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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

VINEYARD BANK, NA,

Plaintiff and Respondent,

v.

DFI FUNDING, INC. et al.,

Defendants and Appellants.

2d Civil No. B224656
(Super. Ct. No. 56-2009-00335838-CU-
OR-SIM)
(Ventura County)

Appellant DFI Funding, Inc. (DFI) and respondent California Bank & Trust (CB&T), as successor in interest to Vineyard Bank, NA (Vineyard), held deeds of trust on a parcel of property. CB&T instituted foreclosure proceedings and took title to the property at the foreclosure sale. DFI claimed its security interest was superior and also initiated foreclosure proceedings, forcing CB&T to bring an action to enjoin the foreclosure. CB&T prevailed at trial.

The issue on appeal is whether the trial court could award attorney fees and costs to CB&T as the prevailing party. We conclude the award of attorney fees under Civil Code section 1717 was proper under *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 315 (*Saucedo*). The parties agreed that if DFI had prevailed at trial, it would have been entitled to add its attorney fees to the debt secured by its deed of trust. This "practical liability" by CB&T for DFI's attorney fees satisfies the reciprocity requirement in section 1717. (*Ibid.*) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2005, Vineyard loaned \$754,000 to Tiffany North Ranch IV, LLC (Tiffany IV) to purchase a lot at 5184 Oxley Place, Westlake Village, California (Oxley Property). The loan was secured by a first deed of trust recorded on April 15, 2005.

A few months later, ALG Financial Group (ALG) loaned \$750,000 to Vanderbilt, LLC to develop another property. The loan was secured by eight deeds of trust, including a second deed of trust on the Oxley Property recorded on August 12, 2005. Marshal H. Wengrow signed the trust deeds in his capacity as managing member of Tiffany IV, Vanderbilt, LLC and another entity. Six of the trust deeds, including the deed on the Oxley Property, provided: "THIS DEED OF TRUST ONLY ENCUMBERS THE INTEREST OF MARSHALL H. WENGROW IN THE TRUSTOR AND THE REAL PROPERTY ENCUMBERED HEREBY." ALG later assigned to DFI the deed of trust on the Oxley Property, the "ALG/DFI deed of trust."

In October 2005, Vineyard loaned Tiffany IV additional money to construct a luxury residence on the Oxley Property. Vineyard recorded a new deed of trust on October 17, 2005. A title search apparently failed to disclose the ALG/DFI deed of trust. Unaware of the ALG/DFI encumbrance, Vineyard recorded a full reconveyance of its first trust deed, which arguably moved the ALG/DFI deed of trust to the first security position, ahead of Vineyard. In December 2007, the amount due under Vineyard's note and deed of trust was \$2,880,454.

Tiffany IV defaulted on the construction loan, and Vineyard began non-judicial foreclosure proceedings in October 2008. At about that time, Vineyard learned of the ALG/DFI deed of trust. Vineyard purchased the Oxley Property at the foreclosure sale on November 3, 2008.

DFI instituted its own non-judicial foreclosure proceedings, claiming that Vineyard's interest in the property was subject to the ALG/DFI deed of trust. Vineyard sued to enjoin the foreclosure and, among other things, sought equitable subordination of the ALG/DFI deed of trust. The trial court issued a preliminary injunction staying the foreclosure.

The threshold issue was whether the ALG/DFI deed of trust created a lien against the Oxley Property or only against Wengrow's membership interest in Tiffany IV. The trial court determined the language in the deed of trust was ambiguous on this point and submitted the issue to the jury. The jury found that the ALG/DFI deed of trust encumbered Wengrow's membership interest in Tiffany IV and his interest in the Oxley Property to the extent he "owned any such interest." Because Wengrow had no personal interest in the Oxley Property itself, the ALG/DFI deed of trust did not create a lien against the property. Consequently, the trial court entered judgment in favor CB&T, as Vineyard's successor in interest.

CB&T filed a memorandum of costs seeking \$12,122.90 in litigation costs against DFI and co-defendant Action Foreclosure Services, Inc. (Action Foreclosure). CB&T also moved for an award of attorney fees against DFI under Civil Code section 1717.

DFI opposed the motion for fees. The trial court awarded \$376,466.45 in fees based on the attorney fees provision in the ALG/DFI deed of trust. DFI admitted that, had it prevailed, it would have been entitled to add its attorney fees to its secured debt recoverable in the foreclosure. The amended judgment includes those fees plus the \$12,122.90 in litigation costs. DFI and Action Foreclosure appealed. The sole issue on appeal is whether the trial court erred by awarding attorney fees and costs to CB&T.

