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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RECON TRUST COMPANY, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant and Appellant; BANK OF AMERICA, N.A., Defendant and Respondent.	B233673 (Los Angeles County Super. Ct. No. SS020213)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman B. Tarle, Judge. Reversed and remanded.

Epport, Richman & Robbins, Mark Robbins, Nami R. Kang, Tyler R. Dowdall for Defendant and Appellant.

Malcolm ♦ Cisneros, William G. Malcolm, Don Robinson, Brian S. Thomley, Charles W. Nunley for Defendant and Respondent.

No appearance for Plaintiff.

Here is a tale of shoddy banking practices. Two national banks are fighting over nearly $1 million, representing the surplus proceeds from a trustee's sale of real property in Beverly Hills. The trial court distributed the lion's share of the funds to Bank of America (BofA), leaving only a few ducats for Wells Fargo Bank (WFB).

A scrupulous examination of the evidence shows that BofA (which inherited this fiasco from Countrywide Home Loans) deposited a cashier's check from WFB that was clearly intended to pay off a loan—ignoring explicit warnings that cashing the check constituted its "unconditional agreement" to close the account and extinguish its lien. BofA also ignored an enjoinder to "bill the customer for any residual balance." After cashing the check, BofA failed to bill the customer for the residual balance, failed to close the credit line, and failed to extinguish its lien on the property. The evidence supports only one conclusion: the cashier's check was an accord and satisfaction of a disputed monetary claim. When BofA cashed the check, the debt was discharged. (Cal. U. Com. Code § 3311.)[1] The trial court incorrectly concluded that BofA is entitled to preserve its priority lien in this transaction.

FACTS

Loans Secured by the Beverly Hills Property

Albert and Mojgan Talassazan owned real property on Linden Drive in Beverly Hills (the Property). The Property was encumbered by several liens. The lender in first priority was America's Wholesale Lender, holding a first trust deed recorded on June 16, 2005, in the amount of $3 million. A notice of default on this debt was recorded in March 2010. The first priority of this lien is not in dispute. The problem is with the two subsequent liens.

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[1] All undesignated statutory references in this opinion are to the California Uniform Commercial Code.

The Talassazans obtained $740,000 from Countrywide Home Loans, predecessor-in-interest to respondent BofA.[2] The BofA credit line was secured by a deed of trust on the Property recorded on June 21, 2005. This was the second lien on the Property.

A third deed of trust on the Property was recorded on October 11, 2007. This was security for a $1 million line of credit extended to the Talassazans by appellant WFB. A notice of default on this indebtedness was recorded in March 2010.

The Trustee's Petition Regarding Unresolved Claims

The Property was sold at a trustee's sale in July 2010, for $4,211,500. After paying $3.2 million to the creditor holding the first trust deed, the trustee determined that WFB and BofA were conflicting claimants for the remaining $1 million collected at the trustee's sale. The trustee filed a petition in November 2010, asking to deposit the surplus funds with the court, the venue where the two banks would fight out their conflicting claims to the funds.

WFB submitted a notice of claim arising from its $1 million line of credit, which is secured by the Property. The debt is unpaid; therefore, WFB claimed the entire surplus from the trustee's sale of the Property. WFB acknowledged that BofA extended credit to the Talassazans in 2005, also secured by the Property. WFB maintained that the debt to BofA was repaid with a cashier's check for $693,913, which BofA processed in October 2007. WFB reasoned that because BofA's loan was repaid, BofA has no right to the proceeds of the trustee's sale.

BofA similarly submitted a notice of claim to the trial court. BofA asserted that the Talassazans currently owe $757,232 on the line of credit secured by the second deed of trust on the Property. BofA did not acknowledge or address the cashier's check for $693,913 that it received from WFB and processed in 2007. The trial court directed the parties to supply further briefing and evidence of their competing claims.

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[2] Countrywide was purchased by BofA in 2008. (*Alston v. Countrywide Fin. Corp.* (3d Cir. 2009) 585 F.3d 753, 755, fn. 1.) All references in this opinion to BofA signify both Countrywide and BofA.

The Parties' Evidence

WFB explained that the Talassazans, through a mortgage broker, contacted WFB in June 2007, requesting a loan. As a condition of making a loan, WFB required that the BofA line of credit be paid off and closed, leaving only the first trust deed for $3 million. The WFB loan was, in other words, a refinance. The Talassazans executed a borrowers' affidavit stating that at the close of the refinance, no other lien (except the first trust deed) would affect the lien position of WFB.

