

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ERNESTO DANIEL GYUREC,

Plaintiff and Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee, etc. et al.,

Defendants and Respondents.

E058590

(Super.Ct.No. RIC1212675)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Judge. Affirmed with directions.

Care Law Group and Stephen F. Lopez for Plaintiff and Appellant.

Bryan Cave, Sean D. Muntz and Allan P. Bareng, for Defendants and
Respondents.

Plaintiff and appellant Ernesto Daniel Gyurec (Gyurec) is a property owner who defaulted on a real estate loan. In August 2012, he initiated this action seeking monetary relief against defendants and respondents Deutsche Bank National Trust Company, as

trustee for the WAMU Mortgage Pass-Through Certificates Series 2005-AR8 G1 (Deutsche Bank), and California Reconveyance Company (CRC) for wrongful foreclosure of real property at 18540 State Street, Corona, California (Property)¹ (collectively, defendants). Defendants demurred to the action on grounds of res judicata, failure to allege tender of the full amount of indebtedness, and lack of standing to question the securitization of the loan. The trial court sustained the demurrer without leave to amend and ordered Gyurec to pay defendants their attorney fees.

Gyurec appeals from the subsequent judgment of dismissal, contending: (1) res judicata does not apply; (2) he has standing to challenge flaws in the securitization of the mortgage loan; and (3) he was not required to tender the balance due to preserve his suit. Gyurec further contends the trial court erred in awarding attorney fees to defendants.

Defendants counter that: (1) res judicata does apply; (2) Gyurec failed to plead the required tender; (3) he lacks standing to challenge the process for securitizing mortgages; (4) he has not alleged prejudice as a result of the alleged improper securitization; and (5) the award of attorney fees was proper. We agree with defendants' positions and affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Gyurec's Loan, Default, and Bankruptcy Proceedings

In February 2005, Gyurec obtained a \$650,000 loan from Washington Mutual (WAMU) for the purchase of the Property. In exchange for the loan, he executed a

¹ Initially Skyline Vista Equities, LLC, a California Limited Liability Company (Skyline) was also a named defendant; however, Gyurec entered into a settlement with Skyline and on November 21, 2012, dismissed it from the action.

promissory note (Note) secured by a deed of trust (DOT) encumbering the Property. WAMU was the beneficiary under the DOT and CRC was the named trustee. On September 25, 2008, WAMU was closed by the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation (FDIC) was named receiver. Thereafter, nonparty JPMorgan Chase Bank, N.A. (Chase) acquired certain assets of WAMU from the FDIC, including all loans and the servicing rights to those loans.

On February 4, 2009, CRC recorded a notice of default on the property. Simultaneously, it recorded an Assignment of DOT, wherein Chase assigned all beneficial interest under the Note and DOT to Deutsche Bank. A second Assignment of DOT (again from Chase to Deutsche Bank) was recorded on August 23, 2010. Following CRC's recordation of a notice of default, on March 11, 2009, Gyurec sought protection under Chapter 11 of the Bankruptcy Code. On October 10, 2010, Deutsche Bank was granted relief from the bankruptcy stay.

On May 19, 2011, Gyurec filed an adversary complaint in the bankruptcy court against defendants and others. He sought to enjoin foreclosure of the Property, and requested declaratory relief, cancellation of instruments, and quiet title. Gyurec alleged: (1) the Note, "by its conditional terms on its face, is a non-negotiable instrument and therefore it is not governed under Article 3 of California's Commercial Code" (original italics and underline); (2) "it is uncertain which trust, if any, does Defendant Deutsche represent as trustee and whether either trust actually obtained rights to enforce"; (3) "the assignments by Defendant Chase appear invalid"; and (4) "neither Defendant Deutsche nor Defendant Chase have any apparent right to enforce the Plaintiff's Note and DOT."

Defendants moved for and on January 11, 2012, the bankruptcy court granted dismissal of Gyurec's adversary proceeding. At the hearing in December 2011, the bankruptcy judge observed: "I just do not believe that the Debtor . . . is the proper party to challenge whether or not the trust has been properly formed. . . . They are not an injured party [¶] If there's somebody injured by the wrong party foreclosing, it's not the borrower who didn't pay on the loan. It's the party that would have the right to foreclose otherwise if it was a different holder of the note or an investor who didn't get their money because the trust wasn't properly formed. Those are the parties that would be injured if the wrong entity forecloses on property, not a debtor, not a borrower who hasn't paid. So, I just don't think that that issue can be properly presented by the defaulting borrower. [¶] . . . [¶] . . . Since that is the entire basis of the complaint to enjoin the foreclosure and have the Court cancel the instrument, I think the complaint fails to state a claim." On January 11, 2012, the adversary complaint was dismissed with prejudice.

Gyurec appealed the bankruptcy court's dismissal of his complaint and sought a stay pending appeal. The stay request was denied. The bankruptcy appellate panel concluded that Gyurec "has not established that [he] is entitled to a stay. In particular, [he] has not demonstrated a sufficient likelihood of success on the merits to warrant a stay pending appeal." Gyurec's appeal was dismissed as moot.

On or about July 5, 2012, the Property was sold to Skyline, and a trustee's deed upon sale was recorded thereafter.

B. This Action

On August 20, 2012, Gyurec initiated this action against defendants and Skyline (who was later dismissed) for the alleged wrongful foreclosure of the Property. By way of his first amended complaint (FAC) filed on November 27, 2012, Gyurec sought monetary damages on his claims for wrongful foreclosure, unjust enrichment, and money had and received. As in his bankruptcy action, he alleged that defendants were not entitled to enforce the Note and DOT. More specifically, Gyurec claimed the foreclosure was wrongful because “the sale was held by and for an entity that did not hold the power of sale under the DOT and further held no legal or equitable interest in the Note, DOT or the Subject Property.”

In December 2012, defendants demurred on the grounds of res judicata, failure to allege tender of the full amount of indebtedness, and lack of standing to question the securitization of the loan. The court reviewed the transcript from the bankruptcy court proceedings, found that “the doctrine of Res Judicata does apply,” adopted the “the reasons cited in the moving papers,” and sustained the demurrer without leave to amend. Judgment for defendants was entered on March 8, 2013. Gyurec was ordered to pay attorney fees to defendants.

II. DISCUSSION

On appeal, Gyurec challenges the trial court’s decision, as follows: First, he argues that he stated a claim for wrongful foreclosure because the sale was void. He claims “there is a significant question of fact and law as to what loans, if any, Chase acquired from the FDIC in its purchase of WAMU’s assets,” and he “can challenge

whether or not the proper procedure and law was followed in securitizing a note where the issue is . . . whether the note was properly placed into the securitized trust claiming to hold the note.” Second, Gyurec argues that *res judicata* is inapplicable because in the bankruptcy court he sought equitable relief, whereas in this action he seeks damages. Finally, he attacks the award of attorney fees on the ground there “was no contractual or statutory basis” for such award.

A. Demurrer

1. Standard of Review

A demurrer should be sustained when “[t]he pleading does not state facts sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subd. (e).)

“We independently review the superior court’s ruling on a demurrer and determine *de novo* whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citations.] We liberally construe the pleading with a view to substantial justice between the parties. [Citations.]” (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.)

“If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. [Citation.] It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if the plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment. [Citation.]’ [Citation.]” (*Bank of America, N.A. v. Mitchell* (2012)

204 Cal.App.4th 1199, 1204.) However, “such a showing can be made for the first time to the reviewing court [citation]’ [Citation.]” (*San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 606.) “Whether a plaintiff will be able to prove its allegations is not relevant. [Citation.]” (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1057.)

2. *Standing to Sue*

Gyurec alleges a purportedly deficient assignment and securitization deprived defendants of any interest in the Property. He argues the transfer of his Note and DOT to Deutsche Bank and the subsequent securitization of the Note were improper. However, even if these claims have merit, Gyurec lacks standing because he has no interest in the Note and DOT: “[T]he relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. . . . As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions. [Citation.]” (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515 (*Jenkins*)). To explain further: “Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.” (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507 [Fourth Dist., Div. Two].)

Gyurec was not the victim of any invalid transfers because his obligations to pay the Note remained unchanged: “Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees. [Plaintiff], however, may not assume the theoretical claims of hypothetical transferors and transferees” (*Jenkins, supra*, 216 Cal.App.4th at p. 515.)

On appeal, Gyurec asserts that *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*) supports his argument that a borrower may challenge a nonjudicial foreclosure based on allegations that transfers in the chain of title of a trust deed were void.^{2,3} There, after concluding that noncompliance with the terms of a Pooling and Servicing Agreement (PSA) would render an assignment void, the *Glaski* court adopted the majority rule in Texas that an obligor may resist foreclosure on any ground that

² Gyurec claims that both the first assignment of the Note and DOT (Chase to Deutsche Bank) and the second assignment (Chase to Deutsche Bank) are void because the assignments were made after the mortgage investment pool closed.

³ This issue is now before the California Supreme Court in the lead case, *Yvanova v. New Century Mortgage Corp.* (2014) 226 Cal.App.4th 495, review granted Aug. 27, 2014, S218973, framed as follows: “In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?” (See also, *Keshtgar v. U.S. Bank, N.A.* (2014) 226 Cal.App.4th 1201, review granted Oct. 1, 2014, S220012, and *Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, review granted Nov. 12, 2014, S220675.)

renders an assignment in the chain of title void. (*Reinagel v. Deutsche Bank National Trust Co.* (5th Cir. 2013) 722 F.3d 700, 705.)

According to the *Glaski* court, under New York trust law, a transfer of a deed of trust in contravention of the trust documents is “void, not merely voidable,” and, under California law, “a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment.” (*Glaski, supra*, 218 Cal.App.4th at p. 1095.) Based upon this theory, the *Glaski* court held that the plaintiff had standing for various causes of action, including wrongful foreclosure. (*Id.* at p. 1097.) The court further held that under New York law, a securitized mortgage trustee’s acceptance of a loan after the trust’s closing date would be void in contravention of the trust document and would jeopardize the trust’s special tax status. (*Ibid.*)

However, a vast majority of courts have criticized *Glaski* as inconsistent with California’s foreclosure jurisprudence and found the opinion unpersuasive. (*Sandri v. Capital One, N.A. (In re Sandri)* (Bankr. N.D. Cal. 2013) 501 B.R. 369, 374-375 [explaining how *Glaski* unpersuasively departs from Cal. jurisprudence]; *Rajamin v. Deutsche Bank National Trust Co.* (2nd. Cir. 2014) 757 F.3d 79, 90 [rejecting *Glaski* as inconsistent with New York law]; *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82-83 [rejecting *Glaski*; borrower has no standing to challenge assignment of deed of trust]; *Jenkins, supra*, 216 Cal.App.4th at pp. 511-515 [same]; *Miller v. JP Morgan Chase Bank N.A.* (N.D. Cal., Aug. 8, 2014, No. 5:13-CV-03192-EJD) 2014 U.S. Dist. Lexis 110038, pp. *11-*12 [“Courts in this District have expressly rejected *Glaski*”]; *Tavares v. Nationstar Mortgage LLC* (S.D. Cal.,

July 14, 2014, No. 14cv216-WQH-NLS) 2014 U.S. Dist. Lexis 95537, p. *9 [finding *Glaski*'s reasoning unpersuasive]; *Zapata v. Wells Fargo Bank, N.A.* (N.D. Cal., Dec. 10, 2013, No. C 13-04288 WHA) 2013 U.S. Dist. Lexis 173187, p. *5 [“Every court in this district that has evaluated *Glaski* has found it is unpersuasive and not binding authority.”]; *Davies v. Deutsche Bank National Trust Co. (In re Davies)* (9th Cir., Mar. 24, 2014, No. 12-60003) 565 Fed. Appx. 630 [2014 U.S. App. Lexis 5416, pp. *4-*5] [following *Jenkins* instead of *Glaski*].⁴ We follow the federal lead, along with a growing number of California cases, in rejecting *Glaski*'s minority holding. Gyurec alleges nothing unlawful except that an allegedly deficient assignment and securitization deprived Deutsche Bank of an interest in the Property. He has no standing to make such a claim.

