Hershorin & Henry, LLP
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HERSHORIN & HENRY, LLP
ATTORNEYS-AT-LAW

Legal Update

HERSHORIN & HENRY, LLP OBTAIN AN APPELLATE VICTORY: ESCROW HOLDER IS NOT LIABLE FOR INTERPLEADING ESCROW DEPOSIT ON CANCELLED TRANSACTION; ATTORNEY'S FEES AND COSTS AWARDED TO FIDELITY

1575 Adrian Road Associates LLC ("Seller") entered into a real estate purchase agreement ("Contract") with Paul Leininger ("Buyer"). Fidelity National Title ("Fidelity") served as the escrow holder pursuant to its own escrow instructions. Fidelity was not a signatory to the Contract.

Buyer made a $50,000 deposit ("Deposit") into escrow, but thereafter the Buyer cancelled the transaction and requested the return of the Deposit. Seller refused to sign mutual cancellation instructions to release the Deposit to the Buyer. After Fidelity waited several months for the Buyer and Seller to resolve their dispute, it retained Hershorin & Henry, LLP ("H&H") to interplead the Deposit. In response to the Interpleader Action, the Seller first informed H&H that the Deposit should not be released to the Buyer. The Seller thereafter contended that Fidelity breached the Contract by failing to release the funds to the Buyer. The Buyer and Seller both argued that Fidelity was a party to their Contract, even though Fidelity was not a signatory, because the Contract referenced the escrow.

H&H prevailed in the case on a motion for summary judgment. H&H argued that Fidelity was not

a party to the Contract and that mutual cancellation instructions signed by both parties was required for the release of the Deposit to the Buyer. The Court adopted H&H's analysis and reasoning. The Court found that Fidelity was not a party to the Contract, and that Fidelity had acted prudently by refusing to release the Deposit to the Buyer in light of the Seller refusing to sign mutual cancellation instructions.

After prevailing on the Motion for Summary Judgment, the Court granted H&H's motion for attorneys' fees and costs against the Seller and Buyer under Civil Code § 1717. H&H argued that California law allowed for attorney's fees for the prevailing party under this fact pattern. The Court concluded that even though Fidelity was not a party to the Contract, it was entitled to an award of attorney's fees and costs against both the Buyer and Seller because they both sought to hold Fidelity liable under the Contract for their attorney's fees and costs. Thus, the attorneys' fees provision of the Contract applied equally to Fidelity even though it was not a signatory. The Seller appealed.

On appeal, Lori Hershorin argued and obtained the victory for Fidelity. The Court of Appeal affirmed the lower Court's Order for Attorney's Fees and Costs in full, and awarded additional Costs on appeal.

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Litigation to Watch

California Supreme Court Grants Review of Two Cases Involving a Borrower's Standing to Challenge a Foreclosure Sale on Grounds that the Assignment of Deed of Trust Was Invalid.

Two cases are before the California Supreme Court concerning the issue of whether a borrower has the right to enjoin or attack a foreclosure sale by alleging that the lender lacks standing because of an invalid assignment of the deed of trust. Standing goes to the hart of any civil dispute.

In Yvanova v. *New Century Bank* (2014) 226 Cal. App. 4th 495, the trial court dismissed the borrower's quiet title action seeking to invalidate a foreclosure sale because she alleged the mortgage and deed of trust recorded against her residence were improperly securitized and assigned by the original lender. The defendant lender filed a demurrer to the complaint and the trial court sustained it without leave to amend. Plaintiff appealed. The Second Appellate District in California affirmed the trial court's decision and held that California's non-judicial foreclosure statutes do not grant the borrower the right to challenge a foreclosure sale by attacking the validity of the assignment. The Court of Appeal reasoned that: (1) since a promissory note is a negotiable instrument, the borrower must anticipate that the lender might transfer the loan to another creditor, (2) in the event of a transfer, the borrower's obligations remained unchanged under the note, and (3) since the borrower was not a party to the securitization of the note, she lacked standing to challenge any assignments of the mortgages or deeds of trust on the grounds that the securitization process was invalid. The California Supreme Court granted review.

The second case is Keshtgar v. *U.S. Bank* (2014) 226 Cal. App. 4th 1201, wherein the Second District Court of Appeal held that California's non-judicial foreclosure statutes do not grant a

defaulted borrower the right to enjoin a foreclosure sale by alleging the lender lacks standing. The *Keshtgar* court followed the same court's prior holding in Gomes v. *Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149, but departed from the Fifth District Court's holding in Glaski v. *Bank of America, N.A.*(2013) 218 Cal. App.4th 1079. The California Supreme Court granted review and deferred briefing until it had decided the *Yvanova* case.

Since there are contradictory rulings between two courts of appeal (i.e., *Keshtgar* disagreed with *Glaski*) the conflict makes the Supreme Court's intervention likely, but still difficult to predict. While the *Keshtgar* and *Gomes* decisions are technically correct that the non-judicial foreclosure statutes (Civil Code §§ 2924 through 2924k) do not provide for a judicial pre-foreclosure determination of the standing of the foreclosing lender, nothing in the statutes precludes such determination.

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