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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

HITOSHI INOUE,

Plaintiff and Appellant,

v.

GMAC MORTGAGE, LLC et al.,

Defendants and Respondents.

A141322

(Sonoma County  
Super. Ct. No. SCV248256)

**I.**

**INTRODUCTION**

Appellant Hitoshi Inoue purchased a home subject to a deed of trust with GMAC Mortgage, LCC (GMAC). After Inoue defaulted on his home loan, foreclosure proceedings were initiated and the home was sold to MED&G Group (MED&G). Inoue brought multiple claims against GMAC and Executive Trust Services LLC (ETS), the company that processed the foreclosure for GMAC, alleging the foreclosure was invalid, and against MED&G to quiet title, alleging it was not a bona fide purchaser. Inoue appeals the trial court's judgment following a bench trial in favor of defendants GMAC, ETS, and MED&G. Inoue argues on appeal that the trial court erred in finding he had not timely submitted a reinstatement payment and that the payment he did submit, even if timely, was insufficient to reinstate the account. He also contends MED&G was not a bona fide purchaser of the property. We affirm.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. Evidence at Trial

In 2003, Inoue borrowed \$248,000 from GMAC to purchase a home in Santa Rosa, California. Inoue's total monthly payment for principal, interest, and fees was \$1,616.76. The deed of trust for the property provided that if the borrower sought to reinstate in the event of a default, the borrower must pay all sums due as well as all expenses and fees.

Inoue stopped making payments in August 2009. He received multiple letters from GMAC from August 2009 through April 2010 about missed payments, the default on his loan, and warnings that he could lose his house to a foreclosure sale. GMAC enlisted ETS to process the foreclosure. On May 20, 2010, ETS recorded a notice of default against the property. As of that time Inoue had been delinquent on his loan for more than 150 days and owed \$11,080.59.

Inoue received the notice of default that same month, which stated: "Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay." It informed Inoue: "you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property." The notice provided that the amount "will increase until your account becomes current." The notice identified ETS as the agent for the trustee, GMAC. It explained that to "find out the amount you must pay, or to arrange for payment to stop the foreclosure," Inoue should contact GMAC, in care of ETS, and included an address and telephone number.

ETS, not GMAC, maintained the exact amount Inoue would need to pay to cure the default. Myron Ravelo, a representative from ETS, testified that GMAC would not give quotes of the reinstatement amount. Any payment, however, would need to be made to GMAC, not to ETS. Kyle Lucas of GMAC similarly testified that the borrower was instructed on the notice of default to contact ETS because GMAC would not know the

exact amount to reinstate the loan. A GMAC representative would have to request a reinstatement quote from ETS. GMAC customer service representatives do not have the “delegated authority to give reinstatement quotes.”

In June 2010, Inoue submitted a request for a loan modification to GMAC. On July 19, 2010, GMAC sent Inoue a letter that the documentation of his financial hardship was incomplete. On July 30, 2010, GMAC sent Inoue a letter that his request for a loan modification had been denied because he had insufficient income to pay the new proposed mortgage.

In processing the loan modification, GMAC completed an escrow analysis that included an estimated calculation of the fees and costs owed by Inoue. GMAC requested this information from ETS in late July 2010. GMAC records contained an estimate of \$2,073 for fees and costs on the loan.

In a notice dated August 19, 2010, ETS informed Inoue of the trustee’s sale of the property. It stated a public auction for sale of the property was scheduled for September 13, 2010.

When Inoue received the notice that the property would be sold, he contacted GMAC by telephone. He testified: “I think they suggested [I] make [the] loan modification again, a second loan modification.” Inoue testified that they asked him to reinstate his account. He admitted that he did not remember exactly what the lender said, except he was told to “just bring money” in the amount of “like \$15,626.02.”

GMAC maintained account servicing notes where every call between a borrower and GMAC is documented by a service representative. There is no entry in GMAC’s records of anyone advising Inoue of a repayment amount of \$15,626.02 in August 2010. GMAC’s documentation showed Inoue called on August 23, 2010, and the entry stated the borrower (Inoue) was advised of the September 13 foreclosure sale. He was told the total amount due not including additional fees, late charges, and expenses.<sup>1</sup> The entry

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<sup>1</sup> The servicing notes contain standardized abbreviations. GMAC representative, Kyle Lucas, translated the abbreviations during his testimony at trial.

stated that Inoue said he was not able to reinstate. Inoue was advised his modification request was denied. Inoue did not request the total amount required to reinstate the loan. Inoue submitted a second loan modification request on August 26, 2010.

