United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar

Tuesday, December 11, 2018 **Hearing Room 302**

9:30 AM

1:16-12255 Solyman Yashouafar **Chapter 11**

Adv#: 1:17-01040 GOTTLIEB v. Elkwood Associates, LLC et al

#1.00 Motion to Dismiss the Abselets' First Amended Counterclaim.

fr. 11/15/18

Docket 165

Tentative Ruling:

First Counterclaim: Declaratory Relief

The allegations in the first claim for relief mirror those in the Trustee's first claim, which survived a separate motion to dismiss and, tentatively, a summary judgment motion by the Elkwood Defendants. The Elkwood Defendants argue, however, that this action for declaratory judgment is essentially an action for quiet title, and that, furthermore, the Abselets lack standing.

The Court agrees with the Abselets that an action for declaratory judgment is appropriate here. It appears that the only concern with a quiet title action is whether the Abselets, as junior lienholders, may quiet title in the Trustee. If that concern is founded, then the Abselets are seeking a remedy that could not be granted in a quiet title action. Regardless of what the action is called, it is clear what the Abselets are seeking.

The Elkwood defendants also argue that declaratory relief is not an independent claim, but rather a remedy. This argument is belied by their later arguments that declaratory relief is only allowed as a separate claim for relief under certain circumstances, such as when it seeks relief not available in a quiet title action.

The first claim for relief is sufficient to state a claim for the declaratory relief sought by the Abselets. As to standing, the Court agrees with the Abselets. Yvanova did not address the standing of junior lienholders who were prejudiced by an allegedly void foreclosure. However, because the rights of the Abselets were unquestionably prejudiced if the allegations are true, they have suffered sufficient injury for standing.

Irregularities

It is unclear what relief the Elkwood Defendants seek with respect to section II B 3 of the motion regarding alleged irregularities. Because there is, by the Elkwood Defendants' own acknowledgment, no cause of action attached to these allegations, the motion is

9:30 AM

CONT... Solyman Yashouafar **Chapter 11**

denied. The allegations may stand as part of the context of the other causes of action.

Second Counterclaim

The second counterclaim is "based on the counterfactual contention of the Nourafshan entities that Elkwood assigned only the New Solyman Obligation and the PWB Chalette DOT to Fieldbrook." The Court has considered the theory that the note was bifurcated and has rejected it, tentatively, in its ruling on the cross-motions for summary judgment. However, because that ruling is subject to the Elkwood Defendants' action for reformation, this issue may yet become relevant.

The Abselets seek a declaration that the Rexford foreclosure sale was void on two grounds. First, the complaint states that the bifurcated "New Massoud Obligation" was unsecured or otherwise that the Elkwood Defendants did not properly record a notice of default or Notice of Sale with respect to the New Massoud Obligation. Second, the complaint avers that any partial assignment was invalid because such assignment would have required the consent of the Debtors and the junior lienholders.

The Abselets' argument for how the debt was unsecured does not state a plausible claim. According to the opposition, the definition sections of the relevant loan documents do not create a security interest in the "New Massoud Obligation."

> The PWB Rexford DOT defines "INDEBTEDNESS" as "**all** principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Trustor's obligations or expenses Incurred by Trustee or Lender to enforce Trustor's obligations under this Deed of Trust, together with Interest on such amounts as provided in this Deed of Trust. . . .
>
> The New Massoud Obligation is not the "INDEBTEDNESS" secured by the Rexford DOT because it is not "all" of the amounts due under the PWB Note or "Related Documents." It was a mere 11.89% of the INDEBTEDNESS.

Opposition, 12:15-13-3. This labored reading of the loan document has no merit for the reasons stated in the Elkwood Defendants' reply.

9:30 AM

CONT... Solyman Yashouafar **Chapter 11**

The second theory for the second counterclaim does not state a plausible claim for relief. The bifurcation of the note, if one occurred, would have been very prejudicial to junior lienholders, including the Abselets. However, the Abselets have not provided any legal authority to support their contention that a "material split" requiring the consent of junior lienholders. The authority relied upon by the Abselets does not support the remedy sought. In Gluskin v. Atl. Sav. & Loan Assn., the court held that a lender and a borrower may not bilaterally make a material modification in the loan to which the seller has subordinated without the knowledge and consent of the seller to that modification if the modification materially affects the seller's rights. 32 Cal. App. 3d 307 (Ct. App. 1973). Gluskin arose in the context of a subordination agreement which was essentially three-way transaction. The Gluskin court recognized "the vulnerable position in which a seller who agrees to subordinate his purchase money deed of trust may find himself." Id. at 313. The court stated that there were "strong public policy reasons to protect the seller in subordination situations." Id. This Court is not willing to stretch this principle from a 45-year-old case to the current situation.

The other authority cited by the Abselets similarly focuses on subordination of the senior lien, particularly in the context of subordination agreements in construction loans. In fact, the treatise cited by the Abselets seems to refute their own theory. After discussing subordination in the context of construction loans, the treatise says the following:

> **Alternate view that consensual junior lienor is inherently at risk of modification of the senior lienor.** The possible argument from these earlier cases, that all junior lienors, not solely subordinating sellers, should be able to gain priority over modifications to the senior lien made without their consent, has been rejected. The most recent case emphasizes that accepting a junior lien position necessarily exposes the junior lienor to the risk of modifications of the senior lien. If the junior lienor is reluctant to incur this risk, the junior lienor can either decline to extend credit in a junior position or else, prior to extending credit or accepting a junior lien position, the junior lienor can negotiate specific terms of a subordination or intercreditor agreement to provide contractual protection against such modifications. The senior lienor owes "no express or implied contractual duties" to a person who extends credit in a junior position without its consent. To the contrary, establishing a rule that protects junior creditors from any material change in a

senior loan would upset the California "first in time, first in right" system of lien priorities, and give undue protection to a junior creditor who "takes a calculated investment risk" by accepting a junior position

Miller & Starr, California Real Estate, 4 Cal. Real Est. § 10:102 (4th ed. August 2018 Update). Notably, none of the cases cited by the Abselets provided any plaintiff with the relief sought by the Abselets: a declaration that the foreclosure was void. All of the cases cited similarly involve subordination agreements, which place the subordinating lienholder "in an especially vulnerable position." Friery v. Sutter Buttes Sav. Bank, 61 Cal. App. 4th 869, 876 (1998).

