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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JERRY I ANOLIK, Plaintiff and Appellant, v. EMC MORTGAGE CORP. et al., Defendants and Respondents.	C044201 (Super. Ct. No. 00AS06473)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster and Raymond M. Cadei, Judges. Reversed with directions.

Robert R. Schaldach for Plaintiff and Appellant.

Wright, Finlay & Zak and Steven K. Linkon for Defendant and Respondent.

This case arises out of an attempt by defendant EMC Mortgage Corporation (EMC) to foreclose nonjudicially on the

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I of the Discussion.

deed of trust securing the loan plaintiff Jerry Anolik used to purchase his home. Anolik sued EMC to enjoin the foreclosure sale, to have the notice of default declared void, for damages, and for an accounting.[1] Following trial, the court found against Anolik and awarded EMC more than $83,000 in attorney fees.

On appeal, Anolik contends: (1) the trial court erred in denying him leave to amend to file a third amended complaint; (2) the trial court erred in determining the notice of default was valid; and (3) the trial court erred in failing to address the application of the Fair Debt Collection Practices Act.[2]

In the unpublished portions of our opinion, we conclude the trial court did not abuse its discretion in denying Anolik leave to amend his complaint and did not err in failing to address the application of the Fair Debt Collection Practices Act. In the published portion of our opinion, we conclude the court *did* err in determining the notice of default was valid. Accordingly, we will reverse the judgment and the award of attorney fees and remand the case for further proceedings.

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[1] Anolik also sued EMC's agent in the nonjudicial foreclosure, Wolf & Richards, a law corporation. We will refer to both defendants jointly as EMC.

[2] Title 15 United States Code section 1601 et seq.

Judge McMaster made the ruling on Anolik's motion for leave to amend before trial; Judge Cadei served as the trial judge.

FACTUAL AND PROCEDURAL BACKGROUND

In July 1998, Anolik purchased a home in Fair Oaks with the proceeds of a loan from Long Beach Mortgage Company. Repayment of the loan was secured by a deed of trust on the property (the Deed of Trust). Under the promissory note (the Note), Anolik agreed to make monthly payments of principal and interest in the initial amount of $900.58.

In June 1999, Long Beach transferred the loan to EMC. On July 6, 2000, EMC recorded a notice of default and election to sell under deed of trust (the Notice of Default). The Notice of Default asserted "that a breach of, and default in, the obligations for which [the] Deed of Trust is security has occurred in that payment has not been made of: [¶] THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS, TOGETHER WITH LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST, ADVANCES, ASSESSMENTS AND ATTORNEY'S FEES, IF ANY."

Disputing the validity of defaults alleged in the Notice of Default, Anolik filed this action against EMC in November 2000, seeking: (1) to enjoin the foreclosure sale; (2) to have the Notice of Default declared void; (3) damages; and (4) an accounting. The trial court temporarily restrained EMC from conducting the foreclosure sale and subsequently issued a preliminary injunction restraining the sale during the pendency of the action.

In June 2002, Anolik sought leave to file a third amended complaint, but the court denied his motion. Thus, the case came on for trial in December 2002 on the second amended complaint. That complaint contained 11 causes of action, two of which (the eighth and eleventh causes of action) had been summarily adjudicated in favor of EMC before trial, leaving nine. The parties agreed to bifurcate the trial on the second, third, and fourth causes of action, which each sought declaratory relief. As the court later noted in its statement of decision, "the Court granted the Motion to Bifurcate in order to resolve the question of the validity of the" Notice of Default.[3]

Following a court trial and further briefing, the trial court issued an order denying Anolik's request for a declaration that the Notice of Default was invalid or void. The court

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[3] The second cause of action was framed as one for declaratory relief relating to the Note and related only to the imposition of late charges. That cause of action was later rendered moot when EMC agreed to drop any claims for late charges.

The third cause of action was framed as one for declaratory relief relating to various rights and obligations under the Deed of Trust.

The fourth cause of action, framed as one for wrongful foreclosure, was the one that sought a judgment determining the Notice of Default was void because the events of default asserted in the Notice of Default were false.

The fifth cause of action was framed as one for *damages* for wrongful foreclosure, and the trial court stated it was bifurcating as to that cause of action also "to the extent that there [wa]s an overlap" with the other three causes of action.

concluded that because Anolik "was in default when the [Notice of Default] was sent," the Notice of Default "was . . . properly sent and is not invalid or void because it may have incorrectly stated the amounts owing."

A court trial on the remaining issues began in February 2003. Anolik voluntarily dismissed the ninth cause of action, and the second cause of action was rendered moot when EMC agreed to drop any claims for late charges. On the seventh cause of action for an accounting, the parties reached agreement as to the amount of money necessary for Anolik to either pay off the loan or reinstate the loan at that time, exclusive of any attorney fees, which had yet to be determined. That left Anolik's three causes of action for damages: the fifth cause of action for wrongful foreclosure, the sixth cause of action for breach of the covenant of good faith and fair dealing, and the tenth cause of action for false credit reporting.

Following further court trial on those causes of action, the court issued its statement of decision and judgment in April 2003. The court reiterated its earlier ruling that the Notice of Default was not void or invalid, addressed the requests for declaratory relief contained in the fourth cause of action, then rejected Anolik's causes of action for damages. On the fifth cause of action, the court noted it was moot because "no foreclosure sale occurred" and that "[e]ven if [it] were read to be [a cause of action] for damages for wrongful *commencing* the foreclosure sale, [it] would be without merit" because Anolik "was in default under the Note and this default justified EMC's

commencement of the foreclosure process by issuing the" Notice of Default. On the sixth cause of action, the court concluded "no damages were proven" and "Anolik failed completely to present any evidence on the causation issue in that there was no evidence to show any conduct of [EMC], much less the several letters, had any appreciable effect on Anolik's ability to obtain other loans or to lease commercial property." Similarly, on the tenth cause of action, the court reiterated that Anolik "failed to present any evidence of causation as to the claimed damages."