Inoue sent a cashier's check via certified mail to GMAC on August 31, 2010, in the amount of \$15,626.02. He testified that the "GMAC agent told me this number." He sent the check for the purpose of reinstating his account. Inoue also faxed a copy of the cashier's check to GMAC. Inoue testified that he never asked GMAC what additional amounts for fees and accrued costs were owed, nor did he remember if GMAC told him the amount included costs and fees.

As of August 31, 2010, Inoue was 10 months behind on his payments of \$1,616.76 per month so he owed at least \$16,167.60 in monthly payments, not including any costs or fees to reinstate the loan. ETS ultimately charged GMAC \$1,466.60 in costs and fees for its foreclosure trustee services.

Inoue never requested a written reinstatement amount from GMAC. Myron Ravelo testified ETS had no record that Inoue contacted ETS prior to the foreclosure sale. There was also no record of a written request for the reinstatement amount from Inoue. Inoue also never contacted ETS about the foreclosure sale.

On August 31, 2010, GMAC's records document three telephone calls between GMAC and Inoue. The log states that Inoue called to "confirm [amount] to reinstate [account]." Inoue was advised that he must send in certified funds. Inoue informed GMAC he had sent a cashier's check for \$15,626.02 that morning by certified mail. He was also advised: "No guar[antee] f[un]ds will be accepted." This caveat was confirmed by Inoue who testified in his deposition that GMAC "probably" told him that there was no guarantee that the sum would be accepted.<sup>2</sup> Inoue was told he would need to make arrangements to postpone the sale and he needed to complete the modification seven days before the sale date.

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<sup>2</sup> At trial, Inoue testified he could not remember what GMAC told him in the August 31 telephone calls.

Inoue called GMAC again on September 2, 2010, to inquire if they had received the cashier's check and he was told they could not locate the check. Between August 31 and September 3, 2010, the GMAC records show no documentation of payment on the account. GMAC records include an entry on September 3, 2010, that states "promise broken 09/03/10," and an entry on September 7, 2010, that states the foreclosure sale was scheduled in the next seven days.

On September 7, 2010, GMAC's records state: "hardship affidavit received" and noted additional items were needed including two pay stubs. Another entry on that date states "sent request to the investor to approve [postponement] request of [foreclosure] sale date 9/13/10 to allow time to review for HAMP [Home Affordable Modification Program]."

Inoue testified that he contacted GMAC "many times" about his account, and they told him the foreclosure had been stopped and his account was reinstated. GMAC's records do not reflect that he was ever informed the foreclosure would be postponed, or that his account had been reinstated. The trial court found that Inoue's statement that he was told the foreclosure had been stopped was "not credible."

Inoue called GMAC on September 8, 2010, and a GMAC representative told him the funds had not arrived. The September 8 entry states: "Said he sent in check for [\$]15[, ]626.02 cert[ified] mail for [payments] that were due not including any fees. He wants to know if the funds were [received] and to check the status of the [account]."

Inoue stated he sent a cashier's check with no Social Security number or loan number. Inoue was advised to fax proof that the cashier's check was sent. The records stated Inoue "already s[e]nt check" and "we don't [have]." Further research needed to be done because if the check was received, "we should [have] s[e]nt proof to [payment] research dep[artment]." Inoue was advised of the foreclosure sale date and told payment on the account had not been received or processed. Inoue was told to send a request to the investor to postpone the sale and allow time for them to review the modification.

Another entry on September 8 states "returning cashier's check . . . in amount of \$15[, ]626.02; not enough to reinstate." An entry on September 10 states "HAMP [Home

Affordable Modification Program] denied as no response from investor, we have no justification to [postpone] as no viable workout [option] approved.”

In a sworn declaration, Inoue stated he received a letter from GMAC on September 10, 2010, that the cashier’s check had been refused, but at trial, he stated he did not receive the letter until after September 13, 2010.

