Filed 12/28/16 Daaus Funding v. Mironer CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAAUS FUNDING, LLC, Plaintiff and Appellant, v. VADIM JEFF MIRONER et al., Defendants and Appellants.	B263730 (Los Angeles County Super. Ct. Nos. BC469595 & BD398253)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas Trent Lewis, Judge. Affirmed in part and reversed in part.

Dan S. Maccabee for Plaintiff and Appellant.

Garrett & Tully, Ryan C. Squire, Motunrayo D. Akinmurele; Cunningham & Treadwell and James H. Treadwell for Defendants and Appellants.

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After the family court entered an order dissolving a marriage and directing that the family home be sold and its proceeds split between the former spouses, one of those spouses borrowed money from a lender and secured that loan with a deed of trust on the as-yet-unsold family home. The home was subsequently sold to a third party in a family court-approved sale. When the lender did not get full repayment of its loan from the sale's proceeds, the lender and the third party sued each other. On cross motions for summary adjudication and after a bench trial, the trial court held that the lender's lien was valid, that the lender could judicially foreclose on the lien, and that the lien was worth more than $1.9 million by the time of judgment. Both parties appeal. We conclude that the lien is valid and subject to foreclosure, but that the trial court's calculation of the lien amount is partially incorrect. Accordingly, we affirm in part and reverse in part.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. Subject Property

The subject of this litigation is a luxury home on Summit Court in the Beverly Hills Post Office neighborhood of Los Angeles (Property).[1]

B. Marriage and Dissolution Proceedings

John Ohanesian (John) and Adela Gregory Ohanesian (Adela) were married in 1989.[2] In 2001, they acquired the Property and eventually held it as their community property.

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1 The Property has an alternative address on Summit Circle.

In 2003, Adela filed for divorce. In 2007, the family court hearing the dissolution action ordered the spouses to "place[] [the Property] on the market immediately, with the funds received from the sale to be included in the final accounting . . . ." On March 14, 2008, the family court entered an order of dissolution. Because the spouses had not yet sold the Property, the dissolution order provided that "[t]he net proceeds from the sale of the [Property] shall be awarded one-half to [Adela] and one-half to [John]," and "reserve[ed] [the family court']s jurisdiction to resolve any [related] disputes."

C. Loan at Issue

In March 2010, Adela borrowed $775,000 from plaintiff, respondent and cross-appellant Daaus Funding, LLC (Daaus) and secured the loan with a deed of trust on the Property (the lien). She did so without the consent of John or the family court.

In the promissory note memorializing the loan, Adela agreed to prepay $186,000 in interest and to repay the full amount of the loan two years later (on March 31, 2012). The note specified a 12 percent interest rate, but acknowledged that "[u]nder no circumstances shall the interest rate on this note be more than the maximum rate allowed by applicable law." The note contained a due-on-default clause: If Adela did not repay the loan or breached any "representation, warrantee or covenant"—including the promise, contained in the related Loan and Security Agreement, not to transfer the property without Daaus's written consent—Daaus could demand immediate payment of the full loan amount by giving "written notice . . . of

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2 Because they shared the same last name during times pertinent to this litigation, we use John's and Adela's first names. We mean no disrespect.

such default." And upon such default, the interest rate jumped to 20 percent, and "all reasonable costs of collection"—namely, attorney's fees, expenses and court costs—would be added to the principal "when incurred" and would accrue interest at the 20 percent rate. The note also spelled out the specific due-on-sale clause included in the deed of trust to be recorded, as set forth below.

In the Loan and Security Agreement memorializing the lien, Adela represented that she "own[ed] . . . a 50% undivided interest as tenants in common" in the Property. The agreement defined eleven different "events of default," including "[a]ny transfer of the Property . . . without [Daaus's] prior written consent." It also contained a due-on-sale clause that required Adela to "immediately" pay the principal of the loan along with any "reasonable costs and expenses . . . incurred by [Daaus] in connection with the [l]oan" and to pay the higher, 20 percent interest rate on those amounts. The due-on-sale clause was triggered automatically by Adela's bankruptcy or any default on the promissory note, but otherwise took effect "at the option of [Daaus] upon written notice to Borrower."

The deed of trust embodying the lien also contained a due-on-sale clause tracking the language set forth in the promissory note. That clause provided that, should Adela "sell, convey, transfer or dispose of the Property . . . without the written consent of [Daaus], . . . [Daaus] shall have the right, *at its option*, to declare all sums of [money] secured hereby forthwith due and payable." (Italics added)

Because Daaus had received a preliminary title report on the Property, Daaus knew that its lien was subordinate to several other liens on the Property. Believing that the remaining equity

in the Property was sufficient to pay off its lien, Daaus funded the loan to Adela, and she used some of the money to pay off one of her outstanding debts. Daaus recorded the deed of trust at the Los Angeles County Recorder's office on March 31, 2010, and a UCC Financing Statement regarding the lien on April 1, 2010.

Less than two weeks later, on April 13, 2010, John filed an ex parte application alerting the family court to Adela's unilateral encumbrance of the Property. In the application, John sought some of the loan's proceeds but did not seek to void the encumbrance. The family court issued an order on April 14, 2010, "further restrain[ing Adela] from hypothecating the [Property]."

D. Sale of the Property

By October 2010, John had found a prospective buyer for the Property—defendants, appellants and cross-respondents Vadim Jeff and Luba Mironer (collectively, the Mironers). In an order dated October 7, 2010, the family court granted John permission to proceed with the sale for a price of $4.75 million.

The escrow agent for the sale sent a letter to Daaus explaining that "the encumbrance you hold on the [Property] is to be paid in full through this escrow" and asking Daaus to reconvey its security interest on the Property. Following the escrow agent's assurance that Daaus would be "paid in full" and "conditioned on full payment of [its] loan," Daaus on October 27, 2010 executed a full reconveyance.

