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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

HARRIET GOSLINS et al., Plaintiffs and Respondents, v. RONALD TAXE, Individually and as Trustee, etc., et al., Defendants, Cross-complainants and Appellants; LARRY NEWFIELD et al., Cross-defendants and Respondents.	B252179, B253153 (Los Angeles County Super. Ct. No. BC419306)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Gregory Grantham for Defendants, Cross-complainants and Appellants.

Silvia Alvarado; Douglas E. Miles, Inc. and Douglas E. Miles for Defendants, Cross-complainants and Appellants Ronald Taxe and Nadina Taxe, individually and as trustees of the Taxe Family Trust.

Klapach & Klapach and Joseph S. Klapach for Defendant, Cross-complainant and Appellant Massrock, Inc.

Anderson, McPharlin & Conners, Jesse S. Hernandez, Bridget M. Moss, Carleton R. Burch and Lisa Ann Coe, for Plaintiffs and Respondents.

Speciale & Burton and Steven E. Burton for Cross-defendants and Respondents Larry Newfield and DMC, Inc.

Plaintiffs and respondents Harriet Goslins, Janey Sweet, as trustee of the Janey Sweet Revocable Trust, and Sara Lemlich, as trustee of the Sara Lemlich Trust (collectively, plaintiffs) purchased a note secured by a deed of trust on real property from Diversified Mortgage Company (DMC). DMC and plaintiffs thought the deed of trust had first position. Instead, a deed of trust in favor of Massrock, Inc. had first position. Massrock foreclosed on its deed of trust and acquired the property at a foreclosure sale. To protect their security interest in the property, plaintiffs sued, among others, defendants and appellants Massrock and the borrowers Ronald and Nadina Taxe, individually and as trustees of the Taxe Family Trust (collectively, defendants).[1] Defendants cross-complained against, among others, DMC. After a bench trial, the court found against defendants on the complaint and cross-complaint.

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[1] Richard Taxe, Massrock's president, also appealed, but we dismissed as untimely his appeal from the judgment but not his appeal from a postjudgment award of attorney fees.

Defendants appeal. They contend that the judgment must be reversed because, among other things, the trial court failed to issue a statement of decision and because there was insufficient evidence to support the judgment. Defendants also appeal the court's attorney fees award. We affirm the judgment and order.[2]

BACKGROUND

I. Factual Background

Richard and Ronald Taxe are brothers, and Nadina is Ronald's wife.[3] Ronald and Nadina are trustees of the Taxe Family Trust (the Taxe Trust), which owned commercial real property on Jefferson Boulevard in Los Angeles (the Property).

In 2003, Ronald and Nadina were involved in litigation with Barbara and Donald Richtol. As a result of that litigation, the Richtols recorded a writ of attachment against the Property on June 19, 2003.[4] Just days later, on June 22, Richard purportedly sold a Max Ernst bronze statue, "The Guardian of the Moon Fish," and "24 original signed oil paintings" to the Taxe

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[2] Plaintiffs filed requests for judicial notice, one dated March 10, 2017 and a second dated May 5, 2017. We take judicial notice of exhibit 15 in the March 10, 2017 request (Secretary of State Certificate of Status dated February 23, 2017). (Evid. Code, § 452, subd. (c).) We otherwise deny the requests for judicial notice.

[3] We refer to the Taxes by their first names to avoid confusion.

[4] That writ of attachment named Ronald and Nadina as individuals. The Taxe Trust, however, owned the Property, so the Richtols recorded another writ of attachment on July 9, 2003, this time naming Ronald and Nadina, as trustees of the Taxe Trust.

Trust.[5] Although the statue was "not reflected in any of the literature" Ronald had on Ernst's works, the Taxe Trust nonetheless executed a promissory note secured by a deed of trust in the amount of $400,000 against the Property in favor of Massrock, a "holding company" of which Richard was president and Ronald was secretary.[6] Ronald recorded the Massrock deed of trust in July 2003, but never made payments on the note.[7]

In 2005, DMC, a mortgage broker, held a $100,000 first deed of trust on the Property. In early 2005, Richard, acting on his brother's and Nadina's behalf, contacted Larry Newfield, DMC's president, about refinancing that loan. Ronald and Nadina wanted a $250,000 loan. In the course of negotiating the new loan, Richard and Ronald represented, orally and in writing, that the Property was encumbered by less than $170,000, an amount which included DMC's $100,000 deed of trust but excluded the $400,000 Massrock deed of trust. Ronald's and Nadina's personal financial statement, for example, did not reflect the $400,000 Massrock obligation. It said, "[t]he only

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[5] Ronald did not separately insure or have the statue appraised. At trial, plaintiffs' art appraisal expert testified it was "highly unlikely" the statue was authentic. It was not in the "catalog raisonné," which listed an artist's complete works. Also, the expert was given access to just four paintings, which she described as being at the "decorative level of the fine art market" in a price range of between $200 and $800 or $900.