The second cause of action does not state a plausible claim for relief due to the lack of supporting legal authority. The motion is GRANTED as to the second claim for relief.

Third counterclaim: intentional fraudulent transfer, Rexford Home. Defendant does not seek dismissal.

Fourth and Fifth counterclaims - Conversion of Chalette proceeds and Money had and received for Chalette Proceeds. Motion denied as Abselets have alleged sufficient facts to support the claims under Lee v. Hanley, 61 Cal. 4th 1225, 1240 (2015) and Baldwin v. Marina City Properties, 79 Cal. App. 3d 393, 403 (1978).

Sixth Counterclaim: Unjust Enrichment

Some states recognize an independent claim for "unjust enrichment" or "restitution." See, e.g., Larisa's Home Care, LLC v. Nichols-Shields, 362 Or. 115 (2017). In California, the majority of courts do not recognize a cause of action for unjust enrichment. Forcellati v. Hyland's, Inc., 876 F. Supp. 2d 1155, 1166 (C.D. Cal. 2012) ("we agree with Defendants that the majority of state and federal district courts in California do not recognize unjust enrichment as a freestanding claim."); Mckell v. Wash. Mut., Inc., 142 Cal.App. 4th 1457, 1490 (2006). Unjust enrichment is instead a remedy under California law. Swain v. CACH, LLC, 699 F. Supp. 2d 1109, 1115 (N.D. Cal. 2009). Because there is no independent cause of action for unjust enrichment under California law, the Motion is GRANTED as to the sixth counterclaim

9:30 AM

CONT... Solyman Yashouafar **Chapter 11**

Seventh Counterclaim: Actual fraudulent transfer: Chalette Proceeds, stands for now as well

Eighth Counterclaim: Conspiracy to Chill bidding. The court agrees that Abselets are not required to tender since they seek damages here, not a reversal of foreclosure. The cases cited by the Abselets generally support this theory as alleged in the complaint.

Party Information

Debtor(s):

Solyman Yashouafar	Represented By Mark E Goodfriend

Defendant(s):

Elkwood Associates, LLC	Represented By Daniel J McCarthy
Fieldbrook, Inc.	Represented By Daniel J McCarthy
Soda Partners, LLC	Represented By Ronald N Richards
Quality Loan Service	Pro Se
Chase Manhattan Mortgage Co.	Pro Se
Howard Abselet	Represented By Henry S David
Israel Abselet	Represented By Henry S David
Citivest financial Services, Inc.	Pro Se
State Street Bank and Trust Co.	Pro Se
DMARC 2007-CD5 Garden Street,	Represented By Timothy C Aires
QUALITY LOAN SERVICE	Pro Se

9:30 AM
CONT... Solyman Yashouafar **Chapter 11**

Plaintiff(s):

DAVID K GOTTLIEB — Represented By
Jeremy V Richards
John W Lucas

Trustee(s):

David Keith Gottlieb (TR) — Represented By
Jeremy V Richards
John W Lucas

1:16-12255 Solyman Yashouafar **Chapter 11**
Adv#: 1:17-01040 GOTTLIEB v. Elkwood Associates, LLC et al

#2.00 Motion of David K. Gottlieb, Chapter 11 Trustee, for Summary Judgment on First Claim for Relief (Quiet Title) Against Defendants Elkwood Associates, LLC and Fieldbrook, Inc.

fr. 9/18/18; 10/10/2018; 11/15/18

Docket 98

Tentative Ruling:

The cross motions for summary judgment address mostly the same issues, so the following tentative ruling addresses both motions together and will be revised in a written ruling following argument:

I.

Trustee's Motion only seeks summary judgment on the first claim for relief: quiet title as to the Rexford Property. Quiet Title claims are actionable under Cal. Civ. Pro. Code § 760.020. Trustee argues that the foreclosure of the Rexford home was void because Elkwood assigned the entire PWB Note to Fieldbrook before the foreclosure sale. Trustee argues further that the PWB note could not be split and assigned in part without the written consent of the borrowers, and that Trustee's rights as a *bona fide* purchaser of the Rexford Property bars reformation of the

contract.

Bifurcation of the PWB Note

The success or failure of Trustee's Motion turns on whether the rights to foreclose under the Rexford DOT were transferred from Elkwood to Fieldbrook in the February 18, 2015 Fieldbrook Assignment.

There seems to be no dispute that when Elkwood obtained the PWB Note from Pacific Western Bank, it remained a single note secured by both the Rexford DOT and the Chalette DOT. Similarly, there is no contention that the PWB Note was in any way altered before Elkwood executed the Fieldbrook Assignment. The Fieldbrook Assignment, therefore, is the contract under which any "bifurcation," "splitting," "partial assignment," or assignment of a "participating interest," as the transaction has been variously described,[1] must have occurred.

Under California law, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636. However, "it is not the parties' subjective intent that matters, but rather their objective intent, as evidenced by the words of the contract." Block v. eBay, Inc., 747 F.3d 1135, 1138 (9th Cir. 2014) (internal quotations omitted). "California recognizes the objective theory of contracts, under which it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." Reilly v. Inquest Tech., Inc., 218 Cal. App. 4th 536, 554 (2013). The Court must examine the wording of the Fieldbrook Assignment to determine the objective intent of the contracting parties.

