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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JOEL S. REYNOLDS,
Plaintiff,
v.

NO. CIV. 2:10-1508 WBS DAD
MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

SUNTRUST MORTGAGE, INC., and
DOES 1-50,
Defendants.

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Plaintiff Joel S. Reynolds brought this action against defendant SunTrust Mortgage, Inc. ("SunTrust"), alleging wrongful foreclosure on plaintiff's home. Defendant now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Relevant Facts

In May of 2003, SunTrust issued plaintiff a mortgage loan of \$189,500 ("the mortgage") that was secured by the deed of trust for plaintiff's residence, which is located at 860 Potsgrove Place, in Tracy, California ("Potsgrove residence").

1 (Reynolds Decl. ¶ 2 (Docket No. 17-2); Switzer Decl. ¶ 1, Ex. A
2 (Docket Nos. 14-14, 14-15).)

3 According to bank records, plaintiff fell behind on his
4 mortgage payments in 2005, but made up the deficiency by the end
5 of the year and was current on his payments entering 2006.

6 (Switzer Decl. ¶ 4.) During 2007 and 2008, plaintiff failed to
7 pay several mortgage payments. (Id. ¶¶ 6-8.) Plaintiff paid
8 defendant funds sufficient to satisfy the outstanding payments in
9 April of 2008, (id. ¶ 9), and made his May 2008 payment in July
10 of 2008, (id. ¶ 10). The May payment was the last payment
11 SunTrust received. (Id.)

12 Plaintiff's mortgage loan went into default in August
13 of 2008 and defendant mailed plaintiff a letter alerting him of
14 this fact on August 5, 2008. (Id. ¶ 10, Ex. B (Docket No. 14-
15 16.) The letter was sent to the Potsgrove residence. (Id.) A
16 second letter was mailed to plaintiff on September 8, 2008,
17 informing him that, due to his continued default, defendant had
18 referred his account to an attorney to begin foreclosure. (Id. ¶
19 11, Ex. C (Docket No. 14-17).)

20 ReconTrust, the organization defendant engaged to
21 handle the nonjudicial foreclosure of the Potsgrove residence,
22 caused a Notice of Default to be recorded on May 8, 2009.
23 (Quitana Decl. ¶ 2, Ex. A (Docket Nos. 14-1, 14-2.) ReconTrust
24 mailed several copies of the Notice of Default to plaintiff's
25 residence. (Id. ¶¶ 3-4, Exs. B, C, D (Docket Nos. 14-3, 14-4,
26 14-5).)

27 In December of 2009, a Notice of Trustee's Sale for
28 January 7, 2010, was recorded at ReconTrust's direction. (Id. ¶

1 6, Ex. F (Docket No. 14-7).) As no sale occurred on January 7,
2 2010, ReconTrust recorded a second Notice of Trustee's Sale,
3 setting February 5, 2010, as the new date for the foreclosure
4 sale of the Potsgrove residence. (Id. ¶ 6, Ex. G (Docket No. 14-
5 8).) Several copies of the second Notice of Trustee's Sale were
6 mailed to plaintiff at the Potsgrove residence. (Id. ¶7, Ex. H
7 (Docket No. 14-8).) Additional copies were posted at the
8 Potsgrove residence and published in a local newspaper. (Id. ¶¶
9 9-11, Exs. J, K (Docket Nos. 14-11, 14-12).)

10 The Potsgrove residence was sold in a foreclosure sale
11 on February 5, 2010, and the trustee's deed upon sale was
12 recorded on February 17, 2010. (Id. ¶ 12, Ex. L (Docket No. 14-
13 13).) The deed upon sale stated that "[a]ll requirements of law
14 regarding the recording and mailing of copies of the Notice of
15 Default and Election to Sell, and the recording, mailing,
16 posting, and publication of the Notice of Trustee's Sale have
17 been complied with." (Id. Ex. L.)

18 Plaintiff lived at the Potsgrove residence with
19 Kimberly Pannell, his girlfriend of over twenty years. (Bradford
20 Decl., Ex. A at 15:3-5 (Docket No. 17-3).) Plaintiff and Ms.
21 Pannell were not married, although Ms. Pannell sometimes used the
22 name "Kimberly Pannell-Reynolds." (Id. at 15:8-25.) Plaintiff
23 and Ms. Pannell had an informal arrangement whereby they each
24 contributed half of the monthly mortgage payments. (Id. at
25 29:24, 34:19, 36:5-9; Reynolds Decl. ¶ 3.)

