

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/22 /13

DEPT. NWC

HONORABLE JAMES A. STEELE

JUDGE

J. GARALZA

DEPUTY CLERK

HONORABLE
14

JUDGE PRO TEM

G. SERPAS, C.A.

ELECTRONIC RECORDING MONITOR

T. PEREZ

Deputy Sheriff

NONE

Reporter

8:30 am

LS023092

Plaintiff
Counsel

QUALITY LOAN SERVICE CORP
VS
CLAIMANTS

NO APPEARANCES

Defendant
Counsel

NATURE OF PROCEEDINGS:

RULING AND ORDER ON DISTRIBUTION OF SURPLUS CLAIMS

BACKGROUND

Mark Gertner and Wendy Sherwood, who were previously married and who have since obtained a dissolution of marriage, owned property at 28924 Fountainwood Street Agoura Hills, CA 91301. The property was encumbered by a DoT. Following default the property was foreclosed upon and in May 2012, it was sold at a trustee's sale. The sales price for the property was \$515,000. The obligation owing to the foreclosing creditor was \$321,333.47. The available surplus proceeds were therefor \$193,666.53.

The trustee reported that its expenses and fees amounted to \$3,366.72 leaving a total of \$190,299.81 to satisfy creditors' claims. Deducting the filing fee in this action in the amount of \$435, the remaining available amount would be \$189,864.81.

On September 28, 2012, the trustee filed a petition and declaration regarding unresolved claims and deposit of undistributed surplus proceeds of trustee's sale. On October 2, 2012, the court ordered that the clerk of the court should receive the sum of \$189,864.81 and deposit the amount into

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the court trust account. The trustee was discharged and relieved of any further responsibility for the disbursement of the funds.

That order was not served on the claimants until January 3, 2013. Furthermore, the United States of America ("USA") advises that it was not properly served with either the petition of the trustee or the instant petition. During oral argument, USA waived the notice defect.

RULING:

Having taken the matter under submission following the 4/12/13 hearing, the court now rules as follows:

Claimants

There are primarily 3 claimants.

JP Morgan Chase Bank Chase's submitted its claim on November 5, 2012 and filed a first amended claim on February 13, 2013. Chase's claim is premised on a 2007 lien. Its predecessor in interest (Optima as trustee for Washington Mutual Bank as Beneficiary) recorded a DoT against the property on August 14, 2007.

The DoT secures the obligation under a home equity

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line of credit signed by Sherwood on June 9, 2005.

Chase contends that its lien is senior to any other, save the foreclosing entity (which amount has been satisfied). Chase's lien is in the amount of \$148,542.60.

Lawrence Sobel Sobel represented Mr. Gertner in the dissolution action and obtained a Family Law Attorney's Real Property Lien pursuant to Family Code §2033, which was recorded on August 19, 2008. Mr Sobel filed his claim on October 26, 2012 but states therein he was never noticed with the Order relieving the trustee of its responsibilities. Mr. Sobel states his lien encumbers Mr. Gertner's interest in the property, title to which was held in the name of Mr. Gertner and his former spouse, Ms. Sherwood. According to Mr. Sobel, the former owners, Gertner and Sherwood, would each be entitled to ½ of the surplus funds (\$96,833.26 each before fees and costs)

There is an equity line of credit encumbering the property in the amount of \$148,542.60. According to the divorce judgment, Gertner was to be charged with \$55,000 of that obligation and Sherwood was to be charged with the remaining balance. This would leave Gertner with \$41,833.26 and Sherwood with \$3,290.66.

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Sobel further explains that pursuant to the divorce decree Sherwood was to pay Gertner \$22,144.50 of her share of the proceeds from the sale of the house.

Although Ms. Sherwood had taken the position that the liens of Sobel and the IRS arose subsequent to the separation/dissolution and accordingly are Mr. Gertner's individual debts, Ms. Sherwood has not filed any claim nor has she filed any objection to Sobel's analysis as to a proposed distribution. While Ms. Sherwood may have grounds for objecting to the equalization payment deducted from her share (see Cal-Western Reconveyance Corp. v. Reed (2007) 152 C.A.4th 1308, 1317), the court will assume that she has waived any objection or claim by failing to file such a claim with the court.

Mr. Sobel seeks the amount owed by Gertner to him \$28,657.72.

United States of America The USA filed a claim on February 27, 2013. The claim rests on tax liability of Mark Gertner. On December 6, 2010 the IRS recorded a Notice of Federal tax Lien against Gertner for his 2007 and 2009 tax years. The balance due as of March 8, 2013 was \$53,467.08 According to the IRS, its lien has priority over lienors with respect to any liens filed after December 6, 2010 and priority over any interest not falling into the

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categories enumerated in 26 USC §6323(b).

