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 REPLY BRIEF

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I. INTRODUCTION

Respondents' Brief ("RB") does everything but respond to Appellant's Opening Brief ("AOB"). From a foundational point of view, it is better to reply to Respondents' Brief out of order (i.e., almost in reverse order).

II. LEGAL ARGUMENT

A. Appellant, WT Capital, has not appealed anything but the trial court's attorney's fees and costs awards.

Appellant, WT Capital, agrees with the trial court's judgment as to the tort causes of action (e.g., slander of title and negligence) and does not disagree with, or appeal from, the trial court's judgment on the contractual or equitable causes of action. Appellant appeals only the trial court's orders on the motions to tax costs and on the attorney's fees motions below (herein "costs and attorney's fees motions").

At one point, Respondents' Brief argues that this case involved a "wrongful foreclosure action" which has never been alleged in this case. (RB, p. 1; see, *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1121-1124 for the elements of a tort of wrongful foreclosure.) Respondents' operative pleading stated equitable actions on the contract or Deed of Trust (e.g., quiet title and declaratory relief and injunction) and tort actions (e.g., slander of title and negligence)

relating to the foreclosure process[1]. There was no wrongful foreclosure cause of action.

Respondents' Brief asserts that Appellant should be estopped from appealing the trial court's decision granting Respondents' late objection to Appellant's Civil Code § 2924*l* declaration of non-monetary status ["DNMS"]. (RB, pp. 29-31.) Appellant did not object in the trial court to Respondents' late filed objection to Appellant's DNMS. (17 CT 4032:15-16; 20 CT 4771:8-10.) Appellant does not appeal that issue here.

Appellant discussed Civil Code § 2924*l*, which created the procedure for a trustee to file a DNMS and for other parties to object to the DNMS, not because this is a Civil Code § 2924*l* case. Rather, that section is discussed to show how Civil Code § 2924*l* furthers the public policy underlying the comprehensive legislative framework governing nonjudicial foreclosure[2] by establishing a cost-efficient and relatively quick nonjudicial foreclosure system with "clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in

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[1] The operative pleading was the Respondent-plaintiff's third amended complaint ("TAC") that alleged causes of action for slander of title, negligence, quiet title, declaratory relief and injunction only. (4 CT 723-764.)

[2] For brevity's sake, hereafter we will refer to the "comprehensive legislative framework governing nonjudicial foreclosure" as the "comprehensive framework" or "comprehensive legislative framework."

time-consuming and costly litigation." (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281, 287-288; AOB, pp. 15-30.)

B. Contrary to the argument in Respondents' Brief, Appellant never argues that Civil Code § 2924*l* precludes the award of attorney's fees in this case.

Respondents' Brief argues that Civil Code § 2924*l* does not preclude the trial court's award for attorney's fees and costs against Appellant. (RB, pp. 11, 32, 34-38.) Appellant never made such an argument!

Civil Code § 2924*l* would have prohibited a monetary recovery (including attorney's fees and costs) had Respondents not filed an objection to the DNMS. However, since Respondents filed an objection to Appellant's DNMS, Civil Code § 2924*l* is irrelevant except as a statute further evidencing the public policy underlying the comprehensive framework i.e., preventing a trustee from becoming embroiled in unnecessary litigation when it follows the provisions of the legislative framework; the deed of trust; and, otherwise does not take one side or the other in disputes between trustors and beneficiaries. Because of this public policy, the litigation objectives of the trustee will often be substantially different than those of the trustor-borrower and the beneficiary-lender (i.e., the other two parties to a three-party deed of trust).

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C. Regardless of whether the trial court understood the role of the trustee and comprehensive legislative framework, it failed to apply the proper standard to determine the prevailing party and it abused its discretion in making its decision as to the prevailing party for attorney's fees and costs.

Respondents argue that the trial court understood the role of the trustee (or foreclosure agent) and that the trial court properly applied the rules relating to nonjudicial foreclosure. (RB, pp. 29, 31-34.) In the instant appeal, the role of the trustee (or foreclosure agent) in the nonjudicial foreclosure system is important with respect to whether the trial court applied the proper standards in determining who were the prevailing parties in the litigation, and whether the trial court abused its discretion in making its determination. (See, *Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 481-482; Civil Code § 1717 and Code of Civil Procedure §§ 1021 and 1032.)

