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IN THE UNITED STATES DISTRICT COURT FOR THE
5
EASTERN DISTRICT OF CALIFORNIA
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7 COUNTRYWIDE HOME LOANS, Inc. a 1:02-CV-6405-AWI-SMS
8 New York Corporation,
9 Plaintiff,
10 v.
11 UNITED STATES OF AMERICA, acting
12 through the Internal Revenue Service, et. al.
13 Defendants.
14 LA JOLLA GROUP II, a California general
15 partnership, and TERRANCE FRAZIER,
16 Counter-Claimants,
17 v.
18 COUNTRYWIDE HOME LOANS, INC., a
19 New York corporation; NEVADA TRUST
20 DEED SERVICES, INC., a Nevada
21 corporation; LA SALLE NATIONAL
22 BANK as TRUSTEE FOR AVONDALE
23 HOME EQUITY LOAN TRUST 1998-1, an
24 entity form unknown; UNITED STATES
25 OF AMERICA, acting through the
26 INTERNAL REVENUE SERVICE; CTC
27 REAL ESTATE SERVICES, a California
28 corporation; ROBERT G. GONZALES, an
individual; and MARISELA GONZALES,
an individual,
Counter-Defendants.

**AMENDED ORDER ON
APPLICATION FOR ORDER OF SALE
OF DWELLING AND MOTION TO
RECALL AND QUASH WRITS OF
EXECUTION, ABSTRACT OF
JUDGMENT AND VACATE NOTICE
OF LEVY**
(DOC. 331 & 332)

INTRODUCTION

Plaintiff, Countrywide Home Loans, Inc. (“Countrywide”), seeks an order for sale of dwelling as to the real property located at 765 E. Woodhaven, Fresno, California, pursuant to the Judgment entered on May 27, 2011 and the Order Setting Amount of Equitable Lien rendered on April 4, 2013, valued at \$342,666.07 as of January 18, 2013 and \$31.9713 per diem thereafter. Conversely, Counter-Claimants, La Jolla Group II (“La Jolla”) and Terrance Frazier, seek to recall and quash writs of execution issued on August 21, 2014 and December 9, 2014 and the abstract of judgment issued on August 21, 2014, and to vacate the notice of levy posted on the subject real property on February 10, 2015.

FACTUAL AND LEGAL BACKGROUND

On February 9, 1994, Marisela and Robert G. Gonzales (“the Gonzaleses”) executed a deed of trust in favor of Victoria Mortgage Company (“Victoria”) in the amount of \$189,000.00 affecting the real property located at 765 E. Woodhaven, Fresno, California. On July 14, 1994, the beneficial interest under the deed of trust with Victoria was assigned to Countrywide.

On February 25, 1998, the Gonzalezes executed a second deed of trust in favor of Avondale Federal Savings Bank (“Avondale”) in the amount of \$189,000.00. Defendant La Salle National bank is the successor in interest to Avondale.

On August 18, 2000, the Internal Revenue Service (“IRS”) recorded a Notice of Federal Tax Lien with the Fresno County recorder, relating to tax assessments made in

1 1997, 1998, and 1999. The tax assessments against Robert Gonzales between tax,
2 penalties, and interest were in the amounts of \$3,483.28 in 1997, \$7,989.61 in 1998, and
3 \$8,847.82 in 1999.

4 Thereafter the Gonzaleses defaulted on the Countrywide loan and Countrywide
5 began non-judicial foreclosure proceedings by recording a Notice of Default and Election
6 to Sell Under Deed of Trust on April 6, 2001. The Gonzaleses cured the default under
7 the Countrywide loan prior to a trustee's sale. Rather than rescinding the Notice of
8 Default, Countrywide, in error, executed and caused to be recorded a full reconveyance
9 of the deed of trust on August 3, 2001.

