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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

JENNIFER ZOLLARS,
Plaintiff and Appellant,

v.

STAN KAHAN,
Defendant, Cross-complainant and
Appellant;

QUALITY LOAN SERVICE
CORPORATION,
Cross-defendant and Respondent.

A130332

(Solano County
Super. Ct. Nos. FCS031010,
VCM100676)

Faced with competing claims of ownership of a Benicia residence, the trial court quieted title in appellant Stan Kahan, whom it found to be a bona fide purchaser. On Kahan's related unlawful detainer action, it ordered the eviction of appellant Jennifer Zollars and awarded Kahan damages for the rental value of the property during her time of possession. The trial court found in Kahan's favor on his cross-complaint for indemnity and declaratory relief against Quality Loan Service Corporation (Quality Loan)—the trustee for his foreclosure sale—awarding him attorney fees but no damages.

Zollars appeals from the judgment, contending inter alia that Kahan was not a bona fide purchaser and thus was not entitled to the benefit of a statutory conclusive presumption applied in his favor. (See Civ. Code,¹ § 2924, subd. (c).) Kahan cross-

¹ All statutory references are to the Civil Code unless otherwise indicated.

appeals, contending that the trial court erred by failing to award him damages for lost profits and for diminution in property value from Quality Loan. He also asserts that the trial court abused its discretion in setting the amount of his attorney fees award. We affirm the judgment.

I. FACTS

A. *Sales of the Benicia Residence*

In March 2006, Gherlie Dancel purchased a residence on East 5th Street in Benicia by grant deed. At the time of purchase, she executed two deeds of trust held by Ownit Mortgage Solutions, Inc. (Ownit)—a first mortgage for \$408,750 and a second mortgage for \$136,250—secured against the property. The deeds of trust gave Ownit the contractual authority to sell the Benicia property if Dancel failed to make timely payments on the underlying loans. The grant deed and deeds of trust were recorded in March 2006.

In October 2006, Dancel conveyed the Benicia residence to Morgan Meeks by grant deed. Meeks's purchase was financed by two deeds of trust from WMC Mortgage Corporation (WMC)—a first mortgage for \$436,000 and a second mortgage for \$109,000. These deeds of trust were also secured against the Benicia property and contained a contractual power to sell that property if Meeks did not pay on her loans. The Meeks grant deed and the two WMC deeds of trust were recorded in October 2006. Financial Title Company—which has since filed for bankruptcy—handled the Dancel-Meeks escrow. For unknown reasons,² when the Benicia property was conveyed to Meeks, the Dancel-Ownit second deed of trust secured against the Benicia property was not cancelled.

The following year, Meeks assigned her WMC first deed of trust to U.S. Bank. This assignment was recorded on July 17, 2007.³

² The escrow records were not available at trial and one witness suggested that the Dancel-Meeks sale might not have been an arm's length transaction.

³ All subsequent dates refer to the 2007 calendar year unless otherwise indicated.

On August 6, the Dancel-Ownit second deed of trust was also assigned to U.S. Bank by a nominee acting on Ownit's behalf.⁴ On August 8, a notice of default and election to sell under the Dancel-Ownit second deed of trust was recorded. Quality Loan was the trustee for that sale, responsible for ensuring that all junior lien holders entitled to notice were given notice of the sale. Ten-day and one-month notices of default were mailed on August 20 and September 7 to Dancel at the Benicia property address, but no one else was sent these notices.

Meanwhile, a separate foreclosure was underway, based on the deed of trust that Meeks assigned to U.S. Bank. On September 5, the Benicia property was sold to U.S. Bank at a trustee's sale conducted under the terms of that deed of trust. A week later, U.S. Bank recorded a trustee's deed upon sale evidencing that purchase. On November 16, U.S. Bank sold the property to appellant Jennifer Zollars by grant deed for \$320,000. On the same date, a deed of trust was recorded from Zollars in favor of Suntrust Mortgage, Inc. (Suntrust), for a \$304,000 loan secured against the Benicia property. Zollars took immediate possession of the property.

A week before the Zollars purchase, notice of a pending sale of the same property pursuant to the Dancel-Ownit second deed of trust was given. Again, only Dancel was given mailed notice of that pending foreclosure. There was evidence that a notice of trustee's sale was posted at the property on November 9—a week before Zollars took possession. A notice of a trustee's sale pursuant to the Dancel-Ownit deed of trust was recorded on November 16, a little more than an hour after Zollars's grant deed and the Suntrust deed of trust were recorded.

A trustee's sale was held on December 5 pursuant to the terms of the Dancel-Ownit second deed of trust. At that sale, appellant Stan Kahan paid \$158,669⁵ for the Benicia property. He was unaware that the trustee had failed to mail notices of default and of sale to all interested parties. On December 21, Kahan recorded a trustee's deed upon sale evidencing his purchase of the Benicia property. The trustee's deed recited that

⁴ The assignment was not recorded until September 25.