Following the entry of judgment, EMC moved for an award of attorney fees under the Note and the Deed of Trust as the prevailing party in the action. The trial court granted EMC's motion at a hearing on June 6, 2003, and entered a formal order on June 30, 2003, awarding EMC $83,806 in attorney fees.

On June 4, 2003, Anolik filed a timely notice of appeal from the judgment entered on April 23, 2003. On June 16, 2003, Anolik filed a premature notice of appeal from the order awarding attorney fees to EMC.[4] We will exercise our discretion to treat Anolik's premature notice of appeal from the attorney fees order as a timely notice of appeal. (See Cal. Rules of Court, rule 2(e).)

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[4] For a reason unexplained on this record, Anolik asserted in his notice of appeal that the attorney fees order was entered "on or about June 13, 2003."

DISCUSSION

I

Denial Of Leave To Amend

In his original complaint, filed on November 22, 2000, Anolik asserted a cause of action for intentional interference with contract based on allegations that in March 2000 he tried to refinance his home loan through Integrity Mortgage Company but EMC interfered with that contract. Anolik repeated this cause of action in his first amended complaint, filed in January 2002, and in his second amended complaint, filed in March 2002.

EMC filed a motion for summary adjudication that encompassed the cause of action involving Integrity Mortgage. In support of that motion, EMC offered Anolik's admission during discovery that he never had an agreement with Integrity Mortgage to refinance his home loan. In response, Anolik offered no opposition to the summary adjudication of that cause of action. Accordingly, in April 2002, the trial court entered a formal order summarily adjudicating the interference with contract cause of action against Anolik.

Trial in the matter was originally set for July 8, 2002. On Anolik's motion in May 2002, the trial was continued to August 19, 2002.

In June 2002, Anolik sought leave to file a third amended complaint. He wanted to add a new cause of action for intentional interference with contract that was essentially the same as the previous cause of action on that theory, except that the new cause of action involved an attempted refinance with New

Century Mortgage Company, instead of Integrity Mortgage. In his memorandum of points and authorities, Anolik asserted that he discovered the attempted refinance was with New Century Mortgage, rather than Integrity Mortgage, when he "located a box of records under a desk which supports his fax machine."

EMC opposed Anolik's motion on the grounds that "discovery is closed and the trial date is six weeks away" and that Anolik had offered "no evidence of a good reason for the tardy amendment."

At a hearing on July 9, 2002, the trial court denied Anolik leave to further amend his complaint, stating: "This is not merely the same legal theory. It involves a different contractual relationship, different documents, and obviously different conduct by EMC and New Century. [Anolik] has no adequate explanation for the recent discovery of the documents. (Health and memory are not an adequate excuse.) Regardless of when he discovered the documents, he is charged with knowledge of the existence of his contractual relationships. He has known for at least 18 months of the alleged interference by EMC, whether with the Integrity refinancing agreement or the New Century refinancing agreement. [¶] The trial date is set for August 19. Discovery related to the New Century refinancing agreement will be necessary. [Anolik] has been dilatory. The proximity of the trial date means additional discovery will be required five weeks before trial when the parties should be making their final preparations for trial."

Anolik contends the trial court erred in denying him leave to file his third amended complaint. We disagree.

"We review the trial court's decision to deny [Anolik] leave to amend his complaint for abuse of discretion." (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 770.) "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, quoting *Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349.)

"Although 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], this policy should be applied only '[w]here no prejudice is shown to the adverse party . . . .' [Citation.] A different result is indicated '[w]here inexcusable delay and probable prejudice to the opposing party' is shown." (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.)

Here, Anolik offered no explanation for why he did not know in November 2000, when he filed his original complaint, the name of the mortgage company through which he had tried to refinance his home loan eight months earlier. Nor did he adequately explain why it took him over a year and a half -- until *after*

his original intentional interference cause of action was adjudicated against him -- to determine it was New Century Mortgage, rather than Integrity Mortgage. Thus, the trial court acted well within its discretion in determining Anolik had been dilatory in seeking to amend in his complaint to identify the other party to the contract he contended EMC interfered with.

Likewise, the trial court acted well within its discretion in determining that EMC would be prejudiced by Anolik's delay because "additional discovery [would] be required five weeks before trial when the parties should be making their final preparations for trial." Anolik's "willingness to extend discovery" did not necessarily obviate the prejudice from Anolik's delay. Furthermore, this was a case in which EMC had been seeking to exercise the power of sale in a deed of trust based on Anolik's breach of obligations secured by that deed of trust, and Anolik's lawsuit had prevented EMC from doing so for two years. The trial court was not obliged to sanction further delay because Anolik failed to make an adequate investigation of his claims both before and after filing his action. There was no abuse of discretion.

II

Validity Of Notice Of Default

EMC sought to exercise the power of sale in the Deed of Trust on Anolik's home based on Anolik's alleged breach of various obligations secured by the Deed of Trust. Anolik alleged in the fourth cause of action in his second amended complaint (for wrongful foreclosure) that "the events of default

as alleged . . . in the Notice of Default . . . [we]re false and untrue" and that "the Notice of Default and Election to Sell [wa]s void" as a result.

