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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HSING LIANG SIDNEY LIN et
al.,

Cross-complainants and
Respondents.

v.

JEFF THOMPSON,

Cross-defendant and
Appellant.

B283223

(Los Angeles County
Super. Ct. No. GC045358,
13P00076)

APPEAL from a judgment and orders of the Superior Court
of Los Angeles County, William D. Stewart, Judge. Affirmed.

Nick A. Alden for Cross-defendant and Appellant.

Dan Hogue for Cross-complainants and Respondents.

Jeff Thompson appeals from a judgment entered in a consolidated action relating to ownership and possession of real property in San Marino (the Property) in favor of Fang Chu and her husband, Hsing Liang Sidney Lin, adjudicating Chu and Lin's causes of action for quiet title and ejectment in their cross-complaint against Thompson and Thompson's cause of action for quiet title against Chu and Lin in Thompson's cross-complaint, and dismissing of Lin's unlawful detainer action against Thompson.

On appeal, Thompson contends as to the cross-complaints: (1) the trial court abused its discretion in vacating the default judgment entered against Chu and Lin on Thompson's cross-complaint; (2) the trial court erred in granting Chu and Lin's motion for summary adjudication of the quiet title causes of action in Thompson and Chu and Lin's cross-complaints; and (3) the trial court erred in overruling Thompson's demurrer to Chu and Lin's ejectment cause of action, and later granting Chu and Lin's motion for summary adjudication of the claim.

As to the unlawful detainer action, Thompson asserts (1) the trial court erred in denying his motion for summary judgment; and (2) the trial abused its discretion in granting Lin's motion for a new trial following a jury verdict for Thompson. Thompson also argues the trial court erred in ordering issuance of a writ of possession and directing the sheriff to execute on the writ prior to entry of a final judgment. Finally, Thompson claims the court erred in awarding damages against him. We affirm.¹

¹ On August 7, 2017 Thompson filed a petition for a writ of supersedeas requesting we order the trial court to rescind its

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Grant Deeds and Deeds of Trust* ²

On October 22, 2009 Scott and Georganne Dority, as trustees of Full Circle Living Trust, executed a grant deed transferring title of the Property to Zhan Giang Han. On the same day, Han signed a promissory note for the principal amount of \$1,170,000, together with a 9.99 percent annual interest rate. Under the terms of the promissory note, Han was obligated to “make monthly payments of interest only of \$9,740.25 beginning December 1, 2009 and continuing monthly thereafter, on the first date of each month, with the entire sum of unpaid principal, accrued interest, and any other sums due, payable on or before April 30, 2011.” The principal would accrue interest at the rate of 9.99 percent; further, if payment was not received by the 10th of the month, interest would increase to 15 percent and a 5 percent late charge of \$487.01 would be added to the principal amount of the note. Upon default or transfer of Property, the noteholders had the option of accelerating the note, so that the entire loan amount became immediately due.

The promissory note was secured by a deed of trust on the Property signed by Han. The deed of trust named Han as trustor and Reliable Trust Deed Services (Reliable) as trustee for the

order granting possession of the Property to Lin and Chu. On August 9, 2017 we summarily denied the petition.

² The underlying documents were trial exhibits in the unlawful detainer trial.

named beneficiaries. The October 22, 2009 grant deed and the deed of trust were recorded on October 26, 2009.

On October 27, 2009 Han executed and recorded a grant deed conveying the Property to Thompson as a “[g]ift.” On the same day, Han signed a grant deed conveying the Property to Shantre Investments, Inc. (Shantre),³ also as a gift. Han’s grant deed to Shantre was recorded on October 28, 2009.

On December 4, 2009 Han signed another grant deed providing that his conveyance of the Property to Thompson on October 27, 2009 was “subject to a first deed of trust in the amount of \$1,170,000.00, and a second deed of trust in the amount of \$950,000.00.”⁴ The December 4 grant deed was recorded on January 7, 2010.

B. *Han’s Default on the Loan and Notice of Default*⁵

According to Thompson, Han and Thompson orally agreed Thompson would make payments on the promissory note. Thompson failed to make the January 2010 payment. On January 19, 2010 the loan servicer sent Han a late payment notice requesting \$10,227.26, comprised of the missed January payment of \$9,740.25 and a late charge of \$487.01. On February 2 the loan servicer sent Han a final delinquent

³ Shantre was a Nevada corporation formed by Scott Dority and his adult children to hold title to the Property.

⁴ On October 27, 2009 Han signed a second deed of trust as security for a \$950,000 loan from JG Management, LLC. The second deed of trust was recorded on October 28, 2009.

⁵ The facts in this section are taken from the testimony and trial exhibits at the unlawful detainer trial.

payment notice requesting \$19,967.51, comprised of the missed January and February payments plus the \$487.01 late charge.

On February 9, 2010 Reliable recorded a notice of default and election to sell under the deed of trust. The notice of default stated the amount owed was \$34,057.45 as of February 2, 2010, which amount would increase until Han paid the balance owed.⁶ The notice stated there had been a default based on failure to pay “the installment of interest which became due on 01/01/10 and all subsequent installments together with all late charges[,] [p]lus the failure to provide proof of earthquake insurance. . . .” Reliable was not contacted to cure the default during the 90 days following the default, and it set a trustee’s sale. On May 17, 2010 Reliable recorded a notice of trustee’s sale for June 10, 2010 to be held in the main lobby of Reliable’s office building. According to Reliable employee Sonia Rivas, Reliable mailed the notice of trustee’s sale to the Property and published and posted the notice of trustee’s sale for three weeks through a publishing company.

C. *The Trustee’s Sale*⁷

At the unlawful detainer trial, Reliable employee Rivas testified Reliable postponed the trustee’s sale to June 11, 2010 at

⁶ Reliable calculated the \$34,057.45 based on the number of months Han was delinquent and the interest rate. Reliable also included its trustee’s fees, including foreclosure costs and expenses.

⁷ The facts regarding the trustee’s sale are taken from testimony at the unlawful detainer trial and declarations filed in connection with the summary judgment motions filed by Thompson and Chu and Lin.

the request of the deed of trust's beneficiaries. Auctioneer Nancy Adams testified that on June 10, 2010 at 11:00 a.m., in the lobby of Reliable's building, she orally announced the postponement of the trustee sale. Rivas observed Adams announce the postponement of the sale. Reliable employee Julie Taberdo testified Reliable's general practice was to announce the postponement in the lobby, notate it in a journal, and enter it in Reliable's database.

Thompson testified that on June 10, 2010 he went to the lobby of Reliable's office building to attend the trustee's sale. He arrived between 9:30 and 10:30 a.m. and stayed until 11:00 or 11:30 that morning. According to Thompson, by 11:00 a.m., no Reliable employee showed up, no announcement was made about the postponement of the trustee's sale, and there were no other bidders. Thompson went upstairs to Reliable's office to inquire about the trustee's sale, but he was not informed about the new date set for the sale.

