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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RAYMOND A. SCHEP, Plaintiff and Appellant, v. T.D. SERVICE COMPANY, Defendant and Respondent.	B276066 (Los Angeles County Super. Ct. No. BC533555)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Affirmed and remanded.

Raymond A. Schep, in pro. Per.; and Timothy L. McCandless for Plaintiff and Appellant.

Lawrence J. Dreyfuss for Defendant and Respondent.

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In *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336 (*Schep I*), we held that a trustee's conduct in recording a notice of sale, a notice of default, and a trustee's deed upon sale—all in conjunction with a nonjudicial foreclosure under a deed of trust—were, at a minimum, conditionally privileged under Civil Code section 47, subdivision (c), such that the plaintiff could not state a claim for slander of title *against the beneficiary* who directed the trustee to record the trustee's deed upon sale. This appeal involves the same case and asks: Does that plaintiff state a claim for slander of title *against the trustee*? We already answered this question in *Schep I*, but plaintiff in his opening brief just ignores *Schep I*, and in his reply brief either tries to distinguish it on grounds *Schep I* itself explicitly addressed or argues that *Schep I* is wrong. Plaintiff's appeal is accordingly frivolous, and we impose sanctions against the plaintiff and his attorney for the amount of attorney's fees incurred by the trustee in defending against this appeal.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In 2007, Raymond A. Schep (plaintiff) borrowed $910,000, and secured that loan with a deed of trust on his home in Beverly Hills. By the fall of 2009, plaintiff had fallen behind on his mortgage payments. At the behest of the deed of trust's beneficiary, T.D. Service Company (T.D. Service) recorded a "Notice of Default and Election to Sell Under Deed of Trust" and a "Notice of Trustee's Sale." Capital One, N.A. (Capital One) bought the home at the foreclosure sale, and thereafter directed T.D. Service to record the Trustee's Deed Upon Sale.

In the period between T.D. Service's recording of the Notice of Default and the recording of the Notice of Trustee's Sale,

Timothy Fitzgerald of "US Banc Trustee TTE" recorded a "Substitution of Trustee and Full Reconveyance" (the "wild deed"). In this document, Fitzgerald inaccurately recited that *he* was the "Original Beneficiary" of the deed of trust and then purported to "substitute [himself] as the new Trustee" and "reconvey" the deed of trust back to plaintiff "without warranty," thereby purporting to absolve plaintiff of any obligation to repay the mortgage.

II. Procedural Background

Plaintiff sued both T.D. Service and Capital One for slander of title stemming from the recording of the Notice of Default, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale.[1]

A. Litigation Against Capital One

Capital One demurred to plaintiff's second amended complaint. The trial court sustained the demurrer without leave to amend after concluding that (1) plaintiff never alleged he had title to the property, and (2) the notice of default and notice of sale documents are privileged under Civil Code section 47, subdivision (c). Plaintiff appealed, and we affirmed in *Schep I*.

B. Litigation Against T.D. Service

T.D. Service demurred to plaintiff's second amended complaint, and the trial court sustained the demurrer with leave to amend. After plaintiff filed a third amended complaint that added new allegations, T.D. Service demurred to this new

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1 Plaintiff also named both defendants in a claim for breach of fiduciary duty, and T.D. Service in a claim for breach of contract. The trial court eventually sustained demurrers without leave to amend on these additional claims, and plaintiff has not appealed those rulings.

complaint. The trial court sustained the demurrer without leave to amend after concluding that (1) plaintiff "does not have a title interest in the property" and thus "lacks standing to claim slander of title," and (2) "the alleged slander concerned the foreclosure notices and those notices were privileged."

Plaintiff then filed a timely notice of appeal.

DISCUSSION

Plaintiff argues that the trial court erred in sustaining T.D. Service's demurrer without leave to amend. T.D. Service responds that plaintiff should be sanctioned because his appeal is frivolous in light of *Schep I*.