The operative language of the Fieldbrook Assignment in its entirety is as follows:

> For Value Received, the undersigned ELKWOOD ASSOCIATES, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY hereby grants, assigns, transfers and conveys to FIELDBROOK, INC., A CALIFORNIA CORPORATION all of its right, title and beneficial Interest In and to that certain Deed of Trust dated MARCH 20, 2009 executed by SOLYMAN YASHOUAFAR, AS TRUSTEE OF THE SOLYMAN AND SOHEILA YASHOUAFAR 2004 TRUST DATED MARCH 8, 2004 as Trustor, to PACIFIC WESTERN BANK, as Trustee, for the benefit of PACIFIC WESTERN BANK as beneficiary and recorded as Instrument No. 20090425658, on March 25, 2009, In Book _____, Page _____ of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land in said county as,
>
> Lot 34 in Tract No. 24484, in the city of Beverly Hills, County of Los Angeles, State of California, as per map recorded in book 657, pages 99 and 100 of maps, in the office of the county recorder of said county.
>
> A.P.N. 4391-009-002 AKA: 580 CHALETTE DRIVE, BEVERLY HILLS, CA 90210
>
> Together with the Secured Promissory Note or Notes therein described or referred to,

> the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust, any liens, security interest, and remedies arising thereunder. This Assignment is made without recourse, representations or warranties of any kind except as may be set forth in any Loan Sale Agreement that may be between assignor and assignee.

Fieldbrook Assignment, RJN ISO T'ee MSJ at Ex. D. By its terms, the assignment purports to assign the Chalette DOT and the PWB Note from Elkwood to Fieldbrook. Conspicuously absent from the Fieldbrook Assignment is any reference to the Rexford DoT, which also secured the PWB Note. Defendants argue that the Fieldbrook assignment contains a latent ambiguity requiring the admission of extrinsic evidence.

Extrinsic Evidence

A latent ambiguity exists when a document, while unambiguous on its face, may be reasonably susceptible to more than one possible meaning upon production of extrinsic evidence. Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 391 (2006). "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." Id. (quoting Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37 (1968)).[2] The Pacific Gas Court reasoned that, under California law, "the intention of the parties as expressed in the contract is the source of contractual rights and duties." Pacific Gas, 69 Cal. 2d at 38. Extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract. Id. at 33.

The Fieldbrook assignment is not reasonably susceptible to a reading that the PWB Note would be bifurcated and $5.8 million of the note secured by only the Chalette DOT would be transferred to Fieldbrook while the remainder of the PWB Note and the Rexford DOT would remain with Elkwood. No amount of extrinsic evidence would allow such a wholesale re-imagining of the terms of the Fieldbrook Assignment. The phrase "[t]ogether with the Secured Promissory Note or Notes therein described or referred to" clearly indicates that all notes secured by the Chalette DOT were transferred in the Fieldbrook Assignment, without any qualification or limitation. While Defendants attach evidence that indicates an intent to assign only a portion of the PWB Note, that evidence does not indicate an ambiguity in the language of the Fieldbrook Assignment—instead, that extrinsic evidence "flatly contradicts" the language quoted above. Consolidated World Investments, Inc. v. Lido Preferred Ltd., 9 Cal. App. 4th 373, 379 (Cal. Ct. App. 1992). The phrase "[t]ogether with the Secured Promissory Note or Notes therein described" is not reasonably susceptible to the reading "[t]ogether with *$5.8 million of* the Secured Promissory Note or Notes

therein described. . . ." Trustee's Reply, 2:21-3:1. See Gerdlund v. Elec. Dispensers Int'l, 235 Cal. Rptr. 279, 284 (Cal. Ct. App. 1987) (refusing to admit parol evidence where contract language stating that "[n]otice of termination may be given at any time and for any reason" was not reasonably susceptible to the proposed reading that such notice could only be given "for any *good* reason.").

Furthermore, the evidence produced by Defendants to support the bifurcation of the PWB Note does not prove a clear intent to have the note bifurcated where all material inferences must be made against the non-moving party. While most facts are not in dispute on these cross motions, the Trustee and the Abselets dispute the significant assertions of fact concerning the bifurcation as self-serving. These statements have not been cross examined at trial and must be evaluated in light of all the evidence. While there were certainly negotiations with Pacific Western Bank regarding some sort of bifurcation of the PWB Note, those negotiations were carried out by an entity which is not party to this litigation, Kensington. While the emails to Mr. Garcia at Pacific Western Bank may demonstrate Kensington's intent to bifurcate the PWB Note, those emails do not provide evidence of the intent of separate legal entities, Elkwood and Fieldbrook. Defendants ask the Court to simply ignore the corporate form—as Jack Nourafshan appears to have—and assume that all three entities acted with one will. In doing so, Defendants are asking for the benefits of the corporate form without any of the responsibilities. This would be particularly inequitable in light of the underlying allegations of fraud which have not been fully litigated.

The Guerrero Memo, which was apparently executed on behalf of Fieldbrook, indicates that the portion of the PWB Note that was transferred to Fieldbrook was $5.8 million. The fact that the Guerrero Memo states that "we" have assigned the Chalette DoT to Fieldbrook, on Fieldbrook's own letterhead, is a further example of Nourafshan's lack of regard for distinct corporate entities. The Guerrero Memo was written the day before Fieldbrook obtained an interest in the Property.