In an order dated December 14, 2010, the family court issued an updated order dictating how the proceeds from the upcoming sale of the Property would be distributed. As pertinent here, the court divided the $4.75 million in proceeds evenly between John and Adela, ordered that seven of Adela's secured

creditors be paid immediately from her half of the proceeds, and ordered that the remainder of Adela's half of the proceeds be placed in a blocked account for Adela's remaining seven secured creditors. Although Daaus was never made a party to the family law proceeding disposing of the Property either by summons or a complaint in joinder, the family court "deemed" Daaus to be a claimant and included it in the group of secured creditors to be paid from the blocked account. The family court set a further hearing for January 19, 2011, "to resolve issues regarding payment of the" secured creditors who would be splitting the funds in the blocked account.

Escrow closed on the Property on December 30, 2010. The Mironers took title to the Property in the name of their family trust. The closing statement in escrow indicated that Daaus would receive a "loan payoff" of $45,576 (for its $775,000 loan), but Daaus was not immediately disbursed that amount.

Following the hearing on January 19, 2011, the family court ordered that the funds in the blocked account be distributed first to Adela's six secured creditors with higher priority liens, with "the remaining balance . . . to Daaus."[3] That balance of $269,503.84 was not enough to pay off Daaus's lien, and the funds remained in a sequestered account until April 2015.

On January 26, 2011, Daaus gave written notice to Adela that it was invoking the due-on-sale clause. Around the same time, Daaus recorded two documents with the Los Angeles County Recorder's office purporting to reinstate its lien. On January 18, 2011, Daaus recorded an Affidavit and Notice of Erroneous Deed of Reconveyance stating that its prior

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3 The family court issued an amended order on May 31, 2011, but that order did not make any changes pertinent to this appeal.

reconveyance of its lien was conditioned upon full payment of its lien and that the condition was not met. And on the same basis, Daaus on February 16, 2011, recorded a Rescission of Reconveyance and Reinstatement of the Deed of Trust as Though the Reconveyance Had Never Been Issued and Recorded.

II. Procedural History

In September 2011, Daaus sued the Mironers for (1) declaratory relief, (2) quiet title, (3) judicial foreclosure, (4) rescission of its deed of reconveyance, and (5) an equitable lien. The Mironers filed a cross-complaint for (1) declaratory relief, and (2) quiet title.

The parties filed cross-motions for summary judgment and/or summary adjudication. After a further round of supplemental briefing, the trial court ultimately granted Daaus's motion on its declaratory relief, quiet title, rescission and equitable lien claims; the court denied the Mironers' motion.[4] In its 16-page written order, the trial court concluded that Daaus's lien was valid. Specifically, the court ruled that the Mironers did not take the property free and clear of Daaus's lien because (1) they were not bona fide purchasers for value, as they knew about Daaus's lien and their agent, the escrow officer, did not fulfill his promise to pay off Daaus's lien in full, and (2) the family court never joined Daaus to the dissolution proceeding and, without its involvement as an indispensable party, lacked the power to extinguish Daaus's lien. The court also ruled that Daaus's lien was not void from the start because (1) Adela held

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4 The trial court initially granted summary *judgment* to Daaus, including on Daaus's judicial foreclosure claim, but subsequently vacated that portion of its ruling and, as described below, proceeded to trial on that claim.

the Property as a tenant in common when she took out Daaus's loan, and (2) only John had the standing to set aside the encumbrance, and he never elected to do so. The court further rejected the Mironers' equity-based arguments, noting that *they*—not Daaus—"were the last persons available to delay the purchase transaction."

The parties proceeded to a bench trial on Daaus's judicial foreclosure claim, primarily to fix the value of Daaus's lien. The trial court ruled that the lien's value included: (1) the full $775,000 of the loan's principal; (2) prejudgment interest on that principal, calculated from the promissory note's March 31, 2012 due date at the 20 percent default interest rate; (3) a late fee of $77,500 on which no prejudgment interest would accrue; and (4) attorney's fees of $444,375 and costs of $8,190.71 that would be awarded as of the date of judgment. These amounts came to $1,916,850.49 as of March 2, 2015, the date of judgment. After giving notice to Adela, the court applied the sequestered funds against the total amount of the judgment. The court then ruled that postjudgment interest would accrue at the 20 percent default interest rate. The court lastly ruled that the Mironers were not *personally* liable for the attorney's fees award.

After the trial court entered judgment, both the Mironers and Daaus appealed.

DISCUSSION

The Mironers' appeal and Daaus's cross-appeal present two questions: (1) is Daaus's lien enforceable, and if so, (2) what is its value, and may the attorney's fees portion of the lien also be collected from the Mironers personally?

The trial court resolved the question of enforceability by summarily adjudicating Daaus's claims for declaratory relief,

quiet title, an equitable lien and rescission. (Accord, *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582 [declaratory relief adjudicates "rights or duties with respect to property"]; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010 [quiet title adjudicates "claims to the title" of property]; *County of Los Angeles v. Construction Laborers Trust Funds for Southern California Admin. Co.* (2006) 137 Cal.App.4th 410, 414-415 [equitable lien adjudicates right to payment of a debt by placement of a lien on property]; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 281-282 [rescission adjudicates contracts based on unilateral mistakes of fact].) In reviewing an order summarily adjudicating a claim, we ask whether there are any "triable issue[s] of material fact"—that is, whether "the evidence reasonably permits the [court] to find the contested fact in favor of the [losing party] in accordance with the applicable standard of proof." (*Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1373-1374.) We do not defer to the trial court in answering this question. (*Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052, 1057.)