DISCUSSION

Except where a contract or statute provides otherwise, each party to a lawsuit must pay its own attorney fees. (Code Civ. Proc., § 1021.) Civil Code section 1717, subdivision (a) provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." This provision was enacted to "establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one

party [citations] and to prevent oppressive use of one-sided attorney's fees provisions. [Citation.]" (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.)

"The trial court exercises a particularly 'wide discretion' in determining who, if anyone, is the prevailing party for purposes of [Civil Code] section 1717 [, subdivision] (a). [Citations.] To overturn that determination on appeal, the objecting party must demonstrate 'a clear abuse of discretion.' [Citation.] However, the 'determination of the legal basis for an award of attorney fees' is a 'question of law' which the reviewing court will examine de novo. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677).)" (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.)

DFI contends that CB&T is not entitled to attorney fees under Civil Code section 1717 because there was no "action on a contract" or privity of contract between the parties. The trial court's tentative decision was to deny the motion for fees on this basis. The court observed "there is a lack of contractual privity and mutual obligations needed to make the attorney fees provision in the [ALG/DFI deed of trust] reciprocal as to [CB&T]."

The trial court changed its tentative decision based on *Saucedo, supra*, 111 Cal.App.3d 309. In *Saucedo*, the property owners sold their encumbered residence to the plaintiffs, who took the home subject to the lender's outstanding note and deed of trust. The lender foreclosed under the due-on-sale clause. The plaintiffs obtained a preliminary injunction halting the foreclosure sale and sued the lender for declaratory relief. (*Id.* at pp. 311-312.) Ultimately, the trial court entered judgment for the plaintiffs but denied their request for contractual attorney fees under Civil Code section 1717. (*Id.* at p. 312.) The court of appeal reversed. (*Id.* at p. 315.)

In awarding fees to the nonsignatory plaintiffs, *Saucedo* reasoned that the plaintiffs, referenced as the "nonassuming grantee," would have paid off the lender, including the lender's attorney fees, rather than face foreclosure. (*Saucedo, supra*, 111 Cal.App.3d at p. 315.) The court stated: "While the nonassuming grantee would not have been personally liable for payment of attorney fees under the note and deed of trust, the

trustee and/or beneficiary would have been entitled to attorney fees under the provisions of the deed of trust had they prevailed, and these fees would have become part of the debt secured by the deed of trust. To prevent foreclosure of his interest, the nonassuming grantee would have had to pay off the secured debt, including the attorney fees, by refinancing or otherwise. [Citations.] This practical 'liability' of the nonassuming grantee is sufficient to call into play the remedial reciprocity established by Civil Code section 1717." (*Ibid.*, fn. omitted.)

Wilhite v. Callihan (1982) 135 Cal.App.3d 295 (*Wilhite*) reached the same conclusion where the plaintiff had purchased property subject to a second trust deed. The lender foreclosed under the due on sale clause, forcing the plaintiff to file an action to prevent foreclosure. (*Id.* at pp. 297-298, 302.) In awarding fees under Civil Code section 1717, the court observed that had the owner "lost in that action, his 'practical' obligations for attorney fees would not differ from that of *Saucedo* . . . [He] would have been placed in a position where he would have to proffer attorney fees to forestall foreclosure and protect his security." (*Id.* at p. 302.)

The parties do not dispute that CB&T took title to the Oxley Property following foreclosure of its deed of trust. As the title holder, CB&T is in the same position as the nonassuming grantee in *Saucedo*. Both parties took title without assuming the obligation under the first deed of trust. Both parties faced foreclosure by the lender purporting to hold the first deed of trust. The only question under the *Saucedo* analysis is whether the ALG/DFI deed of trust would have allowed DFI to add its attorney fees to the secured debt had it prevailed at trial. If so, this "practical liability" by CB&T for DFI's fees would satisfy the reciprocity requirement, entitling CB&T to fees under section 1717. (*Saucedo, supra*, 111 Cal.App.3d at p. 315.)

