S241324

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DR. LEEVIL, LLC
Plaintiff & Respondent,

vs.

WESTLAKE HEALTH CARE CENTER,
Defendant & Appellant.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX, APPEAL NO. B266931
ON APPEAL FROM JUDGMENT OF VENTURA COUNTY SUPERIOR COURT
CASE NO. 56-2015-00465793-CU-UD-VTA, HON. VINCENT O' NEILL

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case is about a sophisticated, commercial tenant's creative attempts to transform the judicial process governing unlawful detainer lawsuits. Having lost possession of its skilled nursing facility after a foreclosure sale, defendant Westlake Health Care Center seeks to change the entire landscape governing the post-foreclosure, unlawful detainer process.

Unable to contest the merits of the case, Westlake's only defense to the unlawful detainer judgment on review is a purely procedural one. Westlake claims that plaintiff Dr. Leevil, LLC, as the new landlord that purchased the subject property at the foreclosure sale, was required to record the trustee's deed upon sale *before* Dr. Leevil served its three-day notice to quit on Westlake. The legislature, however, disagrees. The statute governing the three-day notice to quit merely requires perfection of title before the *removal* of the tenant. Just as an information or an administrative citation does not establish one's guilt or culpability, the mere issuance/service of a three-day notice to quit does not constitute the "removal" of the tenant. To the extent that Westlake seeks to export the statutory requirement for tenants' removal into the front-end of the unlawful detainer process, Westlake's fight is with the legislature, not with Dr. Leevil or this Court.

Westlake's arguments should be rejected to ensure that California's foreclosure process provides investors with an efficient legal mechanism to eject trespassers such as Westlake. Given the significant carrying costs associated with property ownership in California, allowing hold-over, trespassing tenants to hold a new owner's property hostage after the

foreclosure process – e.g., by insisting on a recorded deed before the three-day notice to quit is even served – could disrupt the nonjudicial foreclosure process. Westlake's arguments also hurt tenants by increasing their liability for hold-over damages, thus increasing the number of lawsuits classified as unlimited civil cases. In sum, setting aside the financial harm to investors and lenders, both tenants and the judicial system would suffer under the novel and more expensive approach to eviction advocated by Westlake.

PROCEDURAL HISTORY

A. The Parties to the Subject Lease

Appellant Westlake Health Care Center ("Westlake Corp.") was the tenant and licensed operator of a residential care, skilled nursing facility at the subject property. (2 AA T49, p. 402, ¶ 2.) Westlake Corp. leased its facility from its landlord, Westlake Village Property, L.P. ("Westlake L.P."), pursuant to a lease agreement dated March 12, 2002. (2 AA T37, pp. 301-307 [copy of lease]; p. 301 [identifying landlord and tenant].) The 20-year lease required monthly payment of $67,000 for this commercial establishment. (2 AA T37, 301, ¶¶ 2 & 3.1.) The lease contains the following automatic subordination clause: "[t]his lease is and shall be subordinated to all existing and future liens and encumbrances against the Premises." (2 AA T37, p. 306, ¶ 21.6.)

The unusual feature of the lease was that the landlord and the tenant were owned and controlled by the same principals—Mrs. Jeoung Hie Lee and Mr. Il Hie Lee. (2 AA T37, p. 307; 2 AA T34, p. 276:6-9.) Therefore, the lease was drafted and entered into by and between the same principals as lessor and lessee.

B. The Underlying Commercial Loan Transaction

In 2008, Westlake L.P., the landlord, obtained a five-year loan from TomatoBank, N.A., that was secured by a deed of trust on the subject premises. (1 AA T25, pp. 184-186 [promissory note]; 1 AA T25, p. 188 [summarizing the loan].) The deed of trust was recorded six days after its execution. (1 AA T2, p. 12, ¶ 7.)

In 2013, in connection with an extension of Westlake L.P.'s loan with TomatoBank, the tenant, Westlake Corp., signed a subordination agreement. (1 AA T2, p. 15, ¶ C; 1 AA T25, pp. 188-196 [extension agreement].) This rendered the 2002 lease inferior to the deed of trust recorded in 2008 by TomatoBank in terms of lien priority, a point disputed by Westlake Corp. before review was granted.