The trial court resolved the question of valuation following a bench trial. In reviewing its ruling, we review the court's factual findings for substantial evidence and ask only whether the evidence, viewed in the light most favorable to the ruling, was sufficient for a rational trier of fact to reach the verdict it did. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720 [damages awards reviewed for substantial evidence].) We review any attendant legal questions—including the meaning of contracts, the interpretation of statutes, and questions of federal preemption—de novo. (*Findleton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1205 [contract interpretation

where no extrinsic evidence exists]; *John v. Superior Court* (2016) 63 Cal.4th 91, 95-96 [meaning of statutes]; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 [federal preemption]; see generally *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 956 [legal questions reviewed de novo].)

I. Enforceability of Daaus's Lien

The Mironers assert that there are triable issues of fact as to whether Daaus's lien is enforceable. Specifically, they argue (1) they are bona fide purchasers for value, and accordingly took the Property free and clear of Daaus's lien, (2) Daaus forfeited its right to enforce its lien because it engaged in inequitable or negligent misconduct, and (3) Daaus's lien was void from the start.

A. Bona Fide Purchaser for Value

A bona fide purchaser for value "receives title [to property] free and clear of [any prior] lien." (*Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 530; see generally Civ. Code, §§ 1107 ["[e]very grant of an estate in real property is conclusive . . . against every one subsequently claiming under him, except a purchaser . . . who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded"] & 1214 ["[e]very conveyance of real property . . . is void as against any subsequent purchaser . . . of the same property . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded"].) To qualify as a bona fide purchaser, the buyer must "(1) purchase the property in good faith for value, and (2) have no knowledge or notice of the asserted rights of another." (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1251 (*Melendrez*),

italics omitted; *Triple A*, at p. 530; *RNT Holdings, LLC v. United General Title Ins. Co.* (2014) 230 Cal.App.4th 1289, 1296.) With respect to the second element, knowledge or notice may be actual or constructive. (*RNT Holdings*, at p. 1296.) A person is deemed to have *actual* "knowledge or notice" of a fact if he has "'knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact. [Citations.]'" (*Melendrez*, at p. 1252, quoting *First Fidelity Thrift & Loan Assn. v. Alliance Bank* (1998) 60 Cal.App.4th 1433, 1443.) A person is conclusively presumed to have *constructive* "knowledge or notice" of any facts contained in documents "'recorded as prescribed by law.'" (*First Bank v. East West Bank* (2011) 199 Cal.App.4th 1309, 1314; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 436-437 (*Marriage of Cloney*); Civ. Code, § 1213 [providing that a recorded document "is constructive notice of the contents thereof"].)

The undisputed facts in this case establish that the Mironers were not bona fide purchasers because they had both actual and constructive knowledge or notice of Daaus's lien. They had actual knowledge because the escrow agent—who is, under the law, the Mironers' agent—knew of Daaus's lien because he wrote a letter to Daaus regarding its lien and in response received Daaus's "demand" for payment of its lien. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1101 ["[e]scrow agents are dual agents"]; *Marriage of Cloney*, *supra*, 91 Cal.App.4th at p. 440 & fn. 10 ["'[w]hen the escrow agent is the dual agent for both parties, the knowledge of the escrow agent regarding matters within the same escrow is imputed to both parties to the escrow'"]; see generally *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288 [agent's knowledge imputed to principal].)

The Mironers also had constructive knowledge because Daaus recorded both the deed of trust and the UCC financing statement. (Civ. Code, § 1213.)

The Mironers resist this conclusion with three arguments.

First, the Mironers acknowledge that they may have known about Daaus's lien, but assert that they lacked any knowledge or notice that Daaus's lien "would *continue* to encumber [the Property] . . . *after* they closed escrow." We reject this argument for several reasons. To begin, the Mironers' argument ignores that the test for assessing whether a buyer qualifies as a bona fide purchaser focuses on the purchaser's knowledge or notice of "the asserted rights of another" (*Melendrez*, *supra*, 127 Cal.App.4th at p. 1251)—*not*, as the Mironers seem to suggest, the purchaser's belief as to whether those rights might be extinguished by the purchase itself.

Even if we departed from precedent and looked to whether the Mironers believed Daaus's lien would survive escrow, it is undisputed that the escrow agent—and hence the Mironers—knew that Daaus's reconveyance was conditioned on full payment of its lien and also knew, prior to and at the close of escrow, that there was not enough money left to make that full payment. If the Mironers truly believed that the close of escrow would extinguish Daaus's lien under these circumstances, that belief was unreasonable. Indeed, even the case the Mironers cite for the proposition that courts should give extra "sanctity" to court-ordered property sales holds that a party to a lawsuit over that property has "actual notice of the pending proceeding and therefore takes any interest acquired subject to the judgment rendered." (*Arrow Sand & Gravel, Inc. v. Superior Court* (1985) 38 Cal.3d 884, 888-889.)

Further, and regardless of the Mironers' belief on this point, the family court lacked the power to extinguish Daaus's lien because it never joined Daaus to the proceeding regarding the disposition of the Property. (See *In re Marriage of Ramirez* (2011) 198 Cal.App.4th 336, 345 ["a lienholder is an indispensable party to a foreclosure action" and "[a]n order rendered without an indispensable party is void as to that party"]; *Castle v. Schulman* (1948) 32 Cal.2d 222, 225 ["persons having an interest in the property actually or constructively known are not affected by the judgment unless they have been joined in the action"]; Code Civ. Proc., § 389 [defining "indispensable" parties generally].) The Mironers assert that this authority has been trumped by California Rules of Court, rule 5.24(e)(2), and by Family Code section 2021, subdivision (a), which indicate that a family court "may" join interested or indispensable parties to family court proceedings. But those authorities do not speak to the consequences of failing to do so. We decline to interpret their silence on this point as an sub silentio overruling of the long-standing jurisdictional principle, noted above, that has for decades been enshrined in both statutory and decisional law.

