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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

WILLIAM MORSCHAUSER,

Plaintiff and Appellant,

v.

T.D. SERVICE COMPANY,

Defendant and Respondent.

E052293

(Super.Ct.No. SCVSS124603)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

William Morschauser, in pro. per.; McKennon Schindler, McKennon Law Group, Robert J. McKennon, Eric J. Schindler and Reid A. Winthrop for Plaintiff and Appellant.

The Dreyfuss Firm and Lawrence J. Dreyfuss for Defendant and Respondent.

Plaintiff and appellant William Morschauser filed an action against defendant and respondent TD Service Company (TD), arising out of a nonjudicial foreclosure for which TD was retained as substituted trustee. Morschauser, individually, and as a partner with Mohammad Abdizadeh, was a trustor of record on the underlying Deed of Trust, the

beneficial interest of which previously had been assigned to Continental Capital, LLC (ConCap). Morschauser alleged causes of action against TD for negligence and intentional infliction of emotional distress. TD moved for summary judgment on the grounds that it had complied with its statutory duties pursuant to Civil Code section 2924 et seq.<sup>1</sup> and the documentation supported the beneficiary's position. The trial court agreed, granting the motion and entering judgment in favor of TD. Morschauser appeals, contending there are triable issues of fact as to TD's conduct in the administration of its trustee duties.

## I. STANDARD OF REVIEW

The well-known principles generally governing appellate review of an order granting a motion for summary judgment are as follows: "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable

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<sup>1</sup> All further statutory references are to the Civil Code unless otherwise indicated.

issue of material fact exists as to that cause of action . . . .’ [Citations.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see also Code Civ. Proc., § 437c, subd. (o)(2).)

## II. PROCEDURAL BACKGROUND AND FACTS<sup>2</sup>

In February 1989, Morschauser and Abdizadeh established Devore Stop as a real estate development partnership (DS Partnership). They held title to the real property (Property) as tenants in common with each holding an undivided 50 percent interest in the Property, which included three contiguous parcels: Parcel 1 is a gas station and convenience store owned and operated by the partnership, and parcels 2 and 3 are unimproved. On April 1, 1998, they, individually, and as Mohammed Abdizadeh William G. Morschauser, a California Partnership, executed a promissory note and a construction loan agreement whereby California State Bank made a construction loan in the principal sum of \$850,000.<sup>3</sup> The loan was secured by a deed of trust on parcels 1 and 2. On March 24, 1999, Abdizadeh executed a promissory note and business loan agreement whereby First Security Bank of California (a successor to California State Bank due to a merger) made a business loan to Abdizadeh in the principal amount of

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<sup>2</sup> TD notes that in this same case, summary judgment was granted in favor of Graham, Vaage & Cisneros (GVC), attorneys representing ConCap, which this court affirmed in our unpublished decision in *Morschauser v. Graham Vaage & Cisneros* (Nov. 22, 2011, E050809 [nonpub. opn.]) (*Morschauser*). TD submits that this court’s opinion in case No. E050809 sets forth a detailed discussion of the underlying facts, which it refers to by reference. On December 14, 2011, TD requested that we take judicial notice of our opinion in case No. E050809. We hereby grant the request and will refer to our prior opinion’s statement of facts to the extent applicable.

<sup>3</sup> Later modified on February 8, 1999.

\$150,000. This loan was secured by a deed of trust on parcel 3. Later, Wells Fargo Bank became the owner of both by merger with First Security Bank of California.

In May 2001, Abdizadeh lost his Arco AM/PM franchise rights and could not make the monthly rent payments due for use of the Property. Commencing in July 2002, Wells Fargo proceeded with a nonjudicial foreclosure of the Property. TD acted as sales/foreclosure trustee for Wells Fargo in the foreclosure, which was authorized by power of sale contained within the trust deed recorded in April 1998. In order to stop the foreclosure proceedings, Abdizadeh filed individual bankruptcy; however, his bankruptcy case was dismissed on December 18, 2002.