⁵ The unpaid amount of the deed of trust was \$157,223.

the conveyance was made in accordance with the terms of the Dancel-Ownit second deed of trust and that required notice—mailed, published, personally delivered, or posted—for the notice of default and notice of sale had been given.

Kahan served Zollars with a three-day notice to quit on January 19, 2008. That notice expired on January 23, 2008. Zollars refused to vacate the Benicia property, claiming ownership of it.

B. Actions Filed and Pretrial Matters

In February 2008, Kahan filed an unlawful detainer action against Zollars, asserting that he was the owner of the property. He claimed damages of \$60 per day—the fair rental value of the residence—resulting from her failure to give him possession of it. (Code Civ. Proc., § 1161a, subd. (b)(3).) The same month, Zollars brought an action against Kahan to quiet title, asserting that she was the owner of the fee and seeking to nullify Kahan’s purchase. She also asked for declaratory and injunctive relief. In her complaint, Zollars alleged that Kahan was not a bona fide purchaser of the property. (Code Civ. Proc., §§ 760.010-765.060.)

Kahan demurred to Zollars’s quiet title action, but her later-filed first amended complaint⁶ rendered that demurrer moot.⁷ Kahan filed a first amended complaint in his unlawful detainer action, alleging that he was a bona fide purchaser entitled to rely on a conclusive presumption of proper notice of the foreclosure sale. (See § 2924, subd. (c).) In July 2008, after Zollars’s demurrer to this first amended complaint was overruled, she answered that complaint.

By this time, Kahan’s unlawful detainer action and Zollars’s quiet title action had been consolidated. (Code Civ. Proc., § 1048, subd. (a).) In August 2008, Zollars filed a

⁶ In her amended complaint, Zollars added a cause of action seeking reimbursement of costs of improvements made to the property while she had a good faith belief that she was the owner of it. She dismissed this fourth cause of action for good faith improver in September 2009.

⁷ He also demurred to Zollars’s first amended complaint without success. Kahan petitioned for a writ of mandate to challenge the trial court’s order overruling of his demurrer. We denied the petition. (*Kahan v. Superior Court*, A123547.)

lis pendens against the property, giving notice of her quiet title action. In November 2008, Kahan answered Zollars's first amended complaint.

Meanwhile, Kahan was pursuing possible remedies against Quality Loan, the trustee for the December 5 sale. He sought indemnification from Quality Loan for any damages or attorney fees he incurred defending his property interest. He also demanded that the trustee defend him in the quiet title action. Quality Loan refused to do either. In November 2008, Kahan filed a cross-complaint against Quality Loan, pleading causes of action for negligence, implied indemnity and declaratory relief. He alleged that Quality Loan had breached its duty to Kahan to provide proper notice of the December 5 foreclosure sale, and that this breach had prompted Zollars's action against him. He asked that Quality Loan indemnify him if he lost the Benicia property and Zollars was awarded any damages. Kahan also sought attorney fees. Quality Loan answered his cross-complaint in May 2009.

In May 2009, Zollars moved for summary judgment on Kahan's first amended complaint, for summary adjudication on his bona fide purchaser affirmative defense and for summary adjudication on her quiet title and declaratory relief causes of action. That motion was denied in August 2009.⁸

C. Trial

Zollars remained in possession of the property at the time of the September 2009 court trial. The quiet title action was heard before the unlawful detainer and damages claim, with the cross-complaint heard after the complaints.⁹

The documentary evidence of the competing purchases of the Benicia property was admitted into evidence. The parties stipulated that before the December 5 sale, Quality Loan did not advise Kahan that the notice of default or the notice of sale had not been mailed to U.S. Bank or to Meeks. Quality Loan's affidavits of mailing of the notice

⁸ The parties did not provide us with a copy of the denial order, but we obtained one. We take judicial notice of this trial court record. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

⁹ Kahan moved for nonsuit at the close of Zollars's opening statement on the quiet title portion of the case. The motion was denied.

of default and the notice of sale did not report that any had been mailed to U.S. Bank, Meeks or Zollars. (See § 2924b.)

At trial, Zollars put on expert testimony suggesting that Kahan's pre-sale review of the public records about the property should have alerted him (1) that the October 2006 first and second deeds of trust were intended to place Meeks's ownership interest in first priority; (2) that Meeks did not acquire a junior interest in the property from Dancel; and (3) that Zollars purchased the property a month before the December 5 sale with a Suntrust first deed of trust. Her expert testified that for Dancel's second deed of trust to continue in force after Meeks acquired Dancel's interest in the Benicia property was "extremely unusual," even "bizarre." Zollars's expert admitted that the timing of the various transactions was critical to a determination of which deed of trust had priority. Dancel's March 2006 deed of trust was recorded before Meeks's October 2006 deed of trust. The expert opined that it was important for a bidder at a nonjudicial foreclosure sale to speak with those in possession of the property before bidding.