10 The Gonzaleses made the August and September 2001 payments then again fell
11 into default. Countrywide again began non-judicial foreclosure proceedings by recording
12 a Notice of Default and Election to Sell Under Deed of Trust on January 4, 2002.

13 On March 15, 2002, Robert Gonzales filed for bankruptcy in the United States
14 Bankruptcy Court, Eastern District of California (Fresno). The Countrywide and La Salle
15 foreclosure sales were automatically stayed. Countrywide obtained relief from the stay,
16 but Nevada Trust Deed Services, Inc. ("Nevada Trust") conducted a foreclosure sale
17 under the La Salle Trust deed on August 15, 2002. La Jolla and Frazier submitted the
18 successful bid of \$24,200.00. La Jolla is a general partnership consisting Alan Boyajian
19 and Lee Kleim. La Jolla has been in the business of buying, selling, and leasing
20 residential foreclosure properties since 1987. Frazier began buying property on his own
21 behalf in 1995. Boyajian and Frazier personally attended the sale.
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1 Prior to his purchase of the real property, Boyajian estimated its value at \$235,000.
2 Neither Boyajian nor Frazier had obtained a preliminary report, guarantee, or
3 commitment from a title company prior to bidding at the foreclosure sale. Boyajian
4 investigated the state of title of the real property by requesting from First American Title
5 Company copies of "open" trust deeds, i.e., trust deeds that have not been reconveyed.
6 Due to the erroneous reconveyance the search yielded no results.
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8 On April 28, 2002 and May 3, 2002, Boyajian sought and obtained from First
9 American documents concerning liens against the real property. Provided in response to
10 Boyajian's request was the second Countrywide Notice of Default that had been filed on
11 January 4, 2002. Boyajian knew that there was an inconsistency between the
12 reconveyance and the notice of default but believed that the latter was filed as a mistake.
13 Boyajian did not attempt to contact the trustee to determine whether the notice of default
14 was a mistake. Nor did Boyajian attempt to contact anyone at Countrywide concerning
15 the apparent discrepancy. Boyajian further failed to contact Nevada Trust to determine
16 its lien holder priority in light of the Countrywide Notice of Default. Boyajian's decision
17 not to contact any of these three entities was informed by his experience that none would
18 give out the information that he sought.
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23 Countrywide presented evidence to suggest that in contacting either Countrywide
24 or Nevada Trust prior to the foreclosure sale Boyajian would have discovered that the
25 Countrywide Loan had not been paid in full and that Countrywide still held an active
26 interest in the real property.
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1 On May 2, 2007, this court held a bench trial for the matter. The court held that
2 La Jolla and Frazier were bona fide purchasers at the subject foreclosure sale who took
3 free of the equitable lien created by the erroneously reconveyed Countrywide deed of
4 trust.
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6 On appeal, the Ninth Circuit reversed and remanded and determined that La Jolla
7 and Frazier were not bona fide purchasers for value. The inconsistencies articulated
8 above put La Jolla and Frazier on notice because they had knowledge of circumstances,
9 which, upon reasonable inquiry, would have led to discovery of Countrywide's
10 unrecorded lien.
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12 The Ninth Circuit concluded that the erroneous Notice of Full Reconveyance
13 converted Countrywide's senior deed of trust into an equitable lien of equal priority. The
14 foreclosure sale by Nevada Trust under a junior deed of trust did not extinguish this lien.
15 The Ninth Circuit further reasoned that “[b]ecause [La Jolla and Frazier] aren't bona fide
16 purchasers, Countrywide retains a valid lien on the home. Countrywide hasn't shown
17 that it will be prejudiced by having to enforce this lien through a judicial foreclosure
18 proceeding. See 4 Miller & Starr § 10:32 (equitable creditor's remedy is limited to
19 judicial foreclosure).” Doc. 43-1, p. 4-5.
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22 The Ninth Circuit held that Countrywide was not entitled to rescission of the
23 foreclosure sale based on either of the two theories advanced: collusion between La Jolla
24 and Frazier or failure to give adequate notice to the IRS. The former was rejected
25 because Countrywide had not proved that it was prejudiced by any collusion between La
26 Jolla and Frazier, i.e. there was no evidence to suggest that a procedural irregularity
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1 contributed to the inadequacy of the price of the real property sale. The latter was
2 rejected because California Civil Code section 2924(b)(c)(4), obligating trustees to notify
3 the IRS of foreclosure sales, was enacted after the sale of the real property in question.
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5 On May 12, 2011, in accordance with the Ninth Circuit's direction, this court
6 issued its Amended Findings of Fact and Conclusions of Law and Order Amending
7 Judgment and essentially adopted verbatim the language of the Ninth Circuit.
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9 On May 27, 2011, this court issued a judgment with nine orders including that title
10 to the subject real property be quieted in favor of La Jolla and Frazier, that this title to the
11 property was subject to the pre-foreclosure tax liens, and that the amount of the equitable
12 lien awarded to Countrywide consisted of the indebtedness due under the deed of trust
13 recorded on February 9, 1994.
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15 On April 4, 2013, this court issued an order setting the amount of the equitable
16 lien in the sum of \$342,666.07 as of January 18, 2013 and \$31.9713 per diem thereafter.
17 The order was clear that “[n]o part of this order is to be interpreted as changing the nature
18 of Countrywide’s equitable lien. This order merely sets the amount.” Doc. 322, 5:11-13.
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20 On August 21, 2014, at the request of Countrywide, the clerk of the court issued a
21 writ of execution to the sheriff of Fresno as well as an abstract of judgment. On
22 December 9, 2014, again at the request of Countrywide, the clerk issued a second writ of
23 execution to the sheriffs of Fresno and Sacramento counties. On February 10, 2015, a
24 notice of levy was posted on the subject real property.
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27 Now before the court are two matters: (1) Countrywide’s application for order of
28 sale of dwelling and issuance of order to show cause why order for sale of dwelling