An entry on September 13 states “Adv[ised] the cashiers check h[a]s been returned 2 him b[e]cause n[o]t enough 2 [reinstate], borrower s[ai]d he w[a]s told that amount [would] b[e] enough, I apologized 2 [Inoue] 4 any misunderstanding.”

The foreclosure sale was held on September 13, 2010, and MED&G purchased the property. Inoue did not attend. Inoue received notice on September 13, 2010, that the property had been purchased and he must arrange to vacate the house. The notification was the first time Inoue became aware of MED&G. Inoue did not contact MED&G about the property and gave it no prior notice of his claims. MED&G had no knowledge of Inoue’s claimed right to the property prior to the sale. MED&G checked with the Sonoma County Recorder’s Office prior to the sale on September 13, 2010, to see if there were any claims affecting the property.

The deed to the property was transferred on September 18, 2010, and the deed was recorded on September 21, 2010. Inoue filed a “Notice of Pendency of Action” on September 20, 2010.

## **B. Procedural History**

The operative complaint was the second amended complaint which stated 10 causes of action. It alleged causes of action to set aside the trustee sale, to set aside the trustee deed, and for declaratory relief against all defendants. Against GMAC, it alleged claims for promissory estoppel, wrongful foreclosure, fraud, negligent misrepresentation, and negligence. It alleged two causes of action against MED&G: quiet title and intentional infliction of emotional distress.

The court conducted a bench trial that was intended to be held in three phases: in phase one the parties would try the equitable issues, phase two would be for the remaining legal issues, and phase three would try the issue of punitive damages, if

necessary. The parties agreed the claims to be tried in phase one included the following causes of actions: (1) promissory estoppel; (2) to set aside the trustee's sale; (3) to set aside the trustee's deed; (8) quiet title and; (9) declaratory relief. During phase one, at the close of Inoue's evidence, both defendants moved for motion for judgment under Code of Civil Procedure section 631.8. The court denied the motions.

At the conclusion of the phase one trial, after the close of evidence, Inoue requested the court take judicial notice of a lis pendens related to the property. Respondents objected because the lis pendens was never included in Inoue's exhibit list or submitted as part of his case at trial. The court found it would be prejudicial to admit the document after the close of evidence and to allow Inoue to reopen his case. However, on September 10, 2013, the court issued an "Order re: Trial of Phase [One]" granting Inoue's motion to reopen the evidence for the limited purpose of considering his request for judicial notice of lis pendens. The court granted the request for judicial notice of the lis pendens, including the date it was recorded.

The court issued a tentative decision to which no party lodged objections. The trial court then adopted the tentative in a 34-page final decision on January 22, 2014. The court found Inoue did not effectively exercise his right to reinstate the loan. Inoue failed to make a written request for the reinstatement amount as required in the notice of default pursuant to Civil Code section 2924c, subdivision (b)(1).<sup>3</sup> Inoue also failed to make his payment by the statutory deadline. (See *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 442 (*Nguyen*); *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1242 (*Melendrez*)). The court found Inoue was notified of the foreclosure sale date of September 13, 2010, so the last date to reinstate the loan was September 2, 2010—six business days prior to the sale. Inoue submitted no evidence at trial that GMAC received his payment prior to September 2, 2010. GMAC's business records also do not reflect a payment was received prior to September 2.

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<sup>3</sup> All subsequent statutory references are to the Civil Code unless otherwise identified.

The trial court also found that even if Inoue's reinstatement payment had been received by the deadline, the payment was not sufficient to cover the reinstatement amount. As of August 31, 2010, Inoue owed more than \$16,167.60 in past due monthly payments of principal, interest and escrow alone without any additional costs and fees so his check for \$15,626.02 was insufficient. The trial court found GMAC "promptly notified Inoue his payment was insufficient," and Inoue's declaration confirmed that he received the returned check prior to the foreclosure sale.

The trial court further found MED&G was a bona fide purchaser of the property. MED&G acquired the property on September 13, 2010, with no prior notice of Inoue's claimed interest. The sale was complete on September 13, 2010, upon acceptance of MED&G's bid and the deed was delivered on September 18, 2010. The court cited *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 821: "After the deed is issued, a bona fide purchaser is entitled to conclusively presume that the sale was conducted regularly and properly. [Citation.]"