Second, the Mironers argue that their position is supported by *J. H. Trisdale, Inc. v. Shasta County Title Co.* (1956) 146 Cal.App.2d 831. The issue in *Trisdale* was whether a buyer of property could sue a title insurance company for breach of contract and negligence when the company misreported who owned an easement on the property. (*Id.* at pp. 835-837.) The court held that the action could proceed, and that the buyer's "constructive notice" of the true easement holder was not a bar to the action. (*Id.* at pp. 837-839.) *Trisdale* does not address—let

alone modify—the test for assessing whether a buyer of property qualifies as a bona fide purchaser vis-à-vis a lienholder.

Lastly, the Mironers cite language indicating that "the issue of whether a buyer is a [bona fide purchaser] is a question of fact." (*Melendrez*, *supra*, 127 Cal.App.4th at p. 1254.) However, "where," as here, "relevant facts are not in dispute[,] such questions may be decided as a matter of law in a summary judgment proceeding." (*Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 28.)

B. Daaus's Forfeiture of Right to Enforce Lien

The doctrines of equitable estoppel, laches and unclean hands can bar a litigant from asserting its rights in court if that litigant has engaged in inequitable or negligent conduct. (See *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1097-1098 [equitable estoppel will estop party who was "aware of the operative facts" and allowed another person "unaware of the facts" to be misled by its failure to disclose them]; *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.* (1960) 54 Cal.2d 773, 778-779 [equitable estoppel requires proof of "careless and culpable conduct" that is "equivalent to an intent to deceive"]; *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1157 [laches requires proof of unreasonable or inexcusable delay in asserting a right or claim]; *Stine v. Dell'Osso* (2014) 230 Cal.App.4th 834, 844 [unclean hands requires proof that "'principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim'"].) In a similar vein, Civil Code section 3543 codifies "an estoppel theory" and provides that, as between two innocent victims, the more negligent of the two should be the one who suffers the loss. (Civ. Code, § 3543 ["[w]here one of two innocent persons must suffer by

the act of a third, he, by whose negligence it happened, must be the sufferer"]; *South Beverly Wilshire Jewelry & Loan v. Superior Court* (2004) 121 Cal.App.4th 74, 81.)

The Mironers argue that Daaus engaged in four instances of inequitable or negligent conduct that, individually or collectively, should preclude it from enforcing its lien against the Property.

First, the Mironers assert that Daaus violated the law when it encumbered the Property because Adela—as a party to a dissolution proceeding—was at that time prohibited by the Family Code from transferring any property without a court order or without the written consent of "the other party," both of which were lacking when she offered up the Property as security for Daaus's loan. (Fam. Code, § 2040, subd. (a).) What the Mironers overlook is that this statutorily mandated restraining order starts when a dissolution complaint is served and, most critically here, *ends* when "the final judgment is entered." (Fam. Code, §§ 231, subd. (a) & 233, subd. (a).) Accordingly, the statutorily mandated restraining order did not apply to Adela's encumbrance in 2010, which took place two years after the family court entered its 2008 order of dissolution.

Second, the Mironers contend that Daaus violated two court orders—namely, (1) the trial court's order prohibiting Adela from "further . . . hypothecating" the Property, and (2) an earlier 2009 family court order prohibiting Adela from taking out a $200,000 loan if John could be personally liable for its repayment. Again, the Mironers overlook that the anti-hypothecating order was entered *after* Daaus perfected its lien, and that the lien did not violate the 2009 order because it did not purport to affect John's interest in the family home.

Third, the Mironers observe that Daaus knew its lien was junior to others when it loaned Adela money. However, this observation is of no consequence because the fact that Daaus's lien is subordinate to others does not mean it is unenforceable.

Lastly, the Mironers argue that Daaus knew that John was selling the Property to them but did not intervene to assert its rights in the family court proceeding and instead "chose to lie-in-wait," even as the family court elected not to use John's equity in the Property to pay off Daaus's lien.[5] We reject this argument for several reasons. As a factual matter, Daaus was not lackadaisical about its rights. Until the December 2010 family court order, Daaus had no *reason* to intervene because the escrow agent had assured it full payment of its lien. And once it became evident that the escrow agent was wrong, Daaus took action to reverse its earlier reconveyance by recording two documents to that effect. What is more, Daaus knew that *the Mironers* actually and constructively knew about its lien and that the Mironers would accordingly take the property subject to the lien. As a legal matter, defendant had no *duty* to intervene. Our Supreme Court has rejected the notion that a party with actual knowledge of a proceeding "require[s] it to intervene or [else] be bound by any judgment" from that proceeding. (*Holt Mfg. Co. v. Collins* (1908) 154 Cal. 265, 274; *Motores de Mexicali v. Superior Court* (1958) 51 Cal.2d 172, 176 [a nonparty with actual knowledge of an action is "under no duty to appear and defend personally in

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5 The Mironers requested that we take judicial notice of matters outside the trial record demonstrating Daaus's knowledge of the family court proceeding. We previously denied that motion. And, as explained below, Daaus's knowledge is of no consequence anyway.

that action, since no claim had been made against [it] personally"].) Moreover, to the extent the Mironers are collaterally attacking the family court's decision not to pay off Daaus's loan with John's equity, they "may not collaterally attack a final judgment for nonjurisdictional errors." (*Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854.)

C. Validity of Daaus's Lien From the Outset

The Mironers offer two reasons why Daaus's lien was void from the beginning.