Thompson testified he brought a cashier's check for \$10,227.46 to the Reliable lobby because that was what he owed on the loan. But opposing counsel impeached Thompson with his deposition testimony, in which Thompson responded "[n]o" when asked, "Did you bring any money with you to bid at the sale?" Thompson also testified inconsistently that he was told by Alex Guralnik⁸ (as opposed to Reliable), "there's not going to be a sale."

At the June 11, 2010 trustee's sale, Dennis Angel, owner of Six Angels, submitted a successful bid of \$1.5 million on behalf of

⁸ According to Thompson, Guralnik facilitated the loan to Han and created the deed of trust.

Chu and Lin.⁹ Angel tendered cashier's checks totaling \$1.5 million to Reliable, and Reliable provided him a "receipt and instructions." The receipt and instructions acknowledged title to the Property would vest in Chu and Lin. The attached handwritten note stated, "6/11/2010 [¶] Angels taking checks totaling 1,500,000 converting into wire transfer on Monday 6/14/2010." Angel testified he received payment of \$1.5 million from Lin or Lin's agent, Nancy Wang, then wired the money to Reliable. Reliable held the cashier's checks until it received the wire transfers.

On June 15, 2010 Reliable's president, Lynn Wolcott, executed a trustee's deed upon sale conveying the Property to Chu and Lin. The trustee's deed upon sale states the Property was sold at public auction on June 11, 2010 to Chu and Lin as the highest bidder, for \$1.5 million. The trustee's deed upon sale was recorded on June 16, 2010.

⁹ Thompson asserts Reliable conducted a "private sale" of the Property, but cites no admissible evidence to support his claim. At the unlawful detainer trial, auctioneer Adams testified she conducted a public auction of the Property on June 11, 2010. Adams could not remember how many bidders were at the trustee's sale, but the final bid was higher than the starting bid, "so there at least had to be two." In her deposition, Reliable employee Rivas confirmed the trustee's sale occurred on June 11, 2010. The bidding started at \$1.1 million and went up by \$2,000 increments until it reached the final sale bid of \$1.5 million. Angel testified at trial there were other bidders at the trustee's sale.

D. *The Lawsuits*

1. *Shantre's lawsuit to quiet title and Thompson's cross-complaint*

On June 7, 2010 Shantre filed a complaint to quiet title against Thompson, Han, and the beneficiaries of the first and second deeds of trust, case No. GC045358 (*Shantre* action). Shantre alleged ownership of the Property based on the recorded October 27, 2009 grant deed from Han. Shantre further alleged Thompson wrongfully interfered with Shantre's use and control of the Property by encumbering the Property with deeds of trust and initiating an unlawful detainer action against Shantre's tenants. Shantre recorded a lis pendens on June 8, 2010.¹⁰

On May 12, 2011 Thompson filed a cross-complaint for declaratory relief, fraud, and quiet title against Shantre, the Doritys, Lin, Chu, and Reliable. Thompson alleged Han purchased the Property from the Doritys, then deeded the Property to Thompson. According to Thompson, the grant deed to Shantre was false. Thompson alleged Reliable improperly foreclosed on the property by listing an incorrect default amount of \$34,067.45. Thompson also alleged Reliable violated the

¹⁰ “A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice.” (*Kirkeby v. Superior Court* (2004) 33 Cal.4th 642, 647; accord, *Mira Overseas Consulting Ltd. v. Muse Family Enterprises, Ltd.* (2015) 237 Cal.App.4th 378, 383.) “A lis pendens clouds title until the litigation is resolved or the lis pendens is expunged, and any party acquiring an interest in the property after the action is filed will be bound by the judgment.” (*Mira Overseas Consulting Ltd.*, at p. 384.)

bankruptcy automatic stay when it foreclosed on the Property on June 11, 2010 because Han filed for bankruptcy on the same date. Thompson sought an order quieting title to the Property, constructive trust, an accounting, damages, and attorneys' fees.

2. *Dismissal of Shantre's complaint, entry of defaults on Thompson's cross-complaint, and order vacating defaults and default judgment*

The court clerk entered a default on the cross-complaint as to Reliable on August 11, 2011 and a default as to Chu on September 20, 2011. On January 9, 2012 the trial court¹¹ dismissed Shantre's complaint on the basis Shantre failed to provide evidence it was in good standing as a Nevada corporation and was qualified to do business in California. On January 24, 2012 the trial court entered judgment vesting title to the Property in Thompson, expunging the lis pendens, and granting judgment on the cross-complaint in favor of Thompson against Shantre, Reliable, Chu, and Lin.¹²

On February 10, 2012 Chu and Lin moved to vacate their defaults and the default judgment under Code of Civil Procedure 473.5 for lack of service. After hearing argument, on March 23 the trial court granted the motion. On April 4, 2012 the court entered an order setting aside the defaults and vacating the default judgment.

¹¹ Judge C. Edward Simpson.

¹² The judgment appears to assume defaults were entered against Chu and Lin, although the appellate record only reflects entry of a default against Chu.

3. *Chu and Lin's cross-complaint*

On March 23, 2012 Chu and Lin filed a cross-complaint against Shantre, Thompson, Han, real estate brokers Nancy Wang and Dylan Cheng, and others. Chu and Lin sought to quiet title based on the June 16, 2010 recorded trustee's deed upon sale. They also brought causes of action against Wang and Cheng for professional negligence, breach of fiduciary duty, fraud, and other claims based on Wang and Cheng's failure to disclose Shantre's lis pendens on the Property. On October 26, 2012 the trial court granted Chu and Lin's motion for leave to amend their cross-complaint to add Reliable and the beneficiaries of the first deed of trust as cross-defendants, and to assert causes of action for money had and received and the intentional infliction of emotional distress.

4. *Lin's unlawful detainer complaint*

On January 28, 2013 Lin filed a complaint for unlawful detainer against Thompson and "all others in possession" of the Property (case No. 13P0076). Lin alleged he purchased the Property at the June 11, 2010 foreclosure sale,¹³ after which the June 16 trustee's deed upon sale was recorded. Lin alleged written notice to vacate was served on defendants, but after three days defendants remained in possession of the Property without Lin's permission. Lin sought possession of the Property,

¹³ Although Lin alleged he purchased the property, as discussed, the property was purchased by Chu and Lin, and the title reflects both Lin and Chu as owners. Chu and Lin jointly filed the cross-complaint; however, the unlawful detainer action was filed on behalf of only Lin.

restitution, damages of \$296.71 per day (the rental value), and costs of suit.

5. *Thompson's second amended cross-complaint*

On April 2, 2013 Thompson filed a second amended cross-complaint for violation of the Homeowner Bill of Rights (Civ. Code, §§ 2923.4, 2923.5, 2924f, and 2924g), breach of fiduciary duty, notary misconduct, notary damages, cancellation of instruments, conspiracy to wrongfully foreclose, unfair business practices, and quiet title. Thompson sought to quiet title against Chu and Lin based on Han's October 27, 2009 grant deed to Thompson and the January 24, 2012 judgment in Thompson's favor against Chu and Lin.