1 should not be made and (2) La Jolla and Frazier's motion to recall and quash the writs of
2 execution and the abstract of judgment, and to vacate the notice of levy.

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4 **PARTIES' ARGUMENTS**

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6 Countrywide argues in its application for order of sale of dwelling that abstract of
7 judgment had specifically attached to the subject real property, that its equitable lien had
8 equal priority to its senior deed of trust, and that the procedure for the sale of a dwelling
9 pursuant to California Code of Civil Procedure section 704.640 had been fully complied
10 with. Thus, Countrywide asserts, it can enforce its judgment under California collection
11 methods, including compelling the sale of real property.

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13 La Jolla and Frazier filed their motion on the grounds that the writs of execution
14 and abstract of judgment were improperly issued since there was no money judgment
15 entered in this action that would support their issuance. La Jolla and Frazier argue that,
16 pursuant to the judgment entered on May 27, 2011, Countrywide has an equitable lien,
17 and not a money judgment. Thus, Countrywide must judicially foreclose in order to
18 enforce the lien. Under federal and California law, La Jolla and Frazier assert, only a
19 money judgment is enforceable by writ of execution. See Fed. R. Civ. Proc. 69(a)(1)
20 ("[a] money judgment is enforced by a writ of execution"); Cal. Code Civ. Pro. §§
21 699.010, 699.510.

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23 In response to La Jolla and Frazier's motion, Countrywide counters that the
24 court's judgment reduced the equitable lien claim to a monetary amount. Countrywide
25 argues that it is therefore not an equitable creditor because an equitable creditor does not

1 have an enforceable lien. Countrywide asserts that the only remedy available to an
2 equitable creditor is judicial foreclosure because judicial foreclosure (1) establishes the
3 rights to an equitable lien, (2) establishes the amount of the equitable lien, and (3)
4 forecloses the lien. Thus, there is no reason for judicial foreclosure here because a
5 judgment lien has already been established and the only thing left to do is apply to the
6 Court for an order to sell the property.