First, they assert that Daaus's lien purported to encumber Adela's "50% undivided interest as tenants in common" in the Property, that the property was held as community property, not a tenancy in common, and that Daaus's lien is accordingly void because its lien attached to a nonexistent property interest. This argument lacks merit because its premise—that the Property was held as community property at the time Daaus created the lien in 2010—is wrong. Although the Property was certainly held by John and Adela as community property while they were married (e.g., Fam. Code, § 760), the family court's 2008 dissolution order ended the marriage, and when that "community" ended, the "spouses [became] tenants in common of the community property." (*Stewart v. Stewart* (1928) 204 Cal. 546, 555-556; *In re Marriage of Dorris* (1984) 160 Cal.App.3d 1208, 1215; see generally *Wilson v. Wilson* (1948) 33 Cal.2d 107, 113 ["on dissolution of the marriage the community is terminated"].) Both the escrow instructions used to establish Daaus's lien and the family court at the April 2010 hearing regarding John's ex parte application attacking that lien acknowledge that the Property was no longer held as community property. The Mironers point to the family court's subsequent October 2010 order authorizing

John to sell the Property, which instructs that the Property be conveyed to the Mironers from John and Adela, "Husband and Wife, as community property." However, the court's recitation merely reflects how ownership of the Property was then-reflected in the chain of title; it did not—and, indeed, could not—convert the Property back to community property when there was no longer any community in existence.

Second, the Mironers posit that John could have asked the family court to void Daaus's lien as an invalid encumbrance under Family Code section 1102. (See Fam. Code, § 1102, subd. (a) [requiring "both spouses" to "join in executing any instrument" affecting "community real property"].) This argument is doubly invalid: The Property, as noted above, was not "*community* real property" at the time Adela encumbered it; and even if it were, encumbrances in violation of Family Code section 1102 "are not void, but voidable, and this only at the instance of the other spouse . . . ." (*Clar v. Cacciola* (1987) 193 Cal.App.3d 1032, 1036.) Because John did not elect to void Daaus's lien, it is neither void nor voided.

II. Value and Enforceability of Daaus's Lien

In the appeal and cross-appeal, the Mironers and Daaus raise a number of issues regarding the amount of Daaus's lien as well as against whom it may be collected. We will address these issues by topic.

A. Accrual of Prejudgment Interest

1. Amount of principal

The trial court ruled that prejudgment interest would accrue on the full amount of principal of Daaus's loan (that is, $775,000). The Mironers argue that the trial court should have reduced the amount of principal due (and on which prejudgment

interest would accrue) by $269,503.84 because the family court had set that amount aside for payment of Daaus's loan in January 2011. We disagree. The "purpose . . . of prejudgment interest . . . is to provide just compensation to the injured party for the loss of use of the award during the prejudgment period." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663.) Because the $269,503.84 sequestered *for* Daaus was also sequestered *from* Daaus, Daaus never had the use of that money and prejudgment interest was appropriately awarded on that sum.

2. Date on which prejudgment interest would begin to accrue on principal

The trial court ruled that prejudgment interest would begin to accrue on the principal as of March 30, 2012, the date Daaus's two-year promissory note came due. Daaus argues that, in light of the due-on-sale clauses contained in the note, the Loan and Security Agreement and the deed of trust, the court should have started the accrual on December 30, 2010, the date on which the Property was sold to the Mironers. To resolve this question, we must decide (1) whether the due-on-sale clause must be conclusively presumed to apply because the Mironers lack standing to argue otherwise, (2) whether any invalidity of the due-on-sale clause under California law is irrelevant because federal law preempts state law to the contrary, and (3) whether Daaus properly invoked the due-on-sale clauses.

a. The Mironers' standing to contest the applicability of the due-on-sale clause

Daaus argues that the Mironers lack standing to contest any of the provisions of its lien because they were not parties to any of the agreements creating it. For support, Daaus draws on the rules that (1) a borrower cannot sue for wrongful foreclosure

based on a wrongful prior assignment of his lien unless the assignment was void (rather than voidable), *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 923-924 (*Yvanova*), and (2) an assignee of a loan cannot assert a defense of usury if he was not the original borrower (e.g., *Roes v. Wong* (1999) 69 Cal.App.4th 375, 379-380).

We reject this argument for two reasons. To begin, the rules Daaus cites stand, at most, for the proposition that a third party to a transaction has standing to attack that transaction only if she does so on the grounds it is void; that the transaction may have been voidable is insufficient to confer standing. (*Yvanova*, *supra*, 62 Cal.4th at pp. 923-924 [so holding]; *Roesch v. De Mota* (1944) 24 Cal.2d 563, 574 [a usurious contract is "voidable," not "void"].) Here, the Mironers contend that the due-on-sale clause is invalid because it is preempted by federal law—that is, it is void. The Mironers have standing to make this claim. Further, in this circumstance, we have an independent duty to assess whether Daaus has established its entitlement to relief. Courts do not award relief to a litigant just because no one is there to oppose it. (See *Nickell v. Matlock* (2014) 206 Cal.App.4th 934, 947 ["the plaintiff is not automatically entitled to judgment in its favor"].) Indeed, even in cases of default, the plaintiff-litigant "must [still] produce evidence at the default prove-up, or judgment will be denied." (*Harbour Vista, LLC v. HSBC Mortgage Services Inc.* (2011) 201 Cal.App.4th 1496, 1503, fn. 6.)

b. Validity of due-on-sale clause

In 1982, Congress passed a law pronouncing that "a lender may . . . enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan." (12 U.S.C. § 1701j-3(b)(1).) By its express terms, the law preempts any state law "to the contrary." (*Id.* [mandate applies "[n]otwithstanding any provision of the constitution or law (including the judicial decisions) of any State to the contrary"]; *Lucas v. Jones* (1983) 148 Cal.App.3d 1008, 1012 (*Lucas*) [so holding]; *Gutzi Associates v. Switzer* (1989) 215 Cal.App.3d 1636, 1643, fn. 5.) The federal law accordingly displaced prior California decisional law declaring due-on-sale clauses to be invalid restraints on the alienation of property barred by Civil Code section 711. (*Lucas*, at p. 1010 [noting how the federal law overturned *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943].)

