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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COUNTY RECORDS  
RESEARCH, INC.,

Plaintiff,

v.

OSCAR E. TOSCANO,

Defendant and Appellant;

WEI HU, et al.,

Defendants and  
Respondents.

B271315

(Los Angeles County  
Super. Ct. No. BC578992)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Oscar E. Toscano for Defendant and Appellant.

Anderson, McPharlin & Conners, Vanessa H. Widener and Elmira R. Howard for Defendants and Respondents.

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Oscar Toscano defaulted on two deeds of trust on a single piece of property, and each time the property was sold at a trustee's sale. The first default—on the second deed of trust—resulted in a trustee's sale (subject to the first deed of trust) to Federal Home Loan Mortgage Corporation (Federal), which sold the property to Wei Hu, who transferred it by quitclaim to himself and his wife, Szu-Yen Yang. The second default—on the first deed of trust—resulted in a trustee's sale to B2A Properties, which again sold the property to Hu and Yang.

After the second trustee's sale, Hu and Yang on one hand, and Toscano on the other, claimed entitlement to the excess funds from the sale. The trustee interpleaded the funds. The trial court granted summary judgment in favor of Hu and Yang, and Toscano appealed. We affirm.

Hu and Yang seek sanctions against Toscano, arguing that his appeal is frivolous. We deny the motion for sanctions.

### **BACKGROUND**

Oscar and Sandra Toscano purchased 4427 Mont Eagle Place in Los Angeles from Roger Di Virgilio in May 1984.<sup>1</sup> To secure Di Virgilio's \$60,000 seller-financed loan (the first loan), the Toscanos executed a deed of trust on the property in Di Virgilio's favor. In July 2006, Toscano executed a second deed of trust on the property to secure a \$397,500 loan from Lehman Brothers Bank (the second loan).

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<sup>1</sup> "Toscano" refers only to Oscar Toscano. Oscar and Sandra Toscano divorced before Toscano secured the second loan; 4427 Mont Eagle Place was awarded to Mr. Toscano as separate property. Mrs. Toscano filed no answer to the interpleader complaint and has not participated in this litigation.

In February 2011, Toscano defaulted on the second loan. Toscano failed to cure the default, and the property was set for a trustee's sale. Shortly before the June 2011 sale date, Toscano sued to stop the sale (L.A. Super. Ct. No. BC463140). On November 15, 2012, the trial court sustained demurrers to most of Toscano's causes of action without leave to amend, granted a motion to strike the remaining cause of action, and dismissed the action. On May 10, 2013, the property was sold to Federal Home Loan Mortgage Corporation (Federal) at a trustee's sale. On May 6, 2014, Federal sold the property to Hu; Hu quitclaimed the property to himself and Yang a week later.

In November 2014, Toscano defaulted on the first loan. On March 6, 2015, the property was again sold at a trustee's sale, this time to B2A Properties.<sup>2</sup> The trustee's sale yielded an excess of approximately \$167,777 over the amount of Toscano's indebtedness. After costs and attorney fees were deducted, approximately \$163,332 remained.

The trustee for the Di Virgilio deed of trust, County Records Research, filed an interpleader complaint in the trial court on April 29, 2015, alleging that Toscano on one hand and Hu and Yang on the other had made competing claims to the excess funds from the second trustee's sale. On October 30, 2015, Hu and Yang filed a motion for summary judgment, which the trial court granted. The trial court entered judgment for Hu and Yang on February 18, 2016. Toscano timely appealed.

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<sup>2</sup> Hu and Yang purchased the property from B2A on May 5, 2015.

## DISCUSSION

“A trial court should grant summary judgment ‘if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ (Code Civ. Proc., § 437c, subd. (c).) . . . A triable issue of material fact exists where ‘the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’” (*Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962, 967, citations omitted.)

“‘We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]’ [Citation.] We view the evidence and the inferences reasonably drawn from the evidence ‘in the light most favorable to the opposing party.’” (*Neiman v. Leo A. Daly Co.*, *supra*, 210 Cal.App.4th at pp. 967-968.)

The material facts are undisputed; it is the legal effect of those facts about which the parties disagree. Toscano contends there are approximately 20 issues that we must decide. Toscano’s entire argument, however, rests on the lone contention that the first trustee’s sale (based on the second loan) conveyed something less than title to the property. Toscano bases this argument on a variety of alternative theories.

### **A. Second deed of trust trustee’s sale**

Toscano relies on *Koch v. Briggs* (1859) 14 Cal. 256 (*Koch*), and its progeny to argue that the first deed of trust conveyed title of the property to the trustee of the first deed of trust, and that title to the property could not, therefore, have been conveyed in a trustee’s sale on the second deed of trust. Toscano contends that

the trustee's sale on the second deed of trust generated a lien. Under Toscano's theory, that lien was extinguished when County Records Research sold the property pursuant to the first deed of trust. Because title never passed to Federal (which, consequently, had no title to pass to Hu), Toscano contends, Civil Code section 2924k requires that excess funds from the trustee's sale on the first deed of trust be distributed to him.