For his part, Kahan testified that he was an experienced bidder at foreclosure sales, having participated in them for 30 years. He purchased properties at foreclosure sales with the intention of reselling them. After the notice of sale, he had 20 days to prepare a bid. As part of that preparation, he reviewed the chain of title to determine the position of the deed of trust that was going into foreclosure—the one that was up for bid. Kahan did not view the Benicia property before December 5, although his employee drove by the site immediately before the sale to be sure that it was not damaged.

Before the December 5 sale foreclosing on the Dancel-Ownit deed of trust dated March 2006, Kahan reviewed a title company summary of recorded transactions on the Benicia property,¹⁰ a multiple listing service report and a report of comparable sales in Benicia the 60 days before the foreclosure sale. He knew from these reports that Zollars had recently purchased that property for \$320,000 pursuant to the October 2006 Meeks deed of trust. He was unconcerned about this purchase, because he concluded that the

¹⁰ One may evaluate and rely on title records obtained through a title agent. (*Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 530.)

October 2006 deed of trust from which Zollars derived her interest had a lower priority than the March 2006 deed of trust that was the subject of the upcoming foreclosure sale.

Kahan was very knowledgeable about foreclosure law and relied on this expertise in his business. He knew that the owner of a junior interest in property would be entitled to notice of a foreclosure of a deed of trust in first position, as the junior interest would be wiped out by foreclosure of a first position deed of trust. As the Dancel-Ownit interest that was up for bid at the foreclosure sale was in first position, it was superior to any interest Zollars held flowing from the later Meeks deed of trust. Thus, he was unconcerned about Zollars's junior interest, which he knew would be eliminated by foreclosure on the Dancel-Ownit deed of trust.

A representative of Quality Loan testified that junior lien holders who were entitled to notice were not given notice of the December 5 sale. If it had known of that failure to provide notice before December 5, that sale would have been cancelled and the nonjudicial foreclosure process would have begun anew.¹¹

D. Decision

In January 2010, the trial court issued its tentative decision on the quiet title and unlawful detainer actions. It found that both parties had acted in good faith and that Kahan had no notice of an adverse competing interest in the Benicia property. It found Kahan to be a bona fide purchaser, and—applying a statutory conclusive presumption about the regularity of notice—found him to be the lawful owner of the property. (See § 2924, subd. (c).) It found for Kahan on both Zollars's quiet title action and his own unlawful detainer action. It awarded Kahan damages of \$60 per day from Zollars for the reasonable rental value of the property during possession of it. Overruling Zollars's objections to the tentative decision, the trial court adopted it as the statement of decision in March 2010.

¹¹ At the close of Zollars's case-in-chief on the quiet title action, Kahan moved for judgment. The trial court declined to render judgment until the close of all evidence. (Code Civ. Proc., § 631.8, subd. (a).)

In August 2010, the trial court issued its statement of decision on Kahan’s cross-action against Quality Loan. It found that Quality Loan breached its trustee duties in the December 5 foreclosure sale, entitling Kahan to both implied indemnity and declaratory relief. As Kahan had been awarded damages from Zollars, the trial court awarded no damages from Quality Loan. It did award Kahan \$150,000 from Quality Loan for attorney fees associated with the unlawful detainer and quiet title actions.¹²

Judgment was entered in September 2010, incorporating the trial court’s rulings on all three underlying actions. Kahan took possession of the Benicia property on October 26, 2010.

II. BONA FIDE PURCHASER

A. Conclusive Presumption

On appeal, Zollars contends that the trial court’s finding that Kahan was a bona fide purchaser is unsupported by substantial evidence. The issue is critical to Zollars’s quiet title claim and her defense to the related unlawful detainer action, because if Kahan was not a bona fide purchaser, she could offer evidence that his purchase was invalid because it was not properly noticed.

In a nonjudicial foreclosure sale, a trustee exercises a power of sale contained in a deed of trust. The purchaser at a nonjudicial foreclosure sale takes title by a trustee’s deed. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 441 (*Nguyen*)). When—as here—the deed that the trustee delivers to the buyer at a foreclosure sale recites that all procedural requirements for the default and sale notices have been met, a rebuttable presumption that these notice requirements have been satisfied applies. If the buyer is a bona fide purchaser, the presumption becomes conclusive.¹³ (§ 2924; *Melendrez v. D & I*

¹² Initially, Quality Loan appealed from this judgment, but that appeal was later dismissed on its own motion.

¹³ The trustee’s deed that was recorded on December 21 contains this paragraph: “All requirements of law regarding the mailing of copies of notices or the publication of a copy of the Notice of Default or the personal delivery of the copy of the Notice of Default and the posting and publication of copies of the Notice of Sale have been complied with.”

Investment, Inc. (2005) 127 Cal.App.4th 1238, 1255 (*Melendrez*); *Nguyen, supra*, 105 Cal.App.4th at p. 441.)

A conclusive presumption *requires* the trier of fact to find the existence of a presumed fact from the finding of a basic fact. The opposing party may not offer any evidence to rebut the existence of the presumed fact. (*Melendrez, supra*, 127 Cal.App.4th at p. 1250, fn. 17.) Kahan’s bona fide purchaser status required the trial court to give conclusive effect to recitals in his trustee’s deed that proper notice of the foreclosure sale had been given. If the bona fide purchaser finding is not supported by substantial evidence, then evidence that Meeks and U.S. Bank were not given notice of default or notice of sale could be admitted to rebut the presumption of proper notice. (§ 2924, subd. (c).)