[6] Ronald became Massrock's secretary in 2006, but he "did no duties" for the company. Instead, Ronald's primary business was buying and selling antiques.

[7] The note was in the amount of $560,000. Principal plus interest was due in five years.

Mortgage payable is a First Mortgage in the amount of $100,000.00 payable to [DMC] and secured by the [Property]. In addition there is a l[ie]n with a balance due of approximately $55,0000.00, also secured by [the Property], payable" to the Richtols.

As to the Massrock obligation, Newfield asked Richard whether a reconveyance of it was recorded. Richard responded that the only lien on the Property was DMC's $100,000 deed of trust and that all other liens had been released or paid off; hence, the new $250,000 DMC deed of trust would have first position.

Although the parties failed to close the loan in mid-2005, Richard raised the refinance again in late 2005. At that time, Richard again represented that the $250,000 DMC deed of trust would have first position and that all liens were "[t]aken care of." Ronald also represented that the DMC deed of trust would have first position in the following documents: a mortgage loan disclosure statement; an estimate of closing costs; escrow lending instructions; and a personal financial statement. Richard also told Newfield that he, Richard, had "ready to record a release of" the Massrock obligation.

Richard and Newfield met on January 13, 2006 to go over closing documents. Before that meeting, Newfield had a substitution of trust deed and full reconveyance prepared and mailed to Ronald and Nadina. The reconveyance stated that the indebtedness secured by the Massrock "Deed of Trust has been fully paid[.]" At the meeting, Richard handed the signed and notarized reconveyance to Newfield in the same envelope in which it had been mailed. Without looking at the reconveyance, Newfield gave it back to Richard, saying he (Newfield) did not need it because he had a preliminary title report from Old

Republic Title Company showing that the Massrock deed of trust was not on the title.[8] Richard knew that Newfield wanted the DMC deed of trust to have first position, and Richard thought that DMC, because Newfield handed the reconveyance back to Richard, would not be in a first position.[9]

The $250,000 DMC loan closed on January 24, 2006.[10] Ronald and Nadina signed the note as trustees of the Taxe Trust. DMC then sold the note to plaintiffs, who recorded an assignment in February 2006. When plaintiffs Sweet and Goslins purchased the note, they had never heard of Massrock and knew of no prior lien against the Property.

Ronald and Nadina defaulted on the DMC note in 2009. When Massrock recorded its notice of default on May 5, 2009, Newfield discovered that Massrock claimed a lien superior to plaintiffs' lien. Massrock, although it had been suspended in April 2007, proceeded with a foreclosure sale in September 2009 and bought the Property. Thereafter, in November 2012, Massrock obtained a certificate of relief from contract voidability for the period from April 2, 2007 to October 1, 2009.

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[8] Newfield said that he went over that title report with Richard, who did not point out that it omitted the Massrock deed of trust.

[9] Richard denied that he had been willing to release the Massrock obligation. Instead, he was willing "to subordinate or reconvey or rerecord the Massrock trust deed."

[10] Proceeds from the loan were used to pay off DMC's $100,000 note and other liens but not the Massrock obligation.

II. Procedural background

A. *The pleadings*

Plaintiffs' operative pleading alleged causes of action to quiet title, for imposition and foreclosure of an equitable lien, cancellation of instrument, and judicial foreclosure against all defendants. The pleading also alleged a cause of action for cancellation of instrument and reconveyance against Massrock and Gregory Grantham, as trustee of the Massrock deed of trust.[11] Defendants and Grantham filed a cross-complaint for negligence, indemnity and contribution against Newfield and DMC.[12]

B. *The bench trial and statement of decision*

The parties identified the issues to be tried as whether: the reconveyance was delivered; plaintiffs were entitled to an equitable lien and to foreclose on it; the trustee's deed of sale should be set aside because the Massrock deed of trust was not supported by consideration and was fraudulent; the statute of limitations had run; and, Massrock was a suspended corporation when it foreclosed on the Property.