Although Appellant's Opening Brief extensively discusses the role of the trustee under the deed of trust, the comprehensive legislative framework and the public policy relating to that framework (AOB, pp. 15-30), Respondents attempt to argue a more limited two-party analysis for determining the prevailing party for the purposes of attorney's fees and costs. (RB, pp. 31-34.) Respondents (as the trial court below) presume that the beneficiary's and the trustee's interests and litigation goals are the same. However, as noted in the *Huckell* case, this is not always the case

and a separate analysis of the trustee's litigation objectives is required under a three-party deed of trust.

The trustee is not a fiduciary of the trustor or of the beneficiary and is more like a common agent with very limited duties. (AOB, p. 21; *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 508; *Stephens, Partain & Cunningham v. Hollis* (1987) 196 Cal.App.3d 948, 955.) Even as this common agent, the scope of the trustee's or foreclosure agent's duties are limited to those set forth in the deed of trust or under the comprehensive legislative framework. (AOB, pp. 19-30.) Every act done by Appellant, WT Capital, was pursuant to a provision of the Deed of Trust or a provision of the comprehensive legislative framework. All of Appellant's conduct was found by the trial court to be privileged. (12 CT 2801-2802.) Under the Deed of Trust and by statute, the trustee may only initiate a nonjudicial foreclosure or reconvey the Deed of Trust upon instructions of the beneficiary. (AOB, pp. 16-18; 4 CT 769-777, Exh. B at 773; Civil Code §§ 2924 2941(b).) The trustee has no duty to investigate facts, mediate, or resolve disputes between the beneficiary and the trustor. (AOB, p. 20.) While a trustee may have a duty to communicate the trustor's objections to the beneficiary, the Respondents' Brief cites no case or statute (because none exists) that requires the trustee (or foreclosure agent) to mediate or otherwise resolve disputes between the trustor and the

beneficiary before following the instructions of the beneficiary.

In stating the public policy underlying the comprehensive legislative framework governing nonjudicial foreclosure, the California Supreme Court held:

> "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.]"

(*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281, 287-288; Emphasis Added.) Each of Respondents' suggestions, many of which were accepted by the trial court, run afoul of the above-stated public policy and they would result in the judicial imposition of duties not found in the comprehensive framework. It does not matter if a new judicially-imposed trustee duty (e.g., duty to resolve disputes) is substantive, or is limited only attorney's fees and costs motions, because the risk of an award of attorney's fees and costs (as opposed to damages) is sufficient to compel compliance.

Respondents argue that when, as here, a trustor has a dispute with a beneficiary over satisfaction of the note, the trustee should consider and weigh the evidence presented by the trustor or beneficiary (e.g., trustor's

claims vs. the beneficiaries' instructions or responses) and then come to a conclusion whether to proceed with the nonjudicial foreclosure; to rescind the notice of default; or to reconvey the Deed of Trust do to claimed prior payment. (RB, pp. 4, 12, 24-25, 28, 32; CT 211-212.) Such an undertaking is a judicial function and it is not a duty imposed upon the trustee or foreclosure agent under the comprehensive legislative framework. The Supreme Court has discouraged the judicial imposition of additional duties onto the comprehensive legislative framework. (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281, 287-288; AOB, pp. 15-30.) How would imposing such a duty forward the public policy of giving the trustee "clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation"? (Id.) If the court were to impose such a duty, every trustor (borrower) in foreclosure would tell the trustee that there is a dispute as to the obligation. Such a duty would upset the carefully crafted balance between trustor, beneficiary and trustee in the comprehensive legislative framework. In addition, it would be contrary to the statutes and provisions of the Deed of Trust that authorize the trustee to act solely upon the instructions of the beneficiary in initiating or proceeding with a nonjudicial foreclosure or in reconveying the deed of trust. (Civil Code §§ 2924 and 2941(b).) If, instead of acting upon the instructions of the beneficiary, the

trustee had a duty to resolve disputes between the trustor and the beneficiary, every nonjudicial foreclosure would run the risk of embroiling the trustee in unnecessary litigation. How would this serve the public policy in favor of a cost-efficient and relatively quick nonjudicial foreclosure procedure? (Id.)