The material undisputed facts are simply that the Fieldbrook Assignment, as recorded at the Los Angeles County Recorder's Office, does not in any way bifurcate the PWB Note, it merely assigns the PWB Note and Chalette DOT to Fieldbrook. Nor has any other document been provided by the Elkwood Defendants purporting to bifurcate the PWB Note.[3]

Disposition of the Rexford DOT

The Court's determination that extrinsic evidence is not appropriate to support a bifurcation of the PWB Note does not resolve the disposition of the Rexford DOT. Because the Fieldbrook Assignment did not mention the

Rexford DOT, but assigned the entire PWB Note, the question remains as to whether Elkwood had the right to foreclose under the Rexford DOT. Defendants argue that the failure to mention the Rexford DOT constitutes a patent ambiguity in the Fieldbrook Assignment. Regardless of whether the ambiguity is patent or latent, the Fieldbrook Assignment is susceptible to the reading suggested by the Elkwood Defendants' extrinsic evidence: the Fieldbrook Assignment was not intended to transfer the Rexford DOT. However, because the Rexford DOT was assigned to Fieldbrook as a matter of law, the extrinsic evidence is of no consequence.

A plain reading of the document is that no ambiguity exists regarding the bifurcation of the amount due, but an ambiguity does exist regarding the disposition of the Rexford DOT. If the Court were to admit extrinsic evidence to determine the intent of the parties with regard to the Rexford DOT, the Court could not use that same evidence to bifurcate the PWB Note as requested by the Elkwood Defendants.[4] Cross-Motion, 13:17-21. Extrinsic evidence cannot be used to show that only $5.8 million of the PWB Note was transferred in the Fieldbrook Assignment because the language of the Fieldbrook Assignment is not reasonably susceptible to that reading. The Elkwood Defendants misapply the rule from Pacific Gas by implying that admission of extrinsic evidence to interpret an ambiguity is separate from the "reasonably susceptible" test of Pacific Gas. Cross-Motion, 25:3-5.

> One exception to the parol evidence rule is that extrinsic evidence may be introduced to explain the meaning of ambiguous contractual language. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'

Consol. World Investments, Inc. v. Lido Preferred Ltd., 9 Cal. App. 4th 373, 379 (1992).

The Trustee is correct that the entire PWB Note was transferred to Fieldbrook days before the Rexford foreclosure, so the issue is whether, as Trustee argues, the Rexford DOT was also necessarily transferred to Fieldbrook. Trustee's Motion, 18:1-20. First, there has been no authority presented that a deed of trust can be separated from the note it secures and remain valid, nor do the Elkwood Defendants make that argument. The Elkwood Defendants instead focus their argument on enforcing their stated intention of assigning only a portion of the PWB Note—an argument which the law does not support.

The transfer of the entire PWB Note to Fieldbrook carried with it the Rexford DOT. "The assignment of a debt secured by mortgage carries with it the security." Cal. Civ. Code § 2936.

> The assignment of a secured debt carries with it the security, since the security is a mere incident of the debt. [Civ. Code, §§ 1084, 2936] The endorsement and delivery of the promissory note secured by a deed of trust

> or mortgage accomplishes the transfer of the security without the necessity of a formal assignment of the trust deed or mortgage itself. The trust deed or mortgage, in fact, need not even be mentioned in the assignment. [Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal 2d 284, 267 P2d 16] On the other hand, an assignment of the trust deed or mortgage without a transfer of the note, that is, of the security without the debt, is completely ineffective. The assignee has nothing except the possibility of an action against the assignor to compel the assignor to transfer the note as well as the security, if that was the agreement. [Kelley v. Upshaw (1952) 39 Cal 2d 179, 246 P2d 23] When one assignee takes the note and another takes the trust deed or mortgage, the holder of the note prevails regardless of the time of transfer. [Adler v. Sargent (1895) 109 Cal 42, 41 P 799]

Cal. Civ. Prac. Real Property Litigation § 4:28, Rights of assignee; see also In re Macklin, 495 B.R. 8, 13 (Bankr. E.D. Cal. 2013) ("The note and the mortgage are inseparable; the former as essential, the later as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 927 (2016) ("The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment.").

The next issue is whether the Trustee's Deed Upon Sale is void. The Court determines that it is. As described above, the Fieldbrook Assignment transferred the entire PWB Note and, consequently, the Rexford DOT. When Elkwood foreclosed, it had neither the right to foreclose nor the right to credit bid. Therefore, the recorded Trustee's Deed Upon Sale was void, and must be treated as a "blank piece of paper." Los Angeles v. Morgan, 105 Cal. App. 2d at 733; See also Taormina Theosophical Community, Inc. v. Silver, 140 Cal. App.3d. 964, 971 (Cal. App. 2d Dist. 1983) ("[T]he act of recording the November 9 CCRs did not make them enforceable. The purpose of recording is to protect innocent purchasers and encumbrancers of property by giving notice of potential limitations on title. . . Recording itself grants no interest in the property, and a void document 'derives no validity from the mere fact that it is recorded.'" (citations omitted)). No action was taken to correct the defective Trustee's Deed Upon Sale before the bankruptcy was filed. This, however, does not resolve the first claim for relief because of the other issues raised.

Tender

As explained in the earlier motions to dismiss, because the foreclosure is void, the Trustee is not required to tender the loan proceeds to proceed with this action.

Participation

The Elkwood Defendants have argued that the Court could consider the transaction between Elkwood and

Fieldbrook to be a participation agreement, which is authorized under the Business Loan Agreement that was related to the PWB Note. See Nourafshan Declaration, Ex. G, P. 5. Participations "are contractual arrangements between a lender and a third party, in which the third party, or participant, provides funds to the lender. The lender, in turn, uses the funds from the participant to make loans to the borrower." In re ACRO Bus. Fin. Corp., 357 B.R. 785, 787 (Bankr. D. Minn. 2006). To determine whether a transaction is a participation agreement, courts have considered the following factors: "a) money is advanced by participant to a lead lender; b) a participant's right to repayment only arises when a lead lender is paid; c) only the lead lender can seek legal recourse against the borrower; and, d) the document is evidence of the parties true intentions." In re Coronet Capital Co., 142 B.R. 78, 82 (Bankr. S.D.N.Y. 1992).