After a bench trial, the trial court issued its Tentative Decision on May 10, 2013. The Tentative Decision stated it would become the court's statement of decision unless, within 10 days, a party "specifies those principal controverted issues a[s] to which the party is requesting a statement of decision or makes

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[11] Grantham, an attorney, represented defendants below and on appeal. New counsel substituted in on appeal after Grantham was suspended.

[12] Old Republic Title Company and plaintiffs' attorneys were also named as cross-defendants, but they were dismissed.

proposals not included in the Tentative Decision." The court made the following findings in its Tentative Decision:

"1. The Massrock Trust Deed fail[ed] for lack of consideration.

"2. Even assuming the Massrock Trust Deed to have been valid, it was reconveyed upon delivery to Newfield[.]

"3. The Massrock Trust Deed is ordered cancelled[.]

"4. The Court finds that the DMC Trust Deed [is] a first priority lien against the property[.]

"5. The Court finds Plaintiffs are bona fide purchasers, encumbrancers and holders in due cour[se.]

"6. The foreclosure is ordered unwound and the Trustee's Deed Upon Sale is set aside[.]

"7. Massrock was suspended while it initiated the foreclosure proceedings[.]

"8. The statute of limitations does not bar any cause of action[.]

"9. Damages for Plaintiffs and against Ronald Taxe and Nadin[a] Taxe, jointly and severally, in the amount of $250,000 plus interest at 8.5% per annu[m] to the date of judgment[.]

"10. That the DMC Deed of Trust be foreclosed[.]

"11. That the subject property . . . be sold [and] the proceeds of the sale be applied in payment of the amounts due to the Plaintiffs[.]

"12. That Defendants and all persons claiming under them after the execution of the DMC Deed of Trust as Lien Claimants, judgment creditors, claimants under a junior deed of trust, purchasers, encumbrancers, or otherwise, be barred and foreclosed from all rights, claims, interests, or equity of

redemption in the subject property when time for redemption has passed.

"13. The Court awards plaintiffs judgment and execution against Defendants Ronald and Nadin[a] Taxe, jointly and severally, for any deficiency that remain[s] after applying all proceeds of the sale of the subject property duly applicable to satisfy the amounts found due by the Court . . . .

"14. The Court orders . . . that Plaintiffs or any other party to this action may purchase the subject property at the foreclosure sale . . . ."

The trial court also found in favor of DMC and Newfield on the cross-complaint and deemed them and plaintiffs to be the prevailing parties.

After the trial court issued its Tentative Decision, Richard and Ronald and Nadina filed requests for a statement of decision.[13] In their requests, defendants asked the court to answer questions. The court found that these "interrogatories" were improper under *McAdams v. McElroy* (1976) 62 Cal.App.3d 985, 992-996. "Therefore the Court will not respond to either Request for Statement of Decision, orders both deemed waived and a written judgment required."

Before judgment was entered, plaintiffs elected to dismiss their fourth cause of action for judicial foreclosure and to proceed with nonjudicial foreclosure. The court, on July 9, 2013, entered judgment. The court found that the Massrock trust deed was void *ab initio* and, in any event, it was reconveyed. The court

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[13] Although Richard filed a request, his appeal has been dismissed and no remaining party to the appeal addresses his request.

declared the trustee's deed upon sale, recorded in September 2009, also "void *ab initio*, removed and canceled." The court declared the DMC trust deed to be a valid first priority lien.[14]

C. *The prevailing parties move for attorney fees*

Plaintiffs and DMC/Newfield separately moved for attorney fees. On October 24, 2013, the trial court awarded plaintiffs $414,568 in attorney fees and awarded DMC and Newfield $34,828.75 in attorney fees.

DISCUSSION

I. The statement of decision was sufficient.

Defendants contend that the trial court failed to prepare a statement of decision in compliance with Code of Civil Procedure section 632.[15] We disagree.

Section 632 provides that, upon a party's timely request, a trial court shall issue a statement of decision explaining "the factual and legal basis for its decision as to each of the principal controverted issues at trial." (See also *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, 295 ["it is for the trial court to determine what are the 'principal controverted issues'—those on which the outcome of the case turns"].) However, the "court is not required to respond point by point to the issues posed in a request for statement of decision. The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372,

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[14] After entry of judgment, Massrock filed for bankruptcy and this appeal was stayed from March 2015 to November 2016.

[15] All further undesignated statutory references are to the Code of Civil Procedure.