Since the evidence established title had been properly conveyed to MED&G as a bona fide purchaser and the deed contained the necessary language under section 2924c, the court concluded the sale could not be set aside. Therefore, Inoue's action to quiet title failed.

The trial court concluded that Inoue failed to prove all causes of action tried in phase one. Judgment was ordered in favor of defendants and defendants were awarded their costs. On February 4, 2014, the court entered a judgment in favor of GMAC, ETS and MED&G and awarded each "their costs of suit." The judgment invited defendants to file motions for attorney fees. It also instructed Inoue to record a notice of withdrawal of his September 20, 2010 Notice of Pendency of Action within five days of the date of the judgment.

### III. DISCUSSION

#### A. Inoue's Appeal Is Properly Before the Court

As an initial matter, GMAC contends that the appeal must be dismissed because the judgment is from phase one of the trial, it was interlocutory and thus, it is not appealable. Phase one only resolved five of the 10 causes of action. GMAC however, “agrees that the trial court’s judgment on phase [one] of the trial moots any further trial on phases [two] and [three], as crucial elements of Inoue’s remaining claims have already been determined in GMAC’s favor. Nevertheless, any such ruling is at best implicit in the trial Court’s judgment.”

To determine whether the trial court’s judgment was meant to be a final judgment resolving all claims, we consider the nature and scope of the superior court’s ruling. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*)). “[A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as ‘separate and independent’ from those remaining.” (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) “ ‘It is not the form of the decree but the substance and effect of the adjudication which is determinative.’” (*Griset*, at p. 698, quoting *Lyon v. Goss* (1942) 19 Cal.2d 659, 670.)

In *Griset*, our Supreme Court concluded that the superior court’s denial of plaintiffs’ petition for a writ of mandate disposed of all issues in the action because it “completely resolved plaintiffs’ allegation—essential to all of plaintiffs’ causes of action.” (*Griset, supra*, 25 Cal.4th at p. 699.) When the superior court’s ruling “disposed of all causes of action framed by the pleadings, leaving no substantive issue for future determination, it was an appealable judgment.” (*Id.* at p. 700; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9 [summary judgment solely as to the seventh cause of action effectively disposed of the entire case, and resulted in an appealable judgment].)

Here, the court found Inoue had not met his burden of proof to establish promissory estoppel, to set aside the trustee's sale, to set aside the trustee's deed, to quiet title, or for declaratory relief. Given the court's extensive factual findings on these causes of action, there were no remaining contested facts relating to the remaining claims for fraud, negligence, negligent misrepresentation, wrongful foreclosure, or intentional infliction of emotional distress that required further trial. Although the trial court did not explicitly address the remaining causes of action after phase one of the trial, the substance of the judgment resolved all claims. Therefore, given the court's rulings on the five equitable causes of action, there is "no substantive issue for future determination." (*Griset, supra*, 25 Cal.4th at p. 700.)

Moreover, the trial court issued a judgment and awarded costs to respondents. It further notified them they could file motions for attorney fees, and it instructed Inoue to remove his Notice of Pendency of Action—all demonstrating the trial court's belief its judgment was final. The "substance and effect of the adjudication" is a resolution of the entire action. (See *Griset, supra*, 25 Cal.4th at p. 698.)

For all of these reasons, we do not consider the appeal to be interlocutory in any sense, nor does proceeding with this appeal violate the single judgment rule. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 560; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 12, pp. 555–556.)

## **B. Standard of Review**

"On review of a judgment based upon a statement of decision following a bench trial, we resolve any conflict in the evidence and reasonable inferences to be drawn from the facts in support of the determination of the trial court. [Citation.]" (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) We do not reweigh the evidence and are bound by the trial court's credibility determinations. Findings of fact are liberally construed to support the judgment. (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) Factual findings made by the trier of fact are reviewed for substantial evidence. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475,

500-501.) Where the facts are undisputed, pure questions of law are reviewed de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

### **C. Inoue's Reinstatement Payment Was Untimely**

GMAC argues that Inoue's payment arrived too late—less than five days prior to the foreclosure sale, and that the failure to make timely payment resolved all of Inoue's claims. We agree with GMAC that the trial court's determination that Inoue's attempt to reinstate his account failed because his attempted payment was untimely had an evidentiary basis sufficient to require affirmance.