BofA issued a payoff demand statement on August 24, 2007. The payoff amount of $691,540.69 was good through September 4, 2007, and the statement promises that upon payment, BofA "will close the account . . . ." WFB did not wire the payoff funds by September 4. According to WFB's mortgage quality assurance analyst, WFB obtained from BofA an updated payoff demand for $693,913.04 on September 12, valid through September 19, 2007. There is no written evidence of the updated payoff amount; however, WFB's mortgage analyst declares that it is customary in the banking industry to obtain an oral update. The mortgage broker employed by the Talassazans, who was personally involved in the transaction, declared that her company (like WFB) received an updated payoff demand from BofA for $693,913.04, valid through September 19, 2007. BofA denies that it ever issued a payoff demand for $693,913.04.

On September 12, 2007, the Talassazans signed the agreement under which WFB gave them a line of credit for $1 million, secured by a deed of trust on the Property. On September 17, WFB issued a cashier's check for $693,913.04, payable to BofA. On its face, the check states twice that it is a home equity line of credit (HELOC) "payoff."

Attached to the WFB cashier's check is a "Loan Payoff Request" signed by the Talassazans. It states: "I have applied for a mortgage with Wells Fargo Bank, N.A. You are hereby authorized to provide them with the information requested below *to pay off and close my account with you*. Your immediate response is appreciated. [¶] *Please bill customer for any residual balance. If this account is a line of credit, then your acceptance of these funds constitutes your agreement that you will close the account and, if secured by real property, discharge the lien;* further, you agree to indemnify us for

your breach of this agreement. In addition, if this is a real property secured account, the amount includes fees for recording a discharge in the appropriate county recorder's office. State law may require you to discharge your lien within a specific number of days. Consult your counsel as to specific requirements. [¶] If there are any discrepancies or you will not close the account and discharge your lien with the above payoff, please contact Wells Fargo Bank, N.A. at [phone number], otherwise *your acceptance of the above amount represents your unconditional agreement to close the account and discharge your lien.*" The Loan Payoff Request lists a balance of $693,913.04. Above the signature line are the words, "I/We understand that no further advance will be allowed on this account and it will be closed at the time of payoff." (Italics added.)

BofA received the cashier's check on September 18, 2007, the date stamped on the face of the check. BofA did not cash the check. Instead, it returned the check to WFB, saying it was not acceptable. WFB determined that it had proffered the correct payoff amount and sent the check back to BofA. Notes in BofA's computer indicate that BofA contacted WFB on September 26, 2007, to say that the check was inadequate to pay off the HELOC balance. Nevertheless, on September 28, 2007, BofA cashed the check and posted the $693,913.04 payment to the Talassazans' account. BofA now maintains that WFB's cashier's check "constituted only a *pay-down* and not a *pay-off*, leaving the HELOC open and the BofA/Countrywide lien intact."

BofA claims it made a payoff demand for $704,117.09 on September 26, 2007. The claim is belied by BofA's account records, which show that on September 28, 2007, the balance owing on the Talassazans' account was $693,913.04. The very next entry shows a payment (from WFB) of $693,913.04. Despite its own business records, BofA opines that WFB's cashier's check for $693,913.04 was deficient, so BofA had no duty to release its lien.

The BofA employee designated as the bank's most knowledgeable person with respect to the Talassazan loan, Alex Resendiz, testified at a deposition that after the WFB cashier's check was posted on September 28, 2007, the Talassazan account showed a principal balance of zero. BofA supposedly notified WFB that "the funds were short,"

though Resendiz admitted that "we don't have anything on record for that." Some time later, on October 17, 2007, the zero balance is reversed and a new balance of $4,863.58 shows up in BofA's records. Resendiz was unsure why, saying "It could be a past due amount. I don't have the specifics on exactly what it is." Resendiz admitted three times that he never saw a BofA payoff demand for $704,117.09, and was unable to produce a copy of it or other communication from BofA to WFB increasing the payoff demand.[3] There is admittedly no record of any request by the Talassazans in 2007 to keep their HELOC account open.

Though BofA cashed the check it received from WFB in 2007, BofA never extinguished its lien on the Property. Nor did BofA follow the signed "Loan Payoff Request" from the Talassazans, instructing BofA to "close my account with you." In fact, BofA loaned the Talassazans an *additional* $720,000 on June 19, 2008, under the 2005 HELOC. When BofA received the Talassazans' request for more money in 2008, the bank's notes reflect that it was going "to have freeze DC03 lifted from this acc[ount]."[4] BofA accused WFB of failing to adequately protect its interest by ensuring that an adequate payoff was made—and the lien released—before completing its transaction with the Talassazans.