The trial court concluded the Notice of Default "was proper and is not invalid or void." Anolik contends the trial court erred in this conclusion. We agree.

"The procedure for foreclosing on security by a trustee's sale pursuant to a deed of trust is set forth in Civil Code section 2924 et seq."[5] (*Miller v. Cote* (1982) 127 Cal.App.3d 888, 894.) Because nonjudicial foreclosure is a "drastic sanction" and a "draconian remedy" (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 827, 830), "[t]he statutory requirements must be strictly complied with." (*Miller*, at p. 894.)

Under section 2924, a power of sale in a deed of trust "shall not be exercised" until a notice of default is recorded "identifying the . . . deed of trust . . . and containing a statement that a breach of the obligation for which the . . . transfer in trust is security has occurred, and setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust . . . that is in default . . . ."

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[5] All further statutory references are to the Civil Code unless otherwise indicated.

"The provisions of section 2924 . . . with reference to inclusion, in the notice of default, of a statement setting forth the nature of the breach 'must be strictly followed.' [Citation.] The person relying upon the notice of default is 'bound' by its provisions, and 'cannot insist upon any grounds of default other than those stated in that notice.'" (*System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 152-153; see also *Hayward Lbr. & Invest. Co. v. Corbett* (1934) 138 Cal.App. 644, 650 [person recording notice of default is "powerless to insist upon . . . grounds for default" other than those described in the notice].)

"[T]he intent of [section 2924] is sufficiently complied with if the notice of default contains a correct statement of some breach or breaches sufficiently substantial in their nature to authorize the trustee or beneficiary to declare a default and proceed with a foreclosure." *(Birkhofer v. Krumm* (1938) 27 Cal.App.2d 513, 523-524.) "[E]rroneous statements [that] may appear in the notice about other breaches . . . may properly be treated as immaterial." (*Id.* at p. 524.) Moreover, "the failure to include an actually known default shall not invalidate the notice of sale and the beneficiary shall not be precluded from asserting a claim to this omitted default or defaults in a separate notice of default." (§ 2924.)

From the foregoing authorities, we distill the following rule: To be valid, a notice of default must contain at least one correct statement of a breach of an obligation the deed of trust secures. Moreover, the breach described in the notice of

default must be substantial enough to authorize use of the drastic remedy of nonjudicial foreclosure. If a notice of default does not satisfy these requirements, then the notice is invalid and the lender cannot exercise the power of sale based on that notice. As we will explain, that is the case here.

The Notice of Default here was signed on July 5, 2000, and recorded the next day. It asserted that Anolik's "past due payments plus permitted costs and expenses" totaled $7,049.06 as of July 5, 2000. It further asserted "that a breach of, and default in, the obligations for which [the] Deed of Trust is security has occurred in that payment has not been made of: [¶] THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS, TOGETHER WITH LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST, ADVANCES, ASSESSMENTS AND ATTORNEY'S FEES, IF ANY."

EMC contends the Notice of Default was valid because "EMC demonstrated at the trial that the amount in default listed in the [Notice of Default], $7,049.06 as of July 5, 2000, was in fact accurate." This argument fails because section 2924 does not even require a statement of "the amounts which are in default." (*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal.App.3d 1023, 1038.) What the statute requires is a statement "setting forth the nature of each breach actually known to the beneficiary." (§ 2924.) Thus, in determining whether the Notice of Default was valid, we address ourselves to the nature of the breaches described in the Notice of Default -- that is, Anolik's alleged failure to pay "THE

INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS, TOGETHER WITH LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST, ADVANCES, ASSESSMENTS AND ATTORNEY'S FEES, IF ANY."

We begin with the validity of the latter part of the assertion of breach -- the phrase that begins with the words "TOGETHER WITH." In effect, this part of the Notice of Default asserted "payment ha[d] not been made of [¶] . . . [¶] LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST, ADVANCES, ASSESSMENTS AND ATTORNEY'S FEES, IF ANY."

The first question is whether the words "IF ANY" were intended to modify only the immediately preceding phrase ("ATTORNEY'S FEES") or instead were intended to modify all four items that precede those words in the phrase beginning with "TOGETHER WITH": that is, (1) "LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST," (2) "ADVANCES," (3) "ASSESSMENTS," and (4) "ATTORNEY'S FEES."

It is an "established rule" of statutory construction "that 'a limiting clause is to be confined to the last antecedent, unless the context or the evident meaning of the statute requires a different construction.'" (*Elbert, Ltd. v. Gross* (1953) 41 Cal.2d 322, 326-327.) Applying that rule to the interpretation of the Notice of Default,[6] we conclude the context

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[6] We recognize the Notice of Default is not a statute, but there is no reason to limit this interpretive rule to statutes. The rule is essentially a rule of grammar that can be applied

here requires a different construction. The assertion of breach in the Notice of Default begins with the assertion of a *specific* breach: the failure to pay "THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS." The words "TOGETHER WITH" then introduce a list of four other, more generally described breaches: the failure to pay: (1) "LATE CHARGES AS SET FORTH IN SAID NOTE AND DEED OF TRUST," (2) "ADVANCES," (3) "ASSESSMENTS," and (4) "ATTORNEY'S FEES." The words "IF ANY" follow this list. Given this division of the assertion of breach into one specific breach and four general breaches, it reasonably follows that the words "IF ANY" were intended to modify all four of the generally described breaches, rather than simply the last of the four.

This leads us to the question of whether a notice of default that qualifies an assertion of one or more breaches with the words "if any" satisfies the requirements of section 2924. It does not.