Under section 2924c, a borrower must pay the entire amount including “(A) all amounts of principal, interest, taxes, assessments, insurance premiums, or advances actually known by the beneficiary to be, and that are, in default and shown in the notice of default, under the terms of the deed of trust or mortgage and the obligation secured thereby, (B) all amounts in default on recurring obligations not shown in the notice of default, and (C) all reasonable costs and expenses, subject to subdivision (c), which are actually incurred in enforcing the terms of the obligation, deed of trust, or mortgage, and trustee's or attorney's fees, subject to subdivision (d)[.]” (§ 2924c, subd. (a)(1).)

“Reinstatement of a monetary default under the terms of an obligation secured by a deed of trust, or mortgage may be made at any time within the period commencing with the date of recordation of the notice of default until five business days prior to the date of sale set forth in the initial recorded notice of sale.” (§ 2924c, subd. (e).) A borrower may still redeem the property and avoid foreclosure within five business days of the foreclosure sale, if he pays the entire balance on the loan plus fees and costs. (§ 2903.)

Therefore, under section 2924c and the express terms of the notice of default, Inoue had to submit the amount owed in default at least five business days prior to the date of the foreclosure sale. Inoue was notified the foreclosure sale was September 13, 2010. Five business days prior to Monday, September 13 was Friday, September 3 because Monday, September 6 was the Labor Day holiday. Inoue mailed a cashier's check via certified mail on Tuesday, August 31, 2010. When Inoue contacted GMAC on September 2, the representative had no record of receiving the check. The GMAC

records show no documentation of receiving the check on or before Friday, September 3, 2010. On September 3, because no reinstatement payment had been made, the account was listed as “promise broken.” From this evidence the trial court properly concluded that Inoue failed to establish his reinstatement payment was received by the statutory deadline.<sup>4</sup>

Nevertheless, on appeal, Inoue argues that his payment was deemed legally to have been delivered at the time of mailing rather than at the time it was received. He relies on authority holding that where a borrower is instructed to mail the payment, the delivery is complete upon mailing.

Normally, the deposit of payment into the mail does not constitute payment; payment is not effective until it is received by the creditor. (*Nguyen, supra*, 105 Cal.App.4th at p. 439, citing 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) Deeds of Trust and Mortgages, § 10:71, pp. 216-217, fn. omitted.) However, an exception exists where the creditor directs the debtor to mail the payment, in which case it is deemed that payment is made when deposited in the mail. (*Nguyen*, at pp. 439-440.)

Inoue presented insufficient evidence that GMAC instructed him to mail his payment, thereby requiring the trial court to invoke the above-mentioned exception to the receipt rule. Inoue argues that GMAC told him to send “certified funds” which constitutes instructing him to mail his payment. While there is evidence that a request for “certified funds” was made by GMAC, the instruction to *send* certified funds is not the equivalent to instructing Inoue to *mail* his payment of “certified funds” to GMAC, and does not compel the conclusion that the exception applies.

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<sup>4</sup> The trial court accepted the date of September 2 as the last day that reinstatement of the loan was possible, noting that it concluded from the evidence that no reinstatement amount was received by GMAC as of that date. We have calculated the last due date to be September 3, because the following Monday was Labor Day. (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) Deeds of Trust and Mortgages, § 13.230 at p. 13-920.) In any event, there is no evidence that GMAC received payment by either September 2 or 3.

Inoue alternatively contends that all previous business was conducted between the parties through the mail constituting a custom and practice of transactions being conducted via mail. From this he asserts that this practice necessarily implied that he could do so with regard to his reinstatement payment. First, the majority of Inoue's interactions with GMAC in August and September 2010 were by telephone, and not by mail, thereby undermining the factual premise of this argument. Inoue also fails to cite any authority that even if the parties regular practice is to use the mail, this would alter the requirements of the statute or the express terms of the notice of default that payment must be received five business days before the foreclosure sale.