While Trustee cites out-of-circuit cases to describe the nature of such agreements, the law appears consistent among jurisdictions and the Elkwood Defendants provide no law in support of their assertion that Participation in the PWB Note is legally equivalent to a partial assignment. Cross-Motion, 23:13-15. A participation is not merely a partial assignment, but a specific and technical agreement.

> Mortgage lenders frequently wish to assign partial interests in a loan or a group of loans to one or more investors. Such transactions occur in two common contexts. The first is the case of a very large loan which may be beyond the financial resources of the originating or "lead" lender. The creation of "participation" interests by way of partial assignments that can be sold to one or more other financial institutions allows the lead lender to reduce its investment in the underlying loan, and at the same time spreads the risk of a possible loan default. . . .
>
> Generally at least two documents are involved in the sale of participation interests of the latter type: a participation agreement and a participation certificate (PC). The first will set forth the parties' rights and duties in general, while the second will state the particular share or percentage that the investor is receiving, and may also identify the loans included in the package. In the first type of participation, involving a single large loan, all of this information will usually be contained in a single agreement.
>
> Whatever the format, the documents should be drafted to state the parties' agreement on a number of important issues, including the following. As among the participants, and as against the lead lender, who will have priority in the loan and foreclosure proceeds? In most cases the participants have equal priority; whether the lead lender will share their priority or be subordinate to them as to any retained interest in the loans is a matter for negotiation. Other financial benefits of the loan, such as default interest, prepayment fees, and extension or assumption fees, should also be allocated. . . .
>
> [T]he participants cannot be holders of the notes, and hence probably cannot enforce them directly.

1 Real Estate Finance Law § 5:35 Partial assignments and participations (6th ed.). No money was advanced by the alleged "participant," Fieldbrook, to the "lender," Elkwood. Also relevant is the fact that Fieldbrook itself pursued foreclosure against the Chalette Property under the PWB Note, which is not consistent with a participant's rights as described above. Furthermore, the language of the Fieldbrook Assignment indicates that the Elkwood Defendants intended an assignment, not a participation agreement. There is insufficient evidence and no legal support for considering the Fieldbrook assignment to be a participation agreement, under which no notice was required.

Prejudice

The Elkwood Defendants further argue that, because Debtors were not prejudiced by a partial assignment of the PWB Note and the Chalette DOT, Trustee may not object. Elkwood Defendants' Motion, 27:13-14. The issue of prejudice arises in the case law in two contexts: first, as a requirement for standing, and second as an element of a wrongful foreclosure claim.

Prejudice as Required for Standing

The Elkwood Defendants' primary contention is that Trustee lacks standing:

> Plaintiff neither alleges nor proves any prejudice beyond the mere foreclosure, which means that he lacks standing, as defined under California case law for purposes of a borrower's claim that a foreclosures sale is void.

Elkwood Defendants' Reply to Elkwood Motion, 6:21-23. This issue was also raised and argued at the February 27, 2018 hearing on the Elkwood Defendants' motion to dismiss the second amended complaint. The Elkwood Defendants are incorrect.

The California Supreme Court in Yvanova v. New Century Mortg. Corp. is the lead case on this area of law. 62 Cal. 4th 919 (2016). In Yvanova, a homeowner challenged the foreclosure of her home by an entity who allegedly did not own the note and deed of trust because the assignment in which the entity received its interest was allegedly void. The court held that, if an assignment necessary to the chain of title is void, the entity seeking a trustee's sale had no legal authority to do so and the "unauthorized sale constitutes a wrongful foreclosure." Id. at 935. The court saw its ruling as narrow in scope, ruling that a homeowner in default and who was not a party to the assignment would have standing to challenge an assignment of the note and deed of trust if the homeowner claimed that the assignment was void, not merely voidable. Id. at 924.

The Yvanova court did not "address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements," Id. at 924, leaving other courts to resolve those questions.[5] Instead, prejudice was discussed in terms of an injury for purposes of the constitutional requirement of standing. "[W]e are concerned only with prejudice in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort." Id. at 937 (emphasis added) (citing Culhane v. Aurora Loan Servs. of Nebraska, 708 F.3d 282 (1st Cir. 2013) ("For purposes of standing doctrine, an injury is defined as an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. The foreclosure of the plaintiff's home is unquestionably a concrete and particularized injury to her."). In order to have standing, a plaintiff "must be able to allege injury—that is, some invasion of the plaintiff's legally protected interests." Angelucci v. Century Supper Club, 41 Cal. 4th 160, 175, 158 P.3d 718, 726–27 (2007)

> As it relates to standing, we disagree with defendants' analysis of prejudice from an illegal foreclosure. A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests—the borrower has lost ownership to the home in an allegedly illegal trustee's sale.

Id. at 937 (citation omitted). In the underlined portions above, the Yvanova court clearly distinguishes between prejudice as a standing issue and prejudice as an element to the tort of wrongful foreclosure. It is equally clear from the language above that a homeowner whose home was foreclosed upon by one with no right to do so had standing to challenge that foreclosure. It is irrelevant for purposes of standing whether the homeowner seeks relief in a wrongful foreclosure action or a quiet title action.

Yvanova is not distinguishable and inapplicable, as Defendants argue, because it involved an attack on an assignment, where here Trustee argues that the assignment is valid, and that the foreclosure is therefore void. While Yvanova and the other related cases involve a void assignment rather than only an allegedly void foreclosure, the ultimate result is clearly to allow challenges to void foreclosures, not merely void assignments. See Glaski v. Bank of Am., 218 Cal. App. 4th 1079, 1101 (2013) ("[W]here a plaintiff alleges that the entity lacked authority to foreclose on the property, the foreclosure sale would be void."). There are many passages of Yvanova which make this clear:

> In itself, the principle that only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt is not, or

> at least should not be, controversial. It is a straightforward application of well-established commercial and real-property law: a party cannot foreclose on a mortgage unless it is the mortgagee (or its agent).

