

Courtside Newsletter

RECENT DEVELOPMENTS

- *The Giardinelli Law Group, APC recently settled a dispute over trust funds between a real estate agent and a buyer.*
- *The Giardinelli Law Group, APC recently settled a case between a commercial landlord tenant, for a dispute arising out of money owed for rent.*

Informing Real Estate Brokers, Association members, and local Businesses for over thirty years.

Tender Rule in California May Stop a Homeowner From Fighting Against Foreclosure

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RIVERSIDE COUNTY OFFICE



Last July, our newsletter article focused on the Garcia case, where a lender promised not to foreclose, but did anyway. The borrower was able to maintain a lawsuit against the lender because the borrowers relied upon the lender's promise, to their detriment. In January of this year, our newsletter article focused on the landmark case in the Massachusetts Supreme Court, also related to overcoming foreclosure. Recently there was another case in the California Courts of Appeal, 2nd District, Aceves v. U.S. Bank, N.A., Cal. App. 2d Dist. Jan. 27, 2011, where another homeowner was successful at maintaining a lawsuit against a lender for allegations of fraud and promissory estoppel.

While the cases illustrate that lenders often violate laws in pursuing non-judicial foreclosures, many do not know that in order to even bring a wrongful foreclosure case, the borrower likely must first offer to tender the full amount of the loan, where the trustee's sale already occurred, or cure any default, where the trustee's sale has not yet occurred, in order to get a court set aside a foreclosure sale. This "tender rule" is not limited to cases where the homeowner seeks to set aside a foreclosure sale, cancellation of a trustee's deed or quiet title. It is also applied to causes of action related to a foreclosure, including negligence and fraud.

The tender rule was set forth in *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575,579-580. It is based on the notion

that one who seeks to set aside the foreclosure sale must first comply with any requirements they are obligated to first. This rule tends to be the biggest hurdle for the wrongfully foreclosed to fight against wrongful foreclosures, and it is a big hurdle. If borrowers had the money to tender to the lender, they would not need a loan in the first place. Additionally, if a borrower could get a loan through another lender, they could use that money to tender. However, once a borrower is in default, their credit is such that they can no longer obtain additional financing.

There are ways around the tender rule. One of the most successful ways to avoid having to tender the entire amount of the loan is to show that because the lender lacked the authority to foreclose, the sale was void. *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 876. That means the trustee's sale was a complete nullity with no force or effect as opposed to one which may be set aside. Indeed some cases have held that it is not "equitable" nor does it make sense to require a homeowner to tender the amounts owing because of a lender's actions. One can certainly see the problems that could arise with a rogue lender wrongfully foreclosing, where the borrowers were helpless to fight the foreclosure because they could not tender the full amount of the loan.

Other cases have held that notice defects void a trustee's sale so tender would not be required. *Bank of America, N.A. v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 715-716 and *Little v. CFS Service Corp.* (1987) 188 Cal.App.3d

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CALENDAR

MLS Rules & Regulations / Data Integrity (Traffic School)

Date: March 4, 2011
Location: Pacific West Association of REALTORS®, Anaheim

Please contact the sponsoring association to sign up!

PWR-Up Membership Meeting

Date: March 11, 2011
Time: 9:00 a.m. – 11:00 a.m.
Location: The Grand, Long Beach

Please contact the Pacific West Association of REALTORS® to sign up!

PWR-Up Membership Meeting

Date: March 11, 2011
Time: 1:00 p.m. – 3:00 p.m.
Location: Friendly Hills Country Club, Whittier

Please contact the Pacific West Association of REALTORS® to sign up!

Deadline to File your Taxes

Federal: April 18, 2011
State: April 15, 2011

However, despite these decisions, local courts have sometimes been reluctant to entertain these arguments. I speculate that the reason for this reluctance is that many homeowners filed wrongful foreclosure actions against the lender, when they had no basis for doing so, simply to stay in the home one more month. It is possible that the courts want to discourage this type of behavior, and therefore require tender.

Additionally, I have seen that where a homeowner has the ability to pay all arrears, the court seems more likely to allow a wrongful foreclosure action. And usually, it is more persuasive to the court if a homeowner can provide proof of their ability to pay all arrears, fees, etc. Additionally, when an unlawful detainer is also pending, the court may ask that the homeowner provide a bond, in the event the homeowner loses and must pay the fair rental value of the foreclosed-upon home.

When a lender's actions are egregious and fraudulent activity is apparent, a court may not focus so much on the tender rule. However, when the facts come short of showing fraud, the tender rule may bar the average homeowner from pursuing a wrongful foreclosure case.

A foreclosed upon homeowner should consider the tender rule before committing to the time and expense associated with a lawsuit. Additionally, if a lender is engaged in conduct that is obviously fraudulent, a foreclosed upon homeowner should know they should not have to tender the full amount of the loan.

BUSINESS CORNER

"We want to help."



BUSINESS TIPS

LEGAL TIPS FOR MANAGING EMPLOYEES' USE OF SOCIAL NETWORKING

1. Have a Social Networking Policy in place wherein employees understand the company's expectations with regards to social media.
2. Ensure that, as part of your company policy, employees acknowledge that there is no expectation of privacy for any electronic device or communication on property of the employer (computers, cellular phones, etc.)
3. Remember that employees are allowed to express even disparaging remarks about their employer on their social media sites, outside of their employment.

With the rate social media is changing, frequent review of company policy is recommended to avoid any liability. As the old saying goes, an ounce of prevention is worth a pound of cure.

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New Law - Short Sale Deficiencies

Rule: No judgment shall be rendered for a deficiency for a first trust deed lender of one-to-four residential units if the borrower sells for less than the amount owed with the Lender's written consent.

Exceptions Include:

- Junior Liens;
- Lender seeking damages for fraud or waste;
- Borrower is a corporation; or
- Borrower is a political subdivision of the state.

(Source: California Association of REALTORS®, 2011)

The Giardinelli Law Group, APC is back in Canyon Lake!!

Our new office is beautiful and we are pleased to be back at home. Mrs. Giardinelli and Ms. Conaway have gone above and beyond to ensure that our office is better than it was before the fire last year. We'd like to thank all our clients, vendors, and affiliates for your patience and support during this last year.

Riverside County: (951) 244-1856

Orange County: (714) 978-2060

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