6. *Consolidation of the unlawful detainer action with the Shantre action*

On June 7, 2013 the trial court¹⁴ granted Thompson's ex parte application to consolidate Lin's unlawful detainer action with the *Shantre* action and designated the *Shantre* action as the lead case. The court found consolidation was proper because title to the Property was at issue in both cases. The court bifurcated the trial, setting the unlawful detainer trial for September 16, 2013 and a court trial for March 17, 2014 to "resolve any and all issues that remain to be resolved in this case following the [u]nlawful [d]etainer trial"

¹⁴ Judge William D. Stewart presided over this and further proceedings in the consolidated action.

7. *Chu and Lin's and Thompson's 2013 summary judgment motions*

On July 12, 2013 Chu and Lin filed a motion for summary judgment or, in the alternative, summary adjudication as to Lin's unlawful detainer action and Thompson's affirmative defenses to Chu and Lin's cross-complaint in the *Shantre* action. Chu and Lin contended they held title and had the right to possession of the Property. On July 29 Thompson filed a cross-motion for summary judgment or, in the alternative, summary adjudication. Thompson asserted he held sole ownership of the Property because of the January 24, 2012 judgment he obtained against Reliable, which estopped Chu and Lin from claiming title; irregularities in the foreclosure proceedings; and the notice of default's statement of an incorrect amount owed on the note. On August 9, 2013 the trial court denied both motions, finding there were triable issues of material fact. On its own motion, the court set aside the January 24, 2012 judgment against Reliable.¹⁵

8. *The unlawful detainer trial and Lin's motion for new trial*

On September 6, 2013 Chu and Lin filed a motion to try the quiet title causes of action before the unlawful detainer action, which Thompson opposed. On September 16 the trial court denied the motion and set the trial on the unlawful detainer

¹⁵ As discussed, on March 23, 2012 the trial court granted Chu and Lin's motion to vacate the January 24, 2012 judgment. However, Reliable never moved to set aside the default judgment as to it.

action for October 14, 2013, and the trial on remaining issues for March 13, 2014.

Prior to the unlawful detainer trial, Lin filed a motion in limine to preclude evidence regarding the bankruptcies of Shantre, Han, and Reliable. Lin also filed a motion in limine to preclude evidence of the vacated January 2012 default judgment. The court granted both motions in limine.

The unlawful detainer trial began on December 9, 2013 and continued for nine court days, ending on December 31. The jury found in its special verdict Lin did not purchase the Property for value at a trustee's sale on June 11, 2010.¹⁶ In addition, seven jurors found the October 27, 2009 and December 4, 2009 grant deeds from Han to Thompson were forgeries; five jurors found the deeds were genuine.¹⁷ On January 2, 2014 the trial court entered judgment on the special verdict form, ordering "Lin shall not have and recover possession" of the Property.

On January 2, 2014 Lin moved for judgment notwithstanding the verdict, or in the alternative, partial judgment notwithstanding the verdict. Lin argued he was a bona fide purchaser; Thompson did not have standing to challenge the trustee's sale; Thompson failed to tender the entire amount owed;

¹⁶ The jury responded "No" to the question, "Did . . . Lin purchase for value the [P]roperty . . . at a trustee's sale on June 11, 2010?"

¹⁷ The special verdict form asked, "Are the deeds to Jeff Thompson from . . . Han . . . genuine or a forgery? Answer 'Genuine' or 'Forgery' as to each." Seven jurors responded "Forgery" as to the October 27 and December 4, 2009 deeds, and five jurors responded "Genuine" as to both deeds.

and Thompson was not prejudiced by any alleged irregularities in the trustee's sale. On January 10, 2014 Lin moved for a new trial based on attorney misconduct, jury misconduct, and insufficiency of the evidence. On February 7, 2014 the trial court granted Lin's motion for a new trial but denied his motion for judgment notwithstanding the verdict.¹⁸

9. *Chu and Lin's Motion for Summary Adjudication of the Quiet Title Causes of Action in the Cross-complaints*

On April 7, 2014 Chu and Lin moved for summary adjudication of the quiet title causes of action in their cross-complaint and the cross-complaint filed by Thompson; Thompson opposed the motion. After hearing oral argument, on November 21, 2014 the trial court granted Chu and Lin's motion, finding Chu and Lin purchased the property at the trustee's sale on June 11, 2010, and Thompson could not challenge the foreclosure process because he had failed to tender the funds to discharge his debt. On December 31, 2014 the court entered an order granting the motion.

¹⁸ Thompson appealed from the order granting a new trial. Lin moved to dismiss the appeal, contending judgment in the bifurcated unlawful detainer action did not resolve issues that remained to be tried in Chu and Lin's and Thompson's respective cross-complaints. On June 17, 2014 we granted the motion and dismissed the appeal. (*Lin v. Thompson* (June 17, 2014, B254752).)

10. *Chu and Lin's cause of action for ejectment*

On December 24, 2014 Chu and Lin moved for leave to amend their first amended cross-complaint to add a cause of action for ejectment against Thompson as an alternative to Lin's unlawful detainer action. Thompson opposed the motion, arguing the ejectment claim lacked merit. On January 23, 2015 the trial court granted the motion, noting Thompson could test the legal sufficiency of the claim by filing an "appropriate motion."

On March 2, 2015 Thompson filed a demurrer to Chu and Lin's amended cross-complaint on the causes of action for quiet title, declaratory relief, and ejectment; Chu and Lin opposed the motion. On May 1 the trial court overruled the demurrer.

On June 22, 2015 Chu and Lin moved for summary adjudication of their ejectment claim; Thompson opposed. After hearing oral argument, on February 22, 2016 the trial court granted the motion, stating in its written order, "[T]he undisputed facts demonstrate that [Chu and Lin] have title to the property, [and] that [Thompson] has withheld possession from them." The order provided further, "A [w]rit of [p]ossession may issue forthwith upon signing of this [o]rder."

On November 10, 2016 the trial court granted Chu and Lin's ex parte application for an order directing the sheriff to execute the writ of possession. The order stated in part, "The court finds that persons known and unknown are acting to frustrate orders of this court and therefore orders as follows: [¶] For good cause shown, the Court orders the Los Angeles County Sheriff to refuse any further [c]laim of [r]ight to [p]ossession filed by anyone in this matter and to proceed with the [w]rit and to place [Chu and Lin] in lawful and peaceful possession of [the

Property] notwithstanding any [c]laim of [r]ight to [p]ossession or [n]otice of [b]ankruptcy filing.”