1380; accord, *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500; *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524 (*Casa Blanca*), abrogated on another ground by *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184.) "Ultimate fact" generally refers to a "core fact, such as an essential element of a claim." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) "Ultimate facts are distinguished from evidentiary facts and from legal conclusions." (*Ibid.*; see also *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1125.) Thus, "a court is not required to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525; see also *Muzquiz*, at p. 1125 [statement of decision "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision"]; *Casa Blanca*, at p. 524.)

Here, defendants contend that the trial court failed to issue a statement of decision, an error that is, they further contend, reversible per se. (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1127, but see *F.P. v. Monier* (2014) 222 Cal.App.4th 1087, review granted Apr. 16, 2014, S216566.) The court did not fail to issue a statement of decision. Rather, the court's Tentative Decision stated it would become the statement of decision, unless "within 10 days after announcement of the Tentative Decision, a party specifies those principal controverted issues a[s] to which the party is requesting a statement of decision or makes proposals not included in the Tentative Decision." (Cal. Rules of Court, rule 3.1590(c)(4)

[authorizing this practice].) Defendants did file "requests for statement of decision," but the court found them to be improper. The Tentative Decision therefore became the statement of decision.

Because the trial court did prepare a statement of decision, the issue is whether the statement of decision explains the factual and legal basis for the court's decision as to each of the "principal controverted issues" at trial. (§ 632.) On that issue, "[w]hen a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity" was brought to the court's attention, "it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." (§ 634.) The operation of this rule depends on a request that adequately specifies the principal controverted issues, the statement of decision's failure to resolve those controverted issues, and a record showing that the omission or ambiguity was brought to the court's attention. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 558 (*Yield Dynamics*).) In addition, "[e]ven though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission . . . is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings." (*Casa Blanca*, *supra*, 159 Cal.App.3d at p. 524; accord, *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 67-68; *Hellman v. La Cumbre Gulf & Country Club* (1992) 6 Cal.App.4th 1224, 1230; *McAdams v. McElroy*, *supra*, 62 Cal.App.3d at p. 996.)

Here, *the* principal controverted issue was whether the DMC deed of trust had first position over the Massrock deed of trust.[16] The trial court made the unambiguous ultimate findings that the Massrock deed of trust failed for lack of consideration, and, in any event, it was reconveyed. The court found that the DMC deed of trust was a first priority lien, and that plaintiffs were bona fide purchasers of the DMC deed of trust. The court cancelled the Massrock deed of trust and unwound the foreclosure sale. The court's statement of decision, although terse, thus resolved the principal controverted issues raised by the pleadings and at trial.

Defendants contend, however, that the trial court did not issue a statement of decision because it refused to address its questions. But defendants' 20 questions did not raise any additional principal controverted issues or otherwise identify ambiguities in the statement of decision. Indeed, the practice of using interrogatories as a vehicle for requesting a statement of decision has been criticized. (See generally *McAdams v. McElroy*, *supra*, 62 Cal.App.3d at p. 993 [practice of generally requesting a finding on a subject without suggesting the specific factual finding is disfavored]; *Yield Dynamics*, *supra*, 154 Cal.App.4th at pp. 558-559; *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1530 ["The trial court is not . . . constrained to provide a statement of decision addressing every single one of Kathleen's 37 questions"]; *Casa Blanca*, *supra*, 159 Cal.App.3d at p. 525 [party's request that court answer 75 questions and list findings on evidentiary facts on issues not controverted by pleadings was

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[16] The other issues identified at the outset of trial were subsumed in this primary issue or rendered moot or irrelevant.

improper "inquisition"]; *Kroupa v. Sunrise Ford* (1999) 77 Cal.App.4th 835, 842 ["73-point request for statement of decision may well have left something to be desired"; nonetheless, court should not cavalierly dismiss it].)

That criticism is well-taken where, as here, defendants' questions were not designed to identify omitted principal controverted issues nor to clear up any ambiguity. Instead, defendants' 20 questions were rhetorical, designed to reargue the case. As we explain, they were also irrelevant, already answered by the statement of decision, improper requests for evidentiary detail and ambiguous. (See generally *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 896 ["To bring an omission or ambiguity to the trial court's attention for purposes of [§ 634], a party must identify the defect with sufficient particularity to allow the court to correct the defect."]; *McAdams v. McElroy*, *supra*, 62 Cal.App.3d at p. 993 [practice of asking questions "unfairly burdens the trial judge in that he must not only speculate which questions embrace ultimate as distinguished from evidentiary facts, but also search his recollection of the record without the assistance of a suggestion from counsel"].)