The Mironers nevertheless argue that the due-on-sale clauses in the promissory note, Loan and Security Agreement and deed of trust are invalid because (1) the federal law mandating the validity of such clauses does not apply to non-institutional, private lenders, and (2) the clauses do not meet the requirement, set forth in Civil Code section 2924.5, that any due-on-sale clause regarding residential property be set forth "in its entirety" in both the deed of trust *and* the "promissory note or other document evidencing the secured obligation." We reject the Mironers' first argument because the federal law applies to due-on-sale clauses in loans made by non-institutional, private lenders. (E.g., *Casa Grande, Inc. v. Minnesota Mut. Life Ins. Co.* (1984) 596 F.Supp. 1385, 1391 [so holding]; *Weiman v. McHaffie* (Fla. 1985) 470 So.2d 682, 683-684 [same].) The trial court cited *Lucas* in support of its ruling that the federal law did not apply,

but *Lucas* relied upon a provision of the federal law preserving earlier California law for a brief "window" of time (*Lucas*, *supra*, 148 Cal.App.3d at pp. 1010-1012); because that window closed decades before Daaus made its loan in this case, *Lucas* is inapplicable. We reject the Mironers' second argument because the federal law preempts Civil Code section 2924.5 and because its requirements are in any event satisfied given that the due-on-sale clauses set forth in the promissory note and the deed of trust are substantively identical.

c. Proper invocation of the due-on-sale clause

Where a lender has the *option* whether to invoke a due-on-sale clause, the clause is not triggered "'until the creditor, by some affirmative act, manifests [its] election to declare the entire sum due.'" (*Garver v. Brace* (1996) 47 Cal.App.4th 995, 1000.) Both of the due-on-sale clauses at issue in this case were optional on the facts of this case: The promissory note and the deed of trust required Daaus to give "written notice," and the Loan and Security Agreement required Daaus to give "written notice to the Borrower," at least for a default based upon the unauthorized sale of the Property. Daaus knew that the Mironers were purchasing the Property, but did not give them written notice of its intention to invoke either due-on-sale clause. Instead, Daaus gave written notice to *Adela* on January 26, 2011; recorded two documents that purported to rescind its earlier reconveyance but said nothing about the due-on-sale clause; and sued the Mironers for judicial foreclosure on September 15, 2011.

The parties dispute whether Daaus properly invoked either due-on-sale clause, and their dispute tees up the following questions: When a lender knows a third party is purchasing a property subject to a security agreement containing an optional

due-on-sale clause and when that third party is not also assuming the security agreement, does the lender properly invoke the due-on-sale clause (1) by following the procedures for invocation specified in the loan documents (in this case, by notifying the original borrower), (2) by recording documents that do not invoke the due-on-sale clause, or (3) by suing the third party for judicial foreclosure?

We conclude that the answer to the first question is "yes," and accordingly need not reach the remaining two questions. The plain language of the due-on-sale clause in the Loan and Security Agreement, and the clear implication of the clauses in the promissory note and the deed of trust, requires Daaus to give notice to Adela as the "Borrower." We derive a contract's meaning first and foremost from its plain language (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288 (*Hartford*)), and Daaus complied with the requirements of that language. The Mironers argue that the deed of trust requires notice to the *trustee*, not the *borrower*, and contend that the Mironers never informed the trustee. But the provision the Mironers cite details what procedures Daaus "may" follow in order to pursue a non-judicial foreclosure after default; it does not purport to limit Daaus's remedies to that option or to export the notice requirements for non-judicial foreclosure into any other context. Here, Daaus is not pursuing non-judicial foreclosure; the Property's sale was pursuant to a court order. More to point, the default here was due to an unauthorized transfer of the Property, and the deed of trust specifically and expressly provides that Daaus has a right to invoke the due-on-sale clause "at its option"; and as discussed above, we construe that clause to require notice to the borrower because any other interpretation would create an

inconsistency between the three documents memorializing the lien.

To be sure, the plain language is not the end of the analysis. We must also interpret a contract's language "'in context [and] with regard to its intended function' [citation]" (*Hartford*, *supra*, 59 Cal.4th at p. 288), and must refuse to enforce a contract's plain language when it leads to "'absurd results'" (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1178). We agree that our conclusion that Daaus validly invoked the due-on-sale clause by notifying *Adela* (but not the *Mironers*) makes it possible for Daaus to silently and secretly accelerate the accrual of interest and thereby increase the amount of its lien. That is because, under our interpretation, Daaus was not required to give notice of its invocation of the due-on-sale clause to the Mironers, even though Daaus knew they owned the Property and even though the Mironers had the greatest incentive to halt that acceleration and increase by paying off the loan immediately. What is more, this result is in some tension with the function of due-on-sale clauses generally, which is to empower lenders to call in a debt when their security is being transferred to a riskier third party—not to empower lenders to quietly accrue interest from an earlier date and at a higher rate. (*Garber v. Fullerton Sav. & Loan Assn.* (1981) 122 Cal.App.3d 423, 428.)