Section 2924 requires a notice of default to "set[] forth the nature of each breach *actually known* to the beneficiary." (§ 2924, italics added.) As this court explained in *Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202, "[a]dding the qualifier 'if any' . . . to an assertion of default indicates the party claiming default has no knowledge of the truth or falsity of the assertion." (*Id.* at p. 213.) "The

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with equal validity to determine the intended meaning of any writing, be it a statute or a notice of default.

purpose [of requiring a notice of default to identify what breach has occurred] is to put the beneficiary to the task of ascertaining the *existence* of a breach before the invocation of the power of sale and the trustor on notice of the obligations the beneficiary contends have been breached. An assertion of a breach 'if any' utterly fails those purposes." (*Id.* at p. 214.)

By asserting that Anolik's breach included the failure to pay late charges, advances, assessments, and attorney fees, "IF ANY," EMC did not describe a breach "actually known" to EMC. Therefore, the latter part of the assertion of breach in the Notice of Default was invalid.

After this court decided *Anderson*, the Legislature amended sections 2924 and 2924c (which relates to curing a default described in a notice of default). (Stats. 1990, ch. 657.) In doing so, the Legislature specifically stated its intent was "to supersede the holding in [*Anderson*] to the extent that decision restricted the ability of mortgagees and beneficiaries under trust deeds to demand payment of all amounts in default under the terms of an obligation secured by a mortgage or deed of trust as a condition to reinstatement of the obligation and avoidance of a sale of the security property to satisfy the obligation." (Stats. 1990, ch. 657, § 3, p. 3159.) Having examined the 1990 revisions to sections 2924 and 2924c, we conclude the Legislature's intent to supersede *Anderson* related to other portions of *Anderson* that involved section 2924c, on which we do not rely. (See *Anderson v. Heart Federal Sav. & Loan Assn.*, *supra*, 208 Cal.App.3d at pp. 215-217.) Indeed, by

adding the words "actually known" to section 2924 as part of the 1990 amendments, the Legislature actually bolstered *Anderson*'s conclusion that an "if any" proviso in a notice of default is invalid.

That leaves us with the assertion that Anolik failed to pay "THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS." Anolik contends this assertion must be read as the "alleged non-payment of monthly promissory note payments for the months of March, 2000; April, 2000; May, 2000; and June, 2000." This contention appears to be premised on the fact that although the Note required him to "make [his] monthly payments on the first day of each month," a late charge could be imposed only if the holder of the Note did not receive "the full amount of any monthly payment by the end of FIFTEEN calendar days after the date it is due." Since the Notice of Default was signed on July 5 and recorded on July 6 -- before any late charge could be imposed for the July payment -- Anolik contends the phrase "ALL SUBSEQUENT INSTALLMENTS" applies only to the installments due in April, May, and June.

This conclusion does not follow from the terms of the Note. As we have observed, the Note required Anolik to "make [his] monthly payments on the first day of each month." The Note also specified that if Anolik did "not pay the full amount of each monthly payment on the date it [wa]s due, [he would] be in default." Finally, under the late charge provision in the Note, a late charge would be imposed if the holder of the Note did not

receive "the full amount of any monthly payment by the end of FIFTEEN calendar days *after the date it is due*" -- i.e., after the first of the month. (Italics added.)

Read together, these provisions provide that Anolik would be "in default" with respect to any monthly payment that he did not pay by the first of the month -- i.e., the date it was due -- regardless of when the Note holder received the payment. Thus, Anolik's failure to pay the *July* payment on the first of July constituted a default encompassed by the assertion, made on July 5, that Anolik had failed to pay "THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS."[7]

Despite this conclusion, we can quickly dispose of any suggestion that the Notice of Default properly could be premised on Anolik's admitted failure to make the July 2000 payment. In *Bisno v. Sax* (1959) 175 Cal.App.2d 714, the court concluded "one day's delay in making [a monthly loan] payment did not effect a default, for time is not declared by the note or trust deed to be of the essence." (*Id.* at p. 721.) The court went on to explain: "The note and trust deed now before us evince an intent that time shall not be of the essence. No action other than foreclosure can be brought upon a trust deed note [citations], and both of these instruments contemplate a foreclosure in the customary manner--sale under the power

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[7] In a letter to EMC dated August 11, 2000, Anolik's attorney noted the July 2000 payment as one that was "unpaid."

conferred upon the trustee. This means the recordation of a notice of default and a waiting period of three months [citation], during which the trustor may cure his default and reinstate the obligation and deed of trust, thus necessitating the discontinuance of any proceeding looking to a foreclosure sale [citation]. All this is irreconcilable with any concept of time as the essence." (*Id.* at p. 722; see also *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust*, *supra*, 168 Cal.App.3d at pp. 821, 825-831 [borrower was likely to succeed on the merits of an action seeking to enjoin foreclosure on several deeds of trust based on "tardy payment of an installment during the period before late payment charges accrue"].)

Here, at the time the Notice of Default was prepared on July 5, the July payment was at most four days late -- not even late enough for EMC to impose a late charge on Anolik. Under the reasoning of *Bisno*, Anolik's failure to make the July payment by the fifth of the month did not constitute a breach of his obligations under the Note and Deed of Trust "sufficiently substantial in [its] nature to authorize [EMC] to declare a default and proceed with a foreclosure." *(Birkhofer v. Krumm*, *supra*, 27 Cal.App.2d at pp. 523-524.)