26 Plaintiff did not make mortgage payments personally,
27 rather he relied on Ms. Pannell to issue payments to SunTrust.
28 (Reynolds Decl. ¶ 3; Bradford Decl., Ex. A at 29:6-13.) At some

1 point during 2006 or 2007, Ms. Pannell, without informing
2 plaintiff, stopped making mortgage payments in a timely manner.
3 (Bradford Decl., Ex. A at 39-40.) She began instead to secretly
4 divert funds that plaintiff believed were being paid to defendant
5 to other destinations or to simply not cash the checks plaintiff
6 paid to her with the intent that she use those funds to make
7 mortgage payments. (Id. at 36-37, 44, 49.) She also intercepted
8 letters sent to plaintiff by defendant regarding the mortgage
9 account. (Id. at 55.)

10 Plaintiff claims that, as a result of Ms. Pannell's
11 actions, he was unaware that he had missed any payments due on
12 the mortgage. He claims he was also unaware that the Potsgrove
13 residence was in default, was foreclosed upon, or was sold until
14 a neighbor informed him that he had discovered that the Potsgrove
15 residence had been sold. (Reynolds Decl. ¶¶ 5-8.) In his
16 separate statement of undisputed facts, plaintiff does not claim
17 that defendant failed to properly notice the default and
18 trustee's sale, as required under California law (see, e.g.,
19 Docket No. 17-1 ¶¶ 4, 5, 6, 9, 11, 12); he only asserts that he
20 never received any of the required notices and was never
21 contacted prior to the entry of default (id.; Reynolds Decl. ¶¶
22 5, 7).

23 II. Discussion

24 Summary judgment is proper "if the movant shows that
25 there is no genuine dispute as to any material fact and the
26 movant is entitled to judgment as a matter of law." Fed. R. Civ.
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1 P. 56(a).¹ A material fact is one that could affect the outcome
2 of the suit, and a genuine issue is one that could permit a
3 reasonable jury to enter a verdict in the non-moving party's
4 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
5 (1986).

6 The party moving for summary judgment bears the initial
7 burden of establishing the absence of a genuine issue of material
8 fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

9 Alternatively, the moving party can demonstrate that the
10 non-moving party cannot produce evidence to support an essential
11 element upon which it will bear the burden of proof at trial.

12 Id. Once the moving party meets its initial burden, the burden
13 shifts to the non-moving party to "designate 'specific facts
14 showing that there is a genuine issue for trial.'" Id. at 324
15 (quoting then-Fed. R. Civ. P. 56(e)). To carry this burden, the
16 non-moving party must "do more than simply show that there is
17 some metaphysical doubt as to the material facts." Matsushita
18 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

19 "The mere existence of a scintilla of evidence . . . will be
20 insufficient; there must be evidence on which the jury could
21 reasonably find for the [non-moving party]." Anderson, 477 U.S.
22 at 252.

23 In deciding a summary judgment motion, the court must
24 view the evidence in the light most favorable to the non-moving
25 party and draw all justifiable inferences in its favor. Id. at

26
27 ¹ Federal Rule of Civil Procedure 56 was revised and
28 rearranged effective December 1, 2010. However, as stated in the
Advisory Committee Notes to the 2010 Amendments to Rule 56,
"[t]he standard for granting summary judgment remains unchanged."

1 255. "Credibility determinations, the weighing of the evidence,
2 and the drawing of legitimate inferences from the facts are jury
3 functions, not those of a judge . . . ruling on a motion for
4 summary judgment" Id.

5 "It is the general rule that courts have power to
6 vacate a foreclosure sale where there has been fraud in the
7 procurement of the foreclosure decree or where the sale has been
8 improperly, unfairly or unlawfully conducted, or is tainted by
9 fraud, or where there has been such a mistake that to allow it to
10 stand would be inequitable to purchaser and parties." 6 Angles,
11 Inc. v. Stuart-Wright Mortg., Inc., 85 Cal. App. 4th 1279, 1287
12 (2d Dist. 2001) (quoting Bank of Am. Nat. Trust & Sav. Ass'n v.
13 Reidy, 15 Cal. 2d 243, 248 (Cal. 1940)). California Civil Code
14 sections 2924 through 2924k provide "a comprehensive framework
15 for the regulation of a nonjudicial foreclosure sale pursuant to
16 a power of sale contained in a deed of trust." Moeller v. Lien,
17 25 Cal. App. 4th 822, 830 (2d Dist. 1994). "The purposes of this
18 comprehensive scheme are threefold: (1) to provide the
19 creditor/beneficiary with a quick, inexpensive and efficient
20 remedy against a defaulting debtor/trustor; (2) to protect the
21 debtor/trustor from wrongful loss of the property; and (3) to
22 ensure that a properly conducted sale is final between the
23 parties and conclusive as to a bona fide purchaser." Id. at 830.