I. Ruling on Demurrer

In evaluating whether a trial court properly sustained a demurrer without leave to amend, we must ask: (1) Was the demurrer properly sustained; and (2) was leave to amend properly denied? Because plaintiff only challenges the trial court's ruling as to the first question, we focus our analysis on that issue by independently "'examin[ing] the complaint'" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230) in order to """determine whether the complaint states facts sufficient to constitute a cause of action""" (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010). "[W]e accept as true all """material facts properly pleaded""" and consider any materials properly subject to judicial notice; we disregard any """contentions, deductions or conclusions of fact or law""" set forth in the operative complaint." (*McClain v. Sav-On Drugs* (2017) 9 Cal.App.5th 684, 694, review granted June 14, 2017, S241471.)

A. Schep I

In *Schep I*, *supra*, 12 Cal.App.5th 1331, we evaluated whether plaintiff had validly stated a claim against Capital One for slander of title. We noted that a claim for slander of title only lies where there is "'(1) a publication, (2) *which is without privilege or justification*,' (3) which is false, and (4) which 'causes direct and immediate pecuniary loss.'" (*Id.* at p. 1336, quoting *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1050-1051, italics added.) We held that plaintiff could not state a claim for slander of title because each of the three "publications" plaintiff relied upon—the Notice of Default, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale—was privileged. (*Schep I*, at pp. 1336-1337.) We ruled that Civil Code section 2924, subdivision (d)(1), expressly declared the recording of a notice of default and notice of sale to be privileged under Civil Code section 47. (*Id.* at p. 1336.) We further ruled that Civil Code section 2924, subdivision (d)(2) rendered the recording of a trustee's deed upon sale privileged under Civil Code section 47 because the act of recording that document was one of the "procedures set forth in this article." (*Ibid.*, citing Civil Code, §§ 2924.12, subds. (a)(1), (b) & 2924.19, subds. (a)(1), (b).) After assuming that the applicable privilege was the narrower "qualified privilege" under Civil Code section 47, subdivision (c) (as opposed to the broader "absolute privilege" under Civil Code section 47, subdivision (b)), we lastly ruled that plaintiff had not alleged the requisite degree of "malice" necessary to overcome the qualified privilege. (*Id.* at pp. 1336-1337.)

B. Analysis

Schep I dictates the outcome of this appeal. Although *Schep I* addressed the validity of plaintiff's slander of title claim against Capital One, its reasoning applies with *greater* force to T.D. Service because T.D. Service was the one who actually recorded all three documents, while Capital One merely directed T.D. Service to file the last of the three (the Trustee's Deed Upon Sale).

Plaintiff nowhere acknowledges the existence of *Schep I* in his opening brief, even though *Schep I* had been decided more than six weeks before that brief was filed and finally modified three weeks after the filing. When plaintiff finally addresses *Schep I* in his reply brief, he offers what boil down to five reasons why *Schep I* is either distinguishable or wrong.

First, he argues *Schep I* and its rationale apply only to deed of trust beneficiaries like Capital One rather than trustees like T.D. Service. He is incorrect. *Schep I* expressly holds that a "*trustee's* acts in recording a notice of default, a notice of sale, and a trustee's deed upon sale [are] privileged" (*Schep I*, *supra*, 12 Cal.App.5th at pp. 1333, 1335, italics added), and goes on to explain that this holding "applies with equal force to both the trustee who actually records the trustee's deed upon sale as well as the principal [here, the beneficiary] who directs that recording" (*id.* at p. 1336). In other words, plaintiff has it backwards: The rationale for applying the privilege to the trustee is even more compelling than it is for applying it to the beneficiary, as *Schep I* explicitly stated.

Second, plaintiff asserts that additional malice allegations in the third amended complaint against T.D. Service are distinguishable from the malice allegations in the second

amended complaint at issue in *Schep I*. They are not. The third amended complaint alleges that T.D. Service acted "malicious[ly]" because the documents it recorded were "in derogation of the facts of the public record, the knowledge of which was possessed constructively by [T.D. Service]." As explained in *Schep I*, plaintiff's second amended complaint "allege[d] that Capital One and T.D. Service were deemed to be constructively aware of [plaintiff's] competing claim to title due to his recording of the wild deed." (*Schep I*, *supra*, 12 Cal.App.5th at p. 1337.) These allegations are substantively indistinguishable.