B. *Professional Bidder Status*

Zollars contends that a professional bidder at a foreclosure sale cannot be a bona fide purchaser, as matter of law. However, the cases that she cites in support of this argument do not conclude that one in the business of buying foreclosed properties can never be a bona fide purchaser. As we read those cases, they hold that a person’s professional bidder status is a relevant fact that may weigh when determining whether that person is a bona fide purchaser, but not that it is a determinative factor. (See *6 Angels, Inc. v Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1286 [person in business of buying properties at foreclosure sales as *evidence* that party was not bona fide purchaser]; *Estate of Yates* (1994) 25 Cal.App.4th 511, 523 (*Yates*) [substantial evidence supports trial court finding that purchaser was not bona fide purchaser, in part because he was professional bidder]; see also *Nguyen, supra*, 105 Cal.App.4th at p. 442 [noting that *Yates* suggests that experienced bidder *may not* qualify as bona fide purchaser].)

In *Melendrez*, the Sixth Appellate District rejected the same argument Zollars makes here—that a speculator who regularly purchases property at foreclosure sales and who purchased the subject property at a trustee’s sale for a price substantially less than its fair market value cannot be a bona fide purchaser. (*Melendrez, supra*, 127 Cal.App.4th at pp. 1249, 1253.) In so doing, it carefully considered *Yates*, one of the authorities on

which she heavily relies. The *Melendrez* court explained that in *Yates*, the Fourth Appellate District upheld a trial court's factual finding that a purchaser was not a bona fide purchaser. The trustee in *Yates* had completely failed to give any notice to a public administrator, despite knowing that the administrator was administering the decedent's estate. The *Yates* trustee's sale was set aside, based on the complete lack of notice and a sale at a grossly inadequate price. The trial court impliedly found that the buyer was not a bona fide purchaser, based on evidence that the buyer regularly bought properties in foreclosure sales, knew that the property was worth more than its price, and paid a grossly inadequate sales price. (See *id.* at pp. 1252-1253; see also *Yates, supra*, 25 Cal.App.4th at p. 523.)

On appeal, the *Yates* court did not conclude that the buyer was not a bona fide purchaser as a matter of law. Instead, it found that there was substantial evidence to support the trial court's implied finding that the buyer was not a bona fide purchaser¹⁴ because he had notice of the irregularity in the sale, thus negating the second prong of the bona fide purchaser test. This conclusion was based in part on the buyer's vast experience of foreclosure sales. (*Melendrez, supra*, 127 Cal.App.4th at p. 1253.)

After a purchase made at a trustee's sale, a buyer's foreclosure sales experience is a factor to consider when evaluating whether the buyer is a bona fide purchaser. This evidence is relevant to the factual determination whether or not the buyer had knowledge or notice of a competing claim. (*Melendrez, supra*, 127 Cal.App.4th at p. 1253, fn. 23.) Kahan's professional bidder status was clearly relevant to the trial court's factual determination of whether or not he was a bona fide purchaser, but we reject the contention that he was absolutely ineligible to be a bona fide purchaser.

C. *Inquiry Notice*

Zollars also contends that there is insufficient evidence that Kahan was a bona fide purchaser because he had inquiry notice of a defect in the December 5 sale. A bona fide purchaser is one who pays value for property without notice of any *adverse* interest or of

¹⁴ The issue before us, by contrast, is whether there is substantial evidence to support the trial court finding that Kahan *was* a bona fide purchaser.

any irregularity in the sale proceedings. (*Melendrez, supra*, 127 Cal.App.4th at pp. 1249-1250; *Nguyen, supra*, 105 Cal.App.4th at p. 442.)¹⁵ If a purchaser for value acquires an interest in real property without notice of the asserted interest of another in that same property, he or she is a bona fide purchaser who takes the property free of these unknown rights. (*Melendrez, supra*, 127 Cal.App.4th at pp. 1251.)

Bona fide purchaser status requires two elements: the purchase of property in good faith for value, and the lack of actual knowledge or constructive notice of another's asserted rights to the property. (*Melendrez, supra*, 127 Cal.App.4th at p. 1251.) The issue of whether or not a buyer is a bona fide purchaser is a question of fact. On appeal, we may reverse the trial court's determination only if it is unsupported by substantial evidence. Bona fide purchaser status is determined based on circumstances existing at the time that the buyer acquired the property. Later-acquired information is irrelevant to our consideration. (*Id.* at p. 1254.) Thus, we limit our inquiry to the facts known as of the December 5 date of sale.

The trustee's deed upon sale evidences that Kahan paid \$158,669 for the Benicia property. This is substantial evidence supporting the conclusion that he purchased the Benicia property for value. This element of the bona fide purchaser test does not require that the property be purchased at fair market value.¹⁶ The buyer need only pay something of value in exchange for the property. The adequacy of the consideration may reflect on the good faith of the purchaser, but does not undermine the conclusion that it was purchased for value. (*Melendrez, supra*, 127 Cal.App.4th at pp. 1251, 1254.)

