply only to foreclosures on first deeds of trust secured property which is the borrower's "owner-occupied", "principal residence" (Civil Code § 2924.15(a).) This case involves a gas station property.

middleman, from constantly becoming embroiled in litigation and to maintain balance in the nonjudicial foreclosure system.

In 1995, the Legislature added Civil Code § 2924*l* which provided that where the trustee under a deed of trust is sued under the deed of trust, "in the event that the trustee maintains a reasonable belief that it has been named *in the action or proceeding solely in its capacity as trustee*, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee," the trustee may serve and file a declaration of nonmonetary status. If no objection to this declaration is served on the trustee within the statutory timeframe, *the trustee is not required to participate in the litigation.* Although the trustee will be bound by the court's decision relating to the secured property, it cannot be held liable for monetary damages, fees or costs. (Civil Code § 2924*l*.) Nothing in Civil Code § 2924*l* distinguishes between actions or proceedings based upon them being on the contract as opposed to being tort actions or proceedings. Clearly, this furthers the existing public policy elaborated in the *I.E. Associates* decision. (*I.E. Associates*, supra, 39 Cal.3d. 281, 287-288.)

In 1996, the Legislature added the provisions to Civil Code § 2924(d) that provide that: "The mailing, publication, and delivery of notices required herein, *and the performance of the procedures set forth in this article,* shall constitute privileged communications within Section 47."

(Emphasis added; Stats. 1996 ch. 483 §1; see discussion above and current rewording of that provision; See, *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 336-337.) The "article" referenced in Civil Code § 2924(d) includes Civil Code §§ 2920 through 2944.7, which includes Civil Code § 2924*l*. This conditional privilege extends to trustees, foreclosure agents, or anyone performing the procedures set forth in the "article" covering nonjudicial foreclosures. Again, Civil Code § 2924(d) shows a Legislative intent to prevent the trustee from becoming embroiled in disputes between the trustor and the beneficiary.

In 1999, the Legislature amended Civil Code § 2924 again, to provide that:

> "In performing acts required by this article [§§ 2920-2944.5], the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage."

In 2000, the Legislature amended Civil Code §2924 to make it clear that trustees are exempt from the California Fair Debt Collection Practices Act in performing services under Civil Code §§ 2920 et seq. (Stats. 2000, ch. 636 § 6.)

These Legislative changes since the 1985 Supreme Court decision in *I.E. Associates* make it clear that the Legislature has attempted to maintain the efficient nonjudicial foreclosure system while protecting the trustee

from unnecessary liability and from becoming embroiled in disputes between the trustor, beneficiary, junior lienholders and third party purchasers. The result reached by the trial court below is wholly inconsistent with the public policy enunciated *I. E. Associates*, as subsequently expanded by statute and case law.

### (3) Case Law has Expanded the Public Policy Set forth in *I.E. Associates* and Has Refused to Impose Common Law Duties on Trustees or Foreclosure Agents.

Since the *I.E. Associates* decision, many courts have articulated the public policy originally set out by the Supreme Court.

If a trustee or foreclosure agent were charged with verifying the default or with resolving disputes between a trustor and beneficiary over the underlying obligation or over the nature and extent of the breach, every trustor in foreclosure would dispute the obligation or breach, and no nonjudicial foreclosure sale would ever be completed until litigated. This is contrary to the law and public policy articulated above and would have a significant impact on the trial courts' resources and those of trustees.[8]

Imposing a new duty on the trustee to resolve disputes between trustors and beneficiaries or to cease foreclosing because the trustor

---

[8] While trustees who have done nothing wrong are protected by the comprehensive legislative framework governing nonjudicial foreclosures, their maximum fees and costs are limited by statute. (Civ. Code §§ 2924c(c)&(d) and 2924d.)

disputes the default or obligation, imposes judicial common law duties on the trustee or foreclosure agent that do not exist under the comprehensive legislative framework. Based upon the result in this case, in every dispute over the obligation being foreclosed upon, a trustee or foreclosure agent would have to resolve the dispute (a judicial function), rescind the foreclosure (which it has no legal authority to do) or risk being held liable by either the trustor or beneficiary for large attorney's fees awards even though the trustee did nothing wrong, and in fact, complied with the law and the deed of trust.

The only option the trustee or foreclosure agent has in a dispute over the default or over the obligation (as opposed to one where the trustee actually violated provisions of Civil Code §§ 2920 et seq.) is to declare its neutrality by filing a DNMS (Civil Code § 2924*l*). If, as here, a party objects to the DNMS, the trustee is forced to respond to the complaint. In responding to the complaint all the trustee can do is to respond to the complaint. The trustee can either choose to actively oppose the trustor's nonmonetary causes of action (*Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 350) or, if it wants to retain its neutrality as a middleman, all it can do is not oppose (or not support) the trustors' nonmonetary causes of action. Here, whether to object to the DMNS or to file monetary causes of action was solely in Respondents' hands. This is not a case where the

trustee did (or was found to have) done anything wrong. The net result of the trial court's order is to impose duties on the trustee that do not exist; to destroy the trustee's role as a middleman; to disturb the careful balance between the parties created by the comprehensive legislative framework and to lead to excessive and unnecessary litigation involving trustee's under deeds of trust.

The courts of appeal have consistently followed and expanded the Supreme Court's 1985 holding in *I.E. Associates* and have refused to impose new or additional duties on the trustee that would expose it to additional risks or upset the established balance created by statute. In *Perez v. 222 Sutter St. Partners* (1990) 222 Cal. App. 3d 938, the court of appeal refused to impose a requirement that the trustee give notice to easement holders of record who had not recorded a request for a NOD. (Id. at 944-949.) The court of appeal in *Perez* observed that the same conclusion would apply to the holders of judgment liens, mechanic's liens or of other interests not specifically entitled to notice under Civil Code § 2924b. (Id.)