24 A. Procedural Irregularities

25 "A nonjudicial foreclosure sale is accompanied by a
26 common law presumption that it 'was conducted regularly and
27 fairly.'" Melendrez v. D & I Inv., Inc., 127 Cal. App. 4th 1238,
28 1258 (6th Dist. 2005) (quoting Brown v. Busch, 152 Cal. App. 2d

1 200, 204 (3d Dist. 1957)). A party seeking to set aside a
2 foreclosure sale bears the burden of overcoming this presumption
3 and, to do so, must present "substantial evidence of prejudicial
4 procedural irregularity." Id. at 430-31 (citing 6 Angles, 85
5 Cal. App. 4th at 1284; Hatch v. Collins, 225 Cal. App. 3d 1104,
6 1113 (1st Dist. 1990)).

7 Plaintiff offers a declaration stating that he never
8 received or saw any notices of default, foreclosure, or pending
9 sale required under California law. As one California court has
10 "pointedly emphasize[d]," however, "Civil Code sections
11 2924-2924h, inclusive, do not require actual receipt by a trustor
12 of a notice of default or notice of sale. They simply mandate
13 certain procedural requirements reasonably calculated to inform
14 those who may be affected by a foreclosure sale and who have
15 requested notice in the statutory manner that a default has
16 occurred and a foreclosure sale is imminent." Lupertino v.
17 Carabahal, 35 Cal. App. 3d 742, 746-47 (3d Dist. 1973), cited in
18 Knapp v. Doherty, 123 Cal. App. 4th 76, 88 (6th Dist. 2004); see
19 also Quinteros v. Aurora Loan Servs., 740 F. Supp. 2d 1163, 1168-
20 69 (E.D. Cal. 2010).

21 Because plaintiff has not presented evidence sufficient
22 to overcome the common law presumption that a nonjudicial
23 foreclosure sale is properly and fairly conducted or presented
24 evidence which would dispute defendant's claim that it complied
25 with nonjudicial foreclosure procedures, plaintiff has not raised
26 a triable issue of material of fact regarding alleged procedural
27 irregularities, and defendant is entitled to judgment in its
28

1 favor as a matter of law. Knapp, 123 Cal. App. 4th at 86-88.²

2 Plaintiff additionally asserts that the Notice of
3 Default is voidable as it was filed in violation of California
4 Civil Code section 2923.5. (Pl.'s Opp'n to Mot. for Summ. J. at
5 4.) As plaintiff correctly points out, there is a dispute as to
6 whether section 2923.5 is preempted by the Home Owners Loan Act
7 ("HOLA"). Compare Wornum v. Aurora Loan Servs., Inc., No. C-11-
8 02189, 2011 WL 3516055, at *7-9 (N.D. Cal. Aug. 11, 2011);
9 Giordano v. Wachovia Mortg., FSB, No. 5:10-cv-04661, 2010 WL
10 5148428, at *3-4 (N.D. Cal. Dec. 14, 2010) (preemption) with
11 Mabry v. Superior Court, 185 Cal. App. 4th 208, 235 (4th Dist.
12 2010) (no preemption). Even if the court were to follow the line
13 of cases holding that section 2923.5 is not preempted, no set of
14 facts would permit plaintiff to have the completed foreclosure
15 sale set aside on account of a violation of section 2923.5.

