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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FIRST AMERICAN TRUSTEE
SERVICING SOLUTIONS, LLC,

Plaintiff,

v.

BINAL S. PATEL et al.,

Defendants and Appellants,

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

G051061

(Super. Ct. No. 30-2014-00727858)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed. Motion to dismiss is denied.

Frank A. Weiser for Defendants and Appellants.

Kutak Rock, Jeffrey S. Gerardo, Steven M. Dailey and Antoinette P. Hewitt
for Defendant and Respondent.

No appearance for Plaintiff.

* * *

Binal S. Patel and Shailesh Patel (the Patels) appeal from the trial court's order on a petition of unresolved claims and deposit of undistributed surplus (Petition). First American Trustee Servicing Solutions, LLC (First American) filed the Petition pursuant to Civil Code section 2924j (all further statutory references are to the Civil Code), seeking the trial court's assistance in determining the proper disbursement of surplus funds after the Patels' home was sold at a trustee's sale. First American deposited with the court the undistributed surplus proceeds of \$126,493.12 and the court considered two competing claims to the funds. The court awarded the surplus funds to Wells Fargo Bank (Wells Fargo). We affirm the order.

I

The Patels owned real property on Somerset Street in Buena Park (the property). On March 29, 2004, the property was secured by a deed of trust (First Deed of Trust), reflecting a \$412,785 loan from Wells Fargo Home Mortgage, Inc. (Wells Fargo).

On November 8, 2005, a second deed of trust reflecting a loan amount of \$169,400 (Second Deed of Trust) was recorded against the property in favor of Wells Fargo. On November 9, 2005, a third deed of trust reflecting a loan amount of \$138,000 (Third Deed of Trust), was recorded against the property in favor of Wells Fargo.

A. The Foreclosure Sale

On January 18, 2011, Wells Fargo recorded a notice of default on the First Deed of Trust. On April 18, 2011, First American recorded notice of a trustee's sale under the First Deed of Trust, and in June 2011 sold the property to a third party.

After the sale, the Patels received tax "Form 1099-A." Wells Fargo claimed the tax document was sent "because a foreclosure sale is, under federal tax laws,

treated as a sale of the property and the former owners need the Form 1099-A to calculate their sale or loss from the [p]roperty.” Wells Fargo denied sending the Patels a Form 1099-C, typically sent when a loan is cancelled. Wells Fargo believed the loans secured by the Second Deed of Trust and the Third Deed of Trust were not cancelled, satisfied, or extinguished by the trustee’s sale on the First Deed of Trust.

B. The Federal Action

The Patels filed a complaint in the federal district court against Wells Fargo and First American. They alleged the trustee’s sale was improper and illegal. In August 2011, the district court granted defendants’ “unopposed motion to dismiss the complaint” and granted leave to amend. The Patels filed their first amended complaint, adding the third party buyer of the property as a defendant. On October 17, 2011, the district court granted defendants’ motion to dismiss under Federal Rule of Civil Procedure 12, subdivision (b)(6) [dismiss complaint when allegations fail to state a claim upon which relief can be granted], the federal equivalent of a demurrer. The district court gave the Patels 21 days to file a second amended complaint (SAC). When they failed to do so, the court dismissed the action with prejudice in January 2012. The Patels appealed, and the Ninth Circuit Court of Appeals affirmed the dismissal. The Patels filed a petition for writ of certiorari to the United States Supreme Court, and it was denied on June 9, 2014.

C. The Section 2924j Petition

Upon completion of the federal case, First American filed a petition and declaration regarding unresolved claims. It deposited with the trial court the undistributed surplus proceeds (\$126,493.12) of the trustee sales calculated as follows: First American subtracted from the \$419,200 in proceeds collected from the trustee’s sale the amount of debt paid to the foreclosing creditor (\$287,523), and other trustee fees and expenses.

The Patels filed a notice of a claim to the surplus proceeds. The Patels stated they owned the residential home that was the subject of the trustee’s sale. They

claimed it was their community property, although Shailesh Patel is not “of record legal title.” The Patels asserted that while the federal case was on appeal, Wells Fargo sent them a tax notification form stating it had abandoned \$157,734.82 owed as principal on the outstanding balance of the note. The Patels stated they were required to report this as income on their federal and state tax returns. The Patels concluded Wells Fargo likely wrote off the amount as uncollected debt on its tax returns. The Patels timely notified First American that they were entitled to collect the surplus proceeds of \$126,493.12.