Thus, to determine the validity of the Notice of Default, we must examine whether Anolik failed to pay any of the four monthly installments that became due between March, April, May, and June 2000. We must first determine the amount of "THE

INSTALLMENT[S] OF PRINCIPAL AND INTEREST" Anolik was obligated to pay during those months.

The Note provided that "[e]ach of [Anolik's] monthly payments w[ould] be in the amount of U.S. $ 900.58," but the Note also provided that this amount could change. EMC contends it "increased Anolik's monthly payment" "commencing with the payment due January 1, 2000" "to recover the tax payments it [had] advanced." At trial, Annette Anderson, a senior litigation specialist with EMC, testified that EMC increased the amount of Anolik's monthly installment payment to $995.14 effective December 1, 1999, because of a property tax payment EMC had made on Anolik's behalf in October 1999. Anderson testified that to recover the tax payment it had advanced, EMC "forced" an escrow account (also referred to an impound account) on Anolik and treated the tax payment as "an impound advance amount." Thus, beginning in December 1999, EMC sought to collect an additional $59.04 every month to cover this "impound advance" and an additional $35.52 per month to cover future tax payments.

Anolik admits he never paid the increased monthly payment EMC sought to collect. He contends, however, that EMC had no authority to force an impound account on him and therefore no authority to increase the amount of his monthly payment. In support of this contention, he cites section 2954, which provides in relevant part: "(a) No impound, trust or other type of account for payment of taxes on the property . . . shall be required as a condition of . . . a loan secured by a deed of

trust . . . on real property containing only a single-family, owner-occupied dwelling, except: . . . (3) upon a failure of the . . . borrower to pay *two* consecutive tax installments on the property prior to the delinquency date for such payments . . . . [¶] An impound, trust, or other type of account for the payment of taxes, insurance premiums or other purposes relating to property established in violation of this subdivision is voidable, at the option of the . . . borrower, at any time . . . ." (Italics added.)

Anolik argues that under section 2954, "[t]he payment of a single tax bill does not authorize a lender to establish an involuntary escrow impound account." We agree. EMC offers no argument on this point. Thus, regardless of whether EMC could, under the terms of the Note or the Deed of Trust, force an impound account on Anolik,[8] section 2954 prohibited EMC from doing so based on Anolik's failure to make a single tax payment.

EMC argues it was entitled to establish an impound account because "Anolik signed an agreement authorizing" such an account when he purchased the property. It is true Anolik signed an "ESCROW ACCOUNT AGREEMENT" for "TAX & INSURANCE" with Long Beach Mortgage Company as part of the original loan transaction. That agreement, however, specified the impound account was "not required" and further specified that Anolik could "cancel it at any time." At trial, Anolik testified that he changed his mind

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[8] The parties disagree on this point.

about the impound account before the loan closed, he canceled the agreement, and an impound account was never established. This testimony was consistent with evidence that upon the closing of the loan, no money was withheld to fund an impound account and no impound account was ever set up until EMC tried to force an impound account on Anolik. Indeed, Anderson admitted that the loan came to EMC from Long Beach "as a non-escrowed loan."

It follows from the foregoing that EMC had no authority to increase Anolik's monthly payment effective December 1, 1999, so that Anolik would pay additional amounts into a forced impound account to allow EMC to recover the taxes it had advanced for Anolik.[9] Thus, the amount Anolik owed for his monthly installment payment in March, April, May, and June 2000 was the amount originally specified in the Note: $900.58.

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[9] Under the Deed of Trust, EMC *was* entitled to pay Anolik's property taxes if he failed to do so. With respect to the recovery of such advances, however, the Deed of Trust provided: "Any amounts disbursed by Lender . . . shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from the Lender to Borrower requesting payment." No such notice was tendered here, and, more importantly, the Notice of Default did not identify the failure to pay this advance as a specific default for which EMC sought to exercise its power of sale.

We turn to the issue of whether Anolik failed to pay any of those installments. At trial, the evidence showed that Anolik's monthly installment payments for those four months in the amount of $900.58 were sent to EMC by Anolik's attorney, along with cover letters specifically identifying the payments as "the March, 2000 monthly loan payment," "the April, 2000 monthly loan payment," etc. EMC accepted the installment payments for March and April, but rejected the installment payments for May and June.

EMC contends that despite its receipt of the March, April, May, and June 2000 payments, Anolik was actually in default on all four of these installments. EMC's argument is premised on the reasoning that follows.

It was undisputed at trial that Anolik failed to make the monthly installment payment due in December 1998, before the loan was transferred to EMC. According to Anderson, because of this missed payment "the account continuously ran one month in arrears." That means EMC treated each payment received after December 1998 as paying the previous month's installment. Thus, when EMC received the February 2000 payment, EMC treated that payment as the January 2000 payment instead and deemed the February 2000 payment unpaid. When EMC decided to apply Anolik's March 2000 payment "to repay the taxes advanced by" EMC, this made the account two months in arrears. In other words, in EMC's view, Anolik was in default for failing to pay the February and March 2000 installments -- because the February 2000 payment Anolik made was applied to the January 2000

installment and the March 2000 payment Anolik made was applied to repay the taxes EMC had advanced.

When EMC received Anolik's April 2000 payment, it applied that payment "to the February 2000 installment." At that point, EMC considered Anolik to be in default for failing to pay the March and April 2000 payments.

As for the May and June 2000 payments, EMC rejected them on the ground they were for the "[i]ncorrect amount" "compared to [the] amount due." At trial, Anderson explained they were returned because they were "insufficient to cure the default amount." Because EMC did not accept the May and June 2000 payments, EMC treated those payments as being unpaid also. Thus, according to EMC, Anolik was in default because he failed to make the March, April, May, and June 2000 payments due under the loan.