Many questions were irrelevant. The first question, for example, asked whether the November 2012 certificate relieving Massrock from contract voidability validated its purchase of the Property at the foreclosure sale. The trial court, however, had made the principal finding that the Massrock deed of trust was reconveyed, meaning that the DMC deed of trust had first position (findings 2 and 4). The court therefore ordered Massrock's foreclosure sale unwound (finding 6). Whether the certificate "validated" Massrock's purchase was thus irrelevant; valid or not, the foreclosure was unwound. At most, the

certificate issue was a "side" issue, not a principal one. (See, e.g., *Vukovich v. Radulovich*, *supra*, 235 Cal.App.3d at p. 295 [court's finding it lacked subject matter jurisdiction rendered all other issues immaterial].) Question 10 raised a similarly irrelevant issue; that is, whether plaintiffs had to tender the amount owed on the Massrock deed of trust. The trial court had found, first, that the deed of trust lacked consideration and, second, it was reconveyed (findings 1 and 2). Therefore, there was nothing to tender because the Massrock obligation was extinguished. (See generally *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 877-878 [exceptions to rule of tender include where foreclosure sale is void].) Also irrelevant was question 19, which asked whether Old Republic Title Company was negligent. The title company had been dismissed before trial, and defendants make no argument why the trial court therefore should have addressed the company's alleged negligence.[17]

Other questions had been answered by the statement of decision. Question 2 asked whether plaintiffs had standing to challenge the Massrock deed of trust. The court had answered this question when it found that plaintiffs were bona fide purchasers, encumbrancers and holders in due course of the DMC deed of trust (finding 5). As such, their legal or equitable rights were affected by the existence of the Massrock deed of trust as a lien against the Property. (*Reina v. Erassarret* (1949)

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[17] On that note, defendants make no argument why the court erred in not responding to questions 10, 11 and 14-20. Generally, contentions are waived when there is failure to support them with reasoned argument and citations to authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Notwithstanding this waiver, we address those questions.

90 Cal.App.2d 418, 424.) Also, question 7 asked whether unspecified "statutes of limitations had run" "on any possible claims which [p]laintiffs" could assert against Massrock.[18] But the court had expressly found that the statutes of limitations did not bar any cause of action (finding 8). Question 12 implied that DMC's negligence should be imputed to plaintiffs. But the court had resolved the cross-complaint—which alleged that DMC was negligent in handling the loan transaction—against defendants. The statement of decision thus answered that question as well. The statement of decision had also answered questions 13 and 18, regarding whether delivery was "prevent[ed]" and whether Newfield and DMC were negligent and thus responsible for damages. Defendants' cross-complaint was premised on Newfield's alleged failure to ensure that the Massrock deed of trust was disclosed and reconveyed. The trial court necessarily resolved this issue and the cross-complaint against defendants because it had found that the reconveyance was delivered (finding 2).

Several questions asked for evidentiary detail. Questions 3, 4, 5 and 6, for example, asked whether there was consideration for the Massrock loan and for the court to value any consideration.[19] The court, however, had made the ultimate finding that the Massrock deed of trust lacked consideration (finding 1). Given that the court resolved the consideration issue

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[18] Question 7 also called for speculation and was ambiguous.

[19] The questions specifically asked whether there was consideration for the loan, what value the court gave to the statue and paintings, the court's reasons for finding there was no consideration, and whether the statue was authentic.

against defendants, the court was not required to make specific evidentiary findings about the worth of the statue and paintings. (See, e.g., *Yield Dynamics*, *supra*, 154 Cal.App.4th at p. 558 [part of question demanding that court state facts to support finding was wholly beyond scope of statutory procedure].)

Many questions were improper legal queries. Questions 7 and 8 asked the trial court to identify the applicable limitations periods. It was unnecessary for the court to respond to this broad inquiry. (See *Yield Dynamics*, *supra*, 154 Cal.App.4th at p. 558 ["queries on pure legal issues" improper].) Questions 9 (the impact of lack of consideration on a junior lienholder's right to set aside a foreclosure sale), 16 (the effect of the judgment of dismissal after the demurrer was sustained), and 14, 15 and 17 (the impact of the interests of unidentified "non-parties") were similar improper legal queries. Also, question 11 queried whether "a decree setting aside the Deed of Trust" was outside the scope of the pleadings in that plaintiffs sought to "cancel" the trustee's deed. Although the court did not have to respond to this question, the answer was apparent. Whether the DMC deed of trust had first position depended on resolving whether the Massrock deed of trust was valid. The court had resolved this issue against defendants, finding that the Massrock deed of trust had to be set aside, either because it lacked consideration or was reconveyed. The validity of the Massrock deed of trust thus was squarely within the scope of the pleadings and the issues at trial.