The IRS appears to acknowledge that the claims of Chase and Sobel are superior. However, it has interposed certain objections. Aside from the notice mentioned above, it objects to the petition of the trustee and the resulting order. The IRS argues that its claim takes priority over the trustee's fees (\$3,366.72) deducted from the surplus amount and as such the petition and resulting order are flawed.

The IRS asserts that the trustee's fees should be deducted from Sobel's claim.

Priority of Claimants

Witkin explains the priority order of junior liens to surplus funds after foreclosure of property:

1. [§ 162] Order of Priority.

Proceeds of the sale must be distributed in the following order:

- (1) To permitted costs, expenses, and fees (see supra, §161). (C.C. 2924k(a)(1).)
- (2) To payment of the obligations secured by the foreclosed deed of trust or mortgage. (C.C. 2924k(a)(2).)

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(3) To satisfaction of junior liens or encumbrances in the order of their priority. (C.C. 2924k(a)(3).)
 (4) To the trustor, or if the property has been sold or transferred, then to the vested owner of record of the property at the time of the trustee's sale. (C.C. 2924k(a)(4).) (See Smith v. James A. Merrill (1998) 64 C.A.4th 94, 98, 75 C.R.2d 108 [effect of homestead declaration and judgment lien on distribution of proceeds]; South Bay Bldg. Enterprises v. Riviera Lend-Lease (1999) 72 C.A.4th 1111, 1124, 85 C.R.2d 647 [trustee's failure to perform statutory obligation to distribute excess amount to junior lienor could be imputed to senior lienor based on agent-principal relationship, and junior lienor had right of action against senior for money due under C.C. 2924k]; 4 Miller & Starr 3d, §10:213.)
 ****SUPPLEMENT****

4 Witkin, Summary 10th (2012 supp.) Sec Trans--Real, § 162, p. 164
 1. [§ 162] Order of Priority.

See Cal-Western Reconveyance Corp. v. Reed (2007) 152 C.A.4th 1308, 1317, 62 C.R.3d 244 [C.C. 2924k authorizes distribution of proceeds of sale only to satisfy secured obligations; wife was not entitled to distribution from surplus proceeds for attorneys' fees and equalization payment awarded to her in

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judgment of dissolution of marriage]; Wells Fargo Bank v. Neilsen (2009) 178 C.A.4th 602, 615, 100 C.R.3d 547, citing the text [where subordination agreement created inconsistency regarding priorities, formula established in Bratcher v. Buckner (2001) 90 C.A.4th 1177, 109 C.R.2d 534, text, §53, for judicial foreclosures was properly applied to nonjudicial foreclosure].

(3) Junior liens and encumbrances: Before distributing surplus sales proceeds to the trustor or property owner, the trustee in a nonjudicial foreclosure is not required to search for judgment lienholders who have not requested special notice or made a written claim under C.C. 2924j (see text, §163). (Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services (2009) 180 C.A.4th 1090, 1103, 1106, 103 C.R.3d 397 [small fee provided by C.C. 2924k for expenses of trustee in investigating priority and validity of claims was not evidence that Legislature expected trustees to conduct independent searches for judgment liens; important purpose of statutory scheme is to protect trustees, not to subject them to liability from hidden judgment creditors].)

4 Witkin, Summary 10th (2005) Sec Trans--Real, § 162, p. 959

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Accordingly, the issues left to determine here are whether the trustees fees were properly deducted and if not, since that issue is now moot, from whose share should those fees be recouped so as to make the amount, unreduced by the trustee's fees, available to the IRS (subject to the Sobel and Chase liens).

Trustees Fees

A court may not diminish the amount available for satisfaction of a federal tax lien by awarding costs and attorney's fees to an interpleading plaintiff. *Campagna-Turano Bakery Inc. v. United States*, 632 F.2d 39, 41. There is little law on how this rule applies in the context of surplus funds after judicial foreclosure. *Housekey Financial Corp. v. Hofer*, 87 A.F.T.R.2d 2001-1265 (E.D. Cal. 2001) is instructive.