C. The Foreclosure Process Leading to This Unlawful Detainer Action

In 2014, after TomatoBank initiated a judicial foreclosure action to foreclose on its lien based on Westlake L.P.'s default, Dr. Leevil, LLC ("Dr. Leevil"), pursuant to an assignment, purchased the promissory note and the deed of trust associated with the loan. (1 AA T25, p. 199; pp. 198-201 [stipulation filed in the judicial foreclosure action].)

After the assignment by TomatoBank, Dr. Leevil ultimately elected to foreclose by non-judicial foreclosure based on the power-of-sale clause contained in the deed of trust. (1 AA T2, pp. 11-12, ¶¶1, 4.) To correlate the sequence of these events with the post-foreclosure events that are germane to this appeal, the following timeline identifies the key procedural history:

► February 19, 2015: The non-judicial foreclosure trustee's sale is conducted. Dr. Leevil acquires the property. (1 AA T2, pp. 11-12, ¶¶1, 4.)

► February 20, 2015: As the new owner, Dr. Leevil serves a three-day notice to quit on Westlake Corp. (1 AA T2, p. 12, ¶8; pp. 23-24 [notice to quit]; 1 AA T31, p. 232.)

► February 25, 2015: The trustee's deed upon sale is recorded. (1 AA T2, pp. 11-12, ¶¶1, 4.)

► April 1, 2015: Dr. Leevil files this unlawful detainer lawsuit. (1 AA T2, pp. 9-26.)

D. Litigation of the Unlawful Detainer Action

1. Trial Court Proceedings

In response to this lawsuit, Westlake Corp. filed a demurrer, contending that Dr. Leevil had no standing to prosecute this case. (1 AA T5, pp. 35-36.) After the filing of opposition (1 AA T9, pp. 69-77) and reply papers (1 AA T11, pp. 82-87), Westlake Corp.'s demurrer was overruled. (1 AA T16, p. 96; 1 AA T22, p. 117.)

Westlake Corp. answered the complaint, claiming that the notice to quit was prematurely served before Dr. Leevil duly perfected its title to the property. (1 AA T17, p. 103, ¶11.) Westlake Corp. later renewed the same argument in its motion for judgment on the pleadings. (1 AA T29, pp. 224-226.)

Having filed other motions that are not relevant to the narrow issue granted review, the parties proceeded to a bench trial. (2 AA T44, p. 352.) On the second day of the trial, the parties reached an agreement. Consistent with the parties' resolution, the court entered a judgment for possession in favor of Dr. Leevil. (2 AA T45, pp. 356-357.)

Westlake Corp. then filed its notice of appeal (2 AA T46, p. 358), followed by its request to stay judgment enforcement. (2 AA T47-50, pp. 360-410.) Dr. Leevil opposed the stay request. (2 AA T51, pp. 411-433.) After granting interim relief (2 AA T52, p. 434), the court reviewed supplemental evidence (2 AA T55-57, pp. 442-469) and denied the request to stay judgment enforcement pending the appeal. (2 AA T58-59, pp. 470-473.)

2. The Court of Appeal Rejects Westlake Corp.'s Attacks on the Judgment.

Westlake Corp. challenged the judgment on numerous grounds, claiming that Dr. Leevil could not invoke a contractual automatic subordination clause without being "bound" by a disputed non-disturbance clause in the lease. (AOB 3.) Westlake Corp. also argued that it was denied "sufficient notice and an opportunity to present evidence and argument" at trial. (*Ibid.*) Finally, as a side point, Westlake Corp. argued that Dr. Leevil was required to perfect its title before serving the three-day notice to quit. (AOB 25-27.)

The Court of Appeal unanimously rejected Westlake Corp.'s multifarious arguments. In rejecting the last point, the court pointed out that there was no contention "that the trustee's sale failed to comply with section 2924 of the Civil Code, or that Leevil failed to perfect title before Westlake [Corp.] was removed from the property." (Typed opn. 7.)

Disagreeing with a decision issued by the appellate division of the San Diego County Superior Court, the Court of Appeal reasoned that there was no statutory requirement to perfect title before serving the three-day notice itself. (*Id.* [questioning *U.S. Financial, L.P. v. McLitus* (2016) 6 Cal.App.5th Supp. 1].) As for Westlake Corp.'s suggestion that it could not verify Dr. Leevil's ownership rights/status when the notice to quit was served, the Court of Appeal explained that Westlake Corp. "had more than five weeks between service of the notice to quit and filing of the unlawful detainer complaint to do so." (Typed opn. at pp. 7-8.)