As of April 3, 2003, Wells Fargo sold its interest in the deeds of trust to ConCap. On April 4, DS Partnership filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code to stop the foreclosure. Morschauser, personally, as one of the general partners of DS Partnership, signed the bankruptcy petition and all supporting pleadings. He listed himself and Abdizadeh as general partners in the bankruptcy petition without any limiting language as to their respective powers or duties. The petition identifies the attorney for DS Partnership as Arshak Bartoumian of the Law Office of Stanley W. Hodge. At the bankruptcy hearings, Bartoumian appeared as counsel for DS Partnership, while Morschauser appeared on behalf of DS Partnership and himself. At no time did Morschauser claim that Abdizadeh was not authorized to act on behalf of the partnership. (*Morschauser, supra*, E050809, p. 4.)

Shortly after acquiring the deeds of trust, ConCap retained GVC to represent ConCap's interest in DS Partnership bankruptcy. GVC immediately filed a motion for

relief from the automatic stay in the bankruptcy proceedings in order to allow ConCap to continue with the foreclosure. Morschauser, through Bartoumian as partnership counsel, opposed the motion.

“Between May 2 and May 13, 2003, counsel for the parties ([GVC] and Bartoumian, the partnership’s attorney) negotiated repayment of the obligations admittedly owed to ConCap. On May 13, the parties reached an agreement, which they placed on the record in the bankruptcy court. Morschauser was present and affirmed the agreement reached between them. According to the agreement, ConCap agreed to provide Morschauser time to sell the Property, and thus, there would be no foreclosure unless there was a default in the agreement. DS Partnership would pay ConCap \$10,000 on June 1 and July 1, 2003, until escrow closed on or before July 14, 2003. If necessary, the buyer or seller of the Property could opt to extend the closing of escrow two times, with each extension being 15 days. The obligation to pay \$10,000 on August 1, 2003, would apply if the extension continued into August. At the close of escrow, ConCap would receive a payoff of all obligations.

“Morschauser sent a letter dated May 13, 2003, to [GVC], stating that he had represented himself, that Bartoumian was not court approved, and that certain payoff amounts were not correct because Abdizadeh had forged Morschauser’s name. The agreement was formalized into a stipulation for relief from stay, which was received by the bankruptcy court on July 21, 2003. Abdizadeh signed the stipulation as general partner on behalf of DS Partnership. On July 22, an order was entered approving the

stipulation without any objections to the contents of the stipulation or the fact that Abdizadeh signed it on behalf of the partnership.

“On July 24, 2003, Bartoumian sent a letter to [GVC] on behalf of DS Partnership and Morschauser, explaining that Morschauser had not signed the stipulation because ‘he does not agree with the bank documents [i.e.,] . . . he did not sign the modification of the note, and other facts surrounding the settlement.’ Bartoumian further outlined various grounds that Morschauser allegedly had ‘against the lender in an adversarial action. . . .’

“Prior to the stipulation being entered in the bankruptcy court, DS Partnership found a buyer for the Property. Thus, Bartoumian, on behalf of the partnership, filed a motion for authority to sell the Property subject to ConCap’s liens. Prior to the hearing on the motion, Bartoumian sent a letter to [GVC], in which a settlement offer was made to ConCap. In response, [GVC] advised that if Morschauser insisted on changing the terms of the stipulation for relief from stay, ConCap would oppose the upcoming motion to approve the sale. The motion was approved, and Bartoumian prepared an order, which provided that ConCap would be paid a discounted sum of \$1,075,000 on both loans out of the sale proceeds, if and only if escrow closed on or before August 11, 2003.

“When escrow did not close on the specified date as required in the order, counsel entered into further negotiations. As a result of those negotiations, the discounted amount originally agreed upon was not extended. Rather, ConCap’s demand was increased to include the full amount then owed, including accrued default interest at the contract default rates, late charges, all fees incurred and costs. A settlement agreement was drafted, which provided that the partnership’s cumulative obligation to ConCap on

the notes was \$1,253,773.99, but the repayment required for release of the liens was reduced to \$1,175,000 (later amended to \$1,100,000 per agreement with another creditor) in full and complete satisfaction of both outstanding promissory notes. This amount was to be paid from the pending sale of parcel 1. The \$75,000 balance was to be secured by parcel 2 (co-owned by Morschauser and Abdizadeh as tenants in common) and would be repaid in monthly installments, and released when ConCap was paid in full. The final settlement agreement was sent to Bartoumian.