E. *The Final Judgment*

On May 25, 2017 the trial court entered judgment disposing of all causes of action in Thompson’s and Chu and Lin’s respective cross-complaints. The court entered judgment on the quiet title claims in favor of Chu and Lin “as of June 16, 2010, free of any claim of Jeff Thompson and persons claiming right title or interest by or through Jeff Thompson to the . . . [P]roperty” The court also granted judgment in favor of Chu and Lin and against Thompson on their ejectment claim, based on its prior order granting Chu and Lin’s motion for summary adjudication, awarding damages in the amount of \$477,687. The court calculated the damages based on its finding “Thompson wrongfully withheld possession of the subject Property for a total of 1,610 days at a daily rate of \$296.71 per day.” The court entered a judgment of dismissal of the unlawful detainer case without prejudice based on Lin’s prior dismissal of the action.

Thompson timely appealed.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Setting Aside the Default Judgment Against Chu and Lin*

1. *The trial court proceedings*

As noted, on September 20, 2011 the court clerk entered a default against Chu, then on January 24, 2012 it entered a judgment against Chu and Lin. On February 10, 2012 Chu and Lin moved to set aside the default and vacate the default

judgment. Chu and Lin asserted they were not personally served and there was no valid substitute service. It was undisputed Thompson only served his cross-complaint on Chu and Lin by substitute service on Lisa Chen on July 11, 2011 at a UPS store located in San Gabriel.¹⁹

In his supporting declaration, Lin stated he and Chu did not live or conduct business at the UPS store, and they were not present at the UPS store at any time on July 11, 2011. Lin acknowledged he (but not Chu) opened a private mailbox at the UPS store on August 14, 2009, but he closed it on October 15, 2010, more than 8 months before the July 11, 2011 service date. Chen, who was a notary at the UPS store, was not related to Chu or Lin and never worked for them. According to Lin, Thompson's summons and cross-complaint were not forwarded to him or Chu.

Chu and Lin also submitted the declaration of Robert Appert, the manager of the UPS store. Appert confirmed Chen was an employee of the UPS store. He also stated Lin was the owner of a mailbox from August 14, 2009 through October 15, 2010, and he did not have a mailbox address at the UPS store on July 11, 2011. According to Appert, Lin did not pay fees to have his mail forwarded after October 15, 2010.

Thompson opposed the motion on the ground service on Chen was proper because Lin's contract with the UPS store, dated August 14, 2009, authorized UPS to act as his agent for service of process "from the date of this agreement until two years after my mail receiving service has been terminated."

¹⁹ Thompson has not included the proofs of service in the record. However, it is undisputed substitute service was on Chen.

Thompson asserted service on July 11, 2011 was within the two-year window of service provided by the agreement. Further, the agreement provided for the customer to make arrangements for mail forwarding prior to termination of the agreement, and that if the customer failed to provide a forwarding address or pay for the UPS store to store the customer's mail, the mail may be discarded or destroyed.

At the March 23, 2012 hearing, Thompson argued service of the cross-complaint and summons on Chen was proper under Business and Professions Code section 17358.5, subdivision (d)(1), which authorized UPS, as a commercial mail receiving agency, to act as the agent for service of process for a customer for "two years after termination of any mail receiving service customer agreement." The trial court²⁰ rejected Thompson's argument, explaining, "I'm unaware of any legal authority that addresses whether or not service under that section is adequate outside the context of a consumer protection situation. . . . [¶] So my view of that Code section is first, its applicable only to situations involving the sale [or] offer for sale of consumer goods or services. [¶] Secondly, in order for the service of process to be deemed perfected, there had to be some showing to the court that the commercial mail receiving agency complied with its requirement to mail a copy of the summons and complaint to [Chu and Lin's] last known address, complete the appropriate declaration, and that wasn't [done] in this situation." The court granted relief under Code of Civil Procedure²¹ section 473.5,

²⁰ Judge Simpson.

²¹ Further undesignated statutory references are to the Code of Civil Procedure.

subdivision (a), because Chu and Lin did not have actual notice of the action.

2. *The trial court did not abuse its discretion in vacating the default judgment*

Under section 473.5, subdivision (a), the trial court may set aside a default or default judgment “if the defendant, ‘through no inexcusable fault of his own, [received] no actual notice’ of the action, provided that relief is requested within a reasonable time, but not more two years after the entry of the default judgment.” (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97; see § 473.5, subd. (a).²²) The moving party must submit “an affidavit showing under oath that the party’s lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect.” (§ 473.5, subd. (b); see *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.) “The phrase ‘actual notice’ in section 473.5 ‘means genuine knowledge of the party litigant’” (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1077; accord, *Rosenthal v. Garner* (1983)

²² Section 473.5, subdivision (a), provides, “When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.”

142 Cal.App.3d 891, 895.) We review the order setting aside the default judgment under section 473.5 for an abuse of discretion. (*Bae*, at p. 97; *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 862.)

Chu and Lin timely filed their motion to vacate the default judgment on February 10, 2012, less than five months after the September 20, 2011 entry of default. Lin submitted a declaration stating he and Chu “were never served” with Thompson’s cross-complaint and summons, and the cross-complaint and summons were never forwarded to them by the UPS store. There is no evidence Chu’s and Lin’s lack of actual notice of Thompson’s cross-complaint and summons was caused by their avoidance of service or inexcusable neglect.

Thompson contends on appeal the trial court erred because Lin authorized the UPS store to accept his mail, then failed to pay the fee to forward his mail to him after cancellation of his agreement on October 15, 2010. Thus, Thompson argues, the failure to pay a forwarding fee was inexcusable neglect. But the cases on which Thompson relies are inapposite. For example, in *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958, 968, the Court of Appeal upheld the statutory scheme under which the Vehicle Code required automobile dismantlers to keep the Department of Motor Vehicles apprised of the location of the business’s established place of business. (*Id.* at pp. 969-970.) Thus, service of an accusation and notice of hearing on the company sent to this address satisfied due process. (*Id.* at p. 970; see *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107 [rejecting petitioner’s claim he did not receive notice of State Bar proceedings in light of petitioner’s failure to comply with the

statutory requirement to advise the State Bar of a change in address].)

Thompson cites to no statutory authority that required Lin to pay for the UPS store to continue to accept mail at the private mailbox or to designate an agent for service of process. The fact Lin could have paid the UPS store to continue to accept and forward mail to him did not mean he had an obligation to do so. Chu had no agreement for the UPS store to accept service of process on her behalf. In light of evidence Lin and Chu had no actual notice of Thompson's cross-complaint and did not act in a manner showing inexcusable neglect, the trial court did not abuse its discretion in granting Chu and Lin's motion to vacate the default judgment.²³

3. *The trial court properly set aside the default judgment in its entirety*

Thompson contends the trial court exceeded its power by vacating the January 24, 2012 judgment as to Shantre and Reliable. At the March 23, 2012 hearing on Chu and Lin's motion to vacate the default and default judgment, after addressing service on Chu and Lin, Judge Simpson stated he was "contemplating" whether to order the transcript of the default prove-up hearing to determine whether "Thompson was placed

²³ Thompson's argument Lin and Chu had constructive notice of the cross-complaint because Shantre recorded a lis pendens against the Property also lacks merit. Shantre's recording of a lis pendens on the Property based on the filing of the complaint would not have placed Lin and Chu on notice of the filing of Thompson's cross-complaint.

under oath” and to obtain “a fuller and better description of the court’s decision at that time.” The court added, “It was my recollection that the only thing in issue at the hearing was the right to, approximately, \$200,000 that was being held by a foreclosure trustee.” In its April 5, 2012 order, the trial court (Judge Simpson) granted Chu and Lin’s motion to vacate the January 24, 2012 judgment, without specifying the court was vacating the judgment only as to Chu and Lin.