Wells Fargo also filed a claim regarding the surplus funds. Wells Fargo stated it “services a second and third loan which were secured by the [p]roperty.” Wells Fargo noted it was aware the Patels sent First American a letter objecting to the disbursement of funds to Wells Fargo and none of their arguments had merit. First, Wells Fargo asserted that contrary to the Patels’ contention, the federal court ruling was final and rejected the Patels’ action challenging the foreclosure. Second, the Form 1099-A did not reflect cancellation of any debt owed to Wells Fargo on the second and third loans. Third, it was undisputed Wells Fargo made a timely claim to First American for surplus proceeds. It provided evidence the amount due on the Second Deed of Trust was \$190,860.70, and on the Third Deed of Trust was \$191,623.70 (as of July 8, 2014).

Wells Fargo separately filed a request for judicial notice of 16 documents relevant to First American’s petition. It included copies of the three deeds of trust, documents relating to the trustee sale, the Patels’ complaint, and other documents filed in federal court.

The trial court determined Wells Fargo had a superior claim to the surplus funds. In its minute order, the court made the following rulings: (1) the Second Deed of Trust exceeded the amount of surplus funds; (2) the federal action was decided against the Patels; and (3) the Patels presented insufficient evidence Wells Fargo forgave the debt. The court ordered the court clerk to release the surplus funds to Wells Fargo and

discharged First American from further responsibility regarding disbursement of the sale proceeds.

II

A. General Legal Principles Regarding Section 2924j Petitions

“A nonjudicial foreclosure sale is deemed final when the trustee accepts the last and highest bid. (§ 2924h, subd. (c).) ‘The beneficiary, like any other party, may bid cash, offering more or less than the balance due on the debt. [Citation.] A junior lien . . . will be extinguished at the foreclosure sale unless the successful bidder purchases at a price sufficiently high to pay off both the senior lien and the junior lien. [Citation.]’ [Citation.] There is a large body of case law devoted to claims made by secured junior lien holders challenging the propriety of the sale in cases where the sale price was insufficient to pay the secured junior lien holders. [Citation.] . . . However, there is scant authority concerning those rare cases in which there were surplus funds after the sale.” (*Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1101-1102 (*3 Arch Trustee*)).

“[S]ections 2924j and 2924k clearly define the trustee’s responsibilities concerning surplus funds. Section 2924k directs the trustee to apply proceeds from the foreclosure sale: (1) first, to pay the trustee’s costs and expenses in exercising the power of sale and conducting the sale; (2) next, to satisfy the debt to the beneficiary (lender); (3) next, to the payment of junior creditors ‘in the order of their priority’; and (4) the balance, if any, to the trustor (or its successor in interest). (§ 2924k, subd. (a).) It is the trustee’s job to sort out the priority and validity of the claims.” (*3 Arch Trustee, supra*, 180 Cal.App.4th at p. 1102.)

“The trustee then must ‘exercise due diligence to determine the priority of the written claims received by the trustee to the trustee’s sale surplus proceeds from those persons to whom notice was sent’ (§ 2924j, subd. (b).) ‘If there is no dispute as to the priority of written claims to the surplus proceeds, the trustee shall pay the proceeds

within 30 days after conclusion of the above notice period. But if the trustee has failed to determine the priority of the claims within 90 days following the 30-day notice period, 10 days later the trustee has to deposit the funds with the court clerk or file an interpleader action.’ [Citations.]” (3 *Arch Trustee, supra*, 180 Cal.App.4th at p. 1102.) Before depositing the funds with the court clerk, the trustee must notify all the claimants they must file a claim with the court within 30 days. (§ 2924j, subd. (d).)

The statutory scheme is less specific regarding the trial court’s responsibilities and duties with respect to surplus funds deposited by the trustee unable to determine the priority of claims. Section 2924j, subdivision (c), provides, “The clerk shall deposit the amount with the county treasurer or, if a bank account has been established for moneys held in trust under paragraph (2) of subdivision (a) of [s]ection 77009 of the Government Code, in that account, subject to order of the court upon the application of any interested party. . . . Upon deposit of that portion of the sale proceeds that cannot be distributed by due diligence, the trustee shall be discharged of further responsibility for the disbursement of sale proceeds.”

“Within 90 days after deposit with the clerk, the court shall consider all claims filed at least 15 days before the date on which the hearing is scheduled by the court, the clerk shall serve written notice of the hearing . . . on all claimants identified in the trustee’s declaration at the addresses specified therein. Where the amount of the deposit is twenty-five thousand dollars (\$25,000) or less, a proceeding pursuant to this section is a limited civil case. The court shall distribute the deposited funds to any and all claimants entitled thereto.” (§ 2924j, subd. (d).)

B. Impact of the Dismissed Federal Case

The trial court distributed the funds to Wells Fargo on the basis it was a junior lien holder, rejecting the Patels’ arguments the debt was forgiven. In addition, the court noted the Patels’ “argument regarding their federal case” lacked merit because that matter was dismissed. Rather than focusing on proving a superior claim to the surplus

funds, the first issue the Patels discuss is their federal case. The Patels devote several pages of briefing to describing why dismissal of the action does not operate as res judicata or collateral estoppel in the underlying proceedings. They explain the issue of priority to the surplus funds was never raised or litigated in the federal action and, in any event, the dismissal was not a final judgment on the merits.

Noticeably missing from their argument on appeal is why the federal case has any relevance to the matter at hand, especially if (as they claim) it did not have a res judicata or collateral estoppel effect. We are left guessing as to how the federal action supports the theory Wells Fargo's junior liens are invalid or secondary to the Patels' claim to the surplus funds. Moreover, to the extent the Patels believe they may have unresolved wrongful foreclosure claims, they misunderstand that the trial court lacked authority to consider such matters in the context of a section 2924j proceeding. (See *Cal-Western Reconveyance Corp. v. Reed* (2007) 152 Cal.App.4th 1308, 1317-1318 [procedure authorizes only distribution to satisfy secured obligations].)

Section 2924j specifically contemplates that “[n]othing in this section shall preclude any person from pursuing other remedies or claims as to surplus proceeds.” (§ 2924j, subd. (b).) The Patels must litigate their claims of wrongful foreclosure or title defect claims in the context of a lawsuit. We conclude the dismissed federal case has no relevance and was properly disregarded by the trial court when considering the merits of the trustee's petition to distribute surplus funds.

C. The Burden of Proving Priority of a Claim

The Patels assert the court erred *as a matter of law* in deciding Wells Fargo did not forgive their entire debt. We conclude they have misconstrued the basis for the trial court's ruling. The trial court ruled the Patels failed to present *sufficient evidence* Wells Fargo forgave their entire debt. Stated another way, the court determined tax Form 1099-A was not enough evidence to prove Wells Fargo gave up their secured interest (two junior liens) in the property. It did not rule that, as a matter of law, the document

could never be used to prove cancellation of the debt. Rather, standing alone tax Form 1099-A was not enough evidence.

Due to this apparent misunderstanding about the nature of the trial court's ruling, the Patels do not discuss either their burden of proof as a claimant in a section 2924j proceedings or whether they met their burden. As we will discuss in more detail below, we conclude the trial court got it right.

The statute does not specify who bears the burden of proof and therefore we look to the default rules regarding burden of proof. (Cf. *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470 [court in interpleader action applied default rules because Hospital Lien Act did not specify who bears burden of proof] (*Huff*).) “‘Except as otherwise provided by statute,’ (1) ‘a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting’ (Evid. Code, § 500), and (2) ‘the burden of proof requires proof by a preponderance of the evidence’ (*id.*, § 115). Courts have applied these rules to claimants in interpleader actions. (See, e.g., *Division Labor Law Enfmt. v. Brooks* (1964) 226 Cal.App.2d 631, 633 [interpleaded funds ‘must be disposed of, but only to a claimant who establishes his own affirmative right’]; *Marine Indem. Ins. Co. v. Lockwood Warehouse & Storage* (5th Cir. 1997) 115 F.3d 282, 289 [claimant to interpleaded funds ‘had the burden of establishing by the preponderance of the evidence that it was entitled to recover’]; *Travelers Ins. Co. v. Keith* (1973) 283 N.C. 577, 580, 196 S.E.2d 731, 734 [‘Each [interpleader claimant] has the burden of establishing his right to the fund by the greater weight of the evidence.’].) Courts have also held in other contexts that a lien claimant has the burden of proof to establish the validity and amount of its lien by a preponderance of the evidence. (See, e.g., *Zenith Ins. Co. v. Workers’ Comp. Appeals Bd.* (2006) 138 Cal.App.4th 373, 376 [medical provider lien]; . . . *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485 [mechanic’s lien];

People v. One 1952 Ford Sedan (1956) 146 Cal.App.2d 183, 184, 187 [lender's lien on forfeited automobile].)" (*Huff, supra*, 216 Cal.App.4th at p. 1470.)

Based on the above legal authority, we hold claimants asserting a right to surplus funds in a section 2924j proceeding each have the burden to prove by a preponderance of the evidence their own claim or right and relative priority as to all other claimants. The trial court properly considered and weighed the evidence presented by both claimants before making its ruling.

On one hand, Wells Fargo presented documentary evidence it held two valid junior liens on the property. It provided evidence the amount due on the Second Deed of Trust was \$190,860.70, and on the Third Deed of Trust was \$191,623.70 (as of July 8, 2014). It was undisputed First American held its trustee's sale under the First Deed of Trust, sold the property to a third party for \$419,200 and paid the foreclosing creditor \$287,523. Wells Fargo submitted evidence proving this payment extinguished the First Deed of Trust but not the junior liens. Wells Fargo's vice president of loan documentation, Denise K. Politte, declared that after the trustee's sale Wells Fargo sent a tax Form 1099-A to the Patels associated with the trustee's sale and extinguishing the First Deed of Trust. Politte declared there was no documentation cancelling or otherwise extinguishing Wells Fargo's two other deeds of trust.

On the other hand, the Patels provided proof they were the homeowners. If the property was not encumbered by other liens, they would be entitled to the surplus proceeds. The only evidence they presented showing their priority over Wells Fargo was the tax Form 1099-A. The Patels believed this tax form "constituted a waiver by Wells Fargo to the surplus funds from the sale" because the form stated it applied to "acquisition or abandonment of secured property" They assert Wells Fargo never argued the Form-1099-A could not be used to cancel a debt and Wells Fargo failed to provide proof they did not write off the Patels' entire debt for tax purposes.

However, it was the Patels' burden to establish priority over the junior liens. It was undisputed tax Form 1099-A was generated after foreclosure triggered by a default on the *First Deed of Trust*. Wells Fargo presented evidence the tax form reflected only a partial satisfaction of the debt, i.e., payment of the first lien. If the Patels believed there was contradictory evidence, it was their burden to present it.

We found no legal support, and the Patels cite to none, holding tax Form 1099-A must be deemed a waiver of both senior and junior liens. To the contrary, Internal Revenue Code section 6050J(a)(1) specifies a lender must send the form "in full or partial satisfaction" of debt.¹ For this reason, the trial court correctly determined tax Form 1099-A was not conclusive proof of a full waiver because the form may be filed by a lender receiving only partial satisfaction, i.e., the debt secured by the First Deed of Trust extinguished by the foreclosure. In summary, because the Patels offered no other proof their entire debt was cancelled or waived, it cannot be said the trial court erred in deciding the Patels failed to meet their burden of proving by a preponderance of the evidence that their claim to the surplus funds was superior to the junior lien holder's claim.

D. One Action Rule

The Patels argue that by foreclosing on the residence, the debt was cancelled under the "one action rule" because it was uncollectable under state law and was subject to anti-deficiency rules. This argument was not raised below and is puzzling

¹ "Any person who lends money secured by property . . . must file an information return reporting any foreclosure or other acquisition of property in full or partial satisfaction of any debt. A similar reporting requirement applies to a lender if the borrower abandons the property which was a security for the loan. . . . [¶] The return on Form 1096 and 1099-A must be filed by Feb. 28 following the calendar year in which the acquisition or the abandonment occurs [Citation.] [¶] The lender must also furnish a statement (copy of Form 1099-A) to the borrower by Jan. 31 following the calendar year in which the acquisition or the abandonment occurs." (U.S. Tax Rep. (RIA) ¶ 60,50J4 [20XX WL 1848863].)

because Wells Fargo has *not* brought an action to collect the debt. The trustee holding the surplus funds initiated the underlying action by filing a section 2924j petition.

In any event, generally, theories that were not raised in the trial court cannot be asserted for the first time on appeal. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) There is an exception where the issue presented involves purely a legal question on an uncontroverted record and requires no factual determinations. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) The completing claims to the surplus funds involve disputed facts and likely the exception does not apply. But more importantly, because the Patels do not acknowledge this is a new issue, they do not address whether the exception should apply.

We also find the dearth of true legal analysis on the merits of this new issue amounts to a waiver and we will treat it as such. It is not enough to quote code provisions and then provide no analysis or reasoning as to its application to this case. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

E. Motion to Dismiss

Under section 2924j, when a trustee cannot determine how to disburse the surplus of a foreclosure sale, the trustee deposits the surplus with the clerk of the court and the court disburses the surplus. In its motion to dismiss, Wells Fargo maintains the trial court's order stated "the funds will be made payable to [Wells Fargo] and sent to its counsel of record." Wells Fargo's attorney, Steven M. Dailey, declared the court sent him the surplus funds. He received the funds on October 2, 2014, and sent them to Wells Fargo that same day.

Wells Fargo points out the Patels did not request a stay of execution of the order distributing funds. They filed their notice of appeal on November 26, 2014, nearly two months after the funds had been sent to Wells Fargo. Wells Fargo concludes the appeal should be dismissed as moot because the requested relief is no longer available, i.e., an appellate court cannot order the trial court to disburse funds it no longer has.

Neither Wells Fargo’s motion to dismiss nor the Patels’ opposition cite to any cases on point regarding this issue. We need not resolve this dispute because we have exercised our discretion and resolved the issue on the merits as discussed above. (See *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404 [“reviewing court may exercise its inherent discretion to resolve an issue rendered moot by subsequent events”].)

III

The order is affirmed. The motion to dismiss the appeal is denied.
Respondent shall recover its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.