Respondents posit, without authority, that Appellant could have filed a declaratory relief action to resolve the payoff dispute between Respondent and the beneficiary. (RB, p. 32.) Such a duty is not part of the comprehensive framework and under the facts of this case, it makes absolutely no sense. At the end of the day, had Appellant filed a declaratory relief action, it would be in the exact same position it is in now (i.e., either the trustor or the beneficiary seeking attorney's fees). Appellant would still have to take sides or attempt to remain neutral between the parties. If, as here, the trustee intended to remain neutral on the equitable actions, filing a declaratory relief action would still put at-issue matters about which it has no knowledge or which are reflected in recorded documents. (See, *Huckell v. Matranga,* supra, 99 Cal.App.3rd 471, 482.) As part of the comprehensive framework, the legislature has provided qualified immunity for trustees or foreclosure agents in performing the acts set forth in Civil Code §§ 2920-2944.7; for a provision allowing the trustee to remain neutral in disputes between the trustor and the beneficiary; and,

in lieu of interpleader, a simple method to disburse surplus proceeds after a trustee's sale. (Civil Code §§ 2924(d); 2924*l*; and 2924j & 2924k.) Each of these amendments supports and furthers the public policy to create a cost-efficient and relatively quick nonjudicial foreclosure system where the trustee has "clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation". The statutes underline the legislature's attempt to encourage trustees to remain neutral, when possible. How would requiring the trustee to initiate a declaratory relief action further any of these public policy objectives?

The Respondents' Brief then embarks upon the legally frivolous argument that Appellant commenced a foreclosure when it was not the trustee under the Deed of Trust. (RB, pp. 20, 24.) 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. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 508 citing Civil Code § 2924 (a)(1); and see, *Wilson v. Hynek* (2012), 207 Cal.App.4th 999, 1009.) As the trial court found, the filing of the notice of default was privileged under Civil Code § 2924(d). (12 CT 2801.) Civil Code § 2924(d) establishing a qualified privilege, covers all privileged conduct and is not limited just to trustees. (*Kachlon v.*

Markowitz (2008) 168 Cal. App. 4th 316, 344-345.) Thus, it does not matter if Appellant recorded the notice of default as trustee or as a foreclosure agent, it is still privileged conduct.

Other acts allegedly showing that Appellant took sides were the fact that Appellant, after being presented with the dispute between Respondents and the beneficiary, recorded a substitution of trustee and notice of trustee's sale. (RB, pp. 23 - 26, fn. 84.) As the trial court found, these are all privileged acts. (12 CT 2802-2803.)

Appellant only participated in the litigation when compelled to do so by Respondents (i.e., filing tort claims and objecting to the DNMS). Even so, Appellant's only opposition or participation in the litigation was to defend itself from the tort claims and to attempt to refrain from taking sides between the Respondent (trustor) and the beneficiary (lender) in the equitable actions. In granting Appellant's motion for summary adjudication on the tort causes of action, the trial court found that Appellant did nothing wrong and that Appellant's conduct was subject to the qualified privilege that applies to persons performing nonjudicial foreclosure activities where malice is not alleged and proven. (12 CT 2801 - 2803; Civil Code § 2924(d); and (*Kachlon v. Markowitz*, supra, 168 Cal. App. 4th 316, 343-345.)

Respondents cite *Munger v. Moore* (1970) 11 Cal.App.3d 1, for the

proposition that Appellant had options other than following the instructions of the beneficiary. (RB, p. 31). *Munger* does not stand for that proposition. Rather, *Munger* holds that "[t]rustees are liable to trustors for illegal, fraudulent, or willfully oppressive sales under the power of sale provision of the deed of trust. (Id., at 7; RB, p. at 31.) In *Munger*, the trustee was found to have engaged in tortious fraudulent conduct because it refused accept a statutorily required reinstatement. (Id.) Here, the trial court found that Appellant did nothing wrong and that Appellant's conduct was privileged. There was no finding of conduct that was illegal, fraudulent, or that constituted a willfully oppressive sale. In fact, there was no finding that Appellant violated any provision of the Deed of Trust or of the comprehensive statutory scheme.

In addition, *Munger* was handed down in 1970; 15 years before the landmark case of *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d. 281 in which the California Supreme Court articulated that the comprehensive legislative framework pre-empts common law duties relating to the trustee's processing of nonjudicial foreclosures. (Id.) The *Munger* case was well before the many legislative amendments and the expansion of the holding in the *I.E. Associates* to apply to numerous other factual situations. (AOB, pp. 15-30.) Both Civil Code § 2924(d) [qualified privilege] and Civil Code § 2924*l* [DNMS procedure] all followed the

Munger case by many years.