Then, on August 9, 2013, at the hearing on the parties’ cross-motions for summary judgment, the trial court (Judge Stewart) on the court’s own motion orally “set[] aside [the] [j]udgment.” At an October 15, 2013 hearing, the court allowed the parties to address whether the judgment was properly set aside as to Shantre and Reliable. The court explained it vacated the judgment on its own motion because Chu and Lin had moved to vacate the judgment, and the April 5, 2012 order vacating the judgment was not limited to Chu and Lin. Therefore, the court treated the April 5, 2012 order as setting aside the judgment as to all parties. Further, the court found the judgment did not comply with section 764.010, which requires the trial court in a quiet title action to determine title based on evidence, not a default.²⁴

²⁴ Section 764.010 provides, “The court shall examine into and determine the plaintiff’s title against the claims of all the defendants. The court shall not enter judgment by default but shall in all cases require evidence of plaintiff’s title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law.”

Thompson has not provided in the appellate record a transcript of the default prove-up hearing or pointed to any other evidence supporting his contention the default prove-up hearing complied with section 764.010. “[A]ppellant has the burden of providing an adequate record. [Citations.] Failure to provide an adequate record on an issue requires that the issue be resolved against appellant.” (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141 [“Because [the appellant] failed to furnish an adequate record of the attorney fee proceedings, [the appellant’s] claim must be resolved against [him].”].) Therefore, Thompson has failed to show the trial court erred in vacating the judgment for lack of compliance with the evidentiary requirements of section 764.010.

B. *The Trial Court Did Not Err in Denying Thompson’s Motion for Summary Judgment as to the Unlawful Detainer Action*

Thompson contends the trial court erred in rejecting the arguments he asserted in his motion for summary judgment that (1) res judicata or collateral estoppel barred Chu and Lin’s claims; (2) the trustee’s sale to Chu and Lin violated the automatic stay; and (3) Chu and Lin were not bona fide purchasers. Thompson’s contentions lack merit.²⁵

²⁵ Chu and Lin argue the denial of Thompson’s summary judgment motion in the unlawful detainer action is not appealable because Lin voluntarily dismissed the action. The judgment of dismissal provides for a dismissal without prejudice in light of the unlawful detainer case “having been dismissed.” Section 581, subdivision (b), provides a plaintiff may dismiss an action with or without prejudice “at any time before the actual

Summary judgment is appropriate only if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) “““““We review the trial court’s decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.””””” (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; *Husman, supra*, 12 Cal.App.5th at pp. 1179-1180.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable

commencement of trial. . . .” Lin’s dismissal was filed after trial commenced, a jury verdict was rendered in favor of Thompson, the trial court granted Lin’s motion for a new trial, and Thompson appealed (but this court dismissed the appeal as premature). Under these circumstances, Lin’s voluntary dismissal of the unlawful detainer action does not deprive Thompson of the right to appeal the trial court’s rulings in that action.

issue of material fact. (§ 437c, subd. (p)(2); *Aguilar*, at p. 850; *Husman*, at pp. 1179-1180.) “[S]ummary judgment cannot be granted when the facts are susceptible [of] more than one reasonable inference” (*Husman*, at p. 1180, quoting *Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1392.)

Thompson contends Lin’s unlawful detainer action was barred by res judicata and collateral estoppel because the trial court entered judgment against Reliable in the January 24, 2012 judgment. But Judge Simpson vacated the judgment in the April 5, 2012 order, and Judge Stewart clarified the vacation was as to all parties by again vacating the judgment on August 9, 2013.

Even if the judgment against Reliable had not been set aside, neither claim nor issue preclusion would have barred Lin’s unlawful detainer action.²⁶ “Claim preclusion prevents relitigation of entire causes of action. [Citations.] Claim preclusion applies only when ‘a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit.’” (*Samara v. Matar* (2018) 5 Cal.5th 322, 326-327; accord, *DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at p. 824.) “Issue preclusion, . . . historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit.” (*DKN Holdings LLC*, at p. 824; accord, *Boeken v. Philip Morris*,

²⁶ The Supreme Court has suggested courts “use the terms ‘claim preclusion’ to describe the primary aspect of the res judicata doctrine and ‘issue preclusion’ to encompass the notion of collateral estoppel.” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

USA (2010) 48 Cal.4th 788, 797.) Thompson failed to show that Lin was in privity with Reliable, or that the January 24, 2012 default judgment against Reliable was a final judgment on the merits.²⁷

Thompson also asserts the June 11, 2010 trustee's sale in which Chu and Lin obtained title violated the bankruptcy automatic stay because Shantre, which filed for bankruptcy on June 9, 2010, and Han, who filed for bankruptcy on June 11, 2010, each listed the Property as an asset. "The filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of any action against a bankrupt debtor or against the property of a bankruptcy estate." (*Pioneer Construction, Inc. v. Global Investment Corp.* (2011) 202 Cal.App.4th 161, 167; accord, *Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1196 [automatic stay "provides debtors with protection from hungry creditors by giving them a "breathing spell" against all harassment, collection efforts and foreclosure actions"]; see 11 U.S.C. § 362.) But Han's October 27, 2009 grant deed to Shantre was superseded by Han's December 4, 2009 grant deed confirming the October 27, 2009 conveyance to Thompson. At the time of their respective bankruptcy filings, neither Shantre nor Han held title to the Property. Even if Shantre and Han had a

²⁷ Thompson asserts in his discussion of claim and issue preclusion there were irregularities in the sale to Chu and Lin. It is not clear how the asserted irregularities relate to claim and issue preclusion, except to the extent they are intended to support Thompson's argument that judgment was properly entered against Reliable.

claim to the Property at the time they filed their bankruptcy petitions, Lin submitted evidence in opposition to Thompson's motion for summary judgment showing the bankruptcy court granted Chu and Lin's motion for relief from the automatic stay, ordering the stay "annulled retroactively to the date of the bankruptcy petition filing" as to the Shantre and Han bankruptcies.

Thompson also contends Chu and Lin were not bona fide purchasers. "[A] bona fide purchaser under [Civil Code] section 2924 "is one who pays value for the property without notice of any adverse interest or of any irregularity in the sale proceedings.'" (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1000 (*Orcilla*); accord, *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1250 ["Under [Civil Code] section 2924, there is a conclusive presumption created in favor of a [bona fide purchaser] who receives a trustee's deed that contains a recital that the trustee has fulfilled its statutory notice requirements."]) Whether the buyer at a foreclosure sale is a bona fide purchaser is a question of fact. (*612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1279; *Melendrez*, at p. 1254.)