“On August 13, 2003, Bartoumian called [GVC] and explained that, while Bartoumian and Abdizadeh had signed the agreement, Morschauser disagreed with the amounts owed to ConCap in the agreement and he would not sign it. [GVC] advised Bartoumian that if the agreement was not signed, then ConCap would not release its lien on parcel 1 and allow the pending sale to go forward, which would then allow ConCap to proceed with its foreclosure for the full amount previously agreed to by the parties. Shortly after this discussion, [GVC] received the signature page bearing Morschauser’s signature.” (*Morschauser, supra*, E050809, pp. 5-7.)

On or about November 19, 2003, ConCap, through TD, commenced nonjudicial foreclosure on parcel 2 because it never received the remaining \$75,000 payment. Prior to initiating foreclosure, TD was provided with a copy of the signed bankruptcy court “Order Approving Stipulation for Relief from the Automatic Stay and for Adequate Protection.” The order provided ConCap, as successor beneficiary, with relief from the automatic stay and confirmed that the debtor was to engage in an outside sale of the subject real property, and that foreclosure would not be initiated so long as that sale was

completed on or before July 11, 2003 subject to two possible extensions not to exceed fifteen days each. Because foreclosure proceedings were initiated, the outside sale did not take place. TD sent a Notice of Default to Morschauser, who acknowledged receiving it. The Notice of Trustee's Sale was recorded on February 24, 2004, and was mailed to Morschauser. After the Notice of Trustee's Sale was processed, Morschauser contacted TD claiming that the foreclosure was improper because the bankruptcy had not been dismissed, and in any event, the loan had been paid off. TD asked Morschauser to provide paperwork to support his claims and advised him to take the bankruptcy matter back before the bankruptcy court if he wished to contest the existing relief from stay order. The documentation which Morschauser faxed to TD was forwarded to ConCap; however, Morschauser never elected to return to bankruptcy court to modify the order.

Morschauser called TD on March 1, 2004, disputing the amount owed and stating that he was unable to obtain reinstatement figures from ConCap. He was again advised to seek assistance/clarification from the courts, including obtaining a temporary restraining order. Because reinstatement of the loan was no longer available, TD obtained the requested payoff figures from ConCap and forwarded this information to Morschauser. Morschauser called on March 8 advising that the loan had been paid in full, that the stipulation regarding the bankruptcy order had not been signed or entered and that the underlying Mutual Release and Settlement Agreement, which gave rise to the foreclosure, was not executed. He was again advised to seek a temporary restraining order but failed to do so.

On March 11, 2004, Morschauser called TD and contended that the judge's handwritten notes on the bankruptcy order precluded ConCap from foreclosing. TD responded that this contention could not be confirmed from the face of the order itself as signed by the judge, and thus, TD advised Morschauser to return to bankruptcy court for clarification. He failed to do so.

Because the foreclosure was based in part on the Mutual Release and Settlement Agreement, and because Morschauser was claiming the agreement had never been executed by him, TD demanded a copy of the agreement from ConCap before proceeding with the foreclosure. Upon receiving a copy of the agreement, TD noted that the signatures included Morschauser's as a general partner and individually. TD was satisfied that the agreement had been fully executed. Moreover, the agreement appears to contain Morschauser's signature. Prior to the completion of the foreclosure, Morschauser paid \$81,464.61 to ConCap to pay off remaining obligations owed under the settlement agreement. The foreclosure sale never took place.

On March 17, 2005, Morschauser sued ConCap and TD. In his first amended complaint, Morschauser claimed that TD was negligent in its actions involving the foreclosure and that TD caused him to suffer intentional infliction of emotional distress. TD answered the first amended complaint and then moved for summary judgment, which was granted. The trial court held there was no triable issue of fact as to whether TD Service breached any duty to Morschauser because it complied with section 2924. Morschauser appeals.