3. This Court Grants Limited Review.

Although Westlake Corp. challenged the Court of Appeal's decision on multiple grounds, this Court limited the scope of review as follows: "Does Code of Civil Procedure section 1161a require a purchaser of real property at a foreclosure sale to perfect title before serving a three-day notice to quit on the occupant of the property?" (Order, June 14, 2017.)

LEGAL DISCUSSION

I. Westlake Corp.'s Arguments Are Based on Its Misconception of the Statutory Scheme Governing the Post-Foreclosure Unlawful Detainer Process.

A. Statutory Regulation of the Foreclosure Process

"In California, the financing or refinancing of real property generally is accomplished by the use of a deed of trust." (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 994.) "There are three parties to a deed of trust: (1) the trustor, who owns the property that is conveyed to (2) the

trustee as security for the obligation owed to (3) the beneficiary." (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 816.) "The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale." (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.)

Civil Code sections 2924 through 2924k "provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249.) Section 2924, for example, identifies some of the procedural requirements governing foreclosures in terms of the timing and the sequence of the steps taken prior to the foreclosure sale. (Civ. Code, § 2924, subd. (a)(1), (2) & (3).) Once the sale is conducted, "[t]he purchaser at a foreclosure sale takes title by a trustee's deed." (*Biancalana, supra,* 56 Cal.4th at p. 814.)

"The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 926.)

B. The Intersection of the Statutory Schemes Governing Unlawful Detainer and Foreclosure Cases

The unlawful detainer statute at issue here provides in relevant text as follows:

> In any of the following cases, a person who holds over and continues in possession of ... real property **after** a three–day written notice to quit the property has been served upon the person ... may be **removed** therefrom as prescribed in this chapter:
>
> * * * *
>
> (3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected.

(Code Civ. Proc., § 1161a, subd. (b) [emphasis added].)

"Code of Civil Procedure section 1161a makes the summary remedy of unlawful detainer available against persons holding over after the property has been sold under a power of sale in a deed of trust. Pursuant to this provision, the remedy is afforded where the property has been sold in accordance with section 2924 of the Civil [Code] and the title under the sale has been duly perfected." (*Old Nat'l Fin. Servs. v. Seibert* (1987) 194 Cal.App.3d 460, 464 [internal quotation marks and footnote omitted; brackets added].)

Granting the new property owner retroactive perfection of title, Civil Code section 2924h, subdivision (c), states as follows:

> "For the purposes of this subdivision, the trustee's sale shall be deemed final upon the acceptance of the last and highest bid, and shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days after the sale[.]"

As noted above, section 2924 is specifically referred to in section 1161a, subdivision (b)(3), rendering these statutory schemes intertwined.

C. The Impact of Foreclosure on the Landlord-Tenant Relationship

"The foreclosure of a senior encumbrance will wipe out all subordinate liens, including leases." (*Aviel, supra,* 161 Cal.App.4th at p. 816.) Stated another way, a "lease which is subordinate to the deed of trust is extinguished by the foreclosure sale." (*Dover Mobile Estates v. Fiber Form Products, Inc.* (1990) 220 Cal.App.3d 1494, 1498). "T]he relation between the purchaser [at the foreclosure] and tenant is that of owner and trespasser, until some agreement, express or implied, is made between them with reference to the occupation." (*McDermott v. Burke* (1860) 16 Cal. 580, 589 [brackets added].) Otherwise, "the tenant becomes a tenant at sufferance (holdover tenant). The relationship between the tenant and the purchaser is that of trespasser and owner, or the purchaser may treat the tenant as [a] tenant without right and maintain an action for possession." (10 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 34:199 (hereafter "Miller & Starr").)

Applying these cases here, because the subject lease includes an automatic subordination clause (2 AA T37, p. 306, ¶ 21.6), Westlake Corp.'s lease was extinguished by the foreclosure sale. [1] As the new owner, Dr. Leevil was entitled to evict Westlake Corp. As discussed below, the three-day notice to quit issued by Dr. Leevil was fully consistent with the

[1] While Westlake Corp. has tried to challenge the Court of Appeal's determination of this point (PFR 14-22), given this Court's order limiting the scope of review, Westlake Corp. cannot challenge this point any more. (Order, June 14, 2017.)

law governing the post-foreclosure unlawful detainer action filed against Westlake Corp.

D. Westlake Corp.'s Entire Argument Is Based on the False Assumption That Dr. Leevil Failed to Perfect Its Title on Time.