Thompson failed to present evidence establishing Lin or Chu had notice of any irregularity in the foreclosure proceedings. Rather, on appeal Thompson points to Reliable's knowledge of the irregularities and its efforts to prevent Thompson from curing the default. Reliable's knowledge, however, cannot be attributed to Chu and Lin. Thompson also argues Chu and Lin admitted in their separate statement of undisputed material facts and evidence filed in opposition to Thompson's motion for summary judgment that Shantre had recorded a notice of lis pendens on

the Property prior to the sale.²⁸ But even if Chu and Lin were on notice that Shantre claimed an interest in the property, the lis pendens did not place them on notice of Thompson's claim. Further, as discussed, the Shantre lis pendens was later expunged as part of the January 24, 2012 judgment.

C. *The Trial Court Did Not Abuse Its Discretion in Granting the Motion for a New Trial in the Unlawful Detainer Action*

1. *Chu and Lin's motion for a new trial*

As discussed, Lin moved for a new trial based on attorney misconduct, juror misconduct, and insufficiency of the evidence to support the jury's verdict. After a hearing on February 7, 2014, the court granted the motion on all three grounds, as reflected in its signed order.

The court found Lin was prejudiced by the repeated attempts by Thompson's attorney to introduce evidence of Reliable's bankruptcy and Thompson's prior judgment, both of which the court had excluded in its rulings on Lin's motions in limine. The court also found Thompson's attorney improperly

²⁸ Thompson also contends Chu and Lin were not bona fide purchasers because the estimated value of the Property on the Zillow Web site was \$3,782,870. Thompson did not make this argument in the trial court, instead only arguing the Property was "worth about \$2.5 million" (without any supporting documentation). Thompson has therefore forfeited this argument the market value was approximately \$3.7 million. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1026; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972.) Further, the Property's value in 2019 is not relevant to the market value at the time of the sale in 2010.

offered his opinion in his closing statement that Lin's interpreters were testifying for Lin, but the court concluded the misconduct did not deprive Lin of a fair trial.

The court found juror misconduct based on the declarations of jurors L.N. and Darlene S. regarding juror Jon G.'s conduct during jury deliberation. L.N. stated, "Jon [G.] spoke about his eviction and real estate experience. He said based on his experience there was no sale on June 11, 2010. He also said he knows the law and there was no sale because some fees were improperly added." Darlene S., who was the foreperson, declared, "During deliberation, . . . Jon [G.] spoke about his past landlord/tenant experience and being served a 3 Day Notice due to nonpayment of two months rent. He referred to a [C]ivil [C]ode section based on this incident. Additionally, immediately after I read out loud a [C]ivil [C]ode section relating to the case, [Jon G.] gave his own interpretation of the law to the jurors. [Jon G.] also stated that all notarized documents are genuine because of the notarization process . . . regardless of the way the signature looks."

Finally, the court found there was insufficient evidence to support the jury's finding there was no sale of the Property on June 11, 2011. The court explained, "A review of the evidence offered at trial reveals the following: [¶] 1) a trustee's sale for the property at issue occurred on June 11, 2010; [¶] 2) [Lin] presented evidence that he purchased the property on June 11, 2010, e.g., the trustee's deed upon sale; [¶] 3) [Thompson] did not offer testimony or evidence that the trustee's sale did not occur; [¶] 4) the trustee received and held cashier's checks, but agreed for the replacement funds to be paid by wire on June 14, 2010; and 5) the cashier's checks were held until the money was

wired to the trustee. [¶] This evidence indicates that the trustee's sale occurred on June 11, 2010 and that [Lin] paid valuable consideration for the property at the trustee's sale. The probative value of the evidence is sufficient to establish that [Lin] purchased the property. [¶] Accordingly, the jury's finding that [Lin] did not purchase the property for value on that date is not supported by the evidence."

2. *The trial court did not abuse its discretion in granting Lin a new trial*

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.] Section 657 sets out seven grounds for such a motion: (1) 'Irregularity in the proceedings'; (2) 'Misconduct of the jury'; (3) 'Accident or surprise'; (4) 'Newly discovered evidence'; (5) 'Excessive or inadequate damages'; (6) 'Insufficiency of the evidence'; and (7) 'Error in law.'" (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633; accord, *Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1089.)

Section 657 states in part, "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. [¶] A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision. [¶] . . . [I]f the motion is granted [the order] must state the

ground or grounds relied upon by the court, and may contain the specification of reasons.”

Section 657 provides further that on appeal the trial court’s “order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict . . . , unless such ground is stated in the order granting the motion.” In addition, on appeal “it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.” (§ 657.)

We review the order granting a new trial for an abuse of discretion. (*Oakland Raiders v. National Football League*, *supra*, 41 Cal.4th at p. 636; *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 859; *Jiminez v. Sears* (1971) 4 Cal.3d 379, 387 [“The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.”].) In considering a motion for a new trial, the trial court is vested with authority “to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact” (*Mercer v. Perez* (1968) 68 Cal.2d 104, 112; accord, *Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 784 [“When a trial court rules on a motion for new trial based upon inadequacy of the evidence, it is vested with plenary power—and burdened with a correlative duty—to independently evaluate the evidence.”].)

The trial court did not abuse its discretion in granting Lin's motion based on insufficiency of the evidence.²⁹ The jury answered "no" when asked, "Did Hsing Liang Sidney Lin purchase for value the [P]roperty . . . at a trustee's sale on June 11, 2010?" But the trial evidence shows Lin purchased the Property for \$1.5 million at the June 11, 2010 trustee's sale.

Auctioneer Adams testified she conducted a public auction of the Property on June 11, 2010. Rivas, a Reliable employee, testified her role was to qualify the bidders by confirming they had sufficient funds to bid on the Property. To qualify, a check had to be made out to Reliable or to the bidder, who then endorses the check to Reliable once the bid is successful. Rivas saw the cashier's checks Six Angels (the successful bidder) had at the trustee's sale for \$1.5 million. Although Rivas did not observe Angel endorsing the checks, she later saw the endorsed checks in Reliable's files. Angel testified he bid on the Property on behalf of Chu and Lin and tendered \$1.5 million in cashier's checks to Reliable. There were other bidders at the sale, but Six Angels was the highest bidder.

Wolcott, Reliable's president, testified, "The sale was complete when they surrender[ed] the checks to me." Instead of depositing the cashier's checks, Reliable instructed Angel to wire \$1.5 million on the following business day, Monday, June 14,

²⁹ Because we affirm the trial court's order based on the insufficiency of the evidence, we do not reach whether the court erred in granting a new trial based also on attorney and juror misconduct.

