

When is a Wrongful Foreclosure Case a “SLAPP”?

California’s anti-SLAPP statute (Code of Civil Procedure section 425.16) arms a defendant with an early method to challenge a lawsuit known as a “SLAPP” — a Strategic Lawsuit Against Public Participation. SLAPPs are meritless lawsuits that arise from the defendant’s exercise of its rights of free speech or petitioning the courts.

As described by [Wikipedia](#), a SLAPP “is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.”

Does the anti-SLAPP statute apply to lawsuits alleging “wrongful foreclosure” based on a flawed nonjudicial foreclosure sale (otherwise known as a trustee’s sale)? It depends on the specific conduct underlying the claims, as clarified in a recent opinion published by the California Court of Appeal (Third District in Sacramento) — [*Crossroads Investors, L.P. v. Federal National Mortgage Assn.*](#)

The loan and default

Crossroads borrowed \$9 million in 2005, and secured the loan with an apartment building in Woodland. Fannie Mae was the trust deed beneficiary. The note imposed a prepayment premium (or “yield maintenance”) triggered by Crossroads’ payment of the note before its maturity date or by a default and acceleration.

Crossroads defaulted in late 2010 by failing to make the required payments. Fannie Mae accelerated the loan and recorded a notice of default.

In April 2011, Crossroads entered into a contract to sell the property to a third party (Ezralow Company, LLC) for \$10.95 million. Crossroads and Ezralow proposed to Fannie Mae that Ezralow would assume Crossroads’ obligations and pay off the loan if Fannie Mae agreed to waive the prepayment premium.

Fannie Mae declined the offer, insisting on payment of the prepayment premium, and noticed a trustee’s sale.

The bankruptcy proceedings

One day before the scheduled trustee’s sale, Crossroads filed for bankruptcy protection and the sale was stayed.

During the bankruptcy proceedings, Crossroads verbally informed Fannie Mae it was ready, willing, and able to cure the default or pay the loan in full, and Crossroads asked Fannie Mae “many times” for a complete accounting of the amount required to cure the default or pay off the loan, but Fannie Mae did not respond.

The issue of whether Fannie Mae was entitled to recover the prepayment premium was litigated in the bankruptcy proceeding. The bankruptcy court eventually ruled in Fannie Mae’s favor on that issue and granted Fannie Mae relief from stay, effective on May 15, 2012, to complete the trustee’s sale.

Crossroads served an interrogatory in the bankruptcy action in February 2012, asking Fannie Mae to state the amount required to cure the default as of June 1, 2012. Fannie Mae responded that it could not provide accurate information because the interrogatory aimed at a future date and the future loan balance was contingent on future events.

The trustee’s sale

On May 17, 2012 and again on May 22, 2012, Crossroads’ attorney asked Fannie Mae’s attorney for a payoff amount to pay the loan in full. Fannie Mae’s attorney told Crossroads’ attorney that he would check and respond later. Fannie Mae also, according to Crossroads, agreed to provide advance notice of any trustee’s sale.

On May 24, Crossroads’ security property (the apartment complex) was sold at a trustee’s sale. The sale came as a surprise to Crossroads. The trustee recorded a trustee’s deed.

Crossroads dismissed its bankruptcy action and filed a new state court action alleging wrongful foreclosure.

The trial court’s anti-SLAPP ruling

Crossroads’ complaint was based on three primary issues: (1) Fannie Mae’s repeated failure to provide a timely and accurate accounting of the amount required to cure the default or pay the loan in full (in response to Crossroads’ verbal requests and its written interrogatory in the bankruptcy action); (2) Fannie Mae’s refusal to accept Crossroads’ tenders; and (3) Fannie Mae falsely stating it would provide Crossroads advance notice of a trustee’s sale.

Fannie Mae filed an anti-SLAPP motion, contending that Crossroads' lawsuit was actually "an attempt to punish Fannie Mae for exercising its rights in the bankruptcy action," which included Fannie Mae's response to Crossroads' interrogatory seeking payoff information.

The trial court denied the motion, ruling that the "gravamen" of Crossroads' complaint was the flawed trustee's sale, not Fannie Mae's protected speech or petitioning conduct.

Fannie Mae appealed.

The court of appeal's opinion

The court of appeal affirmed the trial court's ruling.

The court's opinion followed the two-step process used in anti-SLAPP cases. First, the court determines whether the defendant made a threshold showing that the plaintiff's claims are based on protected speech or petitioning activity, as defined in the statute. If the defendant meets this burden, then the burden shifts to the plaintiff to make a "prima facie" showing on the merits of the claims.

First step — claims based on protected activity?

On the first step of anti-SLAPP analysis, the court concluded that the "principal thrust" of Crossroads' wrongful foreclosure claims was Fannie Mae's alleged failure to comply with state nonjudicial foreclosure law, not Fannie Mae's exercise of speech or petitioning rights.

The court observed that Civil Code section 2924c requires a recorded notice of default to inform the debtor he may obtain payoff information by communicating with the lender or beneficiary. Crossroads alleged multiple attempts to do just that, but Fannie Mae did not respond.

The court acknowledged that one of Crossroads' requests for payoff information (the interrogatory served during the bankruptcy proceedings) and Fannie Mae's response thereto were statements made in connection with a judicial proceeding, and therefore protected under the anti-SLAPP statute. However, most of Crossroads' requests for payoff information were verbal, and Fannie Mae's lack of response was "non-expressive" conduct, which is not protected under the anti-SLAPP statute.

The court rejected Fannie Mae's argument that it had provided adequate payoff information in its bankruptcy court filings, finding: "The bankruptcy court was deciding the amount Fannie Mae was entitled to receive under federal bankruptcy law as of the bankruptcy petition date . . . , not the amount needed to cure the default or pay off the loan under state law on a different date."

Finally, the court cited to prior law (*Garretson v. Post* (2007) 156 Cal.App.4th 1508), which held that trustee's sales are private, contractual proceedings, and normally do not involve any judicial proceeding or petitioning conduct.

Second step — merits of claims

On the merits, the court found that Crossroads established a prima facie case showing Fannie Mae violated Civil Code section 2924c by not providing the requested payoff information despite multiple requests. The court held:

Implied in section 2924c's right to learn the amount needed to pay off the loan is a requirement that the beneficiary or trustee will in fact provide that information to the debtor.

The court rejected Fannie Mae's argument that under section 2924c, all requests for an accounting must be in writing. The statute, the court held, "requires requests to be in writing only when the debtor wants a written accounting. Otherwise, the statute encourages the debtor to contact the beneficiary, even by telephone, to obtain the information."

Lesson

Under the prior *Garretson* decision, complaints alleging isolated procedural defects with a trustee's sale are probably not subject to anti-SLAPP scrutiny because a trustee's sale is a private, contractual proceeding. But if a wrongful foreclosure claim is based primarily on the defendant's conduct in related litigation, then the anti-SLAPP statute probably applies.

Side lesson for lenders: Respond to payoff demands promptly. Don't evade responding simply because of pending related litigation.

Side lesson for borrowers: Make payoff demands in writing, and in a simple form that is not directly tied to any pending litigation.