¹⁵ The *Nguyen* court did not reach the issue of whether the buyer was a bona fide purchaser, or the subsequent issue of whether a rebuttable or conclusive presumption applied pursuant to section 2924. (*Nguyen, supra*, 105 Cal.App.4th at p. 444, fn. 7; see *Melendrez, supra*, 127 Cal.App.4th at pp. 1253-1254, fn. 24.)

¹⁶ The fact that the buyer purchased the property for less than its fair market value is not evidence of bad faith on the buyer's part. At foreclosure sales, the full potential value of the property sold is often unrealized. (*Melendrez, supra*, 127 Cal.App.4th at p. 1254; see *Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 414 [acknowledging that property sold at foreclosure may be worth less than property sold in different real estate transaction].)

The second element of bona fide purchaser status is a lack of notice. This element requires that the buyer have neither knowledge nor notice of a competing claim. The recording laws do not protect those whose ignorance of the title is deliberate or intentional, but protect only those who honestly believe that they acquired good title and who invest a substantial sum in reliance on that belief. (*Melendrez, supra*, 127 Cal.App.4th at p. 1252.)

Generally, one has notice of a particular fact if he or she has knowledge of circumstances that, on reasonable inquiry, would lead to that fact. (*Melendrez, supra*, 127 Cal.App.4th at p. 1252.) The public records of the Benicia property gave Kahan inquiry notice that Zollars had a junior lien against the property. However, as Zollars's junior interest was *not adverse* to the senior deed of trust that was up for bid at the December 5 sale, this notice did not preclude Kahan from being a bona fide purchaser. (See *id.* at p. 1249; *Nguyen, supra*, 105 Cal.App.4th at p. 442.)

Significantly, a review of the public records did *not* given Kahan notice of the pivotal defect in the foreclosure sale—that Zollars's predecessors in interest were not given notice of the December 5 foreclosure sale. Also, there was no evidence that Kahan had actual notice of Quality Loan's failure to provide notice to Meeks and/or U.S. Bank—Zollars's predecessors in interest—that a foreclosure sale of the Dancel-Ownit deed of trust was to be conducted that would extinguish their interests in the underlying property.

Substantial evidence supports the trial court's finding that at the time of the December 5 trustee's sale, Kahan had no actual or imputed notice that would defeat his bona fide purchaser status. (See *Melendrez, supra*, 127 Cal.App.4th at pp. 1254-1255 [little evidence to challenge bona fide purchaser status].) As substantial evidence supports the trial court's finding that Kahan was a bona fide purchaser, we must uphold that finding on appeal.¹⁷ (See *id.* at p. 1254.)

¹⁷ On appeal, Zollars raises three other issues challenging application of the conclusive presumption—that the deed of trust did not authorize its application, that another statute prohibits it in her case, and its application violates her due process rights.

D. *Effect*

Sections 2924 through 2924l provide a comprehensive framework regulating nonjudicial foreclosure sales pursuant to a power of sale contained in a deed of trust. The purpose of this statutory scheme is threefold: to provide a creditor or beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor; to protect the debtor from wrongful loss of the property; and to ensure that a properly conducted sale is final between the parties and conclusive for a bona fide purchaser. (*Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 809 (*Millennium*); *Melendrez, supra*, 127 Cal.App.4th at pp. 1249-1250.)

Under these provisions, when a trustee delivers a deed to a buyer at a foreclosure sale and that deed recites that all procedural requirements for the default and sale notices have been met, a rebuttable presumption that these notice requirements have been satisfied applies. If the buyer is a bona fide purchaser, the presumption is a conclusive one. (§ 2924; *Millennium, supra*, 179 Cal.App.4th at p. 809; *Melendrez, supra*, 127 Cal.App.4th at p. 1255; *Nguyen, supra*, 105 Cal.App.4th at p. 441.) The purpose of this statutory presumption serves to ensure that a properly conducted sale is conclusive to a

She did not raise these issues in the trial court. As a general rule, a party to an action may not offer a new theory for the first time on appeal. (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340-341.) While we have the authority to determine pure questions of law despite her failure to raise them in trial court, we are not required to do so. (See *id.* at p. 341; *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 93 fn. 4.) We decline to exercise that power. If we were to address the merits of Zollars's primary contention that the conclusive presumption was inapplicable because the relevant deed contained no reference to any conclusive effect, we would hold that section 2924, subdivision (c) requires only a recital that all required notices were provided. Once that recital of notice has been made in the relevant deed, the statute gives prima facie or conclusive legal effect to it, without any requirement that the deed also refer to the evidentiary effect of the notice recital. (See § 2924, subd. (c).) We also conclude that—having found that the trial court had substantial evidence from which to find Kahan to be a bona fide purchaser—the scope of an agent's duty, the scope of a trustee's duty, and whether the knowledge of one business area of a bank may be imputed to another business area of the same bank are supplemental issues that we need not resolve.

bona fide purchaser. (*Millennium, supra*, 179 Cal.App.4th at p. 809; *Melendrez, supra*, 127 Cal.App.4th at p. 1255; see *Nguyen, supra*, 105 Cal.App.4th at p. 440.)