Finally, question 20 asked whether any witnesses were impeached and how any impeachment affected the witnesses' credibility. To be sure, it is generally helpful for a trial court to make express credibility findings. (See generally *Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189 [appellate

court may not reweigh evidence and is bound by trial court's credibility determinations].) But Richard's and Ronald's credibility, for example, was not a "principal controverted issue" as opposed to an "evidentiary fact." In any event, the court's finding that the Massrock deed of trust lacked consideration impliedly, if not expressly, suggests that the court resolved credibility issues against defendants. Similarly, the court's finding that the Massrock deed of trust was reconveyed suggests that the court found not credible Richard's testimony that he did not agree to "release" the Massrock deed of trust from the Property.

We therefore conclude that the trial court's statement of decision was adequate and that defendant's "interrogatories" failed to identify any additional principal controverted issue or ambiguity. Because we so conclude, the usual standard of review of a statement of decision applies. (See, e.g., *Yield Dynamics, supra*, 154 Cal.App.4th at p. 559 ["A party cannot be prevented from using the request [for a statement of decision] as a way of arguing with the court rather than clarifying the grounds of its decision. But neither should a party who makes that choice be entitled to rely on the resulting document to insulate the judgment from the presumption of correctness."].) That is, a trial court's findings of fact after a bench trial are reviewed under the substantial evidence standard, while the trial court's resolution of a question of law is subject to independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364.) Under "the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision." (*Fladeboe v. American Isuzu*

Motors Inc. (2007) 150 Cal.App.4th 42, 48.) "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Moreover, even if we agreed that the trial court failed to issue a statement of decision, we would apply a harmless error review. Although some courts have found that the failure to issue a statement of decision is reversible per se (see, e.g., *Miramar Hotel Corp. v. Frank B. Hall & Co*, *supra*, 163 Cal.App.3d 1126; *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397-1398), a guiding constitutional principle of appellate review is a judgment cannot be set aside unless, after an examination of the entire cause, the error has resulted in a miscarriage of justice (Cal. Const., art. VI, § 13; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580). Here, the trial court made ultimate findings, and the record is otherwise adequate to permit meaningful appellate review. Thus, as we explain in connection with the next issue, we see little reason to reverse a judgment supported by more than sufficient evidence. (See, e.g., *Edgar v. Hitch* (1956) 46 Cal.2d 309 [applying prejudicial error analysis to court's failure to make finding on a defense].)

II. Sufficient evidence supports the trial court's finding that the Massrock reconveyance was delivered.

Defendants argue that there was insufficient evidence the Massrock reconveyance was delivered. We disagree.

"Delivery is a question of intent." (*Osborn v. Osborn* (1954) 42 Cal.2d 358, 363.) "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and

particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title." (*Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 129; see also Civ. Code, § 1054 ["A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."].) To ascertain the donor's intent, it may be necessary to have recourse to his acts and declarations, both before and after his transmission of the documents to a grantee or third party. (*Osborn*, at pp. 363-364; *Bank of America v. Cottrell* (1962) 201 Cal.App.2d 361, 363; *Wilcox v. Hardisty* (1922) 60 Cal.App. 206, 211.) A failure to record an instrument does not in and of itself vitiate delivery or the intent to make a present transfer. (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 685.)

Here, there was more than sufficient evidence that the Massrock reconveyance was delivered, which is a question of fact. (*Henneberry v. Henneberry*, *supra*, 164 Cal.App.2d at p. 129; *Kelly v. Bank of America* (1952) 112 Cal.App.2d 388, 395.) Ronald knew about the reconveyance. He testified that Richard "must have" explained the reconveyance to him (Ronald): "I think [Richard] told me should [*sic*] about it, that's why I knew something about a reconveyance or something like that." Also, Ronald's failure to make payments on the Massrock obligation when it came due in 2008 shows that he thought it was reconveyed. As to Nadina, the parties stipulated that her signature, wherever it appeared, was her signature, and she therefore was charged with knowledge of what she signed.