7 Pursuant to directions issued by this court on May 5, 2015, the parties filed
8 briefing about the application of the rule of mandate in general to the writs of execution
9 and abstract of judgment and specifically to the order setting the amount of the equitable
10 lien. In these supplemental briefings, Countrywide submits that the Ninth Circuit
11 mandate is limited to:

12 “CTC’s erroneous Notice of Full Reconveyance converted Countrywide’s senior
13 deed of trust into an equitable lien of equal priority. The foreclosure sale by
14 Nevada Trust Deed Services, Inc. under a junior deed of trust did not extinguish
15 this lien. Defendants [La Jolla and Frazier] did not acquire the home free and
16 clean of Countrywide’s lien because they were not bona fide purchasers for value.
17 Countrywide was not entitled to rescission [of the foreclosure sale] due to
18 procedural irregularities.”

19 Countrywide further asserts that the Ninth Circuit’s opinion does not provide guidance on
20 how this court should construe the language of the mandate. Accordingly, the rule of
21 mandate does not require judicial foreclosure here nor preclude the order setting the
22 amount of the equitable lien.

23 Conversely, La Jolla and Frazier argue that the scope of the mandate includes that
24 Countrywide’s deed of trust was converted into an equitable lien which must be enforced
25 through judicial foreclosure proceedings. Since only a money judgment is enforceable

1 through a writ of execution, the issuance of the writs of execution and the abstract of
2 judgment were in violation of the appellate court's mandate. Furthermore, under
3 California law, La Jolla and Frazier assert, the amount of the lien is determined in the
4 judicial foreclosure action and made a part of the foreclosure decree. Because the
5 mandate dictates that the equitable lien should be foreclosed by judicial foreclosure, the
6 order setting the amount of the lien is at least indirectly in violation of the rule of
7 mandate.
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11 **DISCUSSION**
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13 The rule of mandate provides that a district court that has received the mandate of
14 an appellate court cannot vary or examine that mandate for any purpose other than
15 executing it. See Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012);
16 United States v. Cote, 51 F.3d. 178, 181 (9th Cir. 1995). At the same time, the rule of
17 mandate allows a lower court to decide anything not foreclosed by the mandate. See
18 Hall, 697 F.3d at 1067; Herrington v. Cnty. Of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993).
19 A district court is limited by the Ninth Circuit's remand when the scope of the remand is
20 clear. See Hall, 697 F.3d at 1067; Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172
21 (9th Cir. 2006). “[I]n construing a mandate, the lower court may consider the opinion the
22 mandate purports to enforce as well as the procedural posture and substantive law from
23 which it arises.” United States v. Kellington, 217 F.3d 1084, 1093 (9th Cir. 2000).
24 Violation of the rule of mandate is a jurisdictional error. See Hall, 697 F.3d at 1067;
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26 United States v. Thrasner, 483 F.3d 977, 982 (9th Cir. 2007).
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1 Countrywide submits that the express mandate of the Ninth Circuit does not
2 include that it must proceed through judicial foreclosure. However, the Ninth Circuit
3 opinion establishes that Countrywide possesses an equitable lien and the remedy of
4 judicial foreclosure. The Ninth Circuit found that “Countrywide hasn’t shown that it will
5 be prejudiced by having to enforce this lien through a judicial foreclosure proceeding.
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7 See 4 Miller & Starr § 10:32 (equitable creditor’s remedy is limited to judicial
8 foreclosure).” Doc. 43-1, p. 4-5. This is consistent with the substantive law, which
9 reflects that judicial foreclosure is the appropriate remedy here. See Cal. Code Civ. Pro.
10 § 725(a) et seq; Kaiser Industries Corp. v. Taylor, 17 Cal.App.3d 346, 352-53 (Cal. Ct.
11 App. 1971); Wachovia Bank v. Lifetime Industries, Inc., 145 Cal.App.4th 1039, 1058
12 (Cal. Ct. App. 2006). Thus, in construing the scope of the Ninth Circuit’s mandate, it is
13 evident that this mandate includes the determinations that (1) Countrywide possesses an
14 equitable lien and not a money judgment, and (2) if Countrywide wants to enforce this
15 equitable lien, then it must go through judicial foreclosure.
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17 To commence a judicial foreclosure, the foreclosing party must file a lawsuit in
18 the county where the property is located. See Cal. Code Civ. Pro. § 725(a) et seq.; Arabia
19 v. BAC Home Loans Servicing, L.P., 208 Cal.App.4th 462, 470 (Cal. Ct. App. 2012).
20 For example, Arabia explained that under judicial foreclosure, instead of proceeding
21 toward a foreclosure sale pursuant to the California Civil Code without court
22 involvement, the plaintiff must prove its case to the satisfaction of the court. Id. At trial,
23 the plaintiff must establish the subject loan is in default and the amount of the default. Id.
24 If successful in proving the loan is in default, the plaintiff asks the court to order the
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1 property sold to satisfy the loan balance. Id. The court then issues a decree stating the
2 amount of the debt, that the security secures the debt, whether a potential deficiency
3 judgment is reserved, and the order that the lien of the property be foreclosed by a sale
4 overseen by the sheriff or other court officer. See Cal. Code Civ. Pro. § 726(b). The sale
5 process is governed by the execution sale statutes found at Cal. Civ. Proc. Code §
6 716.020 and, if the potential for a deficiency is reserved, Cal. Civ. Proc. Code §§
7 729.010-729.090. Since Countrywide has not proceeded through this judicial foreclosure
8 process, La Jolla and Frazier's motion must be granted. See Hall, 697 F.3d at 1067. The
9 Court will recall and quash the writs of execution issued on August 21, 2014 and
10 December 9, 2014 and the abstract of judgment issued on August 21, 2014 and vacate the
11 notice of levy posted on the subject real property on February 10, 2015.

