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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

FRANK LACHAPELLE,

Petitioner,

v.

THE SUPERIOR COURT OF  
RIVERSIDE COUNTY,

Respondent;

HANSEN MCCOY INVESTMENTS,  
LLC, et al.,

Real Parties in Interest.

E058014

(Super.Ct.No. INC1101291)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey L. Gunther,  
Judge. (Retired judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant  
to art. VI, § 6 of the Cal. Const.) Petition granted.

John C. Torjesen & Associates and John C. Torjesen for Petitioner.

No appearance for Respondent.

Theresa A. Jones for Real Parties in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

In the underlying action, petitioner alleges that the security instrument that was executed and recorded when he refinanced his home is void because it was procured by fraud and forgery. Thus, he asserts the real parties in interest, who were purchasers at a non-judicial foreclosure sale and their successors in interest, did not acquire valid title. He asks in an amended pleading for cancellation of their deeds and for quiet title. Petitioner filed a notice of lis pendens on February 25, 2011.

Real parties moved to expunge the lis pendens on the ground that petitioner cannot establish the probable validity of his claim. They contend that their trustee's deed relates back to the recording of the trust deed in 2008 and petitioner can claim no present interest in the property. They also contend that his claim of fraud can form a basis for a claim for money damages only—and not a claim for title or possession of the property.

The trial court ordered the notice of lis pendens expunged. In its tentative ruling, the trial court cited the following statement in Miller and Starr (3rd ed.) section 10.208 to support its ruling: “The purchasers title (at a foreclosure sale) . . . is not encumbered by any interest that is created and recorded after the deed of trust, but prior to the date of the foreclosure sale, even if the foreclosure sale purchaser had actual or constructive notice of the intervening lien or interest.” The court recited the facts that the notice of default

here showed that the trust deed foreclosed upon was last modified and recorded on November 5, 2009; petitioner's first lis pendens notice was not recorded until February 15, 2011, and that his second one naming moving parties was not recorded until January 3, 2013. "Thus, the moving defendants' trustees' deed relates back to the date of 11/5/09 trust deed and is effective prior to any notice of lis pendens. As a result, there is no basis for a lis pendens to remain against the property."

The parties presented no additional argument at the hearing and the tentative ruling became the court's ruling. Petitioner seeks review of this ruling pursuant to Code of Civil Code section 405.39. We conclude that the court's stated reasons do not support the order for expungement.

Justification for setting aside a foreclosure sale is that the deed of trust is void. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104-105; see *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 563-564 [trustor sought rescission of promissory note on grounds of fraud].) There, Lona's home was sold at a nonjudicial foreclosure sale. Lona sued the lender, the loan servicer, and others to set aside the trustee's sale, claiming he was a victim of predatory lending in that the loan broker ignored his inability to repay the loan and Lona, lacking fluency in English, did not understand many of the details of the transaction. The court reversed summary judgment for the lenders, concluding that Lona had raised a triable issue that the underlying loan was illegal and unconscionable, thus excusing him from the requirement he tender full payment of the debt to obtain relief.

Plaintiff's notice of lis pendens is not a lien itself, but simply gives notice that plaintiff was challenging the validity of the trust instrument. Here, at least in the Fifth

Amended Complaint, petitioner is claiming that the trust deed is void because of fraud in the inducement and forgery. Petitioner's position is much like Lona's—the security instrument was void and he filed suit challenging it. Thereafter, the nonjudicial foreclosure sale took place, which he now seeks to set aside. Indeed, in the same section cited by the trial court (3rd. ed., § 10.208), Miller and Starr also states that in certain cases the purchaser's title following a foreclosure sale is subject to being recovered by the trustor by an attack on the validity of the instrument. Thus, it appears he has stated grounds to set aside the sale based on the invalidity of the trust deed—he does claim an interest in the real property so that the trial court erred in expunging the notice of lis pendens

Real parties' argument that fraud is simply a monetary claim is not well taken, and we note that petitioner alleges that he acted to rescind the original agreement based on this fraud and forgery. Real parties also argue that the judgment of foreclosure and the eviction have conclusive effect, but in the case relied on, *Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, there was a claim that there were irregularities in the foreclosure sale itself. The judgment of foreclosure was conclusive as to the purchaser's title. Here, as discussed above, petitioner is challenging the security instrument as void. Thus, the foreclosure judgment is not conclusive that that instrument was valid.

We offer no opinion whether the trial court may correctly base an order for expungement on other factors showing petitioner cannot establish the probable validity of his claim. We merely conclude that the trial court's ruling was based on a narrow ground

regarding the priority of the purchaser's deed, which is not justified based on the face of petitioner's pleadings. Thus, we conclude that the petition must be granted and the trial court directed to reconsider the motion. The trial court is in no way precluded on reconsideration from reaching the same result, i.e., finding that petitioner has not shown the probable validity of his claim under Code of Civil Procedure section 405.32.

DISPOSITION

Let a peremptory writ of mandate issue directing the Riverside Superior Court to set aside and vacate its order granting the motion to expunge lis pendens and to reconsider the matter in accordance with the views expressed herein.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioner is to recover his costs.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.