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CERTIFIED FOR PARTIAL PUBLICATION[*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MORDECHAI KACHLON, et al., Plaintiffs and Appellants, v. DEBRA W. MARKOWITZ, et al., Defendants and Appellants.	B182816 (Los Angeles County Super. Ct. No. BC291979)
DONALD J. MARKOWITZ, et al., Plaintiffs, Cross-defendants and Appellants, v. MORDECHAI KACHLON, et al., Defendants, Cross-complainants and Appellants; BEST ALLIANCE FORECLOSURE AND LIEN SERVICES, Defendant and Appellant.	(Los Angeles County Super. Ct. No. BC301492)

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[*] Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I.B.4 through I.B.6 and part II.

APPEAL from a judgment of the Superior Court of Los Angeles County, Aurelio Munoz, Judge. Reversed in part and Affirmed in part.

The Law Office of John Derrick for Plaintiffs and Appellants Mordechai Kachlon and Monica Kachlon.

Gary G. Kuist and Timothy D. McGonigle for Plaintiffs, Cross-defendants and Appellants Donald J. Markowitz.

Edwin B. Stegman for Defendant and Appellant Debra W. Markowitz.

Adleson, Hess & Kelly, Phillip M. Adleson, Berger Kahn, and G. Arthur Meneses for Defendant and Appellant Best Alliance Foreclosure and Lien Services.

Kirby & McGuinn, Martin T. McGuinn, and Dean T. Kirby, Jr., for Amicus Curiae United Trustee's Association on behalf of Defendant and Appellant Best Alliance Foreclosure and Lien Services.

INTRODUCTION

This appeal arises following a joint trial in two consolidated lawsuits involving, broadly speaking, allegations of wrongful foreclosure under a deed of trust and breach of a home improvement contract. The relationships among the parties giving rise to the lawsuits are complicated. The relevant events began in September 1998, when the Markowitzes (Donald and Debra, husband and wife) purchased a residence from the Kachlons (Mordechai and Monica, also husband and wife).[1] As part of the transaction, the Markowitzes executed a promissory note

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[1] For clarity, we often refer to the Markowitzes and Kachons by their first names. We intend no disrespect.

for $53,000 in favor of the Kachlons, secured by a second deed of trust on the home. Thereafter, Mordechai provided contractor services for the Markowitzes involving various home improvement projects. Debra, an attorney, provided legal services to Mordechai, and also became romantically involved with him.

The parties' dealings soured, resulting in two lawsuits. In the first, Mordechai sued the Markowitzes for allegedly breaching his home improvement contract and failing to repay personal loans. In the second, the Markowitzes sued the Kachlons, alleging that they wrongfully initiated nonjudicial foreclosure proceedings on the residence under the deed of trust. The Markowitzes also named as a defendant, among others, Best Alliance Foreclosure and Lien Services (Best Alliance), whom the Kachlons substituted in as the trustee to conduct the nonjudicial foreclosure. In the Markowitzes' action, Mordechai filed a cross-complaint against Debra for legal malpractice and breach of fiduciary duty.

Following consolidation, the two lawsuits were tried together. The results of the trial, along with the trial court's rulings on motions for directed verdict, judgment notwithstanding the verdict, and attorney fees, create a thicket of appeals by the Kachlons, Donald and Debra Markowitz (who appeal separately, having been separately represented in the trial court as well), and Best Alliance.

So as to discuss related issues from the appeals and cross-appeals together, we divide our opinion into two main parts. We ultimately affirm the judgment, except for the court's award of $16,000 in attorney fees to Debra Markowitz under Civil Code section 1717 as against the Kachlons and Best Alliance. We remand that issue to the trial court for a redetermination of the attorney fees to which Debra is entitled under Civil Code section 1717, and direct the court to use the lodestar method as described in *PLCM Group., Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096 (*PLCM*).