"A trustee may charge costs and expenses incurred for such items as mailing and a reasonable fee for services rendered in connection with the distribution of the proceeds from a trustee's sale, including but not limited to, the investigation of priority and the validity of claims and the disbursement of funds. If the fee charged for the services rendered pursuant to this subdivision does not exceed one hundred dollars (\$100), or one hundred twenty-five dollars (\$125) where there are

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obligations [with respect to satisfying the outstanding balance of obligations secured by junior liens and encumbrances], the fee is conclusively presumed to be reasonable." Cal. Civ. Code section 2924k(b). Additionally, under California Civil Procedure Code section 386.6, a party may request allowance for costs and reasonable attorney fees in its complaint for interpleader.

The court has discretion to award such party his costs and reasonable attorney fees. Cal. Civ. P. Code section 386.6. However, although the courts generally have discretion to award the plaintiff its costs and attorney's fees, the Ninth Circuit has held that the existence of prior federal tax liens gives the government a statutory priority over the interpleader plaintiff's ability to diminish the fund by an award of fees. *Abex Corp. v. Ski's Enters., Inc.*, 748 F.2d 513, 516 [55 AFTR 2d 85-401] (9th Cir. 1984). According to the Ninth Circuit, the governmental priority established under the tax lien statutes precludes an award of fees to the plaintiff stakeholder from an interpleader fund when such an award would deplete the fund prior to the satisfaction of the lien. *Id.* at 517.

In the present case, Housekey Financial seeks recovery for costs and attorney's fees it incurred in the prosecution of the interpleader action.

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Housekey Financial contends that it is entitled to an award of fees from the interpleader funds because its right to attorney's fees and costs derived from the deed of trust, which was recorded prior to the tax liens and judgment lien. Housekey Financial argues that its right to fees under the deed of trust has statutory basis in California Civil Code sections 2924j and 2924k. Plaintiff states that sections 2924j and 2924k authorize the trustee to recover fees for the investigation of the validity of the competing claims and to utilize the interpleader process.

While section 2924k(b) does permit the trustee to charge costs and expenses incurred for such items as mailing and a reasonable fee for services provided in connection with the distribution of the surplus proceeds, the provision does not specifically provide for an award of fees in the event that the trustee brings an interpleader action. Moreover, section 2924k(b) states that a fee of \$125 is conclusively presumed to be reasonable, where there are junior lienors, suggesting that the provision does not address the award of fees with respect to an interpleader action. In addition, Housekey Financial's argument that its right to attorney's fees and costs from the surplus funds derives from the trust deed is unpersuasive. Rather, the court agrees with the United States that plaintiff's right

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to fees incurred in connection with its interpleader action did not come into existence until the interpleader action was filed. More importantly, the court must follow federal law when determining whether a state interest or lien has priority over a federal tax lien. Therefore, the court is bound by the Ninth Circuit's Abex Corp. decision and must deny Housekey Financial's request for an award of fees and costs.

Housekey Financial Corp. v. Hofer 87 A.F.T.R.2d 2001-1265

Accordingly, the IRS's objection is well taken that the fund available to satisfy its lien may not be diminished by the trustee's fees but that the fund available to satisfy the liens of Chase and Sobel can, by contrast, be so diminished. Item 15 of the petition makes it clear that the \$3,666.72 was incurred in providing notice of surplus funds and attempting to determine rights to the surplus funds and filing the instant petition, rather than fees incurred in the foreclosure process itself. The same argument applies to the clerk's fee of \$435.00.

These amounts will have to be offset from the claims of Sobel and/or Chase. The court is unaware of any authority explaining how to offset the trustee's fees from Sobel and/or Chase's shares. The court believes that the most equitable off-set, given that

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Sobel's lien is junior to Chase's lien, and given that the Sobel and the IRS debt appears to be individual debts of Mr. Gertner, would be to offset the amount of the trustee's fees and filing fee from Sobel's share. It should be noted that this will not relieve Mr. Gertner from responsibility of paying the amount he is owed, regardless of how much might be applied to address the amount owing Mr. Sobel from these funds.

The total amount of surplus is \$193,666.53 but the amount of deposit was \$189,864.61 The amount owed to Chase is \$148,542.60, leaving \$41,322.21 available to satisfy the claim of Sobel and the IRS. Sobel's claim, which is junior to Chase's claim, is \$28,657.72. The amount of trustee's fees and filing fee will be offset from Sobel's claim. Sobel will therefore receive \$24,856. This leaves \$16,466.21 to satisfy the IRS lien, which is of course less than the \$53,467.08 owed to the IRS.

The distribution shall now therefore be as follows:
Chase shall receive \$148,542.60.
Sobel shall receive \$24,856.00
The USA shall receive \$16,466.21.
Clerk is to give notice.

CLERK'S CERTIFICATE OF MAILING

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