The ALG/DFI deed of trust has an attorney fees provision. On page 2 of the deed, the trustor agreed "[t]o appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of the Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and

attorney's fees in reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear"

The trial court aptly observed that "[w]hile the above referenced language may not be the model of clarity on this point, this is precisely the interpretation adopted by Defendant DFI" DFI made the reasonable assertion in its opposition to the motion for fees that "if DFI had prevailed at trial, it would have been able to add its attorney's fees and costs to its secured debt . . . under the ALG/DFI deed of trust."

DFI attempts to distinguish *Saucedo* and *Wilhite* by relying on a line of cases involving disputes between competing lienholders. (E.g., *Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.* (2011) 196 Cal.App.4th 290; *Clar v. Cacciola* (1987) 193 Cal.App.3d 1032; *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295; *Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36.) These cases do not apply. This is not a dispute between lenders holding competing deeds of trust. It is a dispute over a foreclosure proceeding initiated by DFI to enforce its security interest in property owned by CB&T. This distinction has a difference.

In *Clar v. Cacciola*, *supra*, 193 Cal.App.3d 1032, the parties advanced competing claims over the priority of two deeds of trust. The prevailing defendants argued they were entitled to recover attorney fees because, had they lost, the plaintiffs' fees would have been added to the secured debt and the defendants would have had to pay those fees "to prevent foreclosure and protect their equity in the property." (*Id.* at p. 1037.) The court rejected the argument because, among other things, the defendants' potential obligation to pay the fees was too speculative. (*Id.* at pp. 1037-1039.) If the plaintiffs had prevailed, the defendants' deed of trust would have been in third position, behind two deeds of trust securing large loans. The court observed: "There is nothing in the record to indicate that defendants would have paid off these loans in order to redeem the property. It is complete speculation to suggest that defendants would have ever been in the position of having to pay plaintiffs' attorney fees even if plaintiffs had prevailed in this action." (*Id.* at p. 1039.)

Here, CB&T's potential obligation to pay DFI's fees was not speculative. DFI's foreclosure forced CB&T to take legal action to protect its substantial equity in the property. CB&T and DFI are not complete strangers to each other, with the dispute resting strictly on the priority of competing security interests established by separate documents. Instead, the dispute rests on DFI's right to enforce a security interest in property owned by CB&T. The critical distinction between *Saucedo* and cases involving competing lienholders is that "the purchasers who recovered fees in *Saucedo* were the successors in interest to the property subject to the promissory note containing the disputed due-on-sale clause and fee provision." (*Diamond Heights Village Assn., Inc. v. Financial Freedom Senior Funding Corp.*, *supra*, 196 Cal.App.4th at p. 308.) Because CB&T is a successor in interest to property in which DFI asserted a security interest under the ALG/DFI trust deed, the trial court properly awarded attorney fees under section 1717. (*Saucedo*, *supra*, 111 Cal.App.3d at p. 315.)

DFI contends the fee award is inequitable. We disagree. As the purchase money and construction loan lender, Vineyard/CB&T invested close to \$3 million in the Oxley Property. In contrast, the ALG/DFI deed of trust was one of eight deeds of trust securing the \$750,000 loan to Vanderbilt, LLC to develop another property. DFI's decision to recoup its investment through this particular deed of trust was not without risk. The scope of the lien was far from clear given the limiting language in the deed. Moreover, DFI's ascension to first security position ahead of Vineyard was the result of an obvious error. DFI forced CB&T to incur substantial costs litigating these issues and, under these circumstances, the award of attorney fees is proper.

DFI and Action Foreclosure also contest the trial court's award of litigation costs totaling \$12,122.90. DFI opposed the motion for attorney fees, but neither DFI nor Action Foreclosure moved to strike or tax the litigation costs. "The 'failure to file a motion to tax costs constitutes a waiver of the right to object. [Citations.]' [Citation.]" (*Douglas v. Willis* (1994) 27 Cal.App.4th 287, 289; see also *Santos v. Civil Service Bd.* (1987) 193 Cal.App.3d 1442, 1447.) "After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs

on the judgment." (Cal. Rules of Court, rule 3.1700(b)(4).) In the absence of a timely objection, the trial court properly included the litigation costs in the amended judgment.

DISPOSITION

The judgment awarding attorney fees and costs is affirmed. CB&T shall recover its costs on appeal.

NOT CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

David Worley, Judge
Superior Court County of Ventura

Bay Area Law Firm, and Carlos Martinez for Defendants and Appellants.

Miltner, Polk, Menck, William L. Miltner and Teresa L. Polk, for Plaintiffs
and Respondents.