In the circumstances before us, section 2924 precludes any attack based on irregularities in the default and sale notices. It does not bar Zollars from attempting to set aside the trustee's sale based on other grounds, but some evidence of fraud must be shown. (See *Melendrez, supra*, 127 Cal.App.4th at pp. 1242, 1255-1257 & fn. 26.) As the person attacking the validity of Kahan's trustee's sale, Zollars had the burden of proof on this issue. (See *id.* at p. 1258; *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1113.) There was no evidence of fraud.¹⁸ As Zollars cannot set aside the December 5 trustee's sale, we affirm the quiet title and unlawful detainer aspects of the judgment.

III. DAMAGES AND ATTORNEY FEES

A. *Damages for Lost Profits*

1. *Trial Court Ruling*

In his cross-appeal, Kahan contends that the trial court erred by failing to award him damages from Quality Loan. First, he asserts that he should have been awarded damages for lost profits.¹⁹ At trial, Quality Loan moved to exclude Kahan's proffered evidence of lost profits as speculative. Kahan testified that between 2007 and 2009, he purchased 17 different properties and resold them. He made an offer of proof of the rate of return on his investment on these 17 transactions. Only one of the 17 properties was in Solano County and it was physically distant from the Benicia property. Of the 17 sites, the one closest to the Benicia property was actually resold for a loss. Ultimately, the trial court excluded as speculative Kahan's proffered evidence of monetary damage suffered

¹⁸ Even if problems with the initial sale from Dancel to Meeks rendered that sale voidable, once a sale to a subsequent purchaser occurs, the new buyer for value who was unaware of those problems takes title without being charged with those earlier issues. The buyer—as a bona fide purchaser—takes title free of any fraud. (See *Melendrez, supra*, 127 Cal.App.4th at pp. 1256-1257.) If the past fraud cannot be charged to the buyer, then there is no basis for setting aside the trustee's sale. (*Id.* at p. 1258.)

¹⁹ Lost profits are the lost net pecuniary gain suffered because of interruption of a business. (See *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884.)

from an inability to resell the Benicia property during the period when he was dispossessed.

Another professional foreclosure bidder testified generally, that a 30 percent net profit on resale of foreclosure property was the “industry standard.” That witness admitted that he did not know anything about the condition of the Benicia property, nor about all of Kahan’s other property interests. The trial court admitted this evidence, finding that objections to it went to the weight it should be afforded, rather than its admissibility.

Ultimately, the trial court found that Kahan’s evidence of lost profits was too speculative. It did not award any damages for lost profits. On appeal, Kahan contends that this was error. He asks us to remand the matter to the trial court with instructions to allow him to present evidence of lost profits, to calculate the amount of his lost profits using his methodology of calculation, and to award those damages to him.

2. *Legal Principles*

In a negligence action, the measure of damages is the amount that will compensate the plaintiff for all detriment *proximately caused* by the defendant’s breach of duty. (§ 3333; *Safeco Ins. Co. v. J & D Painting* (1993) 17 Cal.App.4th 1199, 1204.) These damages may include loss of anticipated profits if an established business has been injured, as long as those damages can be ascertained with reasonable certainty from the working experience of the business, the past volume of business, and other provable data relevant to probable future sales. (*Grupe v. Glick* (1945) 26 Cal.2d 680, 692; *Kids’ Universe v. In2Labs, supra*, 95 Cal.App.4th at p. 883; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 889-890.)

An award of damages for lost profits turns on whether there is a satisfactory basis for estimating the probable earnings that would have been realized if the tort had not occurred. If no basis exists, damages are denied. If the operating experience of the business is sufficient to permit a reasonable estimate of probable income and expense, then lost profits are awarded as damages. (*Natural Soda Prod. Co. v. City of L.A.* (1943) 23 Cal.2d 193, 199; *Kids’ Universe v. In2Labs, supra*, 95 Cal.App.4th at p. 883.)

Proving the amount of lost profits can be difficult. The evidence must make *reasonably certain* both the occurrence and extent of any lost future profits. That evidence must be reasonably reliable in order to justify an award. (*Grupe v. Glick, supra*, 26 Cal.2d at pp. 692-693; *Kids' Universe v. In2Labs, supra*, 95 Cal.App.4th at pp. 883-884, 887; *S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536.) Uncertainty about the amount of damage is not fatal to a lost profits claim. However, uncertainty about whether any profit would have been derived at all from the lost business venture precludes an award. (See *Kids' Universe v. In2Labs, supra*, 95 Cal.App.4th at pp. 883-884.)