EMC contends that it does not matter how it applied Anolik's payments during those months because "Anolik admitted that he failed to pay sufficient amounts to bring the Loan current" and "[h]ad EMC applied the payments received from Anolik as he directed the Loan would nonetheless still have been in default." According to EMC, "Had EMC not applied the March payment made by Anolik to reimburse the amount of taxes previously advanced, Anolik would have been in default by 1 monthly payment and $1,425.19 in taxes. By applying the March payment to taxes, Anolik was in default by 2 monthly payments, and only $551.61 in taxes. Applying a payment towards taxes, or

not makes no difference in that either way Anolik was in default under the Loan."

The fatal flaw in that argument is this: The issue before us is not simply whether Anolik was in default under the loan; he admittedly was, because he failed to make the December 1998 monthly installment payment and failed to pay the property taxes that were due in October 1999. The issue before us is whether Anolik was in default under the loan *in the manner EMC specified in the Notice of Default*. Under section 2924 and the cases applying that statute, EMC had to correctly identify in the Notice of Default at least one breach by Anolik of his obligations under the Note and the Deed of Trust. If Anolik did not commit any of the specific breaches that EMC asserted in its Notice of Default, then that notice was invalid under section 2924 -- even if Anolik was in breach of his obligations in other ways EMC failed to specify.

Thus, it is of critical importance how EMC applied Anolik's payments in determining whether Anolik was in breach of his obligations as specified in the Notice of Default. If Anolik was in breach because he failed to pay the taxes EMC advanced on his behalf in October 1999, Anolik's breach could not properly be described as his failure to make the March 2000 payment of principal and interest, *unless* there was some provision in the Note or the Deed of Trust that expressly allowed EMC to treat Anolik's March 2000 loan payment of principal and interest as a payment of the taxes EMC had previously advanced for Anolik. There is no such provision, however. Paragraph 3 of the Deed of

Trust, which is entitled "Application of Payments," specifies that any payment of principal and interest, and any payment toward an impound account, "shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable [to an impound account]; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note." We have already concluded that EMC was not entitled to force an impound account on Anolik when it tried to do so, and therefore EMC was not entitled to apply Anolik's March 2000 payment of principal and interest toward any tax advances that EMC was treating as an "impound advance amount."

Nor was EMC entitled to apply Anolik's March 2000 payment of principal and interest directly toward the taxes it had advanced for Anolik. Paragraph 3 of the Deed of Trust does not permit the lender to directly apply such a payment toward a tax advancement the lender has made for the borrower. Instead, as we have previously explained, the Deed of Trust provides for the lender to recover any tax advancement it has made by requesting that the borrower pay the lender the amount of the advancement. The advancement becomes "payable" by the borrower "upon notice from the Lender to Borrower requesting payment."[10]

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[10] If, following that notice, the borrower fails to pay the lender the amount of the advancement, then the borrower is in default for failing to do so.

It follows from the foregoing that EMC had no right to treat Anolik's March 2000 payment as anything other than a payment of principal and interest. The issue that remains is whether, because Anolik failed to make his monthly payment in December 1998, EMC was entitled to treat each of Anolik's subsequent monthly loan payments as one month late, leaving Anolik perpetually in default for failing to pay the most recent monthly installment. If EMC was entitled to do this, then EMC's description of Anolik's breach in its Notice of Default was at least partly correct because Anolik was always a month behind on his payments and therefore in any given month could be described as being in default for having failed to make the payment due the previous month.

Under the Note, Anolik was obligated to make a payment of principal and interest every month in the amount of $900.58. Anolik admits he breached that obligation in December 1998 when he failed to make a payment for that month. Thereafter, however, Anolik made a payment every month between January 1999 and June 2000. From Anolik's perspective, under these circumstances, his breach was his failure to make the December 1998 payment, and therefore EMC's assertion in the Notice of Default that he did not pay "THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS" was inaccurate.

In EMC's view, however, it was entitled to treat each payment Anolik made after December 1998 as one month late. Thus, EMC contends it was entitled to treat the payment Anolik made in January 1999 as a belated payment for December 1998, and so on through June 2000. Under this reasoning, even if Anolik is credited with having made the payments in May and June 2000 that EMC refused to accept, as of July 5, 2000, Anolik had failed to make the installment payment due on June 1, and therefore the Notice of Default was valid because it accurately described a breach by Anolik of his obligations under the Note.

If Anolik had sent each monthly payment to EMC without designating the purpose of that payment, EMC's view might prevail. In other words, if EMC received a check for $900.58 from Anolik in March 2000 without any indication as to what that check was for, EMC reasonably could have treated that check as a belated payment of the installment due in February 2000, having treated each payment since January 1999 in the same manner. But the evidence showed that at least as far back as August 1999, Anolik's attorney sent each monthly installment payment to EMC with a cover letter identifying the purpose of the payment. Thus, in August 1999, when -- by EMC's accounting -- Anolik was in default for failing to make the July 1999 payment, EMC received a check for $900.58 from Anolik designated as "payment of the August, 1999 monthly loan payment." The question is whether EMC was entitled to ignore Anolik's specification of the nature of the payment he was making.