There is no dispute that an unlawful detainer lawsuit requires the plaintiff to have some form of ownership interest in the subject property. The question, then, is whether Dr. Leevil obtained such an interest in order to evict Westlake Corp. While Westlake Corp. believes that Dr. Leevil did not perfect its trustee's deed upon sale before issuing the three-day notice to quit, Westlake Corp. is wrong. (OBOM 10.) Here's why.

The record shows that six days after the foreclosure sale was conducted on February 19, 2015, the trustee's deed upon sale was recorded; *i.e.*, on February 25. (1 AA T2, pp. 11-12, ¶¶1, 4 [complaint].) Because title was recorded within the statutory fifteen-day grace period under Civil Code section 2924h, subdivision (c), Dr. Leevil's title to the property was retroactively deemed perfected under this statute as of the date of the sale on February 19. Therefore, when the three-day notice was issued on February 20, Dr. Leevil was already the legal owner of the property. Because section 2924h authorizes retroactive perfection in this context, Westlake Corp.'s argument is flawed.

Westlake Corp., however, insists that section 2924h does not apply here because the retroactive perfection invoked by Dr. Leevil applies only "for the purposes of this subdivision"—meaning subdivision (c) of section 2924h is limited only to this statute, not to proceedings under Code of Civil

Procedure section 1161a. (OBOM 12-13.) The basic flaw in this argument is that Westlake Corp. seeks to divorce the two statutory schemes at issue here which are inextricably intertwined. The first statutory scheme governing the eviction process specifically refers to the second statutory scheme governing the foreclosure process. (See Code Civ. Proc., § 1161a, subd. (b)(3) [authorizing eviction where "the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected"].) Westlake Corp.'s argument disregards the basic principle of statutory construction that related statutes must be read together.

The cases cited by Westlake Corp. do not justify a contrary result. (OBOM 10.) Those cases repeat the general statement that "[t]itle is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt [citation] which includes good record title." (*Stephens, Partain & Cunningham v. Hollis* (1987) 196 Cal.App.3d 948, 953.) While this is the general rule, section 2924h makes an exception by authorizing retroactive perfection. The *Stephens* case, however, was decided before the 1993 amendment to section 2924h which adopted this exception. "Prior to 1993, this section provided only that the trustee's sale was final upon acceptance of the last and highest bid." (*In re Bebensee–Wong* (Bankr. 9th Cir. 2000) 248 B.R. 820, 822.) Given the practical problems caused by the inevitable delays between the sale and the recording (e.g., bankruptcies filed after the sale but before recording), "the California legislature in 1993 responded to the frustration expressed by lenders and foreclosure trustees by amending" this statute. (*Id.*) Under the amended statute, "[t]he trustee's sale is 'deemed perfected' on the date of sale as long as the trustee's deed is

recorded within 15 days." (5 Miller & Starr, § 13:250.) Therefore, *Stephens* does not govern this case. [2]

Finally, while not precisely on point, to the extent the appellate division held in *Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837 that recording is required to establish the validity of title "as between the parties to the transaction" (*id.* at p. 841), that decision should be overruled. (See Civ. Code, § 1217 ["An unrecorded instrument is valid as between the parties thereto..."]; see also *RNT Holdings, LLC v. United Gen. Title Ins. Co.* (2014) 230 Cal.App.4th 1289, 1296 ["Recordation of a trust deed is not usually required for the validity of a trust deed, but merely affects its potential efficacy regarding subsequent bona fide purchasers for value"] (internal citations omitted); 1 Bernhardt, Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2009) § 9:44, p. 9-41 ["Although recordation is essential to protect a lien against competing liens and other interests, a lien is nonetheless valid between the immediate parties to it even if it is unrecorded, e.g., a deed of trust is valid among trustor, trustee and beneficiary whether or not it is recorded"].) The *Kessler* decision, just like Westlake Corp., misconstrues the whole purpose behind the concept of perfection. (See Friedman, Secured Transactions in California Commercial Law Practice (Cont.Ed.Bar 2d ed. 2001) § 3.6, p. 3-8 ["Perfection of a security interest in collateral is the means by which a creditor may seek to have superior rights to *other creditors*"]; emphasis added.)

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[2] The amended law has implications in other contexts. For example, given this statutory retroactive perfection, "[t]he issuance of a foreclosure sale deed after the trustor has filed for bankruptcy relief will not violate the automatic stay, provided that the foreclosure sale purchaser records the deed within the 15 day period provided for relation back of the perfected nature of the purchaser's interest." (5 Miller & Starr, § 13:250 [footnote omitted].)