Third, plaintiff argues that we just got it wrong in *Schep I* in concluding that Capital One and T.D. Service did not act with malice. To begin, this challenge is itself improper because *Schep I* is now law of the case. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1242.) Plaintiff's arguments are in any event entirely without merit. He asserts that the document filed by Fitzgerald is not truly a "wild deed" and that it is Capital One's claim to the property that is a "wild deed." The document Fitzgerald filed purported to be on Fitzgerald's own behalf as the "Original Beneficiary" of the deed of trust. Because Fitzgerald's name appears nowhere on any prior document connected with the property, *his* document is a document "not in [the] chain of title" and hence, by definition, a "wild deed." (*People v. Denman* (2013) 218 Cal.App.4th 800, 806; *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1107.) Conversely, Capital One acquired title after it purchased the property at the foreclosure sale and then directed T.D. Service to file the Trustee's Deed Upon Sale memorializing that transaction. Plaintiff's argument that Capital One had a "wild deed" because it did not have title prior to buying the property would mean that

every purchaser at every foreclosure auction would have a "wild deed" and ostensibly invalid title; this argument is specious.

Fourth, plaintiff asserts that T.D. Service was not *required* to file a Trustee's Deed Upon Sale, such that its voluntary undertaking to do so cannot be privileged. We rejected this very same assertion in *Schep I*: "That [Civil Code section 2924] do[es] not expressly *mandate* that a trustee's deed upon sale be recorded is of no consequence because recording of that deed will occur as a practical matter in every case and, more to the point, the recording of that deed is one of the 'procedures set forth in th[e] article.'" (*Schep I*, *supra*, 12 Cal.App.5th at p. 1336.)

Lastly, plaintiff posits that the trial court did not expressly address whether the Trustee's Deed Upon Sale was privileged and thus "tacitly" ruled that it was not privileged. This position is unfounded. The trial court ruled that the "foreclosure notices" were "privileged," and the Trustee's Deed Upon Sale was the capstone of the foreclosure process and hence a "foreclosure notice." Moreover, *Schep I* holds that the Trustee's Deed Upon Sale is privileged, and, as noted above, is now law of the case.[2]

II. Sanctions On Appeal

Although this power should be used sparingly, an appellate court has the power to impose sanctions when an "appeal indisputably has no merit"—that is, "'when any reasonable attorney would agree that the appeal is totally and completely without merit.'" (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 826; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appeal "indisputably lacks merit" when it restates arguments

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2 For the first time during oral argument, plaintiff asked for a continuance to obtain further evidence in support of a new theory for relief. We hereby deny that request.

based on identical facts and legal issues decided by the court in a prior appeal. (See *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 194-195 [appeal based on same facts and issues in previous appeal was frivolous]; *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 193 [same]; *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1432 [portions of appeal that raised same issues asserted by—and decided against—the same plaintiff in a prior appeal were frivolous].)

This appeal qualifies as being "totally and completely without merit." *Schep I* squarely resolves the only question presented in this appeal. Rather than acknowledge this binding authority directly on point, plaintiff brought an appeal that at first ignored that authority, and later attempted to distinguish it (on grounds the authority expressly addressed) or to attack it (despite the authority being law of the case).

Our consideration of these sanctions accords with due process. Plaintiff was notified of the potential for sanctions when T.D. Service, in its respondent's brief, requested the sanction of attorney's fees on the basis of frivolousness, and plaintiff had the opportunity to respond to this request in his reply brief and was specifically asked for his response during oral argument. This suffices. (See *International Ins. Co. v. Montrose Chemical Corp.* (1991) 231 Cal.App.3d 1367, 1374 [so holding]; see generally Cal. Rules of Court, rule 8.276(c).)

In these circumstances, an order finding plaintiff and his attorney jointly responsible for paying T.D. Service's reasonable attorney's fees for defending this appeal is warranted. (See, e.g., *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 343 [attorney's fees incurred in responding to a frivolous appeal is an appropriate measure of sanctions under Code of Civil Procedure section 907];

Collins v. Department of Transportation (2003) 114 Cal.App.4th 859, 868-869 [same].)

DISPOSITION

The judgment is affirmed. In addition to the regular costs on appeal to which T.D. Service is entitled, plaintiff and his attorney are jointly ordered to pay T.D. Service's reasonable attorney's fees incurred on appeal—the amount of which is to be determined by the trial court on remand.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST