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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVIS M. DEBARD, Plaintiff and Appellant, v. US BANK NATIONAL ASSOCIATION, as Trustee etc., Defendant and Respondent.	E064933 (Super.Ct.No. CIVDS1406285) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Law Offices of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Magdalena D. Kozinska for Defendant and Respondent.

I

INTRODUCTION

Plaintiff and appellant Davis M. DeBard appeals from an order granting defendant's motion for attorney's fees in the amount $16,835.50. In a related appeal, E063640, which we incorporate here by reference, this court found that defendant U.S. Bank[1] is the beneficiary of record by assignment of a trust deed and upheld the judgment against DeBard. U.S. Bank is the trustee acting on behalf of the investment trust, Ownit Trust. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.) We hold that U.S. Bank is entitled to recover from DeBard its contractual attorney's fees incurred in the underlying litigation.

II

FACTUAL AND PROCEDURAL BACKGROUND

As discussed in the related appeal, DeBard executed a trust deed, which was recorded in March 2006. The beneficial interest in the deed was successively assigned to different beneficiaries in June 2009 and December 2013, making U.S. Bank the current beneficiary of record. This court has upheld the lower court's ruling in favor of U.S. Bank.

U.S. Bank filed a motion for attorney's fees based on the March 2006 trust deed which allows recovery of attorney's fees in accordance with Civil Code section 1717 and Code of Civil Procedure section 1021. DeBard opposed the fee motion, claiming that

[1] U.S. Bank National Association, as trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-4 (Ownit Trust).

U.S. Bank did not present admissible evidence showing that it was a party to the trust deed or that it was entitled to recover fees under the trust deed. DeBard also objected to the accompanying request for judicial notice on the grounds that the lower court could not take judicial notice of the legal effect of the December 2013 assignment. The lower court granted the fee motion and awarded U.S. Bank $16,835.50 in attorney's fees.

III

DISCUSSION

A. Standard of Review

We afford a presumption of correctness to the lower court's decisions. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 376 (affirmance proper if the lower court ruling was correct on any basis, even one not considered by that court.) "The decision as to whether an award of attorney fees is warranted rests initially with the trial court. . . . [if w]here, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion." (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143; *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 964.) The review is de novo of a pure issue of law regarding the entitlement to attorney's fees. (*Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.)

B. Contractual Attorney's Fees

Under California law, parties may agree via contract to allocate the payment of attorney's fees following litigation. (Code Civ. Proc., § 1021.) Alternatively, Civil Code

section 1717 provides where the contract provides for attorney's fees, the prevailing party is entitled to reasonable attorney's fees as a matter of right: ". . . when the decision on the litigated contract claims is purely good news for one party and bad news for the other — the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

To prevail on its fee motion, U.S. Bank must establish that: (1) the subject trust deed authorizes the recovery of attorney's fees against DeBard; (2) U.S. Bank was the prevailing party; and (3) the attorney's fees incurred were reasonable. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1008-1016.) DeBard does not argue that the attorney's fees are unreasonable. DeBard cannot argue that U.S. Bank was not the prevailing party in the lower court. The only issue on appeal is whether the trust deed authorizes the recovery of fees.

The subject trust deed contains several contractual provisions permitting recovery of attorney's fees. In *Valley Bible Center v. Western Title Ins. Co.* (1983) 138 Cal.App.3d 931, 932, the court upheld awarding attorney's fees to a deed of trust's beneficiary based on a fees provision that is very similar to the fees provision in this action.

Specifically, Section 9 of the Deed of Trust provides:

"If . . . (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, . . . Lender's actions can include, but

are not limited to . . . (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, . . . [¶] Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower . . . ."

Section 14 of the trust deed provides: "Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorney's fees, . . . " Section 22 of the trust deed provides: "Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees . . . ."

Section 13 of the trust deed expressly provides that: "[t]he covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender." Section 20 adds that: "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." Here, the subject deed was assigned twice, the second time to U.S. Bank.

DeBard tries to argue "a court cannot take notice of the legal impact, effect, or interpretation of language in the document." However, judicial notice may be taken of "the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the

recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 (disproved on other grounds); *Linda Vista Vill. San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 184; *Intengan v. BAC Home Loans Servicing, LP* (2013) 214 Cal.App.4th 1047, 1054-1055.) This is different from requesting a court to take judicial notice of disputed facts within a recorded document, as was the concern in the cases cited by DeBard.

As stated in *Fontenot v. Wells Fargo Bank, NA., supra,* 198 Cal.App.4th at pages 264-265: "The official act of recordation and the common use of a notary public in the execution of such documents assure their reliability, and the maintenance of the documents in the recorder's office makes their existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute." Courts can take judicial notice of the existence and recordation of recorded documents and other facts such as the "parties, dates, and legal consequences of a series of recorded documents relating to a real estate transaction." (*Fontenot,* citing *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118; see *Intengan v. BAC Home Loans Servicing, L.P., supra,* 214 Cal.App.4th at pp. 1054-1055; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388 [court properly took judicial notice of notice of default demonstrating that the plaintiffs had notice of the amount claimed to be in default and an opportunity to cure said default].)

Indeed, in *Yvanova*, the California Supreme Court reiterated the lower court may properly take judicial notice of a recorded deed of trust, an assignment of the deed of

trust, and a notice of default: "The existence and facial contents of these recorded documents were properly noticed in the trial court under Evidence Code sections 452, subdivisions (c) and (h), and 453. [Citing *Fontenot*.] Under Evidence Code section 459, subdivision (a), notice by this court is therefore mandatory. We therefore take notice of their existence and contents, though not of disputed or disputable facts stated therein. (See *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1102.)" (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.)

The lower court did not err in taking judicial notice of the legal effect of the June 2009 and December 2013 assignments of the March 2006 trust deed. As stated in Civil Code section 2934, "any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons."

Here, on June 18, 2009, MERS recorded an assignment of the beneficial interest in the March 2006 trust deed to Bank of America, as trustee for the Ownit Trust. DeBard has never challenged the validity of that assignment and cannot do so many years later. (Code Civ. Proc., § 343; *Moss v. Moss* (1942) 20 Cal.2d 640, 644-645; *Salazar v. Thomas* (2015) 236 Cal.App.4th 467, 477, fn. 8.)

On December 27, 2013, a second assignment was recorded, replacing Bank of America with U.S. Bank, as trustee of the Ownit Trust. The December 2013 assignment served to correct the name of the trustee of the Ownit Trust. In other words, between 2006 and 2013, the beneficial interest in the trust deed was transferred by MERS to Bank

of America as the Ownit trustee and from Bank of America to U.S. Bank as the Ownit Trustee.

It is thus clearly established that, not only can the court take judicial notice of the legal effect of the assignments, but the recordation of the assignments gave constructive notice of the legal effects and the contents of the assignments, including that U.S. Bank was assigned the trust deed.

DeBard's reliance on cases involving judicial notice of SEC filings and newspaper articles is inapt. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065.) *Mangini* and *StorMedia* involved hearsay items subject to dispute, not recorded title documents containing non-hearsay, legally operative agreements. DeBard's reliance on *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 292, is also misplaced. *Cockrell* holds an assignee must prove its assignment before enforcing an assigned right. But *Cockerell* involved a post-sale dispute between competing junior lienholders over the right to surplus proceeds. It had no bearing on the right of a legitimate assignee to recover contractual attorney's fees.

Finally, *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375, was a case involving "lack of proof in the record that the party making the assignment had the authority to do so—in other words, that the record did not contain evidence of the entire chain of title of the mortgage." (*Fontenot v. Wells Fargo Bank, NA., supra,* 198 Cal.App.4th at p. 267, fn. 7, citing *Herrera,* at p. 1375.) Here, the chain

of title from MERS to Bank of America to U.S. Bank has been established by the recorded documents.

The lower court did not err in taking judicial notice of the recorded documents or their legal effect. U.S. Bank, as the trustee of the Ownit Trust, the beneficiary under March 2006 trust deed, has the contractual right to recover attorney's fees under the trust deed.

IV

DISPOSITION

We affirm the award of attorney's fees in favor of U.S. Bank. In the interests of justice, we order the parties to bear their own costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.