THE TRIAL COURT'S RULING

The trial court noted that WFB did not obtain a written payoff demand statement before it issued its cashier's check to BofA to pay off the HELOC. Nevertheless, BofA's business records show that it told WFB orally that it wanted more money to pay off the Talassazan HELOC. Performing an admittedly "not exactly precise" mathematical analysis, the court "roughly calculated the balance due over the relevant timeframe" and

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[3] The trial court treated the case as if the purported demand for $704,117.09 had never been made, so it evidently disbelieved BofA's claim for this amount.

[4] BofA employee Resendiz could not explain what a "code 3" means, in the bank's internal lingo. He conceded, however, "that there was a freeze on the account." In the next breath, Resendiz claimed to not know what it means when "an account is frozen."

determined that WFB underpaid BofA by $449.12 in the famous cashier's check. Owing to this $449.12 shortfall, WFB cannot claim equitable subrogation because it failed to pay the "entire debt."

The court did not discuss the Loan Payoff Request accompanying the cashier's check, or BofA's business records showing a zero balance, or WFB's argument that the check itself stated that this was a "payoff," so that BofA was required to release the lien upon cashing the check. Instead, the court reasoned that because of WFB's $449.12 shortfall, BofA had no obligation to close the account or reconvey its trust deed on the Property. On April 29, 2011, the court distributed $757,232.25 to BofA, and the remainder (about $232,000) to WFB. This appeal was taken on June 6, 2011. On June 7, 2011, the court stayed its order pending resolution of this appeal.

DISCUSSION

1. Appeal and Review

The order directing the allocation of the disputed surplus funds between the two banks was made pursuant to Civil Code section 2924j, which addresses the actions a trustee may take when there are competing claims by persons with recorded interests in property sold at a trustee's sale. The courts have treated resolutions of lien priorities as appealable orders, using a de novo standard of review when the facts are undisputed. (*Wells Fargo Bank v. Neilsen* (2009) 178 Cal.App.4th 602, 608-609; *CTC Real Estate Services v. Lepe* (2006) 140 Cal.App.4th 856, 859-860.) Here, although some of the facts are disputed (for example, the amount of the debt owed to BofA), the dispositive facts are uncontradicted, allowing the matter to be decided as a matter of law. (See *Cal-Western Reconveyance Corp. v. Reed* (2007) 152 Cal.App.4th 1308, 1316-1319 [no evidence supported the trial court's distribution of surplus proceeds to a party who lacked a recorded lien or encumbrance].)

2. Equitable Subrogation

The doctrine of equitable subrogation covers every instance in which someone "not acting as a mere volunteer" pays the debt of another so that, in equity and good conscience, the debt should have been discharged. (*Caito v. United California Bank*

(1978) 20 Cal.3d 694, 704; *Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1305.) The right to subrogation "'"depends on the superiority of the equities of him who asserts it over those of the one against whom it is sought. It will never be enforced when the equities are equal or the rights not clear."'" (*Meyers v. Bank of America etc. Assn.* (1938) 11 Cal.2d 92, 101.)

Equitable subrogation applies when someone pays a debt (1) to protect his interest; (2) is not acting as a volunteer; (3) is not primarily liable for the debt; (4) remits the entire debt; and (5) there is no injustice to the rights of others. (*Caito v. United California Bank*, *supra*, 20 Cal.3d at p. 704.) A bank that advances money to a debtor during a refinance to pay off an existing encumbrance—with the express or implied understanding that the advance will be secured by a priority trust deed—is not a "volunteer." (*Smith v. State Savings & Loan Assn.* (1985) 175 Cal.App.3d 1092, 1096, 1098-1099.)

The only real question presented is whether the debt was repaid, and whether it would be unjust to apply subrogation against BofA.

With respect to the repayment of the entire debt owed to BofA, principles of accord and satisfaction apply. An accord and satisfaction is "an informal method of dispute resolution carried out by use of a negotiable instrument." (Official com., Deering's Ann. Code (1999 ed.) foll. § 3311, p. 422.) A cashier's check is a negotiable instrument. (§ 3104; *Spencer v. Sterling Bank* (1998) 63 Cal.App.4th 1055, 1058; *Burke v. Mission Bay Yacht Sales* (1963) 214 Cal.App.2d 723, 729.)