D. Under Civil Code § 1717, relating to claims on the contract, the court must separately analyze the trustor, beneficiary, and trustee to determine the prevailing party for the purpose of awarding attorney's fees and costs.

In *Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, the court held that, in applying Civil Code § 1717 to the three-party relationship in a deed of trust, the trustor, beneficiary and trustee should be reviewed separately in determining who is the prevailing party vis-à-vis the others. (Id., at 482; AOB, pp. 37-51.) The trial court failed to apply the *Huckell* decision in two material respects: (1) to do a separate analysis, distinguishing between the trustee and beneficiary vis-à-vis the Respondents as to the equitable-contract causes of action; and, (2) failing to recognize that once Respondents sued Appellant for torts and objected to Appellant's DNMS, Appellant's conduct in the equitable causes of action was limited to putting "in issue those matters of which it had no knowledge or which were contrary to the apparent interests of record." (*Huckell v. Matranga* (1979) 99 Cal.App.3rd 471, 482.)

Respondents do not provide any meaningful legal or factual analysis of *Huckell* as it applies to the instant case. The Respondents' Brief asserts that *Huckell* did not involve a nonjudicial foreclosure. (RB, pp. 32-33.) While true, this has no significance. The trustee's two duties under the

deed of trust and under the comprehensive framework are, upon the instructions of the beneficiary: (1) to reconvey upon satisfaction of the obligation (Civil Code § 2941(b)); and, (2) to initiate a nonjudicial foreclosure upon default. (Civil Code § 2924.) Each of these duties is triggered by instructions from the beneficiary and neither requires further consent of the trustor. (AOB, pp. 16-17.) Both duties are subject to the qualified privilege that was enacted after the *Huckell* decision. Respondents simply make a distinction without a difference. In *Huckell*, had the beneficiary provided the trustee the proper corporate indemnity bond for its lost note, the trustee would have complied with Civil Code § 2941(b) and reconveyed. Similarly, in the instant case, had the beneficiary instructed Appellant not to proceed with the nonjudicial foreclosure or to reconvey the Deed of Trust, it would have done so. In both *Huckell* and in this case, the beneficiary engaged in wrongful conduct, ***but the trustee did not***. In both cases, the trustee was dragged into the trustors' equitable actions. As such, the court of appeal required that the trial court separately analyze the trustee and beneficiary vis-à-vis the trustor in its determination of prevailing party. That analysis requires consideration of whether the trustee did anything wrong or opposed the equitable (contractual) relief.

Respondents' Brief admits that "a trustee may be immune from attorney's fees if [it] does not resist the trustor's action and only puts at

issue matters which the trustee 'had no knowledge or which were contrary to the apparent interest of record.'" (RB, p. 33) Respondents fail to articulate how Appellant had personal knowledge of the alleged payoff that occurred before it was instructed by the beneficiary to initiate nonjudicial foreclose. How would Appellant have known whether Respondents were entitled to a reconveyance or if they were "100% legal and equitable owners of the real property at issue" when there was an unreconveyed deed of trust of record? They would not. Respondents try to cure this problem by arguing that Appellant was a common agent owing duties to both parties. This was why understanding the role and duties of the trustee is important. (AOB, pp. 15-30; discussed supra). While Respondents' statement is technically correct, the scope of the duties of the trustee does include investigating, mediating, or resolving disputes between the trustor and the beneficiary (discussed supra). The instant case falls squarely within *Huckell*. The fact that the trial court may have found that Appellant did not act in a neutral fashion is merely evidence of the trial court applying the wrong standard and of its abuse of discretion.

Next, the Respondents' Brief suggests that Civil Code § 1717 has been amended 4 times since *Huckell*. (RB, pp. 33). Again, while true, *Huckell* remains good law and none of the amendments have any bearing on the court of appeal's analysis. Other than pointing out the changes,

Respondents fail to articulate how any amendment undermines the court of appeal's holdings in *Huckell*. More importantly, after the court of appeal's decision in *Huckell*, there have been numerous changes to the comprehensive framework which support the public policy of preserving a cost-efficient, quick nonjudicial foreclosure system that attempts to avoid embroiling trustees in disputes between the trustor and beneficiary. (See, AOB, pp. 22-30.)