In *Diediker v. Peelle Financial Corp.* (1998), 60 Cal. App. 4th 288, 295 the court of appeal refused to impose upon trustees a common law duty of due care to purchasers at a trustee's sale to give the IRS a notice of sale where the IRS had recorded tax liens against the secured property. After *Diediker,* the Legislature amended the statute to require that the trustee give

notice that an IRS lien had been recorded. (Stats. 2001 c. 438 (S.B. 958), §2 eff. Oct. 2, 2001.) Clearly, when it has seen fit, the Legislature has expanded the duties of the trustee. No such amendment has been made requiring trustees to resolve disputes over the obligation between the beneficiary and trustor or to rescind a NOD or cease a foreclosure when it becomes aware of such a dispute. (*Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 343.)

In *Moeller v. Lien* (1994) 25 Cal. App. 4th 822 the court of appeal rejected an attempt to apply general provisions against forfeitures which were not part of the comprehensive statutory framework. (Id., at 831.)

In *Residential Capital, LLC v. Cal-Western Reconveyance* (2003) 108 Cal.App.4th 807, the court of appeal held that the trustee could not be liable for negligence to a third party purchaser for failing to verify with the beneficiary whether the default had been cured before conducting the trustee's sale. (Id at. 825-827.)

In *Banc of America Leasing & Capital, LLC, v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090 the court of appeal refused to expand a trustee's duties with regard to surplus funds to include the duty to search for, prioritize and distribute surplus proceeds to other persons named in 2924k.

In further limiting the obligations of the trustee or foreclosure agent

to those duties prescribed in Civil Code § 2920 et seq. and to keep it from unnecessarily becoming embroiled in litigation between the trustor and beneficiary, the appellate courts have also held that:

1. The trustee or foreclosure agent need not possess the note to initiate a nonjudicial foreclosure. (*Debrunner v. Deutsche Bank Nat. Trust. Co.* (2012) 204 Cal.App.4th 433, 439-440; *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 512.)

2. The trustor may not pursue preemptive judicial actions to challenge the right, power, and authority of a foreclosing "beneficiary" or beneficiary's "agent" to initiate and pursue foreclosure. (*Debrunner v. Deutsche Bank National Trust* Co. (2012) 204 Cal.App.4th 433, 440–442; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267- 272; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149. 1154–1157.)

3. The recording of an assignment of deed of trust is not a precondition of transferring a note in California. (Civil Code § 2934; *Haynes v. EMC Mortg. Corp.* (2012) 205 Cal.App.4th 329, 332-337; *Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122-125; *Herrera v. Federal Nat. Mortg. Assn.* (2012) 205 Cal.App.4th 1495, 1508-1510.)

With few exceptions not relevant here, the Legislature has enacted a comprehensive legislative framework designed to create a cost-effective

method for lenders to resort to their security; to balance the rights of the trustor; limiting the duties of the trustee or foreclosure agent and protecting the trustee from unnecessarily being involved in litigation between the trustor (borrower) and the beneficiary (lender). (*I. E. Associates v. Safeco Title Insurance Co.*, supra.) Each of the following arguments is impacted by the trial court's misunderstanding of the comprehensive legislative framework and the role of the trustee or foreclosure agent; leading it to applying the incorrect law (de novo review) and to its abuse of discretion in determining that WT's conduct constituted opposing Respondents' equitable causes of action.

**B. The Attorney's Fees Provisions in the Note and Deed of Trust Were Broad Enough to Cover Tort Claims under Code of Civil Procedure § 1021.**

The trial court's analysis for its attorney's fees order started and ended with the contract causes of action under Civil Code § 1717 and it failed to consider attorney's fees under Code of Civil Procedures §§ 1021, 1032, 1033.5(a)(10) & 1034(a)(4) as those sections apply to the tort causes of action upon which WT prevailed. (See, 1 RT pp. 12:1-25; 20 CT 13:1-13.) The trial court's analysis of the tort causes of action consisted of it observing that they were not to be considered as to who was the prevailing party under Civil Code § 1717. (20 CT 4946:21-24).

The court's ruling on both parties' attorney's fees motions

recognized the application of Code of Civil Procedure § 1021 which states:

> "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided."

(20 CT 4943:11-13.) Code of Civil Procedure section 1021 provides the basic right to an award of attorney fees. (*Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92.) It allows the allocation of attorney's fees to be determined by agreement of the parties. There is nothing in § 1021 that limits its application solely to contract actions. Code of Civil Procedure § 1021 provides that parties may agree that a particular party or the prevailing party will be awarded attorney's fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract. (*Skyway Aviation, Inc. v. Troyer* (1983) 147 Cal.App.3d 604, 610-611; *Malibou Lake Mountain Club, Ltd. v. Smith* (1971) 18 Cal.App.3d 31, 35-36.) Under Code of Civil Procedure § 1021, unlike Civil Code § 1717, the contract attorney's fees provision does not have to be reciprocal. (See, *Moallem v. Coldwell Banker Commercial Group, Inc.* (1994) 25 Cal.App.4th 1827, 1832.)

In this case, the Deed of Trust provides:

> "A. To protect the security of this Deed of Trust, Trustor agrees:
>
> [(1) & (2) omitted]
>
> (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, . . . and attorney's fees in a reasonable sum, ***in any action*** or proceeding ***in which Beneficiary or Trustee may appear***, . . ."

(4 CT 723-765 (TAC) and Exh. B at 4 CT 773 ¶ 3 attached thereto; emphasis added.) The express language of the attorney's fees clause refers to *"any action"* - not just actions to enforce the contract. In addition, such actions include those which "affect the rights or powers of the Beneficiary or Trustee." (Id.)

As the court of appeal observed in *Xuereb v. Marcus & Millchap Inc,* 3 Cal.App.4th (1992) 1338, where the attorney's fees provision is broad enough as here to cover tort actions, Civil Code § 1717 does not control the attorney's fees provision under Code of Civil Procedure § 1021. (Id., at 1341-1345; *Santisas v. Goodin* (1998) 17 Cal.App. 4th 599, 615-622; *Drybread v. Chipain Chiropractic Corp. (*2007) 151 Cal.App.4th 1063, 1071.) Civil Code § 1717 has limited application which necessarily presumes the contractual right to attorney's fees under Code of Civil Procedure § 1021. (Id.) As such, the court must determine whether a party may recover attorney's fees under the wording of a particular attorney's fees clause. (Id., at 1342.)

*Xuereb*, supra, involved an attorney's fees provision in a real estate purchase agreement which provided for attorney's fees "[i]f this Agreement

*gives rise to a lawsuit* . . . between the parties hereto, including Agent, the prevailing party shall be entitled to recover actual costs and reasonable attorney's fees . . ." (Id. at 1341-1343; emphasis added.) Unlike this case, in *Xuereb*, the contract actions were dropped and the case went to judgment in favor of the agent-defendant on the tort causes of action. In *Xuereb,* the torts involved the agents' failure to make a reasonably diligent inspection of the property subject to the contract. The court of appeal held that the various tort causes of action against the agents arose from the contract (i.e., not independent from it) and reversed; awarding attorney's fees on the torts to the Agent defendants on the tort causes of action.

In our case, the tort actions all involved alleged wrongdoing of WT as trustee or foreclosure agent under the Deed of Trust (i.e., negligence and slander of title). Here, the attorney's fees clause is broader than the one in *Xuereb.* The Deed of Trust here requires the trustor "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, . . . and attorney's fees in a reasonable sum, ***in any action*** or proceeding ***in which Beneficiary or Trustee may appear***, . .." (4 CT 723-765 (TAC) and Exh. B at 4 CT 773 ¶ 3.)

The holding in *Xeureb* has been applied to a vast number of attorney's fees provisions (e.g., *Lerner v. Ward* (1993) 13 Cal.App.4th 155,

158 ["in any action . . . *arising* out of this agreement"; *Cruz v. Ayroloo* (2007) 155 Cal.App.4th 1270, 1277 ["if civil action is instituted in connection with this Agreement"]; *Maryland v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 933 ["any dispute"].)

Unlike *Xeureb,* where the contract actions did not go to judgment, in this case, both the contract and tort actions went to judgment. The prevailing party on the noncontract tort actions may recover attorney's fees *even if it did not "prevail"* on the contract actions under Civil Code § 1717. (See, *Adam v. DeCharon* (1995) 31 Cal.App.4th 708, 712.)

Once the court determines whether a contractual attorney's fees provision is broad enough to cover tort actions, the prevailing party may recover attorney's fees as a matter of costs. (*Santisas v. Goodin* (1998) 17 Cal.App.4th 599, 605-606; Code of Civ. Proc. §§ 1032, 1033.5(a)(10); 1034.) Absent a definition of "prevailing party" in the contract containing the broad attorneys' fees clause, "a court may base its attorney fees decision on a ***pragmatic definition of the extent to which each party has realized its litigation objectives,*** whether by judgment, settlement, or otherwise." (Id. at 622 [as to tort actions] and citing *Hsu v. Abbara* (1995) 9 Cal.4th 863, 877; Emphasis added.) In *Hsu v. Abbara*, *supra,* the Supreme Court held that "*in determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by 'equitable

considerations.'" (Italics original.) 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." (*Hsu v. Abbara*, supra, 9 Cal.4th 863, 877.)

WT had three litigation objectives from the inception of the litigation: (1) to remain neutral by serving a DNMS; (2) to oppose the tort actions; and, (3) to remain neutral and intentionally not oppose the equitable claims arising from the dispute over the obligation between Respondents (trustors) and the Beneficiary. Not only did WT obtain a simple, unqualified win on the tort causes of action, but it also obtained its litigation objective on the equitable causes of action by not opposing them or taking sides between the Respondents (trustor) and the Beneficiary. On the other hand, Respondents had two litigation objectives: (1) to prevail against WT on the tort (monetary) causes of action; and, (2) to obtain equitable relief. In reaching their litigation objectives as to WT (as opposed to the Beneficiary), Respondents lost the tort claims outright and only got what they could have achieved by not objecting to WT's DNMS. In determining litigation success, courts should respect substance rather than form, and to this extent should be guided by "equitable considerations." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.) Here Respondents' litigation strategy did not further their objectives and got

them nothing they did not already have once WT filed its DNMS.

Prevailing party status for the purposes of Civil Code § 1717 and under Code of Civil Procedure § 1032 are not necessarily the same. (*Santisas v. Goodin* (1998) 17 Cal.App.4th 599, 606.) Here, for the purpose of finding the prevailing party under Code of Civil Procedure § 1032 and for awarding attorney's fees, the trial court applied the wrong legal standard. That is, the trial court solely applied the rules under Civil Code § 1717 as to matters on the contract (finding the tort causes of action not applicable to its determination of entitlement to attorney's fees or as to who was the prevailing party). (20 CT 4950:3-4; 20 CT 4946:21-24; 1 RT 8:22-24; 1 RT 9:20-26; 1 RT 10:3-15; 1 RT 12:6-15.) As such, the trial court failed to consider that WT was entitled to attorney's fees for the tort causes of action (discussed supra) as costs under Code of Civil Procedure § 1032; it refused to consider WT's unqualified victory on the tort actions in determining who was the "prevailing party"; and it abused its discretion in finding that WT "opposed" the equitable causes of action. As discussed above, application of the law in this case is a matter for de novo review.

**C. In Determining Who Was the Prevailing Party the Trial Court Failed to Consider the Defendants Separately Under Both Civil Code § 1717 and Under Code of Civil Procedure §§ 1021, 1032, 1033.5(a)(10) and 1034(a)(4).**

In an action *on a contract*, where the contract specifically contains

an attorney's fees provision, regardless of whether the attorney's fees provision is bilateral, attorney's fees shall be awarded to the "prevailing party". (Civ. Code §1717(a); *Reynolds Metals Co. v. Alperson*, (1979) 25 Cal.3d 124, 128-129, emphasis added.) Civil Code § 1717(a) states in relevant part:

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶]
>
> Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. [¶]
>
> (b)(1) . . . Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. *The court may also determine that there is no party prevailing on the contract for purposes of this section.*

(See, *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 346-347.)