Yvanova, 62 Cal.4th at 928. "A foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action." Id. at 929. Clearly, Yvanova is not so absurdly narrow as to only allow standing to challenge void assignments; it also grants the wronged party standing to challenge a void foreclosure.[6]

Prejudice as an Element of Wrongful Foreclosure

Trustee argued at the motion to dismiss stage and continues to argue that the first claim for relief seeks quiet title, not to set aside foreclosure[7], and that prejudice is not a requirement of quiet title. Trustee's Opposition to Cross-Motion, 24:13-28. Quiet title actions are controlled by Cal. Civ. Proc. § 761.020. To state a claim for quiet title, a complaint must include (1) the subject property's description, including both its legal description and its street address or common designation; (2) plaintiff's alleged title to the property; (3) the adverse claims against which a determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title against the adverse claims. Metcalf v. Drexel Lending Grp., No. 08-CV-00731 W POR, 2008 WL 4748134, at *5 (S.D. Cal. Oct. 29, 2008).

The Elkwood Defendants argue that, in effect, a quiet title claim based upon a void foreclosure must necessarily be accompanied by a wrongful foreclosure action. Two legal issues are raised with that argument: 1) can a quiet title action attacking an allegedly void foreclosure of real property succeed without an accompanying successful wrongful foreclosure tort, and 2) in the context of such a quiet title action, is prejudice beyond the fact of foreclosure required as a substantive requirement of the claim?

The court in Sciarratta v. U.S. Bank Nat'l Assn., relying in part on Yvanova, held that when a homeowner is foreclosed on by one with no right to do so, that homeowner is sufficiently prejudiced to challenge the allegedly void assignment in a wrongful foreclosure action. 247 Cal. App. 4th 552, 565-66 (2016). The Elkwood Defendants cite Cardenas v. Caliber Home Loans, Inc., which explicitly rejects the Sciaratta court's approach, finding that the failure to allege any prejudice beyond the fact of foreclosure is fatal to an action to set aside a foreclosure based upon a void assignment. 281 F. Supp. 3d 862, 873 (N.D. Cal. 2017).[8]

To the extent the Elkwood Defendants argue that a quiet title action under these circumstances must be accompanied by a wrongful foreclosure action, the Court disagrees. First, the Elkwood Defendants' have provided

no authority to that effect. Second, this argument was never raised at the motion to dismiss stage, at which the court dismissed the action for wrongful foreclosure in part because it was duplicative of the quiet title action. The wrongful foreclosure action was dismissed on the belief that the prejudice issue would become irrelevant, as prejudice is not an element of quiet title. Third and most importantly, prejudice is not an element of a quiet title action.

The Abselets, in their opposition to the Cross Motion, argue that Massoud, in whose shoes Trustee stands,[9] was prejudiced by 1) losing the opportunity to find funds to pay $782,000 for the "New Massoud Obligation" (the amount Massoud would owe if the Note were bifurcated, as the Elkwood Defendants' seek); 2) if Massoud could not produce those funds, "the Abselets would have stepped in" to pay that amount in order to protect their interest, "relieving Massoud of substantial obligations," Abselet Opp. To Elkwood Motion, 19:7-20; and 3) Massoud could have "paid off the Original Obligation through bidding at the foreclosure on the Chalette Home, and freed his home from the subject loan altogether," Id. at 22:20-23:4. These theories offered to satisfy the prejudice requirement, while possibly reasonable in a vacuum, are confusing in light of the allegations of fraud and collusion advanced by both the Abselets and the Trustee.

Reformation of Contract

Reformation is raised as part of the Defendants cross motion for summary judgment and as a defense to the Trustee's first cause of action. Reformation of contract under California law is governed by Cal. Civ. Code. § 3399:

When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

Trustee argues that the equitable remedy of reformation cannot be used to defeat the rights of a trustee in a bankruptcy case because of the Trustee's rights as a *bona fide* purchaser of real property pursuant to § 544(a)(3). The final clause of Cal. Civ. Code § 3399, "so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value," indicates that reformation is not available where the rights of a *bona fide purchaser* would be prejudiced.

Trustee's Rights as Bona Fide Purchaser

Trustee has argued that his standing as a hypothetical *bona fide purchaser* of real property under the strong-arm powers of § 544(a)(3) precludes any action for reformation of contract by the Elkwood Defendants. Trustee Motion 19:16-24:4. The Elkwood Defendants respond that reformation is available despite Trustee's powers under § 544(a)(3) because Elkwood recorded a Trustee's Deed upon Sale following the foreclosure of the Rexford Property. The purpose of § 544(a)(3) is to encourage perfection of interests in real property, such as mortgages. The question for the Court is whether a purchaser would have been on notice of Elkwood's interest in the Rexford Property. A reformation action will be allowed only if a hypothetical *bona fide* purchaser would have had notice of Elkwood's interest. See, e.g., In re Weisman, 5 F.3d 417, 420 (9th Cir. 1993); In re Probasco, 839 F.2d 1352, 1354 (9th Cir. 1988).

The rights of a *bona fide* purchaser under § 544(a)(3) are defined by state law. In re Tleel, 876 F.2d 769, 772 (9th Cir. 1989). In California, a purchaser of real estate for value without actual or constructive notice of a prior interest is given status as a *bona fide purchaser*. Id. Because § 544(a) specifies that a trustee has its strong-arm powers "without respect to any knowledge," "actual notice cannot overcome the Trustee's *bona fide purchaser* status." Id. However, constructive or inquiry notice can preclude a Trustee's status as a *bona fide purchaser* under § 544(a)(3). In re Harvey, 222 B.R. 888, 893 (B.A.P. 9th Cir. 1998). Constructive notice in the context of real estate is provided by recordation of interests against the property. Cal. Civ. Code §§ 19, 1214.