In part I of our opinion, we consider issues relating to the Markowitzes' lawsuit against the Kachlons and Best Alliance for wrongful foreclosure on the residence under the deed of trust. In the published portion of part I, we hold that Civil Code section 2924 deems the statutorily required mailing, publication, and delivery of notices in nonjudicial foreclosure, and the performance of statutory nonjudicial foreclosure procedures, to be privileged communications under the qualified, common-interest privilege of Civil Code section 47, subdivision (c)(1). We conclude that Best Alliance's recording of the notice of default on instruction by the Kachlons was privileged, that the evidence failed to demonstrate Best Alliance acted with malice, and that therefore Best Alliance was immune from the Markowitzes' slander of title and negligence claims. Also, we reject the Markowitzes' claim that the scope of the privilege is limited by another provision of section 2924, which grants the trustee immunity for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the default under the deed of trust. We further conclude that, unlike Best Alliance, the Kachlons are not entitled to privilege protection. Finally, we hold that the trial court properly found, under Civil Code section 1717, that the Markowitzes were prevailing parties entitled to attorney fees against the Kachlons and Best Alliance on the Markowitzes' equitable claims arising out of the $53,000 promissory note and deed of trust.

In the unpublished portion of part I, we conclude that the court did not abuse its discretion in determining the amount of attorney fees to which Donald was entitled. Regarding the single aspect of the judgment as to which we reverse, we conclude that the trial court erred in limiting Debra's award of attorney fees on the claims arising out of the promissory note and trust deed to an amount purportedly based on the contingency fee agreement between Debra and her counsel. We

remand solely for a redetermination of the attorney fees to which Debra is entitled under Civil Code section 1717.

In part II of our opinion, which is unpublished, we consider issues relating to the Kachlons' action to recover sums allegedly owing on the home improvement contract and unsecured personal loans. We find no error in this portion of the case.

I. THE WRONGFUL FORECLOSURE AND RELATED CLAIMS

A. FACTUAL AND PROCEDURAL BACKGROUND

1. *The Original Promissory Note and Second Deed of Trust*

In 1998, the Markowitzes purchased a home from the Kachlons. In the sale, the Markowitzes executed a promissory note for $53,000 in favor of the Kachlons, secured by a second deed of trust on the residence. In addition, the parties agreed that Mordechai Kachlon would take possession of a 1995 Jaguar automobile owned by the Markowitzes, and Donald Markowitz would continue to make all payments on the car. These payments were to be credited toward the monthly payments due on the promissory note. Debra Markowitz and Mordechai also agreed that Debra would provide legal services to Mordechai, which were to be credited toward the amount owed on the promissory note.

Over time, the parties' entanglements increased, as Mordechai began performing various construction and home improvement projects at the Markowitzes' home, and Mordechai and Debra began an affair. Eventually, in late 2001, Donald initiated divorce proceedings from Debra.

2. *The Kachlons' First Nonjudicial Foreclosure, and the 2002 Reduction of the Note*

In early 2002, a dispute arose between the Kachlons and the Markowitzes regarding the amount still owing under the promissory note. Donald asserted that

he had made over $30,000 in payments on the Jaguar that should have been credited against the note. In early May 2002, the Kachlons initiated nonjudicial foreclosure proceedings, claiming the Markowitzes were in default on the promissory note. Ultimately, the Kachlons and the Markowitzes entered into an oral agreement to resolve the dispute. The Kachlons agreed to withdraw the foreclosure action, and acknowledge that the obligation on the promissory note had been reduced by $41,000. In turn, the Markowitzes agreed to transfer title to the Jaguar to Mordechai. In late May 2002, the parties executed a written agreement stating the obligation on the promissory note was reduced by $41,000 to reflect payments and credits received from the Markowitzes.

Later in 2002, Mordechai insisted the Markowitzes still owed him additional money. In July 2002, Debra signed an unsecured promissory note in Mordechai's favor. Under the note, Debra agreed to pay Mordechai $7,000 in return for his forgiving $7,000 due on the original $53,000 note.[2]

3. *Donald's Line of Credit*

In July 2002, City National Bank (Bank) agreed to extend to Donald a $200,000 line of credit, which was to be secured by a new second deed of trust on the Markowitz residence. To complete this transaction, the Bank required that the original $53,000 promissory note issued by the Markowitzes to the Kachlons be repaid in full, and that the Kachlon's second deed of trust, which secured the note, be reconveyed. The Bank retained Fidelity National Title Company (Fidelity) to

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[2] Debra signed the note as an individual and "on behalf of Donald J. Music and the publishing company for the song 'Time of My Life.'" Donald Markowitz is a published songwriter. "Time of My Life" is one of his compositions.

provide a policy of title insurance, and Fidelity also agreed to act as a subescrow to hold and exchange money and documents between Donald and the Kachlons.