In addition to failing to apply the overriding provisions of Code of Civil Procedure § 1021 in interpreting the specific attorney's fees provisions of the Deed of Trust with respect to the monetary (tort) causes of action upon which WT prevailed, the trial court failed to recognize that, unlike a normal bilateral contract under Civil Code § 1717, the Deed of Trust is a triparte relationship involving the trustor (borrower), the trustee (a neutral party), and a beneficiary (creditor). (*Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, 481; *Lupertino v. Carbahal* (1973) 35 Cal.App.3rd 742,

747-748.) Trustee's or foreclosure agent's conduct is governed exclusively by the comprehensive legislative framework and the public policy arising from that framework. (Discussed supra.)

In *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, the trustor paid off the loan and requested that the beneficiary reconvey the deed of trust. (Id., at 475-476.) Before it would execute a reconveyance deed, the trustee demanded that the beneficiary give it a request for reconveyance, the original note, a copy of the trust deed, and a reconveyance fee. Since the note had been lost, the trustee offered to accept a "Lost Instrument Indemnity Bond" in lieu of the original note. (Id. at 479-481.) While the beneficiary instructed the trustee to reconvey and met the other requirements of Civil Code § 2941(b), the beneficiary and her attorney offered to personally indemnify the trustee in lieu of the corporate (lost note) indemnity bond requested by the trustee. (Id. at 476.) The trustee refused to reconvey the deed of trust and the trustor sued both the beneficiary and the trustee for quiet title; sued the beneficiary for damages for failure to reconvey; and the beneficiary sued the trustee for indemnity. (Id.) The Huckells (trustors) prevailed on the quiet title cause of action against both the beneficiary and the trustee and against the beneficiary on the damages cause of action for failure to reconvey. The court awarded the beneficiary indemnity (damages) against the trustee on her indemnity cross-

complaint. (Id.) Thereafter, the trial court found as to the quiet title action, the trustors were the prevailing party on the contract under Civil Code § 1717 and it awarded the trustors attorney's fees against both the beneficiary and the trustee. (Id. at 476.)[9] The court of appeal in *Huckell* held that there was no question that the trustor (Huckell) was the prevailing party on the quiet title (equitable) action, but it held that the trustor was only entitled to attorney's fees *as to the beneficiary* ***and not as to the trustee***. (Id. at 482.)

As to the trustee only, the court of appeal reversed both the trial court's award of attorney's fees against the trustee as well as the judgment for indemnity in favor of the beneficiary. In reversing the trial court's judgment, the court of appeal recognized the public policy discussed above as it existed at that time[10], focusing on the triparte relationship between the trustor, beneficiary and trustee; and on the fact that the trustee had not done

---

[9] It should be noted that unlike our case, where the Respondents prevailed on equitable claims and the trustee (WT) prevailed on the monetary (tort) claims, in *Huckell* the court of appeal did not have to address how to handle the damages claims as the trustee had not prevailed on any claim in the trial court resulting in the court of appeal's reversing the judgment as to the trustee. As such, the *Huckell* court of appeal did not consider the application of Code of Civil Procedure § 1021 to damages (tort) claims under the contractual attorney's fees provisions and solely focused on the application of Civil Code § 1717 to the quiet title cause of action.

[10] As discussed above, since the *Huckell* decision, the comprehensive legislative framework and the public policy relating to those laws have been massively expanded both by statute and by case law.

anything wrong. The court of appeal emphasized the fact that the trustee, while defending the action by answering and participating in the action, did not oppose the trustor's quiet title action other than to put in issue those matters of which it had no knowledge or which were contrary to the apparent interests of record, all of which was occasioned by the beneficiaries' inability to deliver the note in the first place. Underlying the court of appeal's holdings in *Huckell* was the recognition of the unique triparte relationship involved in a deed of trust:

> "While [the trustors] are clearly the prevailing parties, there were two parties defendant and ***we must determine who they prevailed against.***
>
> As we have determined, the [trustee] did nothing wrong in insisting on the indemnity bond by a corporate surety and judgment against it for damages was improper. There is nothing in the record to indicate it resisted Huckells' quiet title action other than to put in issue those matters of which it had no knowledge or which were contrary to the apparent interests of record. The quiet title action was required by reason of the inability of the beneficiaries to deliver the original note as required under the terms of the agreement. They alone occasioned Huckells' action."

(*Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, 482.)

This is precisely what happened in this case. Here, the trial court ignored in its order the triparte nature of the relationship between the trustor, beneficiary; the comprehensive legislative framework (and public policy) governing nonjudicial foreclosures; the fact that the trustee was compelled to answer, putting certain (but not all) allegations at issue; and, the that the trustee did nothing wrong according to the court's own ruling.

(12 CT 2800-2810.) The trial court failed to apply the proper legal standard in determining that WT opposed the equitable actions by filing a verified answer, as discussed above in *Huckell*. (20 CT 4949:19-22.) In addition, to the extent the trial court's order was based upon a determination of whether the trustee "opposed" Respondents' action, the trial court abused its discretion.

WT recorded the NOD upon instructions of the beneficiary before it was made aware that Respondents disputed that the obligation. (12 CT 2801, 3rd full paragraph.) Under the comprehensive legislative framework governing nonjudicial foreclosures, WT could not rescind the NOD or reconvey the deed of trust without a written instruction of the beneficiary. (*Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 343; Civil Code §§ 2924c(a)(2) and 2941(b).) There is no provision in Civil Code §§ 2920 et seq. requiring a trustee or foreclosure agent to resolve disputes between the trustor and beneficiary.

The only part of the rule articulated in *Huckell* employed by the trial court here was to analyze whether WT opposed the equitable relief. (20 CT 4949:19-22.) However, in *Huckell*, the court of appeal recognized that the trustee did not "resist" Respondents' equitable action by merely putting "in issue those matters of which [the trustee] had no knowledge or which were contrary to the apparent interests of record." (*Huckell v. Matranga* (1979)

99 Cal.App.3rd 471, 482.)

Since *Huckell*, Civil Code § 2924*l* was passed permitting the trustee to declare its neutrality where it believes it has done nothing wrong. WT filed its DNMS which would have bound WT to whatever ruling the court made on the non-monetary, equitable causes of action. (1 CT 130-132.) It was Respondents who chose to object to the DNMS and to file monetary causes of action against the trustee (upon which the trustee prevailed). Had Respondents not taken these actions, they could have obtained all of their equitable relief without involving WT after it served its DNMS. In *Huckell* the trustee did not prevail on any causes of action. The court of appeal's decision in *Huckell* is more significant in that it preceded the enactment of Civil Code § 2924*l*, so the trustor did not have the option of declining to object to a DNMS. The trustee in *Huckell* answered and participated in the action but it did not oppose the trustor's equitable action for quiet title.

