

Former Servicer Trustee Entitled to Recover Attorneys' Fees

The Court of Appeal for the Second District of California held that California's fee shifting statute in **California Civil Code § 1717 permitted a former loan servicer and foreclosure trustee to recover their attorneys' fees authorized by the contract, even though the deed of trust was assigned to another financial institution.**

However, the Court vacated the trial court's award of attorneys' fees against the borrower because **the deed of trust only permitted attorneys' fees to be added to the loan balance.**

A copy of the opinion in *Chacker v. JPMorgan Chase Bank, N.A.* is available at: [Link to Opinion.](#)

The borrower defaulted on the mortgage and sued the loan servicer and foreclosure trustee (collectively, "defendants") to stop the foreclosure. Her complaint asserted four causes of action: (1) violation of California Civil Code § 2923.5, (2) quiet title, (3) unlawful debt collection practices in violation of the California Rosenthal Act, and (4) declaratory and injunctive relief.

The trial court sustained the defendants' demurrers without leave to amend. The appellate court affirmed the trial court's ruling on appeal. The defendants moved for attorneys' fees pursuant to the deed of trust and the Rosenthal Act.

In relevant part, **section 9 of the deed of trust authorizes the lender to pay "reasonable attorneys' fees to protect its interest in the Property and/or rights in the Security Instrument."** Section 9 further states that **"[a]ny amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument."**

Section 14 of the deed of trust states in pertinent part: "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 fees."

The defendants argued that they were entitled to attorneys' fees pursuant to sections 9 and 14 — even though the deed of trust had been assigned to

another financial institution — because California Civil Code § 1717 authorizes courts to enforce contractual attorney fee clauses.

The trial court granted the motion for attorneys' fees and ordered the borrower to pay the defendants \$46,827.40. The trial court did not discuss the defendants' request for fees pursuant to the Rosenthal Act.

This appeal followed.

The first issue on appeal was whether the defendants were entitled to contractual attorneys' fees under the deed of trust even though they were neither the lender nor signatories to the promissory note or deed of trust.

As you may recall, California Civil Code § 1717(a) provides that “[i]n 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.”

Section 1717 has been “interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorneys’ fees should he prevail in enforcing the contractual obligation against the defendant.” *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.

Although the defendants were not the original lender identified in the note and deed of trust, the Court noted that **the defendants were agents of the lender who had authority to enforce the lender’s rights under the contracts. The borrower sued the defendants for taking actions authorized by the deed of trust during their tenure as loan servicer and trustee.** Thus, in the Court’s view the defendants stood in the shoes of a party to the contract and could recover attorneys’ fees as provided by the contract pursuant to section 1717.

The second issue on appeal was whether the deed of trust authorized a separate award to pay attorneys’ fees, as opposed to adding the fees to the loan balance.

The Court observed that section 9 of the deed of trust provides that any amounts disbursed by the lender “shall become additional debt of Borrower secured by this Security Instrument.” The Court held that the text of section 9 did not authorize a separate award of attorneys’ fees.

The Court also found that the word “charge” in section 14 of the deed of trust **authorizes the lender to charge the borrowers attorneys’ fees it may have incurred and add those fees to the outstanding balance due under the promissory note.** In the Court’s own words, “[t]here is no language in section 14 that indicates the trust deed permits a freestanding contractual attorney fees award.”

The defendants argued that because they were no longer the active servicer or trustee of the deed of trust, their attorneys’ fees were not amounts disbursed by the lender under section 9 and adding their attorneys’ fees to the loan balance would be unjustified.

The Court found the argument unpersuasive because the defendants’ right to seek attorneys’ fees in the first place, despite being non-parties to the contracts, depended on their assertion that they acted as the lender’s agents and stood in the lender’s shoes. As the Court explained, the defendants “must take the bitter with the sweet.”

Thus, the Court concluded that **the deed of trust permitted the defendants to recover their attorneys’ fees but did not authorize a separate fee award against the borrower.**

The loan servicer also argued that it was entitled to attorneys’ fees under the Rosenthal Act, as an independent basis for a fee award against the borrower.

As you may recall, **the Rosenthal Act includes a provision authorizing a court to award reasonable attorneys’ fees 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.”** Civil Code § 1788.30(c).

The Court determined that the borrower advanced a colorable argument in her complaint, and therefore the Rosenthal Act did not authorize an award of attorneys’ fees to the loan servicer under these circumstances.

Accordingly, the Court reversed the order compelling the borrower to pay \$46,827.40 in attorneys' fees and remanded for further proceedings consistent with its opinion.