

TRUSTEE HAS NO DUTY TO VERIFY VALIDITY OF LOAN ASSIGNMENT BEFORE FORECLOSURE

A trustee in charge of administering a trust has many duties.

A trustee appointed pursuant to a deed of trust, however, is different. The duties of a deed of trust trustee are exceptionally narrow.

A recent opinion from California's Fourth Appellate District — [*Citrus El Dorado, LLC v. Chicago Title Company*](#) — illustrates the point.

Facts: loan assignment followed by foreclosure

Real estate developer Citrus El Dorado, LLC (“Citrus”) purchased an unimproved 9.25 acre parcel in La Quinta, California, with the intention of developing it into a residential housing tract. Citrus obtained a construction loan of more than \$13 million to be released in incremental draws, secured by a deed of trust on the property.

The loan was initially made by First Heritage Bank, but that bank failed and was placed into a Federal Deposit Insurance Corporation (FDIC) receivership. The FDIC assigned the loan to Stearns Bank.

In April 2009, Stearns Bank issued a Notice of Default stating that Citrus had failed to make required payments.

In July 2009, Chicago Title recorded a Substitution of Trustee, which substituted Chicago Title as the new trustee under the deed of trust, and which identified the new lender/beneficiary as FNBN Rescon I, LLC (“Rescon”).

Several years later in 2014, Chicago Title recorded a new Notice of Default showing a total balance due of over \$20 million, followed by a Notice of Sale. A trustee's sale (nonjudicial foreclosure) occurred on March 5, 2015, and a Trustee's Deed was recorded the next day. Rescon obtained the property through a credit bid of \$7.2 million.

The wrongful foreclosure claim: dismissed

Citrus sued Chicago Title for wrongful foreclosure.

Citrus alleged that Chicago Title, as trustee under the deed of trust, was negligent in failing to verify that Rescon received a valid assignment of the loan, and in failing to verify the authority of the person who signed the substitution of trustee form appointing Chicago Title as trustee.

The trial court sustained Chicago Title's demurrer and dismissed the complaint, entering judgment in favor of Chicago Title.

Citrus appealed.

Court of Appeal's opinion: no duty

The Court of Appeal affirmed the trial court's judgment.

Under general California tort law, a loan beneficiary or a trustee under a deed of trust can be liable for wrongful foreclosure if they caused an "illegal, fraudulent, or willfully oppressive sale of real property" pursuant to a deed of trust.

Case law examples of trustees being held liable for wrongful foreclosure include a sale in which the trustee wrongfully refused to accept the borrower's pre-sale tender of the sum needed to cure the default, and a sale in which the trustee failed to give notice to the borrower at the borrower's current, known address.

But those cases finding trustee liability are the exceptions. Normally, trustees are not liable because of their narrowly circumscribed duties.

As the Court of Appeal explained, a trustee under a deed of trust "is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary." The trustee's role is "passive," and his duties are "exclusively defined by the deed of trust and the governing statutes" unless the trustee has taken on expanded duties by its actions.

In general, a trustee's **only duties** are: (1) to foreclose upon the borrower's default; and (2) to reconvey the deed of trust upon satisfaction of the secured debt.

The Court of Appeal ruled that neither the deed of trust nor the governing statutes created a duty on the part of Chicago Title to verify that the beneficiary received a valid assignment of the loan or to verify the authority of the person who signed the substitution of trustee.

Lesson

A trustee under a deed of trust has very narrow duties — essentially to foreclose if the borrower defaults, and to reconvey the deed of trust if the loan is repaid. Wrongful foreclosure claims based on alleged trustee duties going above and beyond those roles are unlikely to succeed.

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