As in *Huckell*, Respondents compelled the trustee to respond and to participate in the litigation. WT's answer, as in *Huckell,* merely put in issue allegations about which the trustee had no personal knowledge. (4 CT 818-831.) This does not constitute "opposing" or "resisting" Respondents' equitable actions. Other than responding to the complaints, WT did not oppose Respondents' equitable causes of action or applications for an injunction. (1 CT 89-91; 20 CT 4765:1-8.) WT did not oppose

Respondents' motion for relief under Code of Civil Procedure § 473(b). (17 CT 4032:15-16; 20 CT 4771:8-10.) WT's summary adjudication motion was limited to the monetary causes of action. (6 CT 1263-1285; 6 CT 1297, fn. 1.) After WT was granted summary adjudication on the monetary causes of action, WT did not appear at the trial on the monetary causes of action. (20 CT 4942:11-14; 20 CT 4765:1-8.) As to the equitable causes of action, WT reluctantly appeared (due to a notice to appear) but it did not oppose Respondents' request for equitable relief. (20 CT 4946:12-13.)

While admitting in its order for attorney's fees that "WT did not oppose [Respondents'] equitable claims", the trial court stated: "After filing its Declaration of Non-Monetary Status, WT filed a verified answer to [Respondents'] third amended complaint in which it disputed [Respondents'] claims for quiet title and denied that plaintiffs were the one hundred percent owners of the property and denied that Shmavonian's attempted enforcement of the deed of trust was wrongful." (20 CT 4949:15-22.) This is nothing more than putting in issue those matters about which WT had little to no knowledge or which were contrary to the apparent interests of record. (*Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, 482.)

The trial court further supported its attorney's fees award based upon the fact that WT denied (put in issue, in its answer to the TAC) Respondents' allegations for declaratory relief and for a permanent

injunction. (20 CT 4949:22-24.) The trial court focused upon the fact that WT prayed that Respondents "take nothing by reason of their complaint. (20 CT 4949-4950:24-1.)

How was WT to know, even from the record, that Respondents were 100% legal and equitable owners? At the time of answering, how would WT know whether Respondents or Shmavonian was telling the truth about the note being paid off (i.e., leading to a wrongful foreclosure)? (CT 4 CT 738 ¶37; and see 4 CT 822 ¶ 37.) Many of Respondents' other claims alleged in the TAC were about things that WT would have no knowledge of. The legal conclusion of "wrongful foreclosure"; the need for "declaratory relief" or the entitlement to a permanent injunction; would all change based upon the determination of the finder of fact much later in the litigation process. Specific facts known to WT were admitted. (See for example, 4 CT 729-731 (TAC) ¶¶16 & 17 with 4 CT 820 (Answer) ¶¶ 16 & 17 & 18.) Many of the legal conclusions and facts regarding WT's alleged wrongful conduct were denied in WT's answer, but ultimately the trial court found that WT did nothing wrong. (4 CT 742 (TAC) ¶ 50; 4 CT (TAC) ¶¶63-66; 4 CT 823-824 (Answer) ¶¶ 50 & 63-66; 12 CT 2800-2810.) Even though Respondents eventually objected to WT's DNMS, WT reasserted its willingness to remain neutral in its answer. (4 CT 818-831, at 827-828, 15th Affirmative Defense.) In fact, WT's litigation objective from

the very beginning was to remain neutral as to the equitable (contract action) and to only oppose the monetary causes of action it was compelled to defend. (1 RT 11-12:21-5; 1 RT 10:3-7; 1 RT 26-27; 21-12.)

The trial court found that WT participating in discovery "with regard to the factual issue of whether plaintiffs paid off the $80,000 note, the core issue in the case" constituted opposition or resistance. (20 CT 4950:1-2.) At the point discovery was done, WT was being sued for negligence and slander of title, causes of action upon which it prevailed. Whether the note was paid off would be highly relevant to these tort causes of action and does not change the fact that WT did not oppose or resist Respondents' equitable causes of action. (1 RT 15:6-15; 1 RT 11-12:21-5; 1 RT 10:3-7; 1 RT 26-27:21-12.)

The trial court's reliance on the fact that WT prayed that Respondents "take nothing by reason of their complaint", is also misplaced and is not opposition. (20 CT 4949-4950:24-2.) The prayer or demand is that part of the complaint that requests the relief sought. (Code of Civ. Proc. § 425.10(a)(2).) The prayer is not a part of the cause of action and, under the authorities, is not even essential in a contested case. (4 Witkin, Cal. Proc. 5th (2008) Plead, § 495, p. 631.) Even if the prayer was part of the complaint and a denial of a factual allegation, how would WT know at the time of answering what any party should receive?

Under the trial court's interpretation of what constitutes opposition or resistance to equitable causes of action, where its DNMS is objected to, all WT could do is to allow its default to be taken and hope for the best. Such a response would make the trustee in every case vulnerable to monetary damages and attorney's fees. WT's only option was to answer because of Respondents' election to object to the DNMS and to include tort causes of action which lacked merit. (1 RT 26-27:21-12; 1 RT 6:12-16; 1 RT 6-7:23-9.)

Here, as in *Huckell*, the trial court failed to separately consider the differences between the beneficiary and trustee in determining against whom the Respondents were the prevailing party. Under the trial court's ruling, where the trustee has done nothing wrong, but merely puts the allegations at issue, and does not resist or oppose the equitable relief to the extent the other parties permit it to, the trustee risks being liable for attorney's fees to either the trustor or beneficiary, depending on which one prevails at trial. The trial court failed to consider the unique role of the trustee (triparte relationship) under the public policy and statutes discussed above and to apply the law articulated in *Huckell* requiring it to distinguish between defendants in this type of case in awarding attorneys' fees. In addition, the trial court abused its discretion in determining that WT opposed Respondents' equitable causes of action.