Fidelity sent the Kachlons a request for demand in July 2002 stating that Donald had made a loan request to be secured by the Markowitz residence, and that the encumbrance held by the Kachlons was to be paid in full. The request for demand was accompanied by a beneficiary's demand in which the Kachlons were to state the amount remaining due on the note, and a request for reconveyance in which they were to consent to reconveyance of the deed of trust upon receipt of payment.

Fidelity requested that the Kachlons complete and sign the beneficiary's demand and request for reconveyance, and deliver them along with the original promissory note and deed of trust to Fidelity.

On or about July 24, 2002, Mordechai delivered the documents. As completed, the beneficiary's demand stated that $12,000 remained due on the note, and requested a check in that amount made payable to Mordechai and Monica Kachlon. The request for reconveyance authorized reconveyance upon satisfaction of the note. On both documents, signatures for Mordechai and Monica Kachlon appear at the bottom. Mordechai had signed for himself. Debra, however, had signed Monica's name on both.

After delivery of the documents, Mordechai received from Fidelity a check for $12,000, payable to both Mordechai and Monica. Mordechai and Monica endorsed the back of the check and deposited it in their joint account. Although Fidelity had not yet recorded a reconveyance of the Kachlon deed of trust, a new deed of trust in favor of the Bank was recorded, and Donald received his line of credit.

4. *The Kachlons' Objection to a Reconveyance of Their Deed of Trust*

In January 2003, Fidelity commenced the statutory procedure for clearing title pursuant to Civil Code section 2941, subdivision (b)(3), whereby a title insurer may prepare and record a release of obligation. Fidelity sent written notice to the Kachlons that their deed of trust had not been removed, and advised them that unless they objected, Fidelity was going to record a release of the obligation. The Kachlons did object, and told Fidelity that the promissory note had not been paid in full. Mordechai informed Fidelity that Monica's signatures on the beneficiary demand and request for reconveyance had been forged by Debra. Fidelity did not record a deed of reconveyance, and the Kachlons' deed of trust remained in place. The Kachlons' original deed of trust and original promissory note remained in Fidelity's possession, even at the time of trial in this matter.[3]

5. *The Second Foreclosure Attempt, and the Kachlons' Substitution of Best Alliance as Trustee in Their Third Foreclosure*

In March 2003, the Kachlons initiated a second foreclosure and caused a notice of default to be recorded. The trustee dismissed the proceeding after seeing the documents evidencing full satisfaction of the $53,000 note.

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[3] The Markowitzes named the Bank and Fidelity as defendants in this action based upon their failure to record a reconveyance of the deed of trust. The Bank was dismissed without prejudice prior to trial, and the trial court entered judgment in favor of Fidelity after granting its motion for nonsuit. In a prior appeal (*Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508), we affirmed the judgment in favor of Fidelity. We held that the relevant statutes did not impose on Fidelity, as a subescrow holder, the duty to record a deed of reconveyance. (*Id.* at pp. 521-525. See Civ. Code, § 2941.) Our conclusion did not rely on Debra's admission that she forged Monica's signature on the request for reconveyance. The Bank and Fidelity are not parties to this appeal.

In June 2003, the Kachlons substituted Best Alliance as trustee. The Kachlons executed and delivered to Best Alliance a declaration of default stating that the debt secured by the deed of trust was in default, and instructing it to commence nonjudicial foreclosure proceedings. The Kachlons gave Best Alliance copies of the $53,000 promissory note and deed of trust, rather than the originals (which remained in the possession of Fidelity). Best Alliance then obtained from a title company a "trustee's sale guaranty," the purpose of which is to inform a trustee of the information necessary to conduct a nonjudicial foreclosure, such as the identity of the vested owner and the persons entitled to notice.

The trustee's sale guaranty showed that the deed of trust securing the Kachlons' promissory note was still of record, and that no prior reconveyance had been recorded. Best Alliance recorded and mailed a notice of default which stated, based on the information given to it by Mordechai, that only $12,000 had been paid on the obligation, and that $56,899.91 was due under the promissory note.

6. *Best Alliance's Suspension of Foreclosure*

Donald's attorney informed Best Alliance that there was a dispute as to whether money was owed and provided it with evidence that the debt had in fact been satisfied (including the executed beneficiary's demand and request for reconveyance that Mordechai had submitted to Fidelity). Best Alliance's president, Sid Richman, related this information to Mordechai, but Mordechai disputed that the debt had been satisfied. Richman advised Donald's attorney and the Kachlons that Best Alliance would put its file on hold until the dispute was resolved. Best Alliance refused to dismiss the foreclosure proceeding, but did not proceed with a foreclosure sale.