15 Furthermore, the court has reconsidered its April 4, 2013 order setting the amount
16 of the equitable lien and concluded that it must be vacated for lack of jurisdiction. The
17 court entering judgment in judicial foreclosure is the court that declares the amount of the
18 lien being foreclosed, and that enters judgment for sale of the property. The California
19 statute governing judicial foreclosure specifically provides that “[t]he decree for the
20 foreclosure of a mortgage or deed of trust secured by real property or estate for years
21 therein shall declare the amount of the indebtedness or right so secured . . .” Cal. Code
22 Civ. Pro. § 726(b). Thus, setting the amount of the equitable lien is part of the judicial
23 foreclosure process. It does not follow that two different courts should declare the
24 amount of the indebtedness. Since the rule of mandate requires that the equitable lien be
25 enforced through judicial foreclosure, the court finds that its April 4, 2013 order was
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1 contrary to the Ninth Circuit's mandate and therefore should be vacated for lack of
2 jurisdiction. Violation of the rule of mandate is a jurisdictional error. See Hall, 697 F.3d
3 at 1067.

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5 **ORDER**

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7 Accordingly, IT IS HEREBY ORDERED that:

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9 1. Plaintiff's application for order of sale of dwelling and issuance of order to show
cause why order for sale of dwelling should not be made is DENIED;

10 2. The writs of execution issued in this action on August 21, 2014 and December 9,
11 2014 and the abstract of judgment issued on August 21, 2014 are RECALLED and
12 QUASHED;

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14 3. The notice of levy posted on the subject real property on February 10, 2015 is
15 VACATED; and

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17 4. This court's April 4, 2013 order setting the amount of the equitable lien is
18 VACATED.

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21 IT IS SO ORDERED.

22 Dated: June 12, 2015

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24 SENIOR DISTRICT JUDGE