Under section 1479, "[w]here a debtor, under several obligations to another, does an act, by way of performance . . . which is equally applicable to two or more of such obligations, such performance must be applied" "to the extinction of any particular obligation" designated by the debtor "at the time of performance." In *Smith v. Renz* (1954) 122 Cal.App.2d 535 -- which, like this case, involved installment payments due under a promissory note -- the court explained that although "installment obligations are not specifically mentioned" in section 1479, the statute nonetheless "may be deemed to bespeak such public or legislative policy as may exist on the point" of how installment payments are to be credited. (*Smith v. Renz*, *supra*, 122 Cal.App.2d at pp. 536, 538.) According to the court, "[w]hen payment is made *on* an obligation, *unless there is some indication to the contrary*, the practical and ordinary interpretation must undoubtedly be that payment is to be applied to the part first coming due to be paid." (*Ibid.*, first italics original, second italics added.)

Thus, absent any contrary designation by Anolik, EMC would have been entitled to treat the payment it received in August 1999 as a belated performance of Anolik's obligation to make a payment in July 1999. Anolik specified, however, that the check EMC received in August was his performance of his obligation to make an installment payment *in August*, and there is nothing in the Note or the Deed of Trust that precluded Anolik from identifying which month's payment he was making. Thus, even accepting EMC's method of accounting for payments, as of August

1999 Anolik's breach became fixed and did not change with each new month.

EMC offers no basis for its position that it was entitled to ignore Anolik's specification of the particular installment he intended to pay from August 1999 forward. It is true that when the parties have established, by their contract, a rule for applying payments, that rule must be given effect "to the exclusion of any other." (*Harrison v. Woodward* (1909) 11 Cal.App. 15, 22.) There is nothing in the Note or the Deed of Trust, however, that specifies how subsequent monthly payments are to be treated when an earlier monthly payment was missed or that allowed EMC to ignore a designation made by Anolik. As we have noted, paragraph 3 of the Deed of Trust specifies that any payment of principal and interest has to be applied "first, to any prepayment charges due under the Note; second, to amounts payable [to an impound account]; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note." This provision does not authorize EMC to treat a monthly installment payment of principal and interest designated for a particular month as a payment for the previous month. Thus, the assertion in the Notice of Default that Anolik failed to pay "THE INSTALLMENT OF PRINCIPAL AND INTEREST WHICH BECAME DUE ON 03/01/2000 AND ALL SUBSEQUENT INSTALLMENTS" did not accurately describe Anolik's breach of his obligations under the Note and the Deed of Trust.

Nothing in *Hammond Lumber Co. v. Henry* (1927) 87 Cal.App. 231 compels a different conclusion. In *Hammond*, the defendant

"was a general contractor and builder, engaged in the construction of a number of houses in and near Los Angeles, and had bought a great deal of building material at different times, such as lumber, cement, lime, etc., from the [plaintiff], and . . . it was the custom of [the parties] to keep a separate account for each building." (*Id.* at p. 233.) On appeal, the defendant, relying on section 1479, complained "that certain payments made by him to [the plaintiff] were not credited as he directed." (*Hammond Lumber Co.*, at p. 234.) The appellate court concluded section 1479 did not apply "for the reason that the [defendant] Henry was indebted to the [plaintiff] Hammond Lumber Company, on but *one obligation* for lumber and building material of all kinds sold and delivered to him, and not upon several obligations. The accounts were kept separate merely for convenience and constituted one debt which Henry was primarily obligated to pay." (*Hammond Lumber Co.*, at p. 235.)

Because *Hammond Lumber Company* did not involve monthly installment payments, it is of no assistance here. Instead, *Smith v. Renz* controls. Under *Smith*, Anolik was entitled to designate which installment he was paying in August 1999 and every month thereafter, and EMC had no authority to ignore that designation. Thus, contrary to EMC's assertion in the Notice of Default, Anolik made the monthly loan payments due from March 2000 through June 2000.

EMC's refusal to accept the loan payments Anolik tendered in May and June based on the contention they were "insufficient to cure the default amount" does not change this conclusion. It

is true Anolik was in default for failing to make one of his prior monthly loan payments and for failing to pay the taxes due in October 1999. EMC points to nothing in the Note or the Deed of Trust, however, that authorized it to refuse an otherwise properly tendered monthly loan payment on the ground the payment was insufficient to cure the existing default, then claim a further default because of the purported failure to make the monthly payment EMC refused to accept. Thus, on the facts of this case, EMC's assertion in the Notice of Default that payment had not been made of the installments of principal and interest that became due between March 1, 2000 and June 1, 2000 was incorrect.

We do not conclude that Anolik was not in breach of his obligations to EMC; he admittedly was. As we have noted, however, foreclosure is a "drastic sanction" and a "draconian remedy" (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust*, *supra*, 168 Cal.App.3d at pp. 827, 830), and accordingly "[t]he statutory requirements [of section 2924] must be strictly complied with" (*Miller v. Cote*, *supra*, 127 Cal.App.3d at p. 894). A person seeking to exercise the power of sale in a deed of trust must slavishly adhere to the procedural requirements of the law governing nonjudicial foreclosures, and "a trustee's sale based on a statutorily deficient notice of default is invalid." (*Ibid.*)

Because Anolik paid the monthly loan payments due in March, April, May, and June 2000, and because his failure to pay the July 2000 payment by the fifth of July did not constitute a

sufficiently substantial breach of his obligations to allow EMC to declare a default, EMC's Notice of Default did not contain a correct statement of any breach of an obligation for which EMC was entitled to begin foreclosure proceedings. Thus, the Notice of Default was invalid. The trial court erred in concluding otherwise.