However, interpreting the contracts to require Daaus to give notice of its invocation of the due-on-sale clause to the Mironers (rather than to Adela) would lead to even more absurd results. This interpretation would establish a rule that rewrites due-on-sale clauses, but does so only if the lender knows the identity of the third party transferee. (After all, a lender can only

be required to notify a third party transferee if the lender knows the transferee's identity.) This interpretation would also mean that the amount of the *security* would be different (and less) than the amount of the *debt* the security is designed to secure whenever the lender notifies the original borrower but not the third party transferee of its invocation of the due-on-sale clause; in that instance, the amount of the *debt* would ostensibly be accelerated, but the amount of the *security* would not. (See *Winnett v. Roberts* (1986) 179 Cal.App.3d 909, 922 [payment of debt entitles party to reconveyance of deed of trust because the debt and security are the same]; Civ. Code, § 2941, subd. (b)(1) [so noting].) And, relatedly, this interpretation would potentially lead to two different accrual dates for lawsuits to enforce the debt vis-à-vis its security, with the former becoming due upon invocation of the due-on-sale clause and the latter not becoming due until the end of the loan's term. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 488 ["[a] cause of action for breach of contract does not accrue before the time of breach"]; *Van Noy v. Goldberg* (1929) 98 Cal.App. 604, 609 [no breach of contract until debt is due].)

Consequently, we conclude that Daaus invoked the due-on-sale clause on January 26, 2011, the date it gave notice to Adela of its intention to do so. We decline Daaus's invitation to use the date the Property was transferred (December 30, 2010) because the due-on-sale clauses for unapproved transfers took effect at Daaus's option, and Daaus did not exercise that option until it notified Adela. We also decline to import the promissory note's requirement of a 10-day grace period because that requirement appears to pertain to defaults that can be "cure[d]" within that period and because that requirement is inconsistent with the

due-on-sale clauses in the deed of trust or in the Loan and Security Agreement, neither of which have a similar grace period.

The Mironers offer two arguments in response. First, they assert that the due-on-sale clauses do not apply because the Property was transferred pursuant to a court order, not through a sale initiated by Adela. However, the plain language of the due-on-sale clauses does not hinge on who initiated the unapproved transfer. Second, the Mironers argue that they should not be assessed the full 20 percent interest rate until the end of the two-year term of the promissory note because, prior to that time, they had already prepaid interest for the entire term at the 12 percent rate. We agree. The due-on-sale clauses provide for an increase in the interest rate from 12 percent to 20 percent, not a further increase of 20 percent on top of whatever has already been paid in interest. Consequently, Daaus is only entitled to an additional eight percent interest on the principal balance from January 26, 2011 through March 30, 2012, and 20 percent interest thereafter until the time judgment was entered.

3. Late fee

The trial court ruled that Daaus was entitled to have the 10 percent late fee of $77,500 added to the lien amount, but held that no interest was to accrue on that amount. The Mironers argue they should not have to pay the late fee at all because it is an unlawful penalty. Daaus contends that the Mironers cannot contest the late fee and, in any event, should have to pay 20 percent interest on the late fee. The Mironers may contest the late fee because they are, as detailed below, arguing that it is void as a matter of public policy. (*Western Camps, Inc. v. Riverway Ranch Enterprises* (1977) 70 Cal.App.3d 714, 725 [noting that Civil Code section 1670 "is an expression

of . . . public policy"].) As discussed above, the Mironers have standing to attack a provision as void. We further determine that the late fee is invalid.

As relevant here, a liquidated damages provision is valid "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671, subd. (b).) A provision is "unreasonable" "if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1115.) A provision is "unreasonable" and is accordingly invalid if it (1) "is measured against the unpaid balance of the loan" (*Ridgley*, at p. 978), or (2) it works in conjunction with "an enhanced interest rate in the event a payment is not made on time" (*Poseidon Development*, at p. 1115; *In re Market Center East Retail Property, Inc.* (Bankr. D.N.M. 2010) 433 B.R. 335, 363 [same]). Under these criteria, the 10 percent late fee in this case is unreasonable because it is *both* "measured against the unpaid balance of the loan" *and* accompanied by an enhanced interest rate. The trial court stated that it would "constru[e]" the late fee "to be a late fee, not a penalty, not a liquidated damages provision," but did not on the record undertake any analysis of the late fee under the case law set forth above. Because the case law dictates that the late fee is

an impermissible liquidated damages provision, it should not be added to the value of Daaus's lien.[6]

4. Interest on attorney's fees and costs

The trial court ruled that interest would accrue on its award of attorney's fees and costs as of the date the court entered judgment. Daaus argues that both the promissory note and the Loan and Security Agreement provide that interest should accrue on those awards as of the date they were "incurred." We disagree. As a general rule, "interest ordinarily begins to accrue on the prejudgment cost and attorney fees portion of the judgment . . . upon entry of judgment." (*Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 137-138 (*Lucky United*).) This makes sense. It is not until a court fixes the amount of attorney's fees and costs—that is, it determines who is the prevailing party and, as to attorney's fees, decides whether they are "reasonable" and decides whether to apply a multiplier—that the amount of the award is known and is, in any meaningful sense, "incurred." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1101 ["'[r]easonable attorney's fees shall be fixed by the court'"]; Civ. Code, § 1717, subd. (a) [providing for award of "reasonable attorney's fees"]; Code Civ. Proc., §§ 1032 & 1033.5 [allowing for costs].) It is impossible to calculate interest on an unknown amount. And even if it were possible, Daaus's suggestion that interest accrues on attorney's fees or costs from the time an attorney bills for her time or from the time a court fee is paid would require interest to be calculated on an amount that would ostensibly change from day-to-day.

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6 Given this conclusion, we need not consider Daaus's further argument regarding the accrual of interest on the late fee.