7. *Markowitzes' Complaint in Case No. BC301492*

In August 2003, the Markowitzes filed their lawsuit challenging the nonjudicial foreclosure. The premise underlying all the claims was that the foreclosure was wrongful because the promissory note to the Kachlons had been fully satisfied.

As against the Kachlons, the Markowitzes sought damages on causes of action for breach of the Kachlons' asserted statutory duty to secure a reconveyance of the deed of trust under former subdivision (b)(3) (now subd. (b)(1)) of Civil Code section 2941, and for slander of title (also styled attempting to obtain title by fraud). Debra alone sued Mordechai for intentional infliction of emotional distress and intentional destruction of personal property. As against Best Alliance, the Markowitzes sought damages on two claims: slander of title (also styled fraudulent business practices) and negligence.

Besides damages, the complaint sought equitable remedies against the Kachlons and Best Alliance for declaratory relief (seeking cancelation of the Kachlon's note and a reconveyance of the deed of trust), an injunction against the foreclosure, and quiet title in favor of the Markowitzes. Before trial, the Markowitzes obtained a temporary restraining order, and later a preliminary injunction, preventing the Kachlons and Best Alliance from continuing with the foreclosure.

8. *Trial and Directed Verdict for Best Alliance*

Trial on the damage claims began in September 2004. After all parties rested, Best Alliance moved for a directed verdict on the claims against it for slander of title and negligence, arguing that its conduct was privileged pursuant to

Civil Code sections 2924 and 47.[4] The court granted the motion as to slander of title, but denied it as to negligence.

9. *Jury Verdict On the Markowitzes' Claims*

a. *Claims Against the Kachlons*

As to the claims against the Kachlons, the jury found that the Kachlons did not breach any duty by failing to cause a reconveyance of their deed of trust, but that "the 2003 non-judicial foreclosures [were] wrongful." The jury assessed damages of $100,000 for Donald and $40,000 for Debra. Further, the jury found by clear and convincing evidence that in "the 2003 foreclosures" Mordechai acted "intentionally, fraudulently and in conscious and callous disregard for the rights of the Markowitzes." The jury awarded $150,000 in punitive damages. Finally, the jury found that Mordechai did not intentionally inflict severe emotional distress on Debra.

b. *Claim Against Best Alliance*

As to the negligence claim against Best Alliance, the jury found that Best Alliance did not "exercise ordinary skill and diligence in performing its duties," and awarded Donald and Debra damages of $30,000 each.

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[4] Best Alliance entitled the motion a motion for "nonsuit." Coming after all parties had rested, however, the motion is properly construed as a motion for directed verdict (the standards applicable to nonsuit and directed verdict are the same). (Wegner, et. al, California Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) § 12:220, p. 12-46.) For clarity, we refer to the motion as one for directed verdict and the court's ruling as granting a directed verdict.

10. *Court's Ruling on Equitable Issues*

After the jury verdict, the parties submitted briefs on the equitable claims not decided by the jury: declaratory relief, injunctive relief, and quiet title. The court, stating that it was using the jury in an advisory capacity, found that the jury was correct in its factual determinations, and granted the relief sought by the Markowitzes. The court cancelled the promissory note, ordered the deed of trust to be reconveyed, and cleared title on the Markowitz residence in favor of the Markowitzes. Best Alliance was ordered to record both a notice of rescission of the pending foreclosure and a deed of reconveyance. The court permanently enjoined the Kachlons and Best Alliance from claiming a default or otherwise exercising the power of sale provision in the deed of trust.

The court also set aside the punitive damages award in favor of the Markowitzes because the jury did not have before it evidence of the Kachlon's net worth.

11. *Motions for Attorney Fees*

Relying on attorney fee clauses in the $53,000 note and deed of trust, the Markowitzes moved for attorney fees against the Kachlons and Best Alliance on their equitable claims founded on the note and trust deed. The trial court ruled that the Markowitzes were the prevailing parties and entitled to attorney fees under Civil Code section 1717. We discuss the specifics of the award under Civil Code section 1717 below in connection with the Kachlons' and Best Alliance's challenges to the award, as well as Debra's and Donald's challenges to the amount of the attorney fees they were awarded.