Finally, the fact GMAC provided a mailing address on the notice of default does not constitute a specific request that any funds be mailed. “[M]erely supplying a mailing address does not constitute a direction to mail the payment. [Citation.]” (*Nguyen, supra*, 105 Cal.App.4th at p. 443.) In *Nguyen*, the payment was sent by the borrower via Federal Express delivery and not received until three days before the foreclosure sale leading the court to hold that the debt remained unsatisfied at the time of the sale. (*Id.* at p. 434.)

In light of the foregoing, we conclude the trial court's finding that Inoue's payment was untimely, and therefore did not support his claim to cancel the foreclosure and reinstate his loan, was consistent with the evidence and applicable law. Despite our conclusion that affirmance of the judgment is mandated on this ground, we have examined the record and conclude further that even if the reinstatement payment had been timely received, Inoue failed to submit sufficient funds to cure the default. We turn to this alternative ground for affirmance now.

**D. The Reinstatement Amount Tendered Was Insufficient to Stop the Foreclosure and Require the Reinstatement of Inoue's Loan**

The trial court concluded that the amount Inoue tendered was insufficient to cover the principal, interest, and escrow amount as well as the additional fees and costs he owed. Therefore, there was no dispute that the funds Inoue attempted to submit to reinstate his account were insufficient to cure the default.

However, Inoue argues that GMAC instructed him to submit that amount and therefore the lender is legally obligated to accept it as sufficient payment. He cites to certain discussions he allegedly had with GMAC personnel in the weeks leading up to the foreclosure to support his position.

First, section 2924c required appellant to make a written request for GMAC to state the reinstatement amount. In fact, the notice of default sent by GMAC used the precise language required by section 2924c and expressly informed Inoue that he was to submit a “written request” to be provided with “a written itemization of the entire amount you must pay.” It informed him if he paid “you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses,” but also advised the amount “will increase until your account becomes current.” The notice identified ETS as the agent for the trustee, GMAC, and stated to “find out the amount you must pay, or to arrange for payment to stop the foreclosure,” contact GMAC care of ETS and included an address and telephone number.

Not only did Inoue fail to contact ETS as required by the notice of default, or to submit a written request to be provided with a reinstatement amount, also there was disputed evidence as to whether GMAC provided him with the \$15,626.02 number, and no evidence that representations were made that this amount would be sufficient to reinstate the loan.

Instead, Inoue testified that he contacted GMAC, rather than ETS, when he learned the property was scheduled to be sold. Inoue testified that he was told by GMAC to “just bring money” in the amount of “like \$15,626.02.” He admitted that he was told the amount due did not include additional fees, late charges, and expenses, and he conceded that he did not request the total amount required to reinstate the loan. GMAC’s record entry does not state what amount was then due but noted that, in any case, Inoue said he was not able to reinstate.

GMAC’s records for August 31, 2010, state that Inoue called to “confirm amount to reinstate account.” Inoue was advised to send in certified funds. In a later call that day, Inoue informed GMAC that he sent a cashier’s check for \$15,626.02 by certified

mail. He was advised: “No guarantee funds will be accepted.” Thus, GMAC made it clear that there was no guarantee this amount would be accepted, which clearly implied that Inoue needed to ascertain the correct reinstatement amount.

Inoue argues he was entitled to rely on the amount provided by GMAC, citing *Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202 (*Anderson*). In *Anderson*, the trial court granted summary judgment for the defendant Heart Federal Savings (Heart) because the borrower failed to tender a sum sufficient to cover the foreclosure costs, principal, interest and late charges necessary to reinstate the account. (*Anderson, supra*, 208 Cal.App.3d at p. 205.) The appellate court reversed, holding there was a triable issue of fact as to whether the borrower’s tender was sufficient to cure the default. (*Ibid.*) Heart representatives told the borrower they would accept \$25,000 in payment and postpone the foreclosure for two weeks to allow the borrower to obtain the remaining funds. (*Id.* at p. 207.) Instead, Heart declined the tender and sold the property.