III. IS THERE A TRIABLE ISSUE OF FACT AS TO WHETHER TD  
BREACHED ANY DUTY OWED TO MORSCHAUSER?

According to Morschauser, “The crux of the trial court’s ruling . . . was that [TD] did [not] breach any duty pursuant to Civil Code section 2924.” However, he contends the court erred in its analysis of sections 2924 and 47, and in relying on *I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281 (*I. E. Associates*) and *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111-1112 (*Hatch*). He argues that the trial court “failed to properly consider the 1996 Amendment to . . . section 2924 and *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 336 [(*Kachlon*)], which held that the 1996 Amendment to section 2924, which incorporated section 47 . . . gave rise to an additional duty on the part of a trustee to act without malice in administering its trustee obligations.” Given the facts in this case, Morschauser claims that TD’s deliberate and reckless disregard of his evidence challenging foreclosure constitutes a breach of the duty of due care.

“California’s nonjudicial foreclosure scheme is set forth in . . . sections 2924 through 2924k, which ‘provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.’ [Citation.] ‘These provisions cover every aspect of exercise of the power of sale . . . .’ [Citation.] ‘The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ [Citation.] ‘Because of the exhaustive nature of this scheme,

California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ [Citations.]” (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154, fn. omitted.)

The *Kachlon* court recognized that “[t]he trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary. [Citation.] The scope and nature of the trustee’s duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist. [Citations.]” (*Kachlon, supra*, 168 Cal.App.4th at p. 335.) However, the *Kachlon* court also considered the 1996 amendment to section 2924 which added the following language: “‘The mailing, publication, and delivery of notices as required herein, and the performance of the procedures set forth in this article, shall constitute privileged communications within Section 47.’ (Stats.1996, ch. 483, § 1, p. 2864.)”<sup>4</sup> (*Kachlon, supra*, at p. 335.) Recognizing that the 1996 amendment failed to specify whether the intended privilege is absolute or qualified, the *Kachlon* court concluded that it was a “qualified common interest privilege of section 47, subdivision (c)(1)” (*Kachlon, supra*, at p. 341) which opens trustees to liability “only if they act with malice.” (*Id.*, at p. 340.)

Here, Morschauser claims he presented evidence and facts that established a triable issue of fact for negligence based on malice. Specifically, he identifies the following evidence: “(1) the Settlement Agreement that formed the basis for [TD’s]

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<sup>4</sup> “This provision . . . was later incorporated into subdivision (d) of section 2924, with somewhat different language, but without relevant substantive change. (Stats. 2006, ch. 575, § 4.)” (*Kachlon, supra*, 168 Cal.App.4th at p. 335, fn. omitted.)

actions in instituting the foreclosure proceedings was invalid because of the bankruptcy filing and bankruptcy court orders [citation]; (2) the notes on which the foreclosure was based were actually paid in full [citation]; and (3) the Settlement Agreement was unauthorized and invalid because it was based on a forged signature of Morschauser [citation].” According to Morschauser, this evidence alone was sufficient “to compel [TD] to uphold its duty to protect [his] rights and to cease all further action to enforce the foreclosure.” In addition, Morschauser notes that TD, as the “sale/foreclosure trustee for Wells Fargo, ConCap’s predecessor in interest . . . was aware of the total payoff amount for [the notes] on the deeds of trust as early as July 2002.” Thus, TD had “constructive and actual knowledge that the Settlement Agreement was fraudulent.” Morschauser argues that TD’s “knowledge of the prior payoff amounts negates any reasonable grounds to believe that the payoff amounts provided by ConCap in the Settlement Agreement were truthful.” Furthermore, Morschauser maintains that by ignoring the dispute as to the validity of the Settlement Agreement, TD acted in reckless disregard of Morschauser’s rights.