Trustee acknowledges that a hypothetical purchaser viewing the real estate records for the Rexford Property on the petition date would have seen the Trustee's Deed Upon Sale filed by Elkwood recorded March 6, 2015. Trustee RJN, Ex. G.[10] Typically, this recorded document would provide constructive notice to any potential purchaser of an adverse interest in the property. However, Trustee argues that the Trustee's Deed Upon Sale is void. A recorded document, if void, should be treated "as a blank sheet of paper" and therefore does not provide constructive notice. City of Los Angeles v. Morgan, 105 Cal. App. 2d 726, 733 (1951) ("[I]t is obvious that invalid documents are not entitled to be recorded, but if they are recorded, they do not give constructive notice."); See also 5 Collier on Bankruptcy ¶ 544.02 (16th 2018) ("Where the holder of a security interest has not taken the essential steps to perfect that security interest, or where the recording is defective, the trustee does not have constructive notice.").

Rights under § 544(a)(3) may be cut off where any *bona fide* purchaser would have inquiry notice of a

superior interest in the property. Courts have applied the standard of whether a "prudent purchaser," in light of reasonably available information, would have made an inquiry about the alleged interest. In re Weisman, 5 F.3d 417, 420 (9th Cir. 1993).

A "prudent purchaser" describes someone who is shrewd in the management of practical affairs and whose conduct is marked by wisdom, judiciousness, or circumspection. *See Probasco,* 839 F.2d at 1356. Such a purchaser will be charged with knowledge of 1) the nature of the property; 2) its current use; 3) the identities of the persons occupying it; 4) the relationship among them; and, 5) the relationship between those in possession and the person whose purported interest in the property the purchaser intended to acquire. Id. Clear and open possession of real property by someone other than the party on title constitutes constructive notice to subsequent purchasers, requiring such purchasers to inquire into the possessor's interest. In re Probasco, 839 F.2d 1352, 1354 (9th Cir. 1988). By the same token, "there is no duty to inquire upon a subsequent purchaser regarding any unknown claims or interest by a person in possession of real property where the occupant's possession is consistent with the record title." Weisman, 5 F.3d at 421.

The court in Probasco decided that is was "almost inconceivable" that a reasonably prudent person, "knowing that Parcels 2 and 3 were jointly owned, and seeing a perimeter fence around all three parcels, no fence between the parcels, the staking of all three parcels, and roads traversing the entire property, would not inquire whether a one-half owner of Parcels 2 and 3 had an interest in Parcel 1." Probasco, 839 F.2d at 1356. Therefore, the court held that the debtor-in-possession, as a hypothetical *bona fide* purchaser under § 544(a)(3), had inquiry notice of a superior interest in the real property, Id. at 1357, and the court further required that the deed be reformed to include all three properties, Id. at 1356. Notably, the success of the reformation action depended upon the trustee having constructive or inquiry notice of the allegedly unperfected interest. Similarly, the court in Weisman held that a reasonably prudent purchaser would have inquired whether debtor had executed an unrecorded deed conveying her interest in property currently occupied by her ex-husband and his new wife. Weisman, 5 F.3d at 422. The court determined that, realistically, people are not willing to allow their ex-husband and his new wife to reside in property still jointly owned by the divorced couple. The Weisman court therefore found that the bankruptcy trustee did not have a superior interest to the unrecorded deed as a under § 544(a)(3) because the trustee was on inquiry notice due to the observable facts surrounding the occupancy of the home. See also In re Sale Guar. Corp., 220 B.R. 660, 666 (B.A.P. 9th Cir. 1998), aff'd, 199 F.3d 1375 (9th Cir. 2000) (Trustee's rights as BFP cut off by

constructive knowledge that property was possessed by parties other than Debtor because a "prudent purchaser" is charged with the knowledge of: (1) the nature of the property; (2) the current use of the property; (3) the identity of the person in possession of the property; and (4) the relationship between the person in possession and the person whose interest the purchaser intends to acquire. (citing In re Weisman,)).

Here, reasonable inspection of the Rexford home would not have put a hypothetical *bona fide* purchaser on inquiry notice of changed ownership of the property due to the highly unusual circumstance of Elkwood, following an alleged foreclosure, allowing Massoud to continue residing at the property. An individual purchasing the home from Massoud on the date of the petition, upon reviewing title, would see that Massoud owned the property subject to certain liens.

Lastly, while a hypothetical *bona fide* purchaser would realistically see the Trustee's Deed Upon Sale in the property records, if that document is void, it would not provide inquiry notice of Elkwood's interest.[11]

Cal. Civ. Code § 1640

Defendants argue that, if the Fieldbrook Assignment is interpreted as assigning the entire PWB Note, any language that suggests that the entire PWB Note was assigned must be disregarded under Cal. Civ. Code § 1640 and the contract should be reformed to reflect Defendants' intent. Defendants' Opp., 17:2-21:15. The language of the statute is as follows:

When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. Cal. Civ. Code § 1640. This provision is one of several rules for the construction of contractual language in California's civil code. Payne v. Commercial Nat. Bank of Los Angeles, 177 Cal. 68, 72 (1917). In the case of mutual mistake, the contract may be reformed to conform to the intent of the parties. Thrifty Payless, Inc. v. The Americana at Brand, LLC, 218 Cal. App. 4th 1230, 1243 (2013). Parol evidence may be considered in making a determination of the true intentions of the contracting parties. Id. "Only gross negligence or 'preposterous or irrational' conduct will bar mutual mistake. . . Mistake must be pleaded with some particularity so that there is 'a clear recitation of facts showing how, when and why the mistake occurred.'" Id., citing George v. Auto. Club of S. California, 201 Cal. App. 4th 1112, 1132 (2011).