The court held that a beneficiary, as a condition to cure of the default as to principal and interest, also could not demand payment for delinquent taxes or repayment of advances for insurance premiums. (*Anderson, supra*, 208 Cal.App.3d at p. 215.) Importantly, Heart did not provide accurate information in response to the borrower’s inquiry of the reinstatement amount and provided no written accounting of the amount due. (*Id.* at p. 216.) Section 2924c specifies that trustor may have “the legal right to bring [her] account in good standing by paying all of [her] past due payments plus permitted costs and expenses within the time permitted by law.” (§ 2924c, subd. (b)(1).) “Compliance with this provision necessarily requires that the beneficiary provide accurate information in response to an inquiry by the trustor.” (*Anderson*, at p. 216.) “If the tender falls short in a sum attributable to the failure of the beneficiary to carry its burden of providing the trustor with accurate information, the trustor is entitled to prevail on the merits.” (*Id.* at p. 217.)

First, we note that reliance on *Anderson* is dubious in light of subsequent legislative action impairing its principal holding. In response to *Anderson*, the California Legislature amended the reinstatement statute in 1990, adding the language on recurring

obligations. (See 1990 Cal. Legis. Serv., ch. 657 (Sen. Bill No. 2339).) In doing so, the Legislature stated its intent to “supersede” *Anderson* insofar as the case restricted a beneficiary’s ability “to demand payment of all amounts in default under the terms of an obligation secured by a . . . trust deed as a condition to reinstatement of the obligation . . . .” (§ 2924c, Historical & Statutory Notes; see Historical & Statutory Notes under § 2924, sec. 3) The revised version of section 2924c specifies the exact language required in a notice of default to inform the borrower of the amount owed. As noted above, GMAC followed precisely the exemplar language of section 2924c in its notice of default to Inoue.

Second, Inoue has failed to demonstrate that GMAC or ETS provided inaccurate information to him in response to his inquiry for the reinstatement amount. The Notice of Default instructed him to contact ETS for this information. Inoue never made an oral or written request to ETS for the full reinstatement amount. Instead, Inoue contacted GMAC but there is no evidence that GMAC represented the figure \$15,626.02 to be the reinstatement amount. This figure is not mentioned in the GMAC records, and Inoue’s testimony at trial was a GMAC representative told him to “just bring money” in an amount “like \$15,626.02.” He did not remember whether the amount included foreclosure costs and fees, which undermines any argument that he was told this sum was the reinstatement amount. GMAC’s records document that when Inoue contacted them on August 23, he was told an amount due not including additional fees, late charges, and expenses.

After Inoue mailed the cashier’s check on August 31, he contacted GMAC to “confirm [amount] to reinstate [his] account.” Unlike the borrower in *Anderson*, Inoue was advised that there was no guarantee the funds would be accepted.

Thus, unlike *Anderson*, which was decided in the context of a motion for summary judgment, Inoue did not produce evidence at trial that GMAC (or ETS) provided him with inaccurate information to reinstate his account. Given Inoue’s incomplete recollection of the telephone calls and the limited nature of GMAC’s call records, it is not possible to tell if he was ever directed to ETS to garner further information about the

reinstatement amount. The evidence also was equivocal at best as to whether the sum “like \$15,626.02” originated from GMAC. What is clear is there is no evidence ETS or GMAC told Inoue that \$15,626.02 was sufficient to reinstate his account. The fact that his missed mortgage payments alone amounted to more than \$16,167.60 without any costs or late fees renders that contention untenable.

In sum, we cannot conclude Inoue reasonably relied on an amount provided by GMAC or ETS, and therefore *Anderson* does not properly apply here. Further, as explained in section III.C., even if Inoue had properly relied on an amount provided by GMAC, not ETS, the funds were not received five business days prior to the foreclosure sale as required by the notice of default and section 2924c.

Finally, we note that when Inoue was made aware he had sent insufficient funds to cure the default on September 8 by phone, or on September 10 by letter, he could have sought to postpone the foreclosure sale or he could have attempted to redeem the property by paying the entire balance owed on the loan prior to September 13. (See § 2903.) With respect to tender, “it is a debtor’s responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect.” (*Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1165.)<sup>5</sup>

#### **E. MED&G Was a Bona Fide Purchaser**

Inoue argues that MED&G was not a bona fide purchaser of the property because it had notice of Inoue’s claim prior to recording the deed for the property. Specifically, Inoue contends that he recorded a Notice of Action, or *lis pendens*, on September 20, 2010, and that MED&G did not record the deed until the next day, September 21, 2010. Therefore MED&G had constructive notice of his claim.