More importantly, there was sufficient evidence that Richard, who was Ronald's and Nadina's agent, intended to deliver the reconveyance. He signed and notarized it. Richard then brought the signed and notarized reconveyance to the January 13, 2006 meeting with Newfield. Richard handed it to Newfield, evidencing Richard's clear intent to extinguish the Massrock debt. Richard and Ronald made numerous representations that the DMC deed of trust would have first position, thereby implying that the Massrock deed of trust would be reconveyed.[20] And neither Ronald nor Richard denied knowing that Newfield wanted first position; Richard "knew it from the beginning."

In an attempt to defeat this overwhelming evidence of the parties' intent to deliver the reconveyance, defendants emphasize the manual transmission aspect of delivery. Physical transmission, however, is not the sine qua non of delivery. (See, e.g., *Counter v. Counter* (1951) 104 Cal.App.2d 786, 789; *Henneberry v. Henneberry*, *supra*, 164 Cal.App.2d at pp. 129-131.) Indeed, an instrument need not be given to the grantee for it to be "delivered." (See, e.g., *Osborn v. Osborn*, *supra*, 42 Cal.2d at pp. 365-366 [deed held by trustee rather than grantee was delivered].) In any event, Newfield's failure to keep the reconveyance is of little moment. The Massrock obligation existed between Massrock as creditor and the Taxe Trust as debtor. Therefore, if someone needed to keep the reconveyance, it was the Taxe Trust, not Newfield. Stated otherwise, Massrock

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[20] Ronald did not deny making these representations but instead explained that he did not reference the Massrock obligation in disclosure documents because he did not know whether the Massrock deed of trust had been recorded.

was supposed to deliver the reconveyance *to the Taxe Trust*. Defendants, however, fail to address this issue, and it is therefore waived.

To the extent delivery to Newfield had any relevance, it provided further evidence of Richard's intent to reconvey the Massrock obligation. That Richard tried to give the reconveyance to Newfield was evidence it had been delivered. Newfield's failure to retain the reconveyance in no way negates that delivery or shows that Newfield did not accept the reconveyance. Rather, Newfield believed it unnecessary to keep the document because the title report did not list the Massrock deed of trust as a lien and, moreover, because Richard and Ronald assured him the DMC deed of trust would have first position. The evidence overwhelmingly supports the trial court's finding that the reconveyance was delivered.[21]

III. Attorney fees

Defendants contend that the contracts underlying these transactions do not support the trial court's award of attorney fees to plaintiffs and to DMC and Newfield. We disagree.

Civil Code section 1717 "governs attorney fees awards authorized by contract and incurred in litigating claims sounding in contract." (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237 (*Barnhart*).) "An action (or cause of action) is 'on a contract' for purposes of [Civil Code]

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[21] Because we conclude that there is sufficient evidence to uphold the trial court's finding that the reconveyance was delivered, we need not address defendants' alternative grounds for reversal of the judgment. We uphold a judgment if correct on *any* ground. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.)

section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause." (*Id.* at pp. 241-242; accord, *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 427.) Courts liberally construe the term "on a contract" in Civil Code section 1717. (*Barnhart*, at p. 240.) We independently review a trial court's determination whether the criteria for awarding attorney fees has been met. (*Id.* at p. 237.)

A. *Plaintiffs' attorney fees award*

Plaintiffs argued that they were entitled to attorney fees under the DMC note and deed of trust. The DMC note provided: "If action be instituted on this note, I promise to pay such sums as the Court may fix as attorney's fees in the event of a default and an action is brought against me to enforce this Note and Deed of Trust securing same." The deed of trust securing the note provided, "To Protect the Security of This Deed of Trust, Trustor Agrees: [¶] . . . [¶] To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear, and in any suit brought by Beneficiary to foreclose this Deed."

Defendants argue that these attorney fees clauses do not support the fee award for two reasons. First, only plaintiffs' fourth cause of action for judicial foreclosure was on the DMC note and deed of trust. Because plaintiffs dismissed that cause of

action, they cannot be prevailing parties under section Civil Code section 1717, subdivision (b)(2), which provides, "Where an action has been voluntarily dismissed . . . there shall be no prevailing party for purposes of this section." (See also *Marina Glencoe L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 877-879.) Even if we agreed that dismissing the judicial foreclosure cause of action implicated Civil Code section 1717, subdivision (b)(2), plaintiffs' remaining equitable causes of action for quiet title, equitable lien and cancellation of instruments arose out of the DMC note and deed of trust. The only reason plaintiffs could, for example, quiet title to the Property was based on the note and deed of trust. In other words, those equitable causes of action were "on the contract." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347-348 [although equitable remedy sought, claims were still actions "on the contract"].)