Hu and Yang, on the other hand, contend that they acquired title to the property from Federal, but that the title was subject to the first deed of trust. According to Hu and Yang, Civil Code section 2924k provides that they are to receive the excess funds after the trustee's sale on the first deed of trust. We agree with Hu and Yang.

"[A] foreclosure of a second deed of trust may be had during the existence of the first deed of trust and . . . a trustee's deed executed following a valid sale under a second deed of trust conveys all title which the trustor had, which title is subject only to the rights of those claiming under the first deed of trust." (*Davidow v. Corp. of America* (1936) 16 Cal.App.2d 6, 12.) On May 10, 2013, when Federal purchased the property at the trustee's sale on the second deed of trust, it purchased the property "subject only to the rights of those claiming under the first deed of trust." (*Ibid.*)

*Koch* is inapposite. *Koch* stands only for the proposition that there is a technical distinction between a mortgage and a deed of trust: one is subject to a foreclosure suit and the other is subject to a trustee's sale without the need to seek court intervention (according to the terms of the trust). (*Koch, supra*, 14 Cal. at pp. 263-264.) The holders of both the second and first deeds of trust here exercised their options to sell the subject

property at separate trustee's sales; the deed of trust was never subject to a foreclosure suit. That does *not*, however, mean that the property's title somehow remained vested in Di Virgilio under the first deed of trust after the trustee's sale on the second, even if he did have an interest to which the property remained tied and able to satisfy.

**B. Procedural challenges to second deed of trust sale**

Toscano also contends here that he is entitled to the excess proceeds from the trustee's sale on the first deed of trust because of procedural flaws in the trustee's sale on the *second* deed of trust. These procedural flaws, Toscano argues, mean that the trustee's sale on the second deed of trust was not a "valid sale," and therefore no title was transferred as a result of that sale. We do not reach this argument.

On June 8, 2011, after he had defaulted on the second loan, Toscano filed suit to cancel the second deed of trust and avoid the trustee's sale. Toscano's complaint alleged the same issues he raises here to challenge the validity of the trustee's sale on the second deed of trust. The trial court ultimately disposed of Toscano's complaint by sustaining demurrers without leave to amend and granting a motion to strike. The trial court entered judgment against Toscano in that case on November 15, 2012. Toscano filed no notice of appeal.

Toscano's arguments on these issues amount to an improper collateral attack on the trial court's judgment of dismissal in his case attempting to set aside the second deed of trust.<sup>3</sup> "A litigant may collaterally attack a final judgment for

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<sup>3</sup> " 'A collateral attack is an attempt to avoid the effect of a judgment or order . . . made in some other proceeding.' " (*Wouldridge v. Burns* (1968) 265 Cal.App.2d 82, 84.) "[A]ny

lack of personal or subject matter jurisdiction, or for granting relief that the court had no power to grant, but may not collaterally attack a final judgment for nonjurisdictional errors.” (*Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854.)

**C. Distribution of excess funds from trustee’s sale**

Civil Code section 2924k, subdivision (a)(4) provides that after proceeds have otherwise been transferred according to statutory priority, “[t]he trustee, or the clerk of the court . . . , shall distribute the proceeds, or a portion of the proceeds, as the case may be, of the trustee’s sale . . . [¶] . . . [¶] . . . [t]o the trustor or the trustor’s successor in interest. In the event the property is sold or transferred to another, to the vested owner of record at the time of the trustee’s sale.” By the time of the trustee’s sale on the first deed of trust, the property had been sold at a trustee’s sale on the second deed of trust, sold again to Hu, and then transferred again to Hu and Yang, all subject to the trustee’s interest in the first deed of trust. The undisputed material facts establish that Hu and Yang were the vested owners of record of 4427 Mont Eagle Place when the property was sold on March 6, 2015 to B2A Properties. Civil Code section 2924k, therefore, entitles Hu and Yang to the excess proceeds from the March 6, 2015 trustee’s sale.

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procedural challenge that does not constitute a direct attack is collateral.” (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 6, p. 590.)

#### **D. Motion for sanctions**

Hu and Yang have moved for sanctions against Toscano under Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a)(1).<sup>4</sup> We deny the motion.

Rule 8.276(a)(1) provides for sanctions for, among other things, “[t]aking a frivolous appeal or appealing solely to cause delay.” “That an appeal lacks merit does not, alone, establish that it is frivolous. [Citation.] An appeal is frivolous ‘only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.’ [Citations.] The good faith of appellant and counsel is tested subjectively. . . . Whether any reasonable attorney would agree that the appeal is without merit is tested objectively.” (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261-1262.)

“[A]ny definition of a frivolous appeal must be read to avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions. [Citations.] An appeal, though unsuccessful, should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not

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<sup>4</sup> The motion was brought pursuant to California Rules of Court, rule 8.891(e). Rule 8.891 applies in limited civil cases. This case is an unlimited civil case. (See Code Civ. Proc., §§ 86, subd. (a)(2), 88.)



amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law.” (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1296.)

“[S]anctions should be used sparingly to deter only the most egregious conduct.” (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 557.) Although Hu and Yang’s plea for sanctions is convincing, we do not find that Toscano’s appeal rises to a sanctionable level of frivolity.

#### **DISPOSITION**

The trial court’s judgment is affirmed. The motion for sanctions is denied. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.