2010.³⁰ Angel left the cashier's checks with Reliable as a deposit on June 11. Reliable held the cashier's checks until it received the wire transfer. Angel testified he wired the money to Reliable on June 14. According to Wolcott, after Reliable received the wire transfer, it returned the cashier's checks to Six Angels. Thompson did not present evidence to the contrary, for example, that Six Angels did not tender the cashier's checks to Reliable, did not endorse the checks, or did not wire funds to Reliable at its request on June 14. In light of this evidence at trial, the trial court did not abuse its discretion in granting a new trial based on insufficiency of the evidence to justify the jury's verdict.³¹

³⁰ Angel testified that some lenders and banks will not accept a third party check, explaining, "So this particular trustee sometimes—depending on who . . . the lender is, who their bank is at that time—will have us wire the funds or bring them back another cashier's check made payable to them"

³¹ Thompson also contends the trial court failed to comply with section 657 because the minute order did not include a statement of reasons, but only "an outline of the grounds." But, as discussed, the court's signed minute order entered the day of the hearing set forth in detail the reasons for the court's ruling. "A motion for new trial may be determined either by minute order or by written order signed by the judge and filed by the clerk." (*Swanson v. Western Greyhound Lines, Inc.* (1969) 268 Cal.App.2d 758, 759; see *Simmons v. Superior Court* (1959) 52 Cal.2d 373, 378 ["[W]hen the court orders the clerk to enter a minute order, the order so entered in the minutes is a written order of the court, and no formal writing signed by the court and filed with the clerk is necessary."].)

D. *The Trial Court Properly Granted Chu and Lin's Motion for Summary Adjudication of the Competing Quiet Title Causes of Action*

1. *The trial court's order on Chu and Lin's motion*

In its November 21, 2014 minute order, the trial court set forth the basis for granting Chu and Lin's motion for summary adjudication of the competing claims for quiet title in their cross-complaint and Thompson's cross-complaint. The court found Chu and Lin met their initial burden of proof by presenting evidence Han signed a deed of trust on October 26, 2009, followed by grant deeds signed the next day transferring the property separately to Shantre and Thompson. Chu and Lin purchased the property at the June 11, 2010 trustee sale, which extinguished any interest Shantre or Thompson had in the Property. The court rejected Thompson's challenges to the foreclosure process because Thompson did not tender the funds to discharge his debt. On appeal, Thompson asserts multiple arguments for why the trial court erred in granting Chu and Lin's motion for summary adjudication of the quiet title causes of action in the two cross-complaints. None has merit.

2. *Thompson's judicial estoppel and standing arguments lack merit*

Thompson contends Chu and Lin were judicially estopped from litigating the question of title by the assertion in their motion to dismiss Thompson's appeal of the trial court's order granting a new trial that there were "unresolved" issues in the

consolidated case that remaining to be tried.³² According to Thompson, this was inconsistent with Chu and Lin’s litigation of title in the quiet title action. It was not.

Judicial estoppel “applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e. the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake.’” (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422.)

The fact title was at the heart of the consolidated action that included Chu and Lin’s quiet title claim means there were “unresolved” issues that needed to be adjudicated before the trial court’s order granting a new trial became appealable. Thus, Chu and Lin took consistent positions in seeking to dismiss the first appeal, then litigating the remaining unresolved issues.

Thompson also argues entry of the January 2, 2014 judgment in the unlawful detainer action deprived Chu and Lin of standing to litigate title in their summary adjudication motion. The January 2 judgment provided, “Lin shall not have and recover possession of” the Property. But “the granting of a new trial vacates the judgment which has been rendered after the trial. . . .” (*Lapique v. Walsh* (1923) 191 Cal. 22, 24”]; accord,

³² Thompson did not raise this argument in his opposition to Chu and Lin’s motion to dismiss the first appeal, but he filed his opposition on June 13, 2014, only two days after the filing of the motion to dismiss, which was served by mail.

Pacific Corporate Group Holdings, LLC v. Keck (2014) 232 Cal.App.4th 294, 302.) Further, as discussed, the judgment in the unlawful detainer action did not adjudicate the competing quiet title causes of action in Thompson's and Chu and Lin's cross-complaints. Thus, Chu and Lin retained standing to litigate the quiet title claims in their motion for summary adjudication.

3. *Chu and Lin's motion did not relitigate their earlier motion for summary judgment, and the motion complied with section 437c*

Thompson asserts Chu and Lin's motion for summary adjudication was in effect a motion for reconsideration of the trial court's denial of Lin's first motion for summary judgment, in violation of sections 437c, subdivision (f)(2),³³ and 1008.³⁴ But

³³ Section 437c, subdivision (f)(2) provides, "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

³⁴ Section 1008, subdivision (a) states, "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what

Lin's first motion for summary judgment was filed in the unlawful detainer action to adjudicate his right to possession of the property, whereas Chu and Lin's motion for summary adjudication concerned the quiet title causes of action in the cross-complaints (adjudicating title); therefore, sections 437c, subdivision (f)(2), and 1008 are inapplicable.

Thompson contends further Chu and Lin's failure to respond to his separate statement in opposition to their motion for summary adjudication leaves those facts uncontroverted, warranting denial of the motion. Thompson's reliance on section 437c, subdivision (b)(3), and California Rules of Court, rule 3.1350(f) is misplaced. Those sections require a party opposing a motion for summary judgment to respond to the moving party's separate statement of undisputed material facts. (See § 437c, subd. (b)(3) ["The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. . . . Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."]; Cal. Rules of Court, rule 3.1350(f) [setting forth requirements for separate statement in opposition].) Nothing in the statute or rules requires a party moving for summary judgment to file a separate statement with the party's reply brief that responds to facts set forth in the opposition statement.

order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

4. *The tender requirement applies to the quiet title claims*

Thompson argues triable issues of material fact concerning irregularities in the foreclosure process precluded summary adjudication of the quiet title claims. Specifically, Thompson asserts the June 11, 2010 foreclosure sale was a private sale; Reliable inflated the default amount in the notice of default; Reliable failed to post or publish notice of the trustee's sale; and Reliable did not give notice of the postponement of the sale. But as the trial court found, "Thompson cannot challenge the trustee sale because there is no evidence of a tender of the funds needed to discharge the debt."

"Generally, 'as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security.' [Citation.] 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].'" (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 47 (*Kalnoki*); accord, *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1305.)

"Case law has recognized four exceptions to the tender requirement in actions to set aside a foreclosure sale: (1) the borrower attacks the validity of the debt (e.g., based on fraud); (2) the borrower has a counterclaim or setoff sufficient to cover the amount due; (3) it would be inequitable as to a party not liable for the debt; or (4) the trustee's deed is void on its face (e.g., because

the trustee lacked power to convey property).” (*Orcilla, supra*, 244 Cal.App.4th at p. 999; accord, *Kalnoki, supra*, 8 Cal.App.5th at p. 47; see *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 929, fn. 4 [“Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so.”].)