16 Mabry held that section 2923.5 was not preempted by
17 HOLA only because the court narrowly read section 2923.5 to
18 provide that "[t]he only remedy provided [for a violation of
19 section 2923.5] is a postponement of the [foreclosure] sale
20 before it happens." Mabry, 185 Cal. App. 4th at 235. Here, the
21

22 ² Additionally, under California's nonjudicial
23 foreclosure statutes, "[i]f the trustee's deed recites that all
24 statutory notice requirements and procedures required by law for
25 the conduct of the foreclosure have been satisfied, a rebuttable
26 presumption arises that the sale has been conducted regularly and
27 properly; this presumption is conclusive as to a bona fide
28 purchaser." Cantu v. CitiMortgage, Inc., No. CV F 10-2334, 2010
WL 5394777, at *9 (E.D. Cal. Dec. 21, 2010) (quoting Moeller, 2
Cal. App. 4th at 831). Here, the trustee's deed recites that
notice and procedural requirements were followed in the sale of
the Potsgrove residence. Nowhere does plaintiff claim that
defendant, the purchaser of the Potsgrove residence, is not a
bona fide purchaser.

1 foreclosure sale has already occurred and so any non-compliance
2 under section 2923.5 is immaterial.

3 B. Fraud

4 An action to set aside a trustee's sale is an equitable
5 action. Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665,
6 671 (Cal. 1974). Courts "have power to vacate a foreclosure sale
7 where there has been fraud in the procurement of the foreclosure
8 decree . . . or where there has been such a mistake that to allow
9 it to stand would be inequitable to purchaser and parties." 6
10 Angels, 85 Cal. App. 4th at 1287 (quoting Reidy, 15 Cal. 2d at
11 248). Plaintiff relies on the fraud perpetrated upon him by Ms.
12 Pannell, a third party to the mortgage and the foreclosure sale,
13 to show that equity demands that the foreclosure sale be set
14 aside.

15 While in some circumstances fraud may justify setting
16 aside a foreclosure sale, see e.g., Susilo v. Wells Fargo Bank,
17 N.A., --- F. Supp. 2d ----, 2011 WL 2471167, at * 9, *13 (C.D.
18 Cal. 2011) (plaintiff adequately plead action for wrongful
19 foreclosure where plaintiff alleged defendant made promises about
20 curing default, reinstating loan, and delaying foreclosure sale
21 that defendant never intended to adhere to), the court is aware
22 of no authority, and plaintiff has provided no authority, to
23 support the proposition that a fraud perpetrated by a third party
24 to the foreclosure sale, in which the foreclosing party was not
25 involved and of which the foreclosing party was unaware, may
26 provide grounds for a wrongful foreclosure claim. The court's
27 skepticism that equity would demand that an innocent party be
28 punished for the fraudulent actions of another actor is supported

1 by the "well established" rule that in an action for wrongful
2 foreclosure where plaintiff alleges fraud on the part of the
3 foreclosing party, a subsequent good faith purchaser for value
4 and without notice of a fraud "takes title free on any equity of
5 the person thus defrauded." Melendrez, 127 Cal. App. 4th at 1257
6 (quoting Strutt v. Ontario Sav. & Loan Ass'n, 11 Cal. App. 3d
7 547, 554 (4th Dist. 1970)).

8 Plaintiff does not claim that the bank was aware of Ms.
9 Pannell's actions. The risk that Ms. Pannell might not make
10 payments on the mortgage was one that plaintiff assumed when he
11 chose to cede responsibility for payments on his mortgage to
12 another person. Further, it was a risk that he was in a better
13 position to protect against than defendant. Setting aside a
14 properly conducted foreclosure sale because, unbeknownst to
15 defendant, plaintiff was duped by a stranger to the foreclosure
16 sale would neither do equity nor advance the purposes of
17 California's nonjudicial foreclosure scheme.

18 Plaintiff chose to rely on Ms. Pannell to oversee
19 mortgage payments on the Potsgrove residence. He evidently
20 trusted her enough that he did not feel that it was necessary to
21 keep himself informed of the status of his account. In the end,
22 it appears that his trust was misplaced. It is regrettable that
23 plaintiff has lost his home due to the actions of another,
24 however fault cannot be laid at the bank's feet. If plaintiff's
25 allegations are true, any equitable claims he may have regarding
26 the loss of the Potsgrove residence would more appropriately be
27 directed against Ms. Pannell.

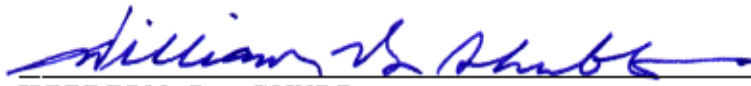
28 IT IS THEREFORE ORDERED that SunTrust's motion for

1 summary judgment be, and the same hereby is, GRANTED.

2 DATED: November 22, 2011

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WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

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