To summarize, because Dr. Leevil's title was retroactively perfected before the three-day notice was issued, Westlake Corp.'s arguments are factually and chronologically flawed.

II. Alternatively, Assuming That the Statutory Provision Authorizing Retroactive Perfection Does Not Apply Here, Dr. Leevil Satisfied the Perfection Requirement by Recording the Deed Before Westlake Corp. Was "Removed"—the Statutory Cut-Off Deadline for Perfection.

"The object of a notice to quit is to lay the foundation for a forfeiture." (*Grand Central Public Market v. Kojima* (1936) 11 Cal.App.2d 712, 717.) Because the notice to quit is the "first step" at the front end of the unlawful detainer process (*Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, 10), "[t]he tenancy is not terminated on the giving of the notice but on expiration of the notice period. There is no cause of action until after the tenancy has been terminated." (*Id.* at p. 7 [citation omitted].) While section 1161a states that a tenant "may be removed" when the title under a trustee's sale has been perfected, serving the three-day notice to quit does not qualify as the "removal" of the tenant; i.e., the ultimate result at the back-end stage of the lawsuit. (See Code Civ. Proc., § 715.020, subd. (c) ["the levying officer shall *remove* the occupants from the property" by executing writ of possession].) In sum, there is no requirement to perfect title as a condition precedent for taking the first step in *initiating* the multi-step unlawful detainer process; i.e., in order to serve the three-day notice to quit.

Westlake Corp., however, assumes that "service of the notice itself restore[s] the landlord to actual possession." (Friedman, et al., Cal. Practice

Guide, Landlord-Tenant (The Rutter Group 2017) ¶7:98.11.) Westlake Corp. is wrong. "Though the tenant's right of possession is terminated by the tenant's noncompliance with the notice ..., possession is restored only when the notice is acted upon by one of the parties—by the tenant's quitting or vacating, or by the landlord's prevailing in an unlawful detainer." (*Ibid.*)

Other language in the eviction statute demonstrates that title need not be perfected prior to service of the three-day notice to quit. As quoted above, section 1161a states that the tenant holding over "**after** a three-day written notice to quit the property has been served ... may be removed therefrom as prescribed in this chapter: [¶] Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected." (Code Civ. Proc., § 1161a, subd. (b)(3) [emphasis added.)

The final clause referencing perfection of title does not relate to the initial clause concerning service of the three-day notice to quit. There is nothing in the statute that states that title must be perfected before service of the three-day notice to quit. Rather, title must be perfected before removal, and removal occurs "after a three-day written notice to quit the property has been served." By distinguishing between the service of the three-day notice to quit (the initial step) and removal (the final step), the legislature has identified the multi-step process for post-foreclosure evictions. If the legislature had sought to change the sequence of the eviction process by having the perfection requirement precede the three-day notice, it could have easily said so. To summarize, Westlake Corp. is asking the Court to re-write this statute.

Another fallacy in Westlake Corp.'s argument is that it erroneously assumes that the three-day notice provides the basis for obtaining jurisdiction over the tenant in an unlawful detainer case. (OBOM 10 [arguing that without a validly-served notice to quit, the landlord cannot evict at all].) But "service of the three-day notice is merely an element of an unlawful detainer cause of action that must be alleged and proven for the landlord to acquire possession." (*Borsuk v. Appellate Division* (2015) 242 Cal.App.4th 607, 612-613.) Because the three-day notice does not provide the basis for asserting jurisdiction (e.g., personal jurisdiction or even subject matter jurisdiction), the authorities that have "described the service of the three-day notice as jurisdictional are incorrect." (*Id.* at p. 163 [addressing personal jurisdiction].) It is the lawsuit itself (the summons and the complaint) that supply the basis for personal and subject matter jurisdiction, respectively—not the three-day notice. (Cf. *People v. Gray* (2014) 58 Cal.4th 901, 909 [violation of statutory 30-day mandatory notice requirement for issuing red light camera citations did "not create a jurisdictional precondition to enforcement" as a defense].)