Looking at Appellant's conduct in the litigation, the trial court simply got it wrong and abused its discretion. None of the nonjudicial foreclosure statutes actually use the word "neutral". However, particularly where the trustee has done nothing wrong, the comprehensive framework attempts to protect the trustee from becoming embroiled in litigation between the trustor and the beneficiary; it provides an opportunity for the trustee to remain neutral (Civil Code § 2924*l*); it provides a qualified privilege where the trustee is merely following the procedures in the statutes (Civil Code § 2924(d); and, it does not create a duty for the trustee to mediate or resolve disputes between the trustor and the beneficiary. (Discussed supra.) However, for the purposes of this case, it becomes a question of what were Appellant's (as trustee) litigation objectives. Critical is the fact that it was totally within Respondents' control whether to bring Appellant into this case. Had Respondents refrained from objecting to

Appellant's DNMS and from filing separate tort causes of action alleging trustee misconduct, Appellant's participation in the litigation would not have been necessary. In addition, Respondents would have achieved the *exact same result on the equitable causes of action as they ultimately received by requiring Appellant's participation.* Respondents' conduct compelled Appellant to adopt a three-fold litigation objective. First, participate by defending the tort causes of action alleging trustee wrongdoing. Second, to put "in issue those matters of which it had no knowledge or which were contrary to the apparent interests of record." And, third, remain neutral by not taking sides between the beneficiary and Respondent in the equitable action.

So-called evidence that Appellant did not meet these litigation objectives was that they incurred substantial attorney's fees prior to Respondents' objection to Appellant's DNMS. (RB, pp. 36.) While true, these efforts were required solely due to Respondents' filing tort actions against Appellant for wrongdoing. Ultimately, Respondents lost these tort causes of action.

Respondents argue that Appellant refused to stipulate to a preliminary injunction. (RB, pp. 36.) Again, Respondents' attempt to impose on the trustee a duty to resolve disputes between the trustor and beneficiary and then take sides. No such duties exist! Appellant neither

stipulated to, nor opposed, any of the equitable relief.

Respondents assert that Appellant made an ex parte application seeking to stay Respondents' discovery and Appellant participated in discovery. (RB, p. 36.)[3] This application however, related to the monetary claims upon which Appellant prevailed. (6 CT 1297, fn. 1; 6 CT 1263-1285.) Much like putting in-issue matters about which the trustee has no knowledge, is the trustee defending itself against a monetary tort expected to do nothing? Participating in discovery is a function of being a party in a case; not a question of supporting one side over another. Besides, Respondents fully controlled whether Appellant was a party to the action by choosing to object to Appellant's DNMS and by filing the tort actions against Appellant.

Respondents further contend that Appellant was not neutral because it responded to the operative complaint by answering it and by praying that Respondents take nothing. (RB, pp. 36-37.) This is nothing more than what was permitted by *Huckell*. (Discussed supra.)

Respondents complain that Appellant was not "neutral" because it would not take sides at the bifurcated trial and stipulate to the equitable

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[3] Respondents' citation to the record here (21 CT 5050) is to the court docket. Neither the ex parte application nor any other discovery motion or order is part of the record on appeal.

claims in Respondents' favor. (RB, p. 37.) How is Appellant's refusal to take sides during trial not remaining neutral? By that point in the proceedings, Appellant had already repeatedly stated it would remain neutral on the equitable claims – even after Respondents objected to its DNMS; forcing Appellant to attend the second phase of the trial. (20 CT 4946:12-13.) Appellant did not oppose Respondents' equitable claims at trial even though it would not stipulate to them. (20 CT 4946:12-13.) Finally, by filing a DNMS on the equitable causes of action at the outset of the litigation, Appellant had already taken all steps it could take to remain totally neutral on equitable causes of action (i.e., without having to file an answer or other responsive pleading).

The Respondents' Brief fails to cite one basis for the trial court's conclusion that Appellant did not meet all of its litigation goals or to support the trial court's conclusion that Appellant's lawful conduct somehow supported a finding that it was not the prevailing party because it did not remain neutral in the litigation.

E. The trial court abused its discretion in refusing to consider Civil Code §§ 1021 and 1032 and the fact that Appellant prevailed on all the monetary claims entitling it to attorney's fees under the contractual attorney's fees provision.