In response, Daaus asserts that it is seeking "attorneys fees qua *indebtedness*" rather than "attorneys fees qua *attorneys fees*," and that prevailing party status is not a prerequisite to the former. Daaus is wrong that a finding of prevailing party status is not required to recover costs (Code Civ. Proc., § 1032) or to recover attorney's fees under a contract, as Daaus is (Civ. Code, § 1717, subd. (a)). The calculation of those amounts is also required. Thus, we decline to draw the distinction Daaus urges upon us. Daaus goes on to cite a number of cases for the proposition that courts can add attorney's fees to the amount of principal; however, these cases do not speak to—and thus do not support—Daaus's further contention that interest must accrue on the attorney's fees from the moment the attorney provides his bill rather than at the time the amount of fees is fixed by the court in a judgment. (*Buck v. Barb* (1983) 147 Cal.App.3d 920, 925; *Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1511-1512 & fn. 10; *Bruntz v. Alfaro* (1989) 212 Cal.App.3d 411, 421; *De la Cuesta v. Superior Court* (1984) 152 Cal.App.3d 945, 948-949; *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 547.)

B. Postjudgment Interest Rate

The trial court ruled that Daaus was entitled to postjudgment interest at the default rate of 20 percent, and that it would accrue on the awards of attorney's fees and costs. The Mironers contend that (1) no interest should accrue on the amounts of attorney's fees and costs, and (2) the maximum postjudgment interest that should accrue on the remaining balance of the judgment is 10 percent.

The Mironers' first contention lacks merit. Both the promissory note and the Loan and Security Agreement expressly

provide that any attorney's fees and costs shall be added to the outstanding balance and subject to the default interest rate. And, as noted above, case law supports the accrual of interest on these amounts from the date of judgment. (*Lucky United*, *supra*, 185 Cal.App.4th at pp. 137-138.)

The Mironers' second contention is sound. Although the legality of the 20 percent interest rate under the Enforcement of Judgments Law, Code of Civil Procedure section 680.010 et seq., turns on whether the trial court's judgment is a "money judgment" (Code Civ. Proc., § 685.010, subd. (a); *Lucky United*, *supra*, 185 Cal.App.4th at pp. 137-138 [so noting]), the California Constitution caps the lawful, postjudgment interest rate at 10 percent—no matter what type of judgment is at issue. (Cal. Const., art. XV, § 1; *Hyundai Securities Co., Ltd. v. Lee* (2015) 232 Cal.App.4th 1379, 1390 ["Article XV, section 1 of the California Constitution . . . limits postjudgment interest to 10 percent"].) The 20 percent interest rate the trial court assessed exceeds this constitutional limit.[7]

C. The Mironers' Personal Liability for Attorney's Fees

The trial court ruled that its award of attorney's fees to Daaus would be added to the amount of the lien, but declined to hold the Mironers personally liable for those fees. Daaus argues that this ruling is in error (1) because, under *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309 (*Saucedo*), it would have been liable to pay the Mironers' attorney's fees if they had

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7 In light of this conclusion, we need not decide whether an order fixing the value of a lien in a judicial foreclosure action constitutes a "money judgment" within the meaning of the Enforcement of Judgments Law.

prevailed, and (2) because Civil Code section 1717 requires that liability go both ways, so that the Mironers should be deemed personally liable to Daaus, as the prevailing party, for attorney's fees. We reject this argument.

Civil Code section 1717 creates an exception to the American rule that parties bear their own attorney's fees because that statute authorizes courts to enforce contractual provisions that award attorney's fees to the prevailing party in any dispute over that contract. (Civ. Code, § 1717, subd. (a).) Courts have interpreted this provision to impose a mutuality of remedy: If one party would be entitled to attorney's fees under the terms of the contract should it prevail, the opposing party is also so entitled—even if the contract did not so provide. (E.g., *Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1146.) The trial court applied Civil Code section 1717 in this case when it added to the lien the amount of attorney's fees Daaus incurred, even though the Mironers were not parties to either the promissory note or the Loan and Security Agreement.

Daaus nevertheless makes the further argument that Civil Code section 1717 requires the court to hold the Mironers *personally* liable for the attorney's fees award. They cite *Saucedo*, but that decision actually refutes Daaus's position. The issue in *Saucedo* was whether a third party who had been assigned a loan and who had prevailed against the lender could obtain attorney's fees under Civil Code section 1717. *Saucedo* allowed the award, reasoning that the lender who prevailed in the litigation would have "as a real and practical matter" been able to require the third party to pay its attorney's fees, so section 1717's mutuality principle required that the third party be entitled to collect attorney's fees from the lender. (*Saucedo*,

supra, 111 Cal.App.3d at pp. 314-315; *Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290, 307-308.) Critically, however, the court noted that had the third party not prevailed, it "would not have been personally liable for payment of attorney fees under the note and deed of trust"; instead, "these fees would have become part of the debt secured by the deed of trust." (*Saucedo*, at p. 315; *Wilhite v. Callihan* (1982) 135 Cal.App.3d 295, 301 [so holding].) Thus, *Saucedo refutes* Daaus's position that a third party should be personally liable for attorney's fees under Civil Code section 1717. What is more, *Saucedo*'s rule dovetails neatly with the general principle that a third party that "takes [property] subject to the mortgage" "is not personally liable therefor" because "the land" is "primarily liable for the payment of the debt." (*Braun v. Crew* (1920) 183 Cal. 728, 731.) Consistent with this precedent, the trial court correctly held the Property—and not the Mironers—liable for attorney's fees.

DISPOSITION

The judgment is modified to calculate 8 percent interest on the principal balance of the debt from January 26, 2011 through March 30, 2012; to calculate 20 percent interest on the principal balance of the debt from March 31, 2012 through the entry of judgment; to calculate 10 percent postjudgment interest on the entire judgment amount (comprised of the principal balance, accrued interest to the date of judgment, attorney's fees and costs). The judgment is further modified to not include the late fee ($77,500). As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.