The trial court cites *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316 as support for its order. However, the facts in the *Kachlon* case were drastically different than the facts in this case and in *Huckell*. As the trial court here observed, in *Kachlon* "the trial court found that the trustee 'consistently allied itself' with the beneficiaries during the course of the litigation by, among other things, joining the beneficiaries in opposing summary judgment, filing a joint trial brief with the beneficiaries, and by declaring it would contest the nonmonetary claims." (20 CT 4948-4949:20-6; *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 349-350.)

In this case, WT did none of those things. In *Kachlon*, the trustee and beneficiary were represented by the same counsel and the trustee joined in almost all of the beneficiaries' oppositions to the trustors' equitable claims. (Id. at 349-351.) Unlike *Kachlon*, and like the *Huckell* case, here the trustee merely put allegations in the complaint in issue and then forbore from opposing Respondents' equitable causes of action.

In addition, in *Kachlon*, the trustee did not file a DNMS in the beginning of the case but only after the equitable causes of action were determined. (20 CT 4948-4949:25-1; *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 332.) While the trustee prevailed on the monetary claims (slander of title and negligence) on a directed verdict and judgment notwithstanding the verdict, the trustee failed to file a motion for attorney's

fees on the claims upon which it prevailed. (Id., at 330-332; 345.) The only motion for attorney's fees was the Borrower's (Markowitz's) pursuant to Civil Code § 1717. (Id.) Therefore, the court in *Kachlon* was not required to consider the principles established in *Huckell* as to Civil Code § 1717) or whether the trustee was entitled to attorney's fees under Code of Civil Procedure §§ 1021, 1032, 1033.5(a)(10) and 1034.

The trial court's failure to consider the triparte relationship between a trustor, beneficiary and trustee as it relates to the application to Civil Code § 1717 (*Huckell*) and the public policy underlying the comprehensive legislative framework clearly led to its misapplication of the law and abuse of discretion. This is demonstrated by the following exchange between the trial court and counsel at the hearing on the court's tentative ruling on the respective attorneys' fees motions and motions to tax cost:

> MR POOL: [WT's trial counsel]:
>
> ...[¶¶]
>
> Under this Court's ruling even if the trustee immediately prevailed on demurrer to all of the monetary claims for failure to [state] the claim, if the trustor plaintiffs ultimately prevailed against the beneficiary, the trustor plaintiff would be entitled to fees and costs against the trustee, even though the trustee has no interest in the outcome of the trustor beneficiary dispute. Effectively, the Court's ruling transforms the trustee from a disinterested nonparticipant that statutorily agrees to be bound by the outcome of the Court's decision into a deep-pocket guarantor of the beneficiary's litigation.
>
> In enacting a statutory – comprehensive statutory scheme for the conduct of nonjudicial foreclosures, surely the legislature did not intend to allow the protections statutorily

granted trustees to be so easily circumvented.

> … The closest case, as the Court has noted in its ruling, is *Kachlon*. … [¶]
>
> As I stated here, we didn't contest the nonmonetary claims. We stipulated at the beginning; we stipulated at summary adjudication; we didn't even appear at the second phase of the trial.
>
> WT Capital has consistently articulated its position that it considered itself a nominal defendant on the nonmonetary claims with no interest in the outcome. …
>
> …[¶¶].
>
> [Discussion between the Court and Mr. Pool regarding the holding in *Kachlon v. Markowitz*.]
>
> THE COURT: Other than the timing of the filing of the declaration of nonmonetary status, how is this case different from Kachlon?
>
> …
>
> MR POOL: … all the way up until the very end, in the *Kachlon* case, they never – they consistently aligned themselves with the beneficiary. That's not true in this case, so that is an important distinction. …
>
> THE COURT: Let me ask you this question: If WT Capital hadn't aligned itself with Mr. Shmavonian *before trial, would this case have ever been filed? In other words, WT Capital took the position before trial that Mr. Shmavonian had a valid unpaid note and, based on that, filed a notice of default and of sale. Right?* [Emphasis added].

(1 RT 10-12:18-8; 1 RT 11-12:21-1; 1 RT 13:4-6; & 13-15 & 19-24; emphasis added.)

Because WT would not resolve the dispute between the trustor and beneficiary before the litigation was filed, the trial court believed that WT had aligned itself with the beneficiary – even though it actively did not oppose the contract causes of action throughout the litigation. (1 RT 13:19-

24; 20 CT 4833 (5th ¶); 20 CT 4950:5-9.)

From this discussion, it is clear that the trial court failed to recognize the trustee's position as a middleman and was attempting to impose upon the trustee or foreclosure agent duties not found in the Deed of Trust or in the comprehensive legislative framework governing nonjudicial foreclosures.

The Deed of Trust and applicable statutes clearly direct the trustee or foreclosure agent to follow the instructions of the beneficiary to commence a foreclosure; to rescind a foreclosure; or to reconvey a deed of trust. (Discussed supra.) The Deed of Trust the Respondents signed expressly gave the trustee authority to commence a foreclosure or reconvey *solely upon the instructions of the beneficiary*.

Neither the Deed of Trust nor the comprehensive legislative framework governing nonjudicial foreclosures impose on the trustee a duty to stop a foreclosure until the trustor and beneficiary resolve a dispute over the obligation. The trial court's attempt to impose such a duty jeopardizes the established public policy protecting the trustee's position as a middleman. This is true particularly in the context of awarding attorneys' fees as costs in such disputes. The trial court's position would judicially impose duties not part of the comprehensive legislative framework and Deed of Trust.

In addition, trustees would be compelled to cease nonjudicial foreclosures every time a trustor raises a dispute for fear of large attorney's fees awards regardless of whether the beneficiary or trustor prevailed and regardless of the extent to which the trustee intentionally does not to oppose the equitable actions relating to the nonjudicial foreclosure. The trial court's award of attorneys' fees to Respondents and it's denial of WT's attorney's fees was wrong on the law, is contrary to public policy, and the trial court abused its discretion in finding that WT was not the prevailing party due to its "opposition" to Respondents equitable claims.