What Respondents' Brief and the trial court ignored or confuse, is that attorney's fees may be recovered in tort actions pursuant to a

contractual attorney's fees provision. (AOB, pp. 30-36; Code of Civil Procedure § 1021.)

While attorney's fees under Civil Code § 1717 must be "on the contract" (Deed of Trust)[4]; Respondents' Brief ignores that attorney's fees for tort actions only need to be pursuant to a contractual attorney's fees provision broad enough to cover the tort in question. (Code of Civil Procedure § 1021; *Xuereb v. Marcus & Millchap Inc.* (1992) 3 Cal.App.4th 1338, 1341-1345; AOB, p. 32.) Torts generally are not "on the contract" which is why they are "torts"! The contractual attorney's fees clause in the Deed of Trust in the instant case is very broad and applies to ***"any action or proceeding purporting to affect the security hereof or the rights or powers of . . .Trustee***; and to pay all costs and expenses, . . . and attorney's fees in a reasonable sum, ***in any action or proceeding in which . . . Trustee may appear, . . ."*** (AOB, pp. 30-36; 4 CT 723-765 (TAC) and Exh. B at 4 CT 773 ¶ 3 attached thereto; emphasis added.) This contractual attorney's fee provision is broad enough to cover Respondents' tort actions in the instant case. (AOB, p. 32- 36; and see, *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 158.)

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[4] RB, pp. 9-10.

As Respondents admit, under Code of Civil Procedure § 1021, unlike Civil Code § 1717, the contractual attorney's fees provision does not have to be reciprocal. (See, RB, p. 14; *Moallem v. Coldwell Banker Commercial Group, Inc.* (1994) 25 Cal.App.4th 1827, 1832.)

The tort actions within the scope of the contractual attorney's fees provision do not have to be "on the contract". Using the pragmatic approach to determining the prevailing party, there is no doubt that Appellant's litigation objective as to the tort causes of action was to oppose them. It is undisputed that Appellant achieved an unequivocal victory on the all the tort causes of action.

Rather than addressing any of these facts, Respondents argue that the trial court did not fail to consider Code of Civil Procedure § 1021, but "...it simply applied section 1717...because the Torigians prevailed "on the contract". (RB, p. 17.) This response is meritless and fails to respond to Appellant's arguments under *Xuereb v. Marcus & Millchap Inc.* relating to contractual provisions providing for attorney's fees in tort actions. (*Xuereb v. Marcus & Millchap Inc.*, supra, 3 Cal.App.4th 1338; See AOB, pp. 31-35.) Civil Code § 1717 does not control the attorney's fees provision under § 1021.

(1) The Deed of Trust did not expire.

The trial court erred in concluding that the torts were not "on the

contract" because the contract had "expired". (RB, pp. 6, 19-20.) As between the parties, satisfaction of the obligation automatically *extinguishes the lien* of the deed of trust. (See, Civil Code §§ 2903-2905; and see, *Nilson v. Sarment* (1908) 153 Cal.524, 529-530.) The Deed of Trust in the instant case expressly states that it not only secures payment of the $80,000 note but also *"the performance of each agreement of Trustor incorporated by reference or contained herein or reciting it is so secured [i.e., the fictitious deed of trust]"* (4 CT 769-777, Exh. B, at 769.) Thus, even though the lien is extinguished as between the parties after satisfaction or after trustee's sale, other obligations remain under the deed of trust such as the beneficiary's duty to instruct the trustee to reconvey; the trustee's obligation upon such instructions to issue a reconveyance deed; the trustee's duty to dispose of surplus funds after a trustee's sale; and the obligation of the trustor under the broad attorney's fees provision in the deed of trust. (4 CT 769-777, Exh. B. at 773, DOT ¶¶ A(3), B(4), B(6); and see, Civil Code §§ 2924j, 2924k, 2941(b).) One of the two main duties of the trustee under the Deed of Trust and under the comprehensive framework is to reconvey title upon instructions of the beneficiary. Why would anyone write an attorney's fees clause that only covers one-half of the duties of the trustee under the Deed of Trust? Neither *Huckell* nor *Kachlon* held that the satisfaction of the note or extinguishment of the lien

prevented enforcement of the attorney's fees in the deed of trust. (See, AOB, p. 58.) None of the cases cited by Respondents on this issue are on point and none have anything to do with the attorney's fees issue in the instant case. (See, RB, p. 18.) *Nilson v. Sarment*, supra, merely stands for the proposition that when the obligation is paid, the note is satisfied and the lien of the deed of trust is automatically extinguished as between the parties. (*Nilson v. Sarment*, supra, 153 Cal. 524, 529-530.) The purpose of the reconveyance deed is to clear record title as to third parties. (Id.) Nothing in the cases cited by Respondents support the conclusion that for purposes other than extinguishing the lien of the deed of trust (e.g., reconveyance to clear title, surplus funds, attorney's fees), the Deed of Trust no longer exists. (Id.)