Even if Gyurec had standing to sue for “wrongful foreclosure,” he would be precluded from litigating the issue for a second time. Unlike the *Glaski* cases pending before the California Supreme Court (*Keshtgar v. U.S. Bank, N.A.*, *supra*, review granted Oct. 1, 2014, S220012 [a preemptive action to forestall foreclosure]; *Yvanova v. New Century Mortgage Corp.*, *supra*, review granted Aug. 27, 2014, S218973 [postforeclosure

⁴ See also *Subramani v. Wells Fargo Bank N.A.*, No. C 13-1605 SC, 2013 U.S. Dist. Lexis 156556, (N.D. Cal. Oct. 31, 2013); *Dahnken v. Wells Fargo Bank, N.A.*, No. C 13-2838 PJH, 2013 U.S. Dist. Lexis 160686 (N.D. Cal. Nov. 8, 2013); *Maxwell v. Deutsche Bank National Trust Co.*, No. 13-cv-03957-WHO, 2013 U.S. Dist. Lexis 164707 (N.D. Cal. Nov. 18, 2013); *Apostol v. Citimortgage, Inc.*, No. 13-cv-01983-WHO, 2013 U.S. Dist. Lexis 167308 (N.D. Cal. Nov. 21, 2013); *Haddad v. Bank of America, N.A.* No. 12cv3010-WQH-JMA, 2014 U.S. Dist. Lexis 2205 (S.D. Cal. Jan. 8, 2014); *Rivac v. Ndex West LLC*, No. C 13-1417 PJH, 2013 U.S. Dist. Lexis 177073 (N.D. Cal. Dec. 17, 2013); *Sepehry-Fard v. Department Stores Nat. Bank*, No.13-cv-03131-WHO, 2013 U.S. Dist. Lexis 175320 (N.D. Cal. Dec. 13, 2013).

action for quiet title and declaratory relief]; and *Mendoza v. JPMorgan Chase Bank, N.A.*, *supra*, review granted Nov. 12, 2014, S220675 [same]), this case involves a res judicata/collateral estoppel bar.

Gyurec's claim was adjudicated in his bankruptcy proceeding, wherein the court rejected his assertion that Deutsche Bank is not the party entitled to enforce the Note and DOT. Gyurec appealed the bankruptcy's court's dismissal of his complaint and requested a stay pending appeal. The request for stay was denied because he had failed to demonstrate "a sufficient likelihood of success on the merits to warrant a stay pending appeal." His appeal was dismissed as moot. Thus, the bankruptcy's court's order/judgment creates a res judicata bar. (*Siegel v. Federal Home Loan Mortgage Corp.* (9th Cir. 1998) 143 F.3d 525, 528-531 [bankruptcy court's disallowance of claim is a final judgment and the basis for res judicata]; *Poonja v. Alleghany Properties (In re Los Gatos Lodge, Inc.)* (9th Cir. 2002) 278 F.3d 890, 894 [allowance/disallowance of a proof of claim is a final judgment for res judicata purposes].) Gyurec had his day in court in the bankruptcy proceeding. "Somewhere along the line, litigation must cease." (*In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1613.)⁵

3. *Leave to Amend*

Gyurec claims that the trial court "should not have granted the demurrer without leave to amend on [his] claims," because he "properly pled a cause and certainly could have amended the complaint to do so." Throughout his opening brief Gyurec asserts that

⁵ Having found that Gyurec lacks standing to sue for wrongful foreclosure, we need not consider his other claims challenging the grant of demurrer.

his FAC adequately alleged all of the elements applicable to each of his claims. We have found otherwise. Not only has Gyurec not met his burden, but he also has not shown how he could meet his burden if given the chance to amend his complaint a second time. Accordingly, the trial court did not err in sustain the demurrer without leave to amend.

B. The Award of Attorney Fees

Gyurec contends that because his claims arose out of a claim for wrongful foreclosure, there is no contractual or statutory basis for awarding attorney fees. We disagree.

1. Standard of Review

“““On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.””” (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213.) The issue in this case is whether the attorney fee provisions in the Note and DOT apply to Gyurec’s claims against defendants. That issue turns on interpretation of the attorney’s fee provision and, therefore, is a question of interpretation of the contract, which, like statutory construction, is a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [“The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is

‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’ [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.”.)

2. Discussion

We begin by noting that Gyurec’s FAC sought “[r]easonable attorney’s fees under [his] Deed of Trust pursuant to California Civil Code [§§] 1717, 1788.30(b), [§]1788.30(c).”⁶ The Note specifically permits the recovery of costs, attorney fees and expenses “in enforcing this Note.” The attorney fee clause in the DOT at issue here permits recovery for any fees incurred to protect the interests in the Property and/or rights under the DOT. Specifically, the attorney fee provision in the DOT expressly applies to “legal proceeding that might significantly affect Lender’s interest in the Property and/or rights under this Security Instrument” Such attorney fee provision is standard in

⁶ Civil Code section 1717 states, in pertinent part: “(a) In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.”