A trial court has broad discretion to determine both whether evidence should be admitted or excluded, and whether a witness is competent and qualified to testify as an expert. On appeal, we review those determinations for an abuse of discretion. (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 701 [competency]; *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, 513 [competency]; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 [admissibility].) To establish an abuse of discretion, Kahan must demonstrate that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner resulting in a miscarriage of justice. (See *Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 421.)

3. *Focus on Benicia Property*

Kahan raises three claims of error related to the denial of damages for lost profits. First, he contends that the trial court erroneously narrowed its focus to profits lost from the Benicia property alone. Kahan argues that he does not claim a specific lost profit on a discrete transaction, but that he was entitled to lost profits because during the time that he was unable to resell the Benicia property, the money that he had invested in it was unavailable for other investment use.

We reject this argument. Kahan had the burden of proving that he suffered a loss as the proximate result of his inability to obtain possession of the Benicia property and to resell it. (See § 3333.) If he was unable to sell that property for a profit, then the proceeds of his investment would have been unavailable to him for reasons that were

unconnected to Quality Loan's breach of its trustee's duties. Necessarily, Kahan's lost profits damages claim turns on whether and to what extent the funds invested in the Benicia property itself were unavailable to him. Thus, he was required to demonstrate that if he had not been delayed in acquiring possession of the Benicia property, he would have been able to resell that property promptly and would have made a reasonably certain amount of profit on that resale. In our view, the trial court properly focused his lost profits claim on whether and to what extent the loss of possession of the Benicia property may have resulted in lost profits.

4. *Evidence Beyond Benicia*

In a related attack, Kahan challenges the trial court's discounting of his evidence of sales and purchases outside of Benicia, involving different types of properties or occurring at different times. The trial court concluded that it was inappropriate to consider the return on investment on all of Kahan's 2007-2009 sales and merely average them in order to determine what profits he lost on the Benicia property. It noted that some of these properties were resold for large profits, some for smaller profits, and some at a loss. It also found that when considering the property that Kahan resold that was geographically closest to the Benicia property, the evidence showed that he lost money on the resale, resulting in no lost profits.

Kahan offered no evidence that the Benicia real estate market was similar to the markets in the other communities where he resold foreclosed properties. Evidence of lost profits is relevant only if the plaintiff establishes a substantial similarity between the business analyzed and that in which the business opportunity was destroyed. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 291; *Kids' Universe v. In2Labs, supra*, 95 Cal.App.4th at p. 886.) The trial court found that Kahan was unable to show that the profits he made on the transactions outside of Benicia were sufficiently similar to the profits he hoped to make on the Benicia property to constitute persuasive evidence of what Kahan might actually have been able to sell the property for during the months after he purchased it. This assessment of the evidence fell within the trial court's discretion. (See *Zhou v. Unisource Worldwide, supra*, 157 Cal.App.4th at p. 1476.) It

was not an arbitrary, capricious or patently determination that could constitute an abuse of discretion. (See *Ghadrdan v. Gorabi, supra*, 182 Cal.App.4th at p. 421.)

5. Methodology

Kahan also asserts that the trial court erred by rejecting his methodology for calculating his return on investment. He contends that his evidence and that of his expert witness allowed his lost profits to be reasonably calculated at approximately 30 percent return on investment—a calculation that he argues was sufficient to warrant an award of damages for lost profits. Again, we disagree. The trial court had discretion to determine whether the evidence could reliably form the basis of an award for lost profits. (See *Zhou v. Unisource Worldwide, supra*, 157 Cal.App.4th at p. 1476.) It was not required to accept Kahan’s proposed methodology at face value, but was entitled to evaluate its underlying soundness. Having rejected Kahan’s evidence, it also found that the evidence of his expert was not sufficiently based on Kahan’s business practices to be given much weight. These rulings are not patently absurd, nor do they result in a miscarriage of justice. (See, e.g., *Ghadrdan v. Gorabi, supra*, 182 Cal.App.4th at p. 421.)

6. Speculation

Having found the trial court’s evidentiary rulings to be within its discretion, we also conclude that its denial of an award of lost profits damages was proper. In its statement of decision on the cross-claim, the trial court found that Kahan’s nonattorney fees damage claims were “[un]supported by the law or evidence” and were “speculative and duplicative.” Speculative evidence is irrelevant, as it has no tendency to prove a disputed fact. (See Evid. Code, § 210; *People v. Clark* (2011) 52 Cal.4th 856, 924; see *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Irrelevant evidence is inadmissible. (Evid. Code, § 350.)

We read the trial court’s rejection of Kahan’s evidence of lost profits as a finding that he failed to prove with reasonable certainty that he suffered lost profits *at all* on the Benicia property. (See *Kids’ Universe v. In2Labs, supra*, 95 Cal.App.4th at pp. 883-884.) An award of damages is properly denied if occurrence of the damage is uncertain or speculative. (See, e.g., *Grupe v. Glick, supra*, 26 Cal.2d at p. 693; *Kids’ Universe v.*

In2Labs, supra, 95 Cal.App.4th at pp. 883, 887 [new business].) As the plaintiff on the cross-claim, Kahan had the burden of demonstrating a reasonable probability that profits would have been earned if not for Quality Loan’s breach of duty. (*S. C. Anderson, Inc. v. Bank of America, supra*, 24 Cal.App.4th at p. 536.) The failure to offer admissible evidence showing with reasonable certainty that lost profits actually occurred precluded such an award.