To support its claim that title should have been perfected before Dr. Leevil served its three-day notice, Westlake Corp. also cites *McLitus, supra,* 6 Cal.App.5th Supp. 1. (OBOM 3.) *McLitus* quoted this Court's prior observation, in reference to a trustee's deed upon sale, that "*upon recording of this deed*, the purchaser is entitled to bring an unlawful detainer action against the trustor in order to get possession of the property." (*McLitus,* at p. 4 [quoting *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 275; emphasis in original].) There is no question here, however, that when Dr. Leevil ultimately filed its unlawful detainer action on April 1, 2015 (1 AA 9), title had been recorded. *McLitus* erroneously treated the act of serving the three-day notice as the act of "bring[ing]" the

action itself—the phrase used in *Garfinkle*. Under *McLitus*'s flawed assumption, any time a pre-lawsuit notice is required (e.g., to file a negligence action against a doctor, engineer, government entity, etc.), the mere service of such notice would constitute commencement of the lawsuit, thereby allowing the plaintiff to delay filing the action for months or years. Needless to say, that's not the law. (See generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶¶ 1:646-1:894 [addressing pre-lawsuit notice requirements in various contexts].)

The other decision invoked by Westlake Corp., *Bank of New York Mellon v. Preciado* (2013) 224 Cal.App.4th Supp. 1, is equally flawed. (OBOM 10.) In that case, the appellate division held that the foreclosing party had the burden of proof to establish that a trustee's sale was duly conducted. (*Id.* at pp. 9-10.) The court refused to accept that a trustee's deed upon sale, standing alone, was sufficient proof that the bank had acquired the property at a regularly conducted sale and thereafter "duly perfected" its title. (*Id.*) Because the trustee identified in the trustee's deed upon sale was different than the trustee identified in the deed of trust, the court found insufficient evidence that the sale was conducted by a trustee with the authority to conduct the sale. (*Id.* at p. 10.)

Preciado does not help Westlake Corp. because Westlake Corp. is not challenging the validity of the sale itself. Westlake Corp. is merely challenging the fact that Dr. Leevil had not recorded the trustee's deed before serving the three-day notice to quit. While *Preciado* evaluated the validity of the sale to decide if title was duly perfected, "[t]his decision fails to take into account the rebuttable presumption of validity of a trustee's deed [citation] which should have been sufficient to meet the threshold

evidentiary requirement of § 1161a." (10 Miller & Starr, § 34:126 [citing *Biancalana, supra,* 56 Cal.4th at p. 820].) Accordingly, the arguments raised by Westlake Corp. should be rejected.

III. Westlake Corp.'s Arguments, If Adopted, Would Significantly Undermine the Administration of the Foreclosure Process, Causing Major Practical Problems for the Entire Lending Industry and the Public at Large.

"The rules providing for the priority of interests in real property ... have been adopted, accepted, and repeated for many years, and persons dealing with real property have relied on these rules over a long period of time. These rules should be considered a 'rule of property' that the court should not change because of the risk of disappointing investment-backed expectations." (4 Miller & Starr, § 10:1.) In fact, "nonjudicial foreclosure under a power of sale is a remedy that has widely been used and recognized in this state for over a century." (*Garfinkle, supra,* 21 Cal.3d at p. 281.)

"The policy favoring the nonjudicial process as a low-cost and expeditious remedy to encourage the lender to make mortgage loans available at reasonable rates also carries with it a strong presumption of finality once the foreclosure sale is completed, in order to encourage third party bidders to purchase at the sale." (5 Miller & Starr, § 13:255.) Otherwise, adoption of Westlake Corp.'s view "would chill participation at trustees' sales by this entire class of buyers, and, ultimately, could have the undesired effect of reducing sales prices at foreclosure." (*Melendrez, supra,* 127 Cal.App.4th at p. 1253.) These are serious practical concerns that Westlake Corp.'s view seeks to sweep under the rug. (Cf. *Lee v. Baca* (1999) 73 Cal.App.4th 1116, 1119-1121 [rejecting argument that tenant's

bankruptcy filing precludes the landlord from evicting tenant in order to ensure that such delay tactics do not preclude landlords from regaining prompt repossession of their properties upon tenant default].) Moreover, Westlake Corp.'s view would nullify the policy behind the retroactive perfection authorized by Civil Code section 2924h, subdivision (c) as discussed above.