12. *The Statement of Decision*

At a hearing on January 7, 2005, the Kachlons and Best Alliance orally requested that the court prepare a statement of decision on the factual and legal bases for its decision as to each of the equitable issues decided, and also regarding the attorney fees awarded. However, they did not request that specific issues be addressed. Donald prepared a proposed statement of decision, to which the Kachlons filed objections. The Kachlons generally objected that the proposed statement of decision failed to explain the factual and legal basis for the court's decision. When the court later entered the statement of decision, it noted that the Kachlons and Best Alliance were required to specify those controverted issues as to which they requested a statement of decision, but had failed to do so.

13. *Post-Trial Motions*

a. *Best Alliance*

Best Alliance then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and also a motion to tax costs including attorney fees. Best Alliance argued in part that, pursuant to Civil Code section 2924, recordation of the notice of default was privileged, and that therefore Best Alliance was immune from tort liability. The court agreed, and granted judgment notwithstanding the verdict on the Markowitzes' negligence claim against Best Alliance. Accordingly, the court entered an amended judgment that deleted the award of damages on that claim. However, the court still awarded the Markowitzes attorney fees under Civil Code section 1717 against the Kachlons and Best Alliance.

At the end of March 2005, Best Alliance filed a declaration of nonmonetary status. (Civ. Code, § 2924*l*.)[5] Best Alliance also filed a motion to vacate the amended judgment. (Code Civ. Proc., § 663.) It argued that because it was immune from tort liability, the Markowitzes should not be deemed prevailing parties as to Best Alliance, and it should not be subject to attorney fees and costs. The trial court denied the motion to vacate.

b. *The Kachlons*

The Kachlons also filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial in March 2005, on essentially the same grounds as Best Alliance had presented, including a claim that their conduct was privileged under section 2924. However, the court denied the Kachlons' motions for a new trial and judgment notwithstanding the verdict.

14. *The Final Judgment and the Appeals*

The final amended judgment was filed on March 30, 2005. Among other things, the judgment awarded attorney fees jointly against Best Alliance and the Kachlons based on the Markowitzes having prevailed on their equitable claims related to the wrongful foreclosure action. Donald was awarded attorney fees, for the foreclosure portion of the case, against the Kachlons and Best Alliance, jointly and severally, in the amount of $166,207.50, plus $14,572.20 for additional attorney fees incurred. The amount of the attorney fees awarded to Debra, as costs,

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[5] As we later explain in greater detail, Civil Code section 2924*l* provides a procedure whereby a trustee under a deed of trust may avoid participation in litigation and liability for damages, costs, and attorney fees.

against the Kachlons and Best Alliance, jointly and severally, was set at $16,000 for the wrongful foreclosure portion of the case.

B. DISCUSSION

1. *The Directed Verdict and Judgment Notwithstanding the Verdict for Best Alliance*

We turn first to the issues raised by the court's directed verdict for Best Alliance on the Markowitzes' slander of title claim, and its judgment notwithstanding the verdict on the negligence claim.

At base, Best Alliance's liability on both claims depended on whether its recording the notice of default and its decision not to rescind the notice were wrongful. Thus, the alleged slander on the Markowitzes' title was the notice of default itself, which remained in place even after Donald's attorney provided documentation showing that the underlying promissory note had been paid. The essence of the negligence claim was that Best Alliance breached its duty of due care in recording the notice of default because it failed to obtain the original promissory note and deed of trust from the Kachlons before recording the notice, and also breached its duty by failing to rescind the notice despite being informed the debt was satisfied.

In its rulings, the court found that Best Alliance's actions were privileged under Civil Code section 2924.[6] At the time, that statute provided in relevant part: "The mailing, publication, and delivery of notices as required herein [for nonjudicial foreclosure], and the performance of the procedures set forth in this article, shall constitute privileged communications within Section 47."

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[6] All undesignated section references in our Discussion in part I are to the Civil Code.

In their cross-appeals, the Markowitzes contend that the court erred in finding Best Alliance's actions were immunized. They assert that, at most, section 2924 accords a trustee a qualified privilege, and that in any event Best Alliance's actions do not qualify for privilege protection. Best Alliance contends, on the other hand, that the privilege is absolute, and that the court correctly applied it.[7]

We hold that section 2924 deems the statutorily required mailing, publication, and delivery of notices in nonjudicial foreclosure, and the performance of statutory nonjudicial foreclosure procedures, to be privileged communications under the qualified, common-interest privilege of section 47, subdivision (c)(1). We conclude that Best Alliance's recording of the notice of default was privileged, that the evidence failed to demonstrate Best Alliance acted with malice, and that therefore Best Alliance was immune from the Markowitzes' slander of title and negligence claims. Also, we reject the Markowitzes' claim that another provision of section 2924, granting the trustee immunity for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the deed of trust, limits the application of the privilege. Therefore, we conclude that the trial court properly directed a verdict for Best Alliance on the Markowitzes' slander of title claim, and properly entered judgment notwithstanding the verdict on their negligence claim.