The intent of the Elkwood Defendants at the time of the Fieldbrook Assignment is disputed, and therefore summary judgment cannot be entered in their favor under this theory. The Court agrees with the Elkwood Defendants that the remedy for mutual mistake is reformation of the agreement under Cal. Civ. Code § 3399, and

that relief in a reformation action may go beyond merely disregarding certain phrases. Trustee raises legitimate concerns that the Elkwood Defendants have not met the requirement articulated in Thrifty and George of clearly reciting facts showing how, when, and why the mistake occurred. Because summary judgment cannot be granted on the reformation action, the Court reserves these issues for resolution at a later time.

Because there is a disputed issue of material fact as to the intent of the parties to the contract, the Court cannot grant summary judgment in favor of either party on the issue of reformation. The Court does not need to reach the issue of whether the Trustee is a bona fide purchaser until the reformation issue is resolved at a subsequent trial.

II. Conclusion

Partial summary judgment is granted in Trustee's favor that the Fieldbrook Assignment is not reasonably susceptible to a reading that the note was bifurcated. The Fieldbrook Assignment must be read as providing that the entire PWB Note was transferred along with the Chalette DoT. The Rexford DoT was then also transferred as a matter of law. With regards to the reformation action, a genuine dispute of material fact exists as to the intention of the parties to the Fieldbrook assignment. Further, the factual issues of the alleged fraud may inform whether the equitable remedy of reformation is appropriate under these circumstances. The Trustee may stand in the shoes of a *bona fide* purchaser, but that issue is not reached unless the requirements for reformation are proven. While the Court holds that the foreclosure appears to be void, that determination is still subject to the affirmative defense of the reformation action. The Court rejects the Elkwood Defendants' standing argument and finds that Yvanova confers standing to the Trustee to bring this action. The Trustee's Motion and the Elkwood Defendants' Motion are otherwise denied, except as detailed above.

Party Information

Debtor(s):

Solyman Yashouafar — Represented By
Mark E Goodfriend

Defendant(s):

Elkwood Associates, LLC — Represented By
Daniel J McCarthy

Fieldbrook, Inc. — Represented By

9:30 AM

CONT... Solyman Yashouafar **Chapter 11**

	Daniel J McCarthy
Soda Partners, LLC	Represented By Ronald N Richards
Quality Loan Service	Pro Se
Chase Manhattan Mortgage Co.	Pro Se
Howard Abselet	Represented By Henry S David
Israel Abselet	Represented By Henry S David
Citivest financial Services, Inc.	Pro Se
State Street Bank and Trust Co.	Pro Se
DMARC 2007-CD5 Garden Street,	Represented By Timothy C Aires
QUALITY LOAN SERVICE	Pro Se

Movant(s):

DAVID K GOTTLIEB	Represented By Jeremy V Richards John W Lucas
DAVID K GOTTLIEB	Pro Se

Plaintiff(s):

DAVID K GOTTLIEB	Represented By Jeremy V Richards John W Lucas

Trustee(s):

David Keith Gottlieb (TR)	Represented By Jeremy V Richards John W Lucas

9:30 AM
CONT... Solyman Yashouafar **Chapter 11**
Adv#: 1:17-01040 GOTTLIEB v. Elkwood Associates, LLC et al

#3.00 Defendants' Cross-Motion for Summary Judgment on Plaintiffs First Claim for Relief (Quiet Title)

fr. 9/18/18; 10/10/2018; 11/15/18

Docket 102

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Solyman Yashouafar	Represented By Mark E Goodfriend

Defendant(s):

Elkwood Associates, LLC	Represented By Daniel J McCarthy
Fieldbrook, Inc.	Represented By Daniel J McCarthy
Soda Partners, LLC	Represented By Ronald N Richards
Quality Loan Service	Pro Se
Chase Manhattan Mortgage Co.	Pro Se
Howard Abselet	Represented By Henry S David
Israel Abselet	Represented By Henry S David
Citivest financial Services, Inc.	Pro Se

9:30 AM

CONT... Solyman Yashouafar **Chapter 11**

State Street Bank and Trust Co.	Pro Se
DMARC 2007-CD5 Garden Street,	Represented By Timothy C Aires
QUALITY LOAN SERVICE	Pro Se

Plaintiff(s):

DAVID K GOTTLIEB	Represented By Jeremy V Richards John W Lucas

Trustee(s):

David Keith Gottlieb (TR)	Represented By Jeremy V Richards John W Lucas

1:16-12255 Solyman Yashouafar **Chapter 11**

Adv#: 1:17-01040 GOTTLIEB v. Elkwood Associates, LLC et al

#4.00 Status conference re: first amended counterclaim for:
1) declaratory relief (two counts)
2) avoid foreclosure sales (two counts)
3) conversion
4) money had and received
5) unjust enrichment
6) conspiracy to chill bidding

fr. 12/12/18

Docket 151

Tentative Ruling:

- NONE LISTED -

Party Information

9:30 AM
CONT... Solyman Yashouafar **Chapter 11**

Debtor(s):

Solyman Yashouafar	Represented By Mark E Goodfriend

Defendant(s):

Elkwood Associates, LLC	Represented By Daniel J McCarthy
Fieldbrook, Inc.	Represented By Daniel J McCarthy
Soda Partners, LLC	Represented By Ronald N Richards
Quality Loan Service	Pro Se
Chase Manhattan Mortgage Co.	Pro Se
Howard Abselet	Represented By Henry S David
Israel Abselet	Represented By Henry S David
Citivest financial Services, Inc.	Pro Se
State Street Bank and Trust Co.	Pro Se
DMARC 2007-CD5 Garden Street,	Represented By Timothy C Aires
QUALITY LOAN SERVICE	Pro Se

Plaintiff(s):

DAVID K GOTTLIEB	Represented By Jeremy V Richards John W Lucas

Trustee(s):

David Keith Gottlieb (TR)	Represented By Jeremy V Richards

United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar

Tuesday, December 11, 2018 **Hearing Room 302**

9:30 AM

CONT... **Solyman Yashouafar** **Chapter 11**

John W Lucas