To the extent that Westlake Corp. suggests that foreclosing lenders (or their assignees) do not deserve to take advantage of the unlawful detainer process (e.g., to obtain expedited relief), that argument is equally flawed. Having enacted section 1161a, the legislature has decided to "extend[] the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property such as [Dr. Leevil]." (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255.) "The purpose of section 1161a of the Code of Civil Procedure was to make clear that one acquiring ownership through foreclosure could evict by a summary procedure." (*Gross v. Superior Court* (1985) 171 Cal.App.3d 265, 271.) Given this legislative judgment, the notion that a trespasser tenant can impede the foreclosing lender's right to promptly take over the property, by creating highly technical disputes about perfection of title – as illustrated in this case – is totally wrong. Because "[s]ection 1161a provides for a narrow and sharply focused examination of title" (*ibid.*), it was never intended to be used as a sword by trespassing tenants against the rightful owners of the property. Westlake Corp.'s argument should be rejected because "the unlawful detainer proceedings under § 1161a are expressly designed to determine who has superior title to the property, including the right to immediate possession." (*In re Perl* (9th Cir. 2016) 811 F.3d 1120, 1130.)

Seeking to prolong its possession of the property despite its trespasser status during the post-foreclosure period, Westlake Corp. also argues that tenants need to be able to verify the identity of the putative landlord as soon as the new landlord serves its three-day notice to quit. The landlord's identity, however, can always be disputed at trial, after the parties conduct discovery on that point. In this case, for example, the record shows that Westlake Corp. had ascertained Dr. Leevil's identity and its role as early as September 2014, five months *before* the notice to quit was served, when Westlake Corp.'s counsel stipulated to Dr. Leevil's substitution as the plaintiff in the judicial foreclosure action. (1 AA T25, p. 200.) [3]

There is no other reason to allow trespassing ex-tenants to delay the landlord's ability to regain lawful possession. While there was a short (six-day) delay in this case between the trustee sale and the recordation of the trustee's deed upon sale, the delay that Westlake Corp. seeks to exploit – by forcing the new owner to wait for the recordation of the deed before even serving the pre-lawsuit notice to quit – could wreak havoc on other owners (not to mention increasing the incentive for individual residential landlords to consider self-help). For example, a deed may be rejected by the county recorder for purely ministerial reasons that are beyond the new buyer's control. (See Gov. Code, § 27361.7 [the notary seals, certificates and other attachments such as legal descriptions must be "sufficiently legible to reproduce a readable photographic record"].) Alternatively, a trustee may

[3] If a putative landlord has no ownership interest at the time of filing the unlawful detainer action or by the time of trial, the tenant can sue for malicious prosecution, abuse of process and/or other claims. (See 1 Moskovitz et al., Cal. Landlord Tenant Practice (Cont.Ed.Bar. 2d ed. 2016) § 8.157A, p. 8-143 ["wrongful eviction can be found merely in the landlord's improper use of the legal system to evict the tenant"].)

delay physical delivery of the deed upon sale for a while after the foreclosure sale for whatever reason. Under Westlake's approach, the new property owner cannot even serve the notice to quit before these issues are resolved.

While landlords would accrue significant carrying charges during the critical post-acquisition period based on such delays, tenants would also suffer by incurring substantial hold-over damages as they remain on the property at the landlord's expense without paying rent. Using the subject property as a representative sample for foreclosed commercial properties – where such a property is purchased for $15.5 million at the trustee sale (RT 63:26-64:4) – forcing buyers to potentially wait for weeks before serving the three-day notice amounts to hundreds of thousands of dollars in interest and other carrying charges (property taxes, insurance, etc.) associated with the delay. If this amount is aggregated across all properties foreclosed throughout California every single year, the damages could potentially reach billions of dollars in terms of additional carrying charges, lost opportunity costs and hold-over damages for all such transactions.

These additional damages would also increase the number of lawsuits classified as unlimited civil cases, instead of using the limited jurisdiction specialized UD courts, thus clogging the court system while reducing the overall disposition rates. When a judgment is finally entered, some tenants may be judgment proof but commercial tenants that do not fall in this category would suffer the practical ramifications of having a large judgment hanging over their head.

In sum, the entire system would suffer under the eviction-delayed, justice-obtained approach advocated by Westlake Corp.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

DATED: January 30, 2018

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, APC

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DATED: January 30, 2018

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By 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

On **January 30, 2018**, the foregoing document described as **ANSWER BRIEF ON THE MERITS** is being served on the interested parties in this action by true copies thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Veronica Lopez

SERVICE LIST

Dr. Leevil, LLC v. Westlake Health Care Center
Supreme Court of California, Case No. S241324

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