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[7] Amicus United Trustee's Association argues that Best Alliance's actions were privileged, and that we have no occasion to determine the scope of the privilege because there was no finding that Best Alliance acted with malice. The scope of the privilege, however, is essential to properly analyzing the extent of protection, if any, given to Best Alliance, as well as to the Kachlons, who contend that their conduct is also immunized. Like Best Alliance, the Kachlons contend the privilege is absolute. It is also necessary to analyze the scope of the privilege in light of the opinion in *Garretson v. Post* (2007) 156 Cal.App.4th 1508 (*Garretson*), issued after the amicus brief was filed. As explained below, we disagree with *Garretson's* interpretation of section 2924.

We begin with a brief review of general principles regarding nonjudicial foreclosure.

a. *Deeds of Trust, Nonjudicial Foreclosure, and the Duties of a Trustee*

Under a deed of trust containing a power of sale, like the trust deed securing the Markowitzes' promissory note in favor of the Kachlons, the borrower, or "trustor," conveys nominal title to property to an intermediary, the "trustee," who holds that title as security for repayment of the loan to the lender, or "beneficiary." (See 1 Cal. Real Estate Finance Practice: Strategies and Forms (Cont.Ed.Bar 2007) §§ 4.3-4.6, pp. 196-199; 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:2, p. 15.) The trustee's duties are twofold: (1) to "reconvey" the deed of trust to the trustor upon satisfaction of the debt owed to the beneficiary, resulting in a release of the lien created by the deed of trust, or (2) to initiate nonjudicial foreclosure on the property upon the trustor's default, resulting in a sale of the property. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 677 (*Vournas*); see 4 Miller & Starr, *supra*, at § 10:4, p. 23, § 10:111, p. 340.) The beneficiary may make a substitution of trustee, such as was done by the Kachlons in substituting Best Alliance, to conduct the foreclosure and sale. (§ 2934a; see 1 Bernhardt, Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar 2007) § 2:13, p. 65.)

When the trustor defaults on the debt secured by the deed of trust, the beneficiary may declare a default and make a demand on the trustee to commence foreclosure. (4 Miller & Starr, *supra*, § 10:181, p. 552.) The Civil Code contains a comprehensive statutory scheme regulating nonjudicial foreclosure. Generally speaking, the statutory, nonjudicial foreclosure procedure begins with the

recording of a notice of default by the trustee. (§ 2924, subd. (a)(1).)[8] After the expiration of not less than three months, the trustee must publish, post, and mail a notice of sale at least 20 days before the sale, and must also record the notice of sale at least 14 days before the sale (§§ 2924, subds. (a)(1), (a)(2) & (a)(3), 2924f, subd. (b)(1); see *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*); see also 4 Miller & Starr, *supra*, § 10:199, p. 623.) The sale and any postponement are governed by section 2924g. (*Moeller, supra,* 25 Cal.App.4th at p. 830; Miller & Starr, *supra*, § 10:201, p. 637.)

The trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary. (*Vournas, supra,* 73 Cal.App.4th at p. 677.) The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 287-288 (*I. E. Associates*); *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 827.)

b. *The 1996 Amendment – Privilege Protection*

In 1996, section 2924 was amended to add the following language: "The mailing, publication, and delivery of notices as required herein, and the performance of the procedures set forth in this article, shall constitute privileged communications within Section 47." (Stats. 1996, ch. 483 (Sen. Bill No. 1488) § 1.) This provision – to which we refer as the 1996 amendment – was later

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[8] In 2006, Civil Code section 2924 was amended by, inter alia, incorporating subdivisions. Our case is governed by a prior version of the statute. As here relevant, however, the 2006 amendment contained no substantive change. We cite to the current statute in discussing nonjudicial foreclosure generally.

incorporated into subdivision (d) of section 2924, with somewhat different language, but without relevant substantive change. (Cal. Legislative Service (2005-2006 Reg. Sess.) ch. 575 (Assem. Bill No. 2624), § 4, pp. 3699-3700.)[9] The original language of the 1996 amendment governs here.