None of the exceptions to the tender requirement applies here. Thompson does not attack the validity of the underlying debt (the promissory note), and he did not present evidence he had a counterclaim or setoff sufficient to cover the amount due. Although he argues in a conclusory way it would be inequitable to apply the tender rule, he does not explain why. Here, as in *Kalnoki*, it is not inequitable to apply the tender rule where Thompson does not dispute he owes the debt. (See *Kalnoki, supra*, 8 Cal.App.5th at p. 47 [“[W]e do not consider it ‘inequitable’ to apply the tender rule here as the [plaintiffs] concede they owed the debt.”].) Thompson also asserts in a conclusory fashion the trustee’s deed is void on its face, but he fails to explain why Reliable lacked authority to convey the Property.

Thompson also contends he offered to tender the amount of the loan, relying on paragraph 28 of his second amended cross-complaint, in which he alleged he “stands ready, willing and able to tender the full amount the Court may assess.” But Thompson did not present evidence in opposing summary adjudication that

he at any time had sufficient funds to pay off the remaining balance owed on the note.³⁵

E. *The Trial Court Properly Overruled Thompson’s Demurrer and Granted Chu and Lin’s Motion for Summary Adjudication of Their Ejectment Cause of Action*

Thompson challenges the trial court’s May 1, 2015 order overruling his demurrer to the ejectment cause of action, and its January 8, 2016 order granting Chu and Lin’s motion for summary adjudication of the cause of action.³⁶ In overruling the demurrer, the trial court rejected Thompson’s argument Chu and

³⁵ Thompson also argues he never failed to tender the amount because the postponement of the trustee’s sale was not posted or published. However, as discussed, the evidence was to the contrary.

³⁶ Thompson also argues the trial court abused its discretion in granting Chu and Lin’s motion to add a cause of action for ejectment following the court’s grant of their motion for summary adjudication of the quiet title causes of action. Under section 473, subdivision (a)(1), the trial court may “in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.” (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 970, 938 [noting general rule of “liberal allowance of amendments”]; *Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1225 [“courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial [citations] . . . “where no prejudice is shown to the adverse party”].) Thompson fails to explain how the trial court abused its discretion or why the amendment prejudiced him.

Lin were barred by claim and issue preclusion from relitigating the issue of possession after a judgment was entered in the unlawful detainer trial, explaining, “Since a new trial has been granted, there has not been a final adjudication of the right of possession, which is required to invoke the doctrines of res judicata or collateral estoppel.”

As to Chu and Lin’s motion for summary adjudication of the ejectment cause of action, the trial court ruled, based on its earlier ruling on Chu and Lin’s motion for summary adjudication of the quiet title causes of action, that Chu and Lin had established the two essential elements of ejectment: (1) their valid ownership of the Property; and (2) Thompson’s wrongful possession and withholding of possession. (See *Montgomery v. Santa Ana W.R. Co.* (1894) 104 Cal. 186, 197; [“The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof.”]; *Baugh v. Consumer Associates, Ltd.* (1966) 241 Cal.App.2d 672, 675 [essential elements of ejectment include “right to possession, the defendant’s possession and a withholding thereof from the plaintiff”].) The trial court again rejected Thompson’s argument the January 2, 2014 judgment in the unlawful detainer action (later vacated) barred the ejectment cause of action.

On appeal, Thompson contends the January 24, 2012 judgment bars Chu and Lin from relitigating the issue of possession in their motion for summary adjudication of the ejectment cause of action.³⁷ Thompson has forfeited this

³⁷ Thompson also asserts the trial court lacked jurisdiction to adjudicate the ejectment cause of action pending appellate review

argument by not raising it in the trial court. (*Pittman v. Beck Park Apartments Ltd.*, *supra*, 20 Cal.App.5th at p. 1026; *Professional Collection Consultants v. Lauron*, *supra*, 8 Cal.App.5th at p. 972.) Even if Thompson had not forfeited this argument, as discussed with respect to the trial court’s denial of Thompson’s motion for summary judgment in the unlawful detainer action, the trial court on April 5, 2012 (and again on August 9, 2013) vacated the January 24, 2012 judgment. Thus, the January 24, 2012 judgment was not a final adjudication of Thompson’s right to possession for purposes of claim and issue preclusion. (See *Samara v. Matar*, *supra*, 5 Cal.5th at pp. 326-327; *DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at p. 824.)

F. *The Trial Court Did Not Abuse Its Discretion in Ordering Issuance of a Writ of Possession and Awarding Damages*

Thompson contends the trial court erred in issuing the writ of possession prior to entry of the May 25, 2017 final judgment. Any error in issuing the writ of possession was harmless.

Civil Code section 3375 provides that a person entitled to real property may recover the property “either by a judgment for its possession, to be executed by the sheriff, or by a judgment requiring the other party to perfect the title, and to deliver possession of the property.” Section 712.010 states in part, “After entry of judgment for possession . . . of property, a writ of possession . . . shall be issued by the clerk of the court upon

of his first appeal. But the trial court ruled on Chu and Lin’s motion for summary adjudication of the ejectment cause of action on January 8, 2016, fifteen months after the September 15, 2014 issuance of remittitur.

application of the judgment creditor and shall be directed to the levying officer in the county where the judgment is to be enforced. . . .” For purposes of the Enforcement of Judgments Law (§ 680.010 et seq.), which includes enforcement of a judgment of possession of real property (§ 715.010), “judgment” means “a judgment, order, or decree entered in a court of this state.” (§ 680.230.) Therefore, it would appear the trial court’s February 22, 2016 order, granting Chu and Lin’s motion for summary adjudication of their ejectment claim and finding Chu and Lin held title to the Property and were entitled to possession, was a “judgment of possession” within the meaning of sections 712.010 and 715.010. Even if the court erred in issuing the writ of possession, it was harmless error because the trial court entered judgment against Thompson on May 25, 2017. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 [the harmless error standard under *People v. Watson* (1956) 46 Cal.2d 818 applies to civil cases, “precluding reversal unless the error resulted in a miscarriage of justice”].) Had Thompson remained on the property, he would have owed additional damages for wrongfully withholding possession during that period.

Thompson also challenges the trial court’s award of \$477,687 in damages in favor of Chu and Lin on their cross-complaint based on the court’s finding that “Thompson wrongfully withheld possession of the subject property for a total of 1,610 days at a daily rate of \$296.71 per day.” Thompson contends he properly held possession of the Property based on the January 24, 2012 default judgment and the January 2, 2014 judgment in the unlawful detainer action. But both judgments were vacated. Therefore, damages were properly awarded pursuant to Civil Code section 3334, subdivision (a), which

provides, “The detriment caused by the wrongful occupation of real property . . . is deemed to include the value of the use of the property for the time of that wrongful occupation” (See *Bailey v. Outdoor Media Group* (2007) 155 Cal.App.4th 778, 783, 792 [applying Civ. Code, § 3334 to award of damages for wrongful occupation of leasehold interest]; see also *F.A. Hihn Co. v. Fleckner* (1895) 106 Cal. 95, 97 [plaintiff in ejectment action was entitled to damages for rents and profits during defendant’s wrongful possession of land].)

DISPOSITION

We affirm the orders and judgment. Chu and Lin are entitled to recover their costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.