**D. The Trial Court Erred in Finding Respondents to be the Prevailing Party for the purposes of Costs and for Purposes of Civil Code § 1717.**

Although Respondents did not prevail against WT on the monetary claims and WT did not oppose the equitable causes of action, the trial court nevertheless determined that Respondent was the prevailing party for purposes of costs and for purposes of attorney's fees under Civil Code § 1717. (20 CT 4959:12-15.) As discussed above, the trial court applied the wrong law to the issue of entitlement to attorney's fees (as to the monetary causes of action) and in determining the prevailing party for the purpose of Code of Civil Procedure § 1032. The arguments regarding the application of triparte contractual relationship (*Huckell*) and the comprehensive legislative framework, apply to Civil Code § 1717. It should be noted

however, that litigation goals as between the trustee and trustor under a deed of trust are substantially different than a normal two-party contract. While the litigation goals between a trustor and a beneficiary resemble a typical two-party relationship, as between WT (as trustee) and the Trustors, WT, as a middleman, had "no dog in the fight" and therefore it did not take sides in the dispute between the trustor and the beneficiary. The trustee remaining neutral is supported by the cases, statutes and public policy discussed above including Civil Code § 2924*l*.

As discussed more fully above, the trial court failed to apply the principals from *Huckell* in analyzing the issue of prevailing party separately as to the Beneficiary and as to WT as Trustee. Such an analysis, under the facts of this case, is compelled by the public policy underlying the comprehensive legislative framework governing nonjudicial foreclosures.

Under Civil Code § 1717(b)(1) the party prevailing "on the contract shall be the party who recovered a *greater relief* in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

"[I]n deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' *demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements,*

*and similar sources.* The prevailing party determination is to be made only upon final resolution of the contract claims and only by "a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876; citing *Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15; Emphasis added.) Also, "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by "equitable considerations." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.) The court may "...base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.)

The court may exercise its discretion in determining which party was the prevailing party where both parties obtained their litigation objectives. (Civ. Code § 1717(b); (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 873-875.) Here, because of the trial court's fundamental misunderstanding of the role and duties of a trustee under a deed of trust, it did not appreciate that, when the trustee attempts to remain neutral in a dispute between a trustor and beneficiary in a deed of trust, that is its litigation objective. (See, *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, 482; discussed supra.) In this case, as in *Huckell*, the Beneficiary's and Respondents' dispute alone occasioned

Respondents' action and the trustee should have been viewed separately to determine if it was the prevailing party under Civil Code § 1717. (Id.)[11]

Respondents clearly prevailed in their litigation objectives as to the Beneficiary and were entitled to attorney's fees. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876-877; Civil Code § 1717(a).) The same is not true, however as to the WT (as trustee). As in *Huckell,* supra, the trustee's litigation objectives *were not* adverse to Respondents on the equitable (non-monetary) causes of action. As to those claims, WT's sole litigation objective, as a middleman, were: (1) to stay neutral by filing a DNMS; (2) if compelled to respond to the lawsuit, to intentionally not oppose the equitable claims to the extent that the parties permitted it to; and, (3) to merely put in issue those allegations about which it did not have knowledge or information of record, leaving it to the Respondents (trustor) and the Beneficiary to resolve the equitable claims. (Id. at 482.)

Even if one does not consider WT's simple, unconditional win on the tort causes of action, as between Respondents and WT, WT was either the prevailing party or there was no prevailing party. Respondents' litigation objective on the equitable causes of action was to have the court

[11] Since there were no tort claims in *Huckell*, the court of appeal's decision in that case addressed attorneys' fees under Civil Code § 1717 after the trustor prevailed on its equitable (quiet title) cause of action against the beneficiary. (Id.)

resolve the dispute over the obligation between themselves and the Beneficiary. WT's DNMS afforded Respondents all of the relief they sought as to the equitable causes of action; conditioned only upon Respondents' prevailing against the Beneficiary. (Civ. Code § 2924*l*.)[12] The only reason Respondents could have had to set aside the DNMS, was to pursue their monetary causes of action against WT. As seen, those causes of action lacked merit and WT prevailed. So here, as to the equitable causes of action, after trial Respondents obtained no greater relief than they already had when WT filed its DNMS. As such, WT obtained equal or greater relief when the "*demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.*" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877.)

In this case, not only did the trial court apply the wrong legal standard, it abused its discretion by attempting to judicially impose on the trustee (WT) duties it did not have under the comprehensive legislative framework or under the Deed of Trust. (Discussed supra.) For example, WT cannot be found to have opposed Respondents' equitable causes of action because before or after the dispute arose it could not or would not

---

[12] WT's position was the same as to the Beneficiary.

resolve disputes between the Beneficiary and Respondents; rescind the NOD, or to reconvey the Deed of Trust. (See, discussion supra.) WT articulated its inability to do these things to Respondents prior to the lawsuit being filed. (4 CT 799, Exh. I.) After the lawsuit was filed, by filing a DNMS, WT confirmed its willingness to remain neutral on the equitable (non-monetary) causes of action. (1 CT 130-132.) WT complied with the statutes in the comprehensive legislative framework governing nonjudicial foreclosures; with the Deed of Trust; and did everything it could do to not oppose the equitable causes of action.

Civil Code § 1717(b) states that the party obtaining greater relief in the action on the contract is the prevailing party. In this case, WT as a trustee middleman clearly stated its intention to remain neutral by filing its DMNS. That was the relief it sought as to the contract causes of action. The only reason this objective had to be reached through trial was because Respondents, in whose hands the decision lay, compelled WT to carry its objective of not opposing the equitable relief through trial by objecting to the DNMS.