Civil Code section 1788.30 states, in pertinent part: “(b) Any debt collector who willfully and knowingly violates this title with respect to any debtor shall, in addition to actual damages sustained by the debtor as a result of the violation, also be liable to the debtor only in an individual action, and his additional liability therein to that debtor shall be for a penalty in such amount as the court may allow, which shall not be less than one hundred dollars (\$100) nor greater than one thousand dollars (\$1,000). [¶] (c) In the case of any action to enforce any liability under this title, the prevailing party shall be entitled to costs of the action. Reasonable attorney’s fees, which shall be based on time necessarily expended to enforce the liability, shall be awarded to a prevailing debtor; reasonable attorney’s fees may be awarded to a prevailing creditor upon a finding by the court that the debtor’s prosecution or defense of the action was not in good faith.”

deeds of trust. (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347 (*Kachlon*).

Under Civil Code section 1717, the attorney fee provision would create a reciprocal obligation on the part of the beneficiary and trustee to pay the trustor's attorney fees.

In *Kachlon*, the court interpreted a similar attorney's fee provision in a deed of trust to constitute a reciprocal agreement between the parties to the deed of trust to pay attorney fees "in any action affecting . . . the rights or powers of the Kachlons (the beneficiaries under the deed of trust) or Best Alliance (the trustee)." (*Kachlon, supra*, 168 Cal.App.4th at p. 347, fn. omitted.) Gyurec's action against defendants for wrongful foreclosure of the Property challenges the securitization of the mortgage loan by questioning defendants' interests and rights under the Note and DOT. As such, his action seeking damages comes within the terms of the attorney's fee clause in the DOT. Thus, the DOT provides defendants a basis for recovery of attorney's fees.

We reject Gyurec's claim that there is no statutory basis for defendants to recover attorney fees because the allegations are rooted in tort and not in contract. The "on the contract" requirement in Civil Code section 1717 is liberally construed to extend to any action as long as the action "involves" a contract. (*Kachlon, supra*, 168 Cal.App.4th at pp. 346-348.) "In determining whether an action is 'on the contract' under [Civil Code] section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action. [Citation]" (*Id.* at p. 347.) "An action (or cause of action) is 'on a contract' for purposes of [Civil Code] section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to

determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause.” (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 242.) Here, Gyurec sought damages for the wrongful foreclosure of the Property based on his claim that defendants did not hold any power of sale under the DOT. The attorney fee provision in the DOT, by its express terms, applies to such lawsuit. Thus, Gyurec's action was “on the contract,” i.e., the DOT.

To the extent Gyurec contends the attorney fee provision applies only to fees incurred in a foreclosure sale, and not to claims stemming from such foreclosure, we must also reject that claim. Whether a contractual attorney's fee provision also covers such actions depends on the wording of the provision. As the Supreme Court explained in *Santisas v. Goodin* (1998) 17 Cal.4th 599, “If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: ‘[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.’ [Citation.]” (*Id.* at p. 608.) The wording of the attorney's fee provision in the DOT is sufficiently broad to include Gyurec's claims in this action.⁷

⁷ Gyurec's reliance on *Yreka Western Railroad Company v. Taveres* (E.D.Cal., Apr. 23, 2013, No. 2:11-1868 WBS CMK) 2013 WL 1749919, is misplaced. In that case, plaintiff sought to “enjoin defendants from foreclosing upon plaintiff's property until defendants apply for and obtain approval from the Surface Transportation Board.” (*Id.* at p. *1) Plaintiff sought a declaratory judgment on which governmental body has jurisdiction to first decide whether defendants have a right to foreclose, not to determine defendants' right to foreclose. (*Id.* at p. *2.)

Having prevailed on Gyurec's action on the Note and DOT, defendants are entitled to an award of reasonable attorney's fees and costs pursuant to the terms of the DOT and Civil Code section 1717.

III. DISPOSITION

The judgment is affirmed. Defendants are awarded their costs and attorney fees on appeal. The matter is remanded to the trial court to determine the amount of attorney fees defendants incurred in defending this appeal, and to enter an order awarding defendants that amount.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

KING

J.