III

Failure To Address Application Of

Fair Debt Collection Practices Act

In the cause of action for breach of the covenant of good faith and fair dealing in his second amended complaint, Anolik alleged that EMC had breached the covenant by knowingly making false allegations of default in the Notice of Default, by refusing to accept the monthly loan payments for May and June 2000, and by pursuing a nonjudicial foreclosure sale of his home.

On the last day of trial, following the close of evidence, Anolik argued that various other actions by EMC that he contended were in violation of the Fair Debt Collection Practices Act should be considered breaches of the covenant of good faith and fair dealing. The trial court questioned whether there was any evidence of a causal connection between those actions and any damages to Anolik.

Anolik subsequently filed a request for a statement of decision. Among other issues, Anolik requested that the court's statement of decision address "[w]hether the Fair Debt Collection Practices Act governs or applies to the actions of

[EMC] in collecting sums allegedly due from . . . Anolik on account of . . . Anolik's loan"; "[w]hether [EMC's] 'demand letters' were in compliance with the requirements of the Fair Debt Collection Practices Act"; "[w]hether [EMC's] 'returned check notifications' for May, 2000, and June, 2000, were in compliance with the requirements of the Fair Debt Collection Practices Act"; "[w]hether [EMC], by maintaining their foreclosure sale process after August, 2000, violated the limitations and requirements of the Fair Debt Collection Practices Act"; and "[w]hether [EMC], by failing to comply with the requirements of the Fair Debt Collection Practices Act in attempting to collect money from . . . Anolik, breached the covenant of good faith and fair dealing."

Following receipt of Anolik's request, the court directed EMC to prepare a proposed statement of decision. EMC apparently did so, even though no copy of the proposed statement of decision appears in the file, because Anolik filed objections to EMC's proposed statement of decision. Among other objections, Anolik objected because the proposed statement of decision did not address the issues he had raised regarding the Fair Debt Collection Practices Act.

The statement of decision the trial court ultimately entered did not specifically address any issue regarding the Fair Debt Collection Practices Act. The trial court did, however, address Anolik's cause of action for breach of the covenant of good faith and fair dealing, as follows: "Anolik contends that several letters sent by agents of EMC evidence

EMC's 'bad faith' state of mind and conduct. Missing from [Anolik's] showing was a causal connection between the alleged breach and the claimed damages. The only damages claimed by Anolik in this case arise out of his inability to obtain alternative financing or refinancing for his Property and an inability to lease a suitable new location for his commercial business. . . . [N]o damages were proven. Anolik failed completely to present any evidence on the causation issue in that there was no evidence to show that any conduct of [EMC], much less the several letters, had any appreciable effect on Anolik's ability to obtain other loans or to lease a commercial property. [Anolik] failed to prove the elements of his 6th Cause of Action."

On appeal, Anolik contends the trial court's failure to address any of the issues relating to the Fair Debt Collection Practices Act in its statement of decision was error. He offers no authority to support that argument, however. Instead, he spends several pages of his brief purporting to explain why the Fair Debt Collection Practices Act applied to EMC's actions, then contends that EMC's actions in this regard "are cognizable under the covenant of good faith and fair dealing."

In its brief, EMC emphasizes the trial court's finding that Anolik failed to prove the causation and damages needed to prevail on his cause of action for breach of the covenant of good faith and fair dealing.

In his reply brief, Anolik ignores his failure to prove causation and damages and continues to insist the trial court

erred by failing to address any of the issues relating to the Fair Debt Collection Practices Act in its statement of decision.

Anolik has failed to carry his burden of showing error. (See *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 978 ["It is the appellant's burden to affirmatively demonstrate error"].) Under Code of Civil Procedure section 632, the trial court's obligation was to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." More importantly, however, "[i]t is an established rule of appellate procedure that if there is a finding of fact that is dispositive and necessarily controls the judgment, the presence or absence of findings on other issues is inconsequential. In other words, sometimes a single finding is all that is really important." (*Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1320.)

Here, the trial court expressly found that "no damages were proven" and "Anolik failed completely to present any evidence on the causation issue." Anolik has not challenged these findings. Given Anolik's failure to prove causation and damages, no findings were necessary on whether any of EMC's actions violated the Fair Debt Collection Practices Act or whether they constituted breaches of the covenant of good faith and fair dealing. "If findings are made upon issues which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error." (*Leonard v. Fallas* (1959) 51 Cal.2d 649, 653.)

IV

Conclusion

Because the Notice of Default was invalid, the judgment must be reversed. Anolik was entitled to judgment in his favor on his fourth cause of action for wrongful foreclosure, in which he sought "a judgment of this court determining that the Notice of Default . . . and all further proceedings taken thereon, are null and void and of no force and effect." He also was entitled to a permanent injunction on his first cause of action enjoining EMC from proceeding with nonjudicial foreclosure based on the invalid Notice of Default. Of course, EMC is not precluded from recording a new notice of default and proceeding with a nonjudicial foreclosure based on new, accurate assertions of default by Anolik, if he remains in default.

Since it is not clear whether the trial court would have found against Anolik on his fifth cause of action for *damages* for wrongful foreclosure if the court had found the Notice of Default was invalid, our decision may effect that cause of action as well, but that is for the trial court to decide on remand.

Finally, because we are reversing the judgment in favor of EMC, we must also reverse the order awarding EMC its attorney fees, which was premised on EMC's being the prevailing party in seeking to enforce the Note and the Deed of Trust.

DISPOSITION

The judgment and the order awarding attorney fees to EMC are reversed, and the case is remanded to the trial court for

further proceedings consistent with this opinion. Anolik shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

MORRISON, Acting P.J.

HULL, J.