The trial court erred in holding that the Deed of Trust had expired and it abused its discretion in failing to apply Code of Civil Procedure §§ 1021 and 1032 to the tort actions upon which Appellant prevailed.

(2) The trial court abused its discretion in not apportioning attorney's fees as costs.

For the reasons set forth above and because the trial court concluded that the Deed of Trust no longer existed for the purpose of awarding Appellant attorney's fees on the tort causes of action it successfully defended, the trial court abused its discretion. (Code of Civil Procedure §

1032).

Citing *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, Respondents assert "[a] trial court is within its discretion to award a prevailing party its attorney's fees without reducing the attorney fee award to represent only fees incurred on contract causes of action, particularly where the tort and contract claims are related . . ." (RB, p. 27.) The instant case is distinguishable from *Abdallah* and most cases dealing with the trial court's discretion to apportion (or refuse to apportion) attorney's fees when contract actions subject to Civil Code § 1717 are inextricably intertwined with actions not covered by the contractual attorney's fee. Unlike the instant case, *Abdallah* never prevailed on the tort causes of action nor did he assert that any of the tort actions were covered by a broad contractual attorney's fees provision. (*Abdallah v. United Savings Bank*, supra, 43 Cal.App.4th 1101, 1005-1006, 1111.) At a minimum, the trial court should have awarded Appellant attorney's fees on the tort causes of action or apportioned attorney's fees awarded to Respondents.

F. Appellant was a party to the contract (the DOT) at the time Respondents sued and, therefore, was entitled to enforce the attorney's fees and costs provision of the Deed of Trust in favor of the trustee.

Without citation of authority, Respondents argue that because Appellant had not substituted in as trustee when it recorded the notice of

default that it "…was not a party to the deed of trust when it committed the acts and omissions the Torigians complained of in their tort claims for slander of title and negligence." (RB, p. 26.) This argument is meritless. Arguments not supported by legal authority may be treated as waived. (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743.) As noted above, many of the procedures that are part of the nonjudicial foreclosure process may be done by a foreclosure agent. (Civil Code §§ 2924(a)(1); 2924a, 2924b(b)&(c).) Appellant substituted in as trustee prior to the lawsuit being filed. There is nothing in the attorney's fees clause in the Deed of Trust that limits the trustee to recovering attorney's fees only for conduct after the substitution of trustee. If the attorney's fees clause in the Deed of Trust were intended to be so limited, it would not have applied to "any action or proceeding."

III. CONCLUSION

Respondents' Brief fails to address many of the arguments made in Appellant's Opening Brief. The trial court erred in failing to consider the trustee separately from the beneficiary and trustor in its determination of the prevailing party under Civil Code § 1717 and under Code of Civil Procedure §§ 1021 and 1032. In addition, for the reasons set forth above the trial court abused its discretion in its determination of the prevailing party in awarding attorney's fees and costs to Respondents and denying

them to Appellant. Appellant respectfully requests that the court of appeal reverse the attorney's fees and costs motions and remand the case back to the trial court.

DATED: December 15, 2014 ADLESON, HESS & KELLY, a PC

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 Defendants and Respondents, 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 6,787 words of the Microsoft Word Program, including footnotes.

DATED: December 15, 2014 ADLESON, HESS & KELLY, a PC

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 December 15, 2014, I served upon the interested party(ies) in the action the foregoing document described as:

RESPONDENT WT CAPITAL LENDER SERVICE'S REPLY BRIEF – CERTIFICATE OF WORD COUNT

[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
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559-445-5491
559-445-5769 FAX
(Original + 4 copies- Via Federal Express w/SASE)

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
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[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 December 15, 2014 at Campbell, California.

TAMMY CLARK
Mail and Federal Express