Although the 1996 amendment deems statutory nonjudicial foreclosure procedures to be privileged communications under section 47, the amendment fails to specify whether the intended privilege is absolute or qualified. (See 1 Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra*, § 2:31, p. 81.) As here relevant, section 47 provides an absolute privilege for communications made in a "judicial proceeding" (§ 47, subd. (b)(2)), generally referred to as the litigation privilege.[10] It also provides an absolute privilege for communications made "in

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[9] Current subdivision (d) of section 2924, incorporated into the statute in 2006, provides:

"All of the following shall constitute privileged communications pursuant to Section 47:

"(1) The mailing, publication, and delivery of notices as required by this section.

"(2) Performance of the procedures set forth in this article.

"(3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure."

[10] Although section 47 has been amended three times since 1996, the language applicable to the instant case has remained the same. (Stats 1996, ch. 1055 (Sen. Bill No. 1540), § 2; West's California Legislative Service (2001-2002 Reg. Sess.) Stats. 2002, ch. 1029 (Assem. Bill No. 2868) § 1, pp. 5159-5160; West's California Legislative Service (2003-2004 Reg. Sess.) ch. 182 (Assem. Bill No. 3081) § 4, pp. 600-601.) The relevant language states: "A privileged publication or broadcast is one made: [¶] (a) In the proper discharge of an official duty. [¶] (b) *In any* (1) legislative proceeding, (2) *judicial proceeding*, (3) *in any other official proceeding authorized by law*, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows: . . . [listing exceptions not applicable here]. [¶] (c) *In a communication, without malice, to a person interested therein, (1) by one who is also interested*, or (2) by one who stands in such a relation to the person interested as to afford

any other official proceeding authorized by law." (§ 47, subd. (b)(3).) By contrast, it provides a qualified privilege for communications made "without malice, to a person interested therein, . . . by one who is also interested" (§ 47, subd. (c)(1)), the so-called common interest privilege. For this purpose, malice is defined as actual malice, meaning "'that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.'" (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413 (*Sanborn*); see *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1370 (*Noel*).) Although the section 47 privileges were originally applicable only to defamation actions, case law now recognizes that the privileges apply to all torts except malicious prosecution. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*).)

c. *The Garretson Decision*

The failure of section 2924 to specify which section 47 privilege applies creates an ambiguity in the statute. The only prior decision to have construed the provision is *Garretson, supra,* 156 Cal.App.4th 1508. There, a trustor under a deed of trust (the purchaser of the property at issue) sued the beneficiary (the seller) for wrongful foreclosure. (*Id.* at p. 1514.) The beneficiary filed a motion to strike under Code of Civil Procedure section 425.16, the anti-SLAPP statute, contending that the wrongful foreclosure claim was barred because the notice of nonjudicial foreclosure sale constituted protected speech or petitioning activity in an "official proceeding authorized by law." (Code Civ. Proc., § 425.16, subds.

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a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Italics added.)

(e)(1) & (e)(2).) As summarized by the Court of Appeal, the essence of the beneficiary's argument was that "because nonjudicial foreclosure proceedings are privileged under Civil Code sections 47 and 2924, . . . nonjudicial foreclosure proceedings are 'official proceedings' under the anti-SLAPP statute." (*Garretson, supra,* 156 Cal.App.4th at p. 1517.)

The court rejected the argument, noting that nonjudicial foreclosure is a private procedure without a close link "to any governmental, administrative, or judicial proceedings or regulation." (*Garretson, supra,* 156 Cal.App.4th at p. 1521.) In the course of its discussion, the court stated, without analysis, that "section 2924, subdivision (d) provides that a creditor's nonjudicial foreclosure activity constitutes privileged communications *under the litigation privilege* [of section 47, subdivision (b)]." (*Id.* at p. 1517, italics added.) The court apparently relied on a portion of the legislative history of the 1996 amendment -- analyses of the Assembly Committee on Judiciary and the Senate Rules Committee -- which equated the purpose of notices of default and sale in nonjudicial foreclosure to those in judicial foreclosure, and suggested the need to give the same privilege protection to trustees in both foreclosure procedures.[11]

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[11] The court referred to these documents, as follows: "The Legislature's rationale for extending the litigation privilege in Civil Code section 2924 to nonjudicial foreclosures was to protect trustees in the performance of their contractual and statutory duties. The proponents of the original amendment to Civil Code section 2924 in 1996 commented that 'Trustees who record and send notices of default and of sale can be vulnerable to defamation suits despite the fact that when the same allegations are made in the context of a judicial foreclosure, they are clearly privileged communications. This appears to be because a nonjudicial foreclosure is a private, contractual proceeding, rather than an official, governmental proceeding or action. Essentially, the required communications of default are the same and made for the same purpose.' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1488 (1995-1996 Reg. Sess.) as amended June 26, 1996, p. 2 (italics added); see also Sen. Rules Com., Off. of Sen. Floor Analysis, unfinished

As we next explain, to the extent *Garretson* concluded that the 1996 amendment makes the litigation privilege applicable to nonjudicial foreclosure, we disagree, because the legislative history is not at all clear.

d. *The Inconclusive Legislative Histo*ry

The legislative history of the 1996 amendment, viewed as a whole, is far from definitive as to the scope of the privilege intended. (See *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578 (*J.A. Jones*) ["the wisest course is to rely on legislative history only when that history itself is unambiguous"].) True, the Assembly and Senate analyses cited by *Garretson* suggest a legislative intent to give the absolute protection of the litigation privilege to nonjudicial foreclosure. Indeed, the Assembly Judiciary Committee Republican Analysis (not cited in *Garretson*) expressly stated that the amendment would "extend[] that same privilege from such defamation liability [applicable to judicial foreclosure] to nonjudicial foreclosure proceedings." (Assembly Judiciary Committee Republican Analysis, Sen. Bill No. 1488, p. 3.)

Yet, other documents in the legislative history show a different intent. The California Trustees Association sponsored the 1996 amendment to protect trustees from the harassment caused by defamation actions based on the publication of notices of default and of sale required by statute. Responding to two Background Information Requests (one from the Assembly Committee on Judiciary, the other from the Senate counterpart), the Senate author stated that the proposed amendment "clarifies" that a trustee's actions under the nonjudicial foreclosure statutes "are 'communications' within the meaning of Civil Code Section 47,

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business analysis of Sen. Bill No. 1488 (1995-1996 Reg. Sess.) as amended July 9, 1996, p. 3.)" (*Garretson, supra,* 156 Cal.App.4th at p. 1518, italics deleted.)

meaning that *truthful communications made without malice* are privileged from libel laws." (Assembly Committee on Judiciary, Background Information Request, Sen. Bill No. 1488, p. 3, italics added; Senate Committee on Judiciary, Background Information Request, Sen. Bill No. 1488, p. 2, italics added.)[12] The reference to granting protection to "truthful communications made without malice" invokes the qualified privilege language of section 47, subdivision (c), and thus contradicts the notion that the amendment was intended to make the litigation privilege applicable.

The Legislative Counsel's Digest accompanying the final version of the bill is ambiguous concerning the scope of the privilege. It states: "Existing law defines a privileged publication or broadcast for the purposes of the law relating to defamation. [¶] The bill would provide that the mailing, publication, and delivery of notices and the performance of specified procedures are privileged communications for the purposes of the law relating to defamation." (Leg. Counsel's Digest to Sen. Bill No. 1488, p. 1.) The Digest does not state whether the "privileged communications" are absolutely or qualifiedly privileged. No other document properly considered in an analysis of the legislative history adds anything definitive to the debate.

Thus, contrary to the apparent conclusion of the *Garretson* court, the legislative history of the 1996 amendment does not give a clear picture of legislative intent. That history alone, therefore, is not a reliable indicator of the scope of the privilege protection intended by the 1996 amendment. (*J.A. Jones, supra,* 27 Cal.App.4th at p. 1578.)

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[12] Background Information Requests are a proper source of legislative history. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1415, fn. 5.)

e. *The 1996 Amendment Reasonably Construed*

Because neither the language nor the legislative history of the 1996 amendment reveal a clear meaning, we "apply reason, practicality, and common sense to the language at hand," seeking to make the 1996 amendment "workable and reasonable [citations], in accord with common sense and justice, and to avoid an absurd result." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239 (*Halbert's Lumber*).) Logic and the purposes of the statutory scheme suggest that the common interest privilege (§ 47, subd. (c)(1)), not the absolute privileges for communications in judicial or official proceedings (§ 47, subds. (b)(2) and (b)(3)), applies to nonjudicial foreclosure.

As noted, the common interest privilege applies to "a communication, without malice, to a person interested therein . . . by one who is also interested." (§ 