

Managing Risks in the Eviction Process

Attorney Thomas S. Van takes a closer look at the eviction process following a foreclosure sale.

By Thomas S. Van, Esq.

In *Homeward Opportunities Fund I Trust 2019-2 v. Taptelis* (Homeward Opportunities) (2023) 314 Cal.Rptr.3d 391, reh'g granted, opinion not citeable (November 13, 2023), the California Court of Appeal, Sixth District, held that the purchaser in a nonjudicial foreclosure sale must expunge a lis pendens recorded by the former borrower prior to commencing eviction proceedings.

While the *Homeward Opportunities* case is pending a rehearing and not citeable precedent, the case presents an opportunity for lenders, servicers, and foreclosure sale purchasers to review their protocols and options for eviction post-sale.

In 2019, Taptelis borrowed \$1.24 million to purchase a property located in Santa Clara County, California, secured by a deed of trust recorded against the property. Homeward Opportunities Fund I Trust 2019-2 (Homeward) was the assignee beneficiary under the deed of trust. After default by Taptelis, nonjudicial foreclosure was commenced by the trustee, setting a sale date for December 4, 2020. Two days prior to the foreclosure sale, Taptelis recorded a lis pendens in connection with a wrongful foreclosure action alleging nine causes of action including quiet title. *Homeward Opportunities*, 314 Cal.Rptr.3d at 396-397. The trustee's sale completed and a Trustee's Deed Upon Sale issued to Homeward was recorded in Santa Clara County on December 11, 2020.

In March 2021, Homeward filed an eviction action against Taptelis. In January 2022, the Court entered judgment in favor of Homeward and issued the writ of possession on February 1, 2022. Taptelis timely filed an appeal. *Ibid.* at 398-399.

In discussing the right of Homeward to bring an eviction action, the Appellate Court contemplated the requirement for Homeward to "duly perfect" title prior to commencing eviction, and the inability of Taptelis to litigate the quiet title cause of action, or present evidence of a lis pendens, in the eviction case.

[W]e hold that the trial court abused its discretion by excluding evidence of the lis pendens, in that it was both relevant and sufficient to defeat Homeward's unlawful detainer claim. Homeward needed to either expunge the lis pendens or resolve the underlying wrongful foreclosure suit to perfect title. Because it did neither, its notice to quit was premature and void.

Id. at 405.

To duly perfect title under a foreclosure sale, the prospective unlawful detainer plaintiff must take all steps to make the title perfect, "i.e., to convey to the purchaser that which he has purchased, valid and good beyond all



reasonable doubt." [citation omitted] The Supreme Court contemplated that its ruling "requiring a new owner to perfect title before serving its three-day notice would avoid the imposition of possibly unnecessary relocation expenses on the possessor of the property" because it would require the resolution of a "cloud on the new owner's title concern[ing] an issue that cannot be litigated in an unlawful detainer action" before the three-day notice can be served.

Id. at 405; citing *Dr. Leevil, LLC v. Westlake Health Care Center* (2018) 6 Cal.5th 474, 479.

Because the issue of title cannot be litigated in an eviction action, a lis pendens is necessarily an impediment to the perfection of title, and "one that must be cleared before the purchaser may serve a notice to quit and commence an unlawful detainer proceeding." *Homeward Opportunities*, 314 Cal.Rptr.3d at 405.¹ Applying this rationale to the case, the Court found that Taptelis' lis pendens clouded title. Homeward took title with notice of the quiet title claim prior to the trustee's sale, and "Homeward was required to, at its option, either expunge the lis pendens or resolve the wrongful foreclosure litigation before it could serve the notice to quit necessary to initiate an unlawful detainer action." *Id.* at 405-406.

Options for the purchaser facing a similar scenario

While resolving the wrongful foreclosure action first to "perfect title" may be required in some cases, there are advantages to filing a motion to expunge the lis pendens. The court in *Homeward Opportunities* acknowledged that while some borrowers may use a lis pendens to delay an inevitable eviction, the "Legislature has enacted a statutory scheme intended to discourage abuse and to make it easier to remove recorded lis pendens before trial." *Id.* at

406-407. On a motion to expunge, the burden is on the recording party to substantiate the probable validity of the real property claim, rather than burdening the party moving for expungement. California Code of Civil Procedure §§ 405.30-405.32, 405.35. Importantly, the motion to expunge may be heard with evidence, including oral testimony, forcing the former borrower to present evidence at the pleading stage. Cal. Code Civ. Proc., § 405.30. The court may also require an undertaking. Cal. Code of Civ. Proc. § 405.34. The grant or denial of an expungement order is subject to expedited writ review. Cal. Code of Civ. Proc. § 405.39. Attorney's fees and sanctions against the recording party may also be available if the motion is granted. Cal. Code of Civ. Proc. § 405.39.

The risk, on the other hand, is the motion to expunge being denied, which may bolster confidence in the former borrower's claim, and incurring additional fees and costs. Even if the *Homeward Opportunities* case is not affirmed, there is a high probability that initiating an eviction prior to expunging a lis pendens will only be met with a motion to consolidate the eviction case with the wrongful foreclosure case, and a potential stay of the eviction case pending resolution of the title issues. Accordingly, a motion to expunge should be considered regardless of the final decision on *Homeward Opportunities*. While the path is not without risks, it should not be feared. Purchasers should evaluate the merits of such a motion with counsel and be prepared for the decision to come from the Sixth District Appellate Court of California.

Thomas S. Van Esq. is a Managing Litigation Attorney for ALAW, a full-service real estate law firm. Van practices throughout California in financial services, real estate, and business litigation matters. He can be contacted by email at tvan@alaw.net.

¹ See also, discussion of eviction case limitations under California Code of Civil Procedure 1161a, subd.(b)(3) at 314 Cal.Rptr.3d 402-403.