Defendants' second argument is that the DMC deed of trust did not authorize an attorney fees award to a beneficiary who prosecuted an action to protect its security. This argument has been rejected. Although such an attorney fee provision "literally seems to contemplate actions filed by someone other than the trustor where the trustor is required to appear and defend the beneficiary's or trustee's rights under the trust deed, in principle, we see no reason why it should not apply to actions by the trustor challenging the beneficiary's and trustee's rights under the trust deed." (*Valley Bible Center v. Western Title Ins. Co.* (1983) 138 Cal.App.3d 931, 932; *Kachlon v. Markowitz*, *supra*, 168 Cal.App.4th at pp. 347 [section 1717 makes unilateral attorney fees clauses reciprocal]; see *Barnhart*, *supra*, 211 Cal.App.4th at p. 237 [primary purpose of Civ. Code, § 1717 is to ensure mutuality of attorney fees clauses].)

Even if this argument had some validity, it nonetheless ignores the attorney fees clause in the DMC note, which refers broadly to an "action instituted on this note." That language supports the fee award under Civil Code section 1717. (*Kachlon v. Markowitz*, *supra*, 168 Cal.App.4th at pp. 347-348; see *Del Mar v. Caspe* (1990) 222 Cal.App.3d 1316, 1334-1336.)[22]

B. *DMC's and Newfield's attorney fees award*

The cross-complaint for negligence and for indemnity and contribution alleged that DMC and Newfield negligently arranged the loan by omitting the Massrock deed of trust from disclosure statements. As the prevailing parties on that cross-complaint, DMC and Newfield argued that they were entitled to attorney fees under the Lenders Escrow Instructions. Those instructions provided: "If any legal action is necessary to enforce or interpret the terms of this Agreement, or in any legal action arising out of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract. The 'prevailing party' shall be the party entitled to recover his or her costs of suit, regardless of whether such legal action proceeds to final judgment."

To determine whether the cross-complaint was "on the contract" under Civil Code section 1717, "the proper focus is not on the nature of the remedy, but on the basis of the cause of action." (*Barnhart*, *supra*, 211 Cal.App.4th at pp. 240-241.)

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[22] Because the award of attorney fees was appropriate under the attorney fees clause in the note, we need not address any of defendants' alternative arguments about the attorney fees provision in the DMC deed of trust.

"Among the relevant factors are 'the pleaded theories of recovery, the theories asserted and the evidence produced at trial, if any, and also any additional evidence submitted on the motion in order to identify the legal basis of the prevailing party's recovery. [Citation]' [Citation.]" (*Hyduke's Valley Motors v. Lobel Financial Corp.* (2010) 189 Cal.App.4th 430, 435.)

Here, the cross-complaint's theory of liability against DMC and Newfield was they were negligent in arranging the loan. The Lenders Escrow Instructions were an integral part of arranging the loan. Indeed, that instrument described the loan transaction and told the escrow company what to do. Thus, the cross-complaint arose out of that agreement, and attorney fees were properly awarded to DMC and Newfield.[23]

C. *Attorney fees award against Ronald and Nadina as individuals*

The trial court awarded attorney fees against Ronald and Nadina, individually and as trustees of the Taxe Trust. Defendants contend that Ronald and Nadina cannot be individually liable for the fees because they signed the DMC note and deed of trust only in their capacity as trustees. They rely on Probate Code section 18001, which provides that "[a] trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault." (See also *Haskett v. Villas at Desert Falls* (2001) 90 Cal.App.4th 864.)

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[23] Defendants appear to argue that an integration clause in the Lender's Escrow Instructions somehow limits the attorney fees clause. It is, however, unclear what relationship the integration clause has to whether the action arose from the agreement.

Defendants, however, never raised this issue in the trial court. Failure to raise an issue below deprives the opposing party of the opportunity to respond to the issue and the trial court of the opportunity to consider it. Thus, the general rule is that issues raised for the first time on appeal which were not litigated in the trial court are forfeited. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564; *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830.) The rule is particularly apt here. Ronald and Nadina complain there is no express finding they were personally at fault; yet, they deprived the trial court of the opportunity to make such an express finding. The issue is forfeited.

DISPOSITION

The judgment and order regarding attorney fees are affirmed. Plaintiffs and respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J*.

We concur:

EDMON, P. J.

LAVIN, J.

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