In response, TD contends that section 2924 et seq. does not require a trustee “to act as judge and jury to evaluate disputed and conflicting documentary evidence and to determine the validity of a trustor’s claims.” Rather, TD maintains that job is entrusted to our court system such that it “acted appropriately in advising [Morschauser], himself an attorney, to make use of that system if he felt his contentions had legal merit.” Noting that Morschauser raises the issue of malice for the first time on appeal, TD points out that (1) there is a court order granting ConCap relief from the automatic stay, (2) there is a

fully executed Settlement Agreement it received prior to completing foreclosure; (3) the Settlement Agreement was signed by Morschauser and his partner, Abdizadeh; (4) there is no statutory duty to question the payoff figure (which was based on the Settlement Agreement) provided by the foreclosing beneficiary, ConCap; and (5) it “repeatedly advis[ed Morschauser] that if he felt he had legitimate disputes with the [ConCap’s] contentions, he should either bring them to the attention of the bankruptcy judge or file a civil action and seek a temporary restraining order.”

After reviewing the record before this court, we conclude the trial court correctly found no triable issue of fact as to any breach of duty by TD toward Morschauser. TD owed no duty to Morschauser beyond that provided by the applicable statutes. (*I. E. Associates, supra*, 39 Cal.3d at p. 287.) Rather, if there were any irregularities regarding the trustee’s sale, Morschauser bore the burden of proof. (*Hatch, supra*, 225 Cal.App.3d at p. 1113; § 2924, subds. (b) & (e).) The fact that TD has “discretionary authority to postpone the sale to protect either the trustor’s or the beneficiary’s interest[,]” (*Hatch, supra*, at p. 1113) the facts in this case fail to support any reason to exercise such discretion. According to the uncontradicted evidence, i.e., the bankruptcy court’s order and the executed Settlement Agreement, there were no irregularities to prevent the foreclosure proceedings. Morschauser’s claims to the contrary are insufficient to call into question a court order and executed agreement. Thus, TD did not breach any duty, or act in reckless disregard of Morschauser’s rights, when it, upon receiving Morschauser’s challenge, advised him to seek clarification from the bankruptcy court and/or a temporary restraining order from the trial court. Instead, TD acted correctly in proceeding with the

foreclosure unless directed otherwise by further order of the court resolving Morschauser's challenges to the applicable bankruptcy court order and executed agreement in TD's possession. Likewise, TD did not breach any duty in relying on ConCap's representations as to the amount of the default. (§ 2924, subd. (b).)

For the above reasons, we conclude that Morschauser failed to raise any triable issue of fact as to his claim of negligence against TD.

#### IV. ARE THERE ANY TRIABLE ISSUES OF FACT AS TO MORCHAUSER'S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Similar to his negligence cause of action, Morschauser's claim for intentional infliction of emotional distress, based on the same evidence he claims supports a finding of negligence, must also fail. ““““The elements of a prima facie case for the tort of intentional infliction of emotional distress [are] . . . as follows: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.” [Citation.]” [Citation.]’ [Citation.] The conduct must be ‘so extreme and outrageous “as to exceed all bounds of that usually tolerated in a civilized society.” [Citation.]” (*Bosetti v. U.S. Life Ins. Co. In City of New York* (2009) 175 Cal.App.4th 1208, 1241-1242.) Given the record in this matter and our conclusion that TD was correct and acted reasonably in advising Morschauser to bring his challenges to either the bankruptcy or trial court, there was no extreme and outrageous conduct here.

V. SLANDER OF TITLE

In his final argument, Morschauser contends the trial court had a duty to determine whether the facts stated any viable legal theory against TD. Specifically, he claims there is a triable issue of fact as to TD’s liability for slander of title. We reject his claim.

“The elements of a cause of action for slander of title are ‘(1) a publication, (2) which is *without privilege* or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.’ [Citations.]” (*Alpha and Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.) According to Morschauser, the Settlement Agreement was “fraudulent and invalid,” and thus, TD “recklessly disregarded this evidence and proceeded with its notice of default.” As we observed above, TD’s conduct was anything but reckless.

VI. DISPOSITION

The judgment is affirmed. Costs are awarded to defendant and respondent.

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HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.