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<sup>5</sup> Because we have concluded both that Inoue’s reinstatement was untimely and in an insufficient amount to support his claims to set aside the foreclosure, we need not, and do not address the additional question of whether Inoue was required to tender the full amount owed as a condition precedent to an action to set aside the trustee’s sale. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.)

There are two elements to establish a party is a bona fide purchaser: the buyer (1) purchase the property in good faith *for value*, and (2) have no knowledge or notice of the asserted rights of another. (*Melendrez, supra*, 127 Cal.App.4th at p. 1251.) A bona fide purchaser can have “neither knowledge nor notice of the competing claim.” (*Id.* at p. 1252.) Bona fide purchaser status is determined at the time of sale and information learned after that time does not affect the bona fide purchaser status. (*Id.* at pp. 1254-1255; 4 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 10:50, p. 10-196 [“The purchaser’s or encumbrancer’s status is determined at the time that the interest or lien is acquired and any information learned after he or she acquires an interest does not affect his or her status as a bona fide purchaser or encumbrancer.”].) The purchaser’s knowledge at the time of his purchase is material to determine the purchaser’s status; any knowledge the purchaser may have acquired later is irrelevant. (*Reiner v. Danial* (1989) 211 Cal.App.3d 682, 690.)

A “ ‘nonjudicial foreclosure sale is generally complete upon acceptance of a bid by the trustee.’ ” (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700.) “ ‘The purchaser at a foreclosure sale takes title by a trustee’s deed. If the trustee’s deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. [Citations.]’ . . .” (*Biancalana v. T.D. Service Co., supra*, 56 Cal.4th at p. 814 quoting *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831.) But, “ ‘the conclusive presumption does not apply until a trustee’s deed is delivered.’ ” (*Ibid.*) If a defect in the procedure is discovered before the trustee’s deed is delivered, the trustee can abort the sale to a bona fide purchaser. (*Ibid.*)

Prior to the sale, MED&G had no knowledge of Inoue’s claimed right to the property. MED&G checked with the Sonoma County Recorder’s Office before the sale to see if there were any claims affecting the property, and found none. Inoue did not attend the sale and did not make his claim known to MED&G. Inoue did not contact MED&G about the property prior to the sale or after the sale prior to delivery of the deed.

Inoue's argument MED&G was not a bona fide purchaser fails both because MED&G did not have notice of his claim at the time of sale, or at the time the deed to the property was delivered. The foreclosure sale was held on September 13, 2010. The trustee's sale is deemed final when the last and highest bid is accepted. (§ 2924h, subds. (a), (c); see also *Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 809.) MED&G made the last and highest bid and it was accepted so the sale was final on September 13, 2010.

The deed to the property was transferred and delivered on September 18, 2010, two days before Inoue recorded the Notice of Pendency of Action. The deed contained all of the required statutory language. Once the property was sold "to bona fide purchasers for value and a trustee's deed containing the required statutory recitals was delivered. Thus, the sale was conclusively presumed to be valid." (*Moeller v. Lien, supra*, 25 Cal.App.4th at p. 833.) Therefore, the fact MED&G's deed was not recorded until September 21, 2010, has no bearing upon its status as a bona fide purchaser. (See *Reiner v. Danial, supra*, 211 Cal.App.3d at p. 691.)

Finally, Inoue claims because he recorded the lis pendens on September 20, 2010, this provided constructive notice to all subsequent purchasers which included MED&G because its deed had not been recorded by then. " "In California, a notice of lis pendens gives constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice. [Citation.] Any taker of a subsequently created interest in that property takes his interest subject to the outcome of that litigation." ' . . ." (*Carr v. Rosien* (2015) 238 Cal.App.4th 845, 850-851, quoting *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 910-911.)

But, MED&G was not a subsequent purchaser of the property; it was a bona fide purchaser taking property through foreclosure and, as we have explained, differing statutes and rules govern its status as such. Therefore, the trial court was correct in concluding that MED&G was a bona fide purchaser of the property.

**IV.**  
**DISPOSITION**

The judgment is affirmed. In the interests of justice, each side is to bear his or its own costs incurred on appeal.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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STREETER, J.