While Civil Code § 1717(b) was amended after *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, the amendment allowing the court to find no prevailing party was merely declaratory of that the law as it existed when *Huckell* was decided. (*Hsu v. Abbara* (1995) 9 Cal.4$^{th}$ 863, 874; *Kytsty v. Godwin* (1980) 102 Cal.App.3d 762, 774) Under the facts of this case, the

trial court abused its discretion and applied the incorrect legal standard by ignoring the standards defined in *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471. At most, under Civil Code § 1717, as between Respondents and WT, the court should have found that there was no prevailing party on the contract. Under these facts, WT could not have done anything more than it did to not oppose the equitable relief and not take sides between the Beneficiary and Respondents.

**E. The Trial Court Erred as a Matter of Law in Concluding That Appellants were Not Entitled to Attorney's Fees Because the Contract had Expired Due to Performance.**

Without citation of authority, the trial court found that WT was not entitled to attorney's fees because the contract or contractual relationship had "expired" due to performance under Respondents' allegations. (20 CT 4947:6-9 & 4947:13-15.) The existence of an enforceable agreement is not a prerequisite to an award of attorney's fees under Civil Code § 1717 or under Code of Civil Procedure § 1021. Civil Code § 1717 applies even where the prevailing party succeeds on the theory there was never an enforceable contract. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.2d 124; see also, *Nevada Livestock Production Credit Assn.* (1989) 214 Cal. App.3d 635.

Because Respondents would have been entitled to recover their attorney's fees against WT had they prevailed on the monetary claims, WT was entitled to its attorney's fees when it prevailed even if the contract was unenforceable (as long as not illegal) or nonexistent. (See, *North Associates*

*v. Bell* (1986) 1854 Cal.App.3d 860, at 865; and see *Jones v. Drain*, (1983) 149 Cal.App.3d 486 at pp. 489-490.)

In both *Huckell* and in *Kachlon* the trustors had paid off the notes which were the subject of contract actions and neither court of appeal found that the satisfaction of the note or extinguishment of the deed of trust prevented enforcement of the attorney's fees in the Note and Deed of Trust. (*Huckell v. Matranga, supra,* 99 Cal.App.3rd 471, 475-476, 482; *Kachlon v. Markowitz* (2008) 168 Cal. App. 4th 316, 346-349.)

## VII. CONCLUSION

For the reasons set forth above, WT respectfully requests that the court reverse the trial court's order granting Respondents attorney's fees and denying WT's motion for attorney's fees and remand the matter to the trial court to the extent necessary.

ADLESON, HESS & KELLY, a PC
BY PHILLIP M. ADLESON, and LISA J. PARRELLA

DATED: June 12, 2014

BY: _____
PHILLIP M. ADLESON
LISA J. PARRELLA
Attorneys for Appellants WT Capital Lender Services, a California corporation

## CERTIFICATE OF COMPLIANCE

I, PHILLIP M. ADLESON, counsel for defendant and respondent, pursuant to Rule 8.204(c) (1) of the California Rules of Court, certify that the attached brief is proportionally spaced, has a typeface of at least 13 points and contains 13,955 words of the Microsoft Word Program, including footnotes.

ADLESON, HESS & KELLY, a PC
BY PHILLIP M. ADLESON, and LISA J. PARRELLA

DATED: June 12, 2014

BY: _____
PHILLIP M. ADLESON
LISA J. PARRELLA
Attorneys for Appellants WT Capital Lender Services, a California corporation

## PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within-entitled action. I am employed in Santa Clara County, California, with the law firm of Adleson, Hess & Kelly, a PC. My business address is 577 Salmar Avenue.

On June 12, 2014, I served upon the interested party(ies) in the action the foregoing document described as:

**RESPONDENT WT CAPITAL LENDER SERVICE'S OPENING BRIEF – CERTIFICATE OF WORD COUNT (Certificate of Interested Entities or Persons filed with the COA on 12/03/13)**

[X] By placing ____ the original _X_ true copy(ies) thereof enclosed in sealed envelope(s) addressed to:

**COURT OF APPEAL – 5TH APPELLATE DISTRICT**
Charlene Ynson, Clerk
2424 Ventura Street
Fresno, CA 93721
559-445-5491
559-445-5769 FAX
*(Original + 4 copies- Via Hand-Delivery)*

**CALIFORNIA SUPREME COURT**
350 McAllister Street
San Francisco, CA 94102
*(4 copies)*

**FRESNO SUPERIOR COURT**
B.F. Sisk Courthouse
1130 O Street
Fresno, CA 93721-2220
559-457-2000
*(One Copy)*

| ATTORNEYS | PARTIES |
|---|---|
| Gary L. Logan, Esq.<br>*Connie M. Parker, Esq.<br>Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP<br>5260 N. Palm Avenue, Suite 201<br>Fresno, CA 93704<br>559-438-4374<br>559-432-1847 Fax<br>cparker@kleinlaw.com<br>***Via Federal Express and email*** | ***Attorneys for Plaintiffs Respondents ANDRE TORIGIAN and TAKOOHI TORIGIAN*** |
| *Matt Backowski<br>Powell & Pool, LLP<br>7522 N. Colonial Avenue, Suite 100<br>Fresno, CA 93711<br>559-228-8034<br>559-228-6818<br>mbackowski@powellandpool.com | ***Co-Counsel for Appellants and Defendant, WT CAPITAL LENDER SERVICES, a California corporation*** |

[ X ] BY MAIL I deposited such envelope(s) with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Campbell, California. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Campbell, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing, pursuant to this affidavit.

[ X ] BY FEDEX I caused such envelope(s) to be placed for FedEx collection and delivery at Campbell, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for FedEx mailing. Under that practice it would be deposited with the FedEx office on that same day with instructions for overnight delivery, fully prepaid, at Campbell, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the FedEx delivery date is more than one day after date of deposit with the local FedEx office,

pursuant to this affidavit.

[ ] BY FACSIMILE I caused the transmission of the foregoing document by facsimile to the offices of the addressee(s), and such transmission was reported as complete and without error.

[X] BY PERSONAL SERVICE I caused such envelope(s) to be delivered by hand to the offices of the addressee(s) pursuant to CCP § 1011.

[ X ] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 12, 2014 at Campbell, California.

BRYANT ADLESON
Personal Service

TAMMY CLARK
Mail and Federal Express