The requirements for an accord and satisfaction based on acceptance of a negotiable instrument are that (1) a party in good faith tendered an instrument to the claimant as full satisfaction of a claim; (2) the amount of the claim was subject to a bona fide dispute; and (3) the claimant cashed the instrument. (§ 3311, subd. (a).) If the party tendering the instrument "'proves that he accompanied the tender with a conspicuous statement that the amount was tendered as full satisfaction of the claim, and if the claimant does not prove that he tendered repayment of the amount within 90 days, the debt is discharged.'" (*Bellows v. Bellows* (2011) 196 Cal.App.4th 505, 510; *Woolridge v. J.F.L. Electric, Inc.* (2002) 96 Cal.App.4th Supp. 52, 58-59.) The point of the accord and

satisfaction is to resolve a dispute that existed by the time the money was tendered. (*Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 151.)

WFB tendered a cashier's check for $693,913.04 on September 17, 2007. BofA admittedly received it the following day. BofA returned the check to WFB, claiming it was inadequate. The parties agree that they discussed the matter by telephone, without any apparent resolution. WFB disputed BofA's demand for more money, and re-tendered the check to BofA. Attached to the check was a "Loan Payoff Request" containing a conspicuous warning to BofA that "your acceptance of the above amount [$693,913.04] represents your unconditional agreement to close the account and discharge your lien." Furthermore, the cashier's check twice states, right on its face, that it is a "payoff" of the debt. The Loan Payoff Request instructs BofA to "bill customer for any residual balance." According to the trial court, the residual balance was a mere $449.12.[5]

This was an accord and satisfaction of a disputed debt. The two banks began quarreling over the account balance in mid-September 2007. BofA notified WFB that it wanted more money. WFB refused to give more, and re-tendered the cashier's check in full satisfaction of the Talassazans' debt. There was a bona fide dispute over the amount owed, and nothing suggests that WFB did not tender the check in good faith. By accepting and cashing the check, which was clearly marked "HELOC payoff," BofA unconditionally agreed to accept the amount tendered as full payment. There is no evidence that BofA repaid WFB within 90 days, or ever. (§ 3311, subd. (c)(2).) There is no evidence that BofA informed the Talassazans that additional money was due.

BofA's business records show that after the WFB check was credited, the Talassazan HELOC account had a principal balance of zero. According to BofA's Alex Resendiz, the zero balance was reversed in mid-October 2007, when a balance of

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[5] The court inadvertently double-charged WFB for a $350 termination fee in its calculations. When the $350 overcharge is deducted, the residual balance is $99.12. Also, the court used a daily interest rate of $176, when the correct daily rate appears to be $171. Multiplying the $5 mistake times 22 days is $110. This means that WFB in fact paid $10.88 *more* than the amount owing, not $449.12 too little.

$4,863.58 appears on the account. Resendiz could not explain why this occurred. BofA's own records reflect a full payoff when it deposited WFB's check on September 28, 2007. Coupled with the accord and satisfaction warning from WFB, the evidence shows, without contradiction, that the entire debt was paid.

Applying equitable subrogation would not be unjust. BofA does not dispute that it understood the legal effect of depositing WFB's cashier's check. In fact, BofA does not even address the accord and satisfaction principles raised in WFB's brief, apparently on the theory that ignoring issues will make them go away. Issues raised by appellant that are unaddressed in the respondent's brief may be treated as a concession. (See *Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1276.)

Despite the full payoff, BofA failed to bill the Talassazans for any lingering residual payment, it failed to extinguish its lien, and it failed to close the account, all of the things it agreed to do when it deposited the cashier's check. After the 2007 payoff, the HELOC was frozen because the Talassazans had unequivocally directed the bank to "close my account with you." Unfreezing the Talassazans' account and loaning them another $720,000 in 2008 was a rash and foolhardy act by Countrywide (and ultimately sad for BofA, which inherited the woes of Countrywide). The carelessness of Countrywide in loaning more money after it accepted the payoff check is not WFB's problem. WFB is entitled to equitable subrogation because BofA's lien must be treated as if it had been extinguished.

DISPOSITION

The judgment is reversed. The case is remanded to the trial court with directions to enter a new order distributing the surplus funds from the trustee's sale to Wells Fargo Bank, as reimbursement for its loan secured by a trust deed recorded on October 11, 2007. Any remaining funds may be distributed to Bank of America as reimbursement for its unsecured loan made in 2008. Wells Fargo Bank is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.