B. Damages for Diminution in Property Value

Kahan also contends that the trial court should have awarded him damages from Quality Loan for diminution in property value. At trial, he testified that once he saw the interior of the residence, he concluded that it was worth \$425,000 at the time of purchase. By the time of the September 2009 trial, Kahan believed that the property was worth \$205,000 to \$210,000. As of early September 2009—at the time of trial—Quality Loan’s expert appraised the property at \$206,000. Kahan reports that he took possession of the property in October 2009.

On appeal, Kahan argues that this evidence establishes that he lost \$219,000 of the value of his property during the time of Zollars’s possession. We disagree. Kahan intended to resell the Benicia property, but he did not establish that he would have been able to do so within a reasonably certain time period. The evidence of the time of resale of his 2007-2009 properties that had been resold varied from a few weeks to two years. He reasons that averaging these figures would provide a reasonably certain time, but that argument fails for the same reasons that his lost profits claim failed. (See pt. III.A.6, *ante*.) Without knowing when the property might have been sold, the trial court could not determine with reasonable certainty what the value of the property would have been at the time of sale. As the diminution in value claim was unduly speculative, the trial court properly denied Kahan’s claim for diminution in value damages.²⁰

²⁰ Kahan also contends that the trial court erred by denying his lost profits and diminution in value claims on the ground that they were duplicative of other damages. As we have already upheld the denials of these awards on another ground, this issue is necessarily moot.

C. Attorney Fees

1. Fee Award

Kahan contends that the trial court abused its discretion by failing to award him a greater amount of attorney fees. By motion, he sought \$189,884 in attorney fees and almost \$15,000 in costs. Several days later, he filed a separate memorandum of costs for an additional \$5,490. More than \$21,000 of the attorney fees sought related to both the Zollars actions and the cross-action. More than \$8,600 in claimed attorney fees were associated with the writ of mandate to challenge the trial court's overruling of Kahan's demurrer. Another \$3,934 in attorney fees was incurred on damage theories that were rejected by the trial court.

Quality Loan sought the complete denial of the motion for attorney fees. Barring that, it asked the trial court to award no more than \$145,074.75 in attorney fees. Ultimately, the trial court set \$150,000 as a reasonable award of attorney fees to Kahan for defending the quiet title action and prosecuting the unlawful detainer action. No costs were awarded.

2. Motion

First, Kahan objects that the trial court required him to file a posttrial motion for attorney fees rather than including those fees as part of the damages awarded at trial. His motion for attorney fees was based on section 1021.6. That statute provides that "[u]pon motion," a trial court may award attorney fees to the prevailing party on an implied indemnity claim if the court finds that (a) the indemnitee—because of the tort of the indemnitor—was required to act to protect the indemnitee's interest by bringing an action or defending a third party action; (b) the indemnitor was properly notified of a demand for defense and failed to avail itself of the opportunity to do so; and (c) the trier of fact determined that the indemnitee was without fault in the underlying action. (§ 1021.6.) The language of this provision requires the prevailing party to seek attorney fees by

motion, thus precluding an award of attorney fees as damages.²¹ The trial court properly awarded attorney fees only after Kahan’s posttrial motion.

3. *Costs*

Kahan also contends that he should have been awarded \$14,626.28 in costs in addition to an award of attorney fees. He asserts that the trial court denied his request for costs because he filed an untimely memorandum of costs. However, the language of section 1021.6 entitling Kahan to an award of attorney fees makes no mention of a right to costs. We reject his claim that case law entitles him to an award of costs as “other expenditures incurred.” (See fn. 21, *ante*.) Regardless of whether his request for costs was timely, Kahan was not entitled to any award of litigation costs.

4. *Reasonableness of Award*

Finally, Kahan contends that the trial court’s \$150,000 attorney fees award was arbitrary and unreasonable. He urges us to conclude that he should have been awarded \$189,884—\$168,837.50 that he attributes to the underlying quiet title and unlawful detainer actions and another \$21,046.50 that he asserts was inextricably intertwined with both those actions and the cross-action against Quality Loan.

A trial court has broad discretion to determine what constitutes a reasonable attorney fee. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1151.) An experienced trial judge is the best judge of the value of professional services rendered in that court. While its judgment is subject to review, that judgment will not be disturbed on appeal absent a showing of an abuse of discretion. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at

²¹ Kahan’s claim to attorney fees and costs beyond those authorized by section 1021.6 is based on case law that was superseded by the enactment of that statute. (See *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1532-1534; *Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 Cal.App.3d 1227, 1243-1244, disapproved on other grounds in *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1032, fn. 12; *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620.)

p. 1095; *Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 571.) We find no abuse of discretion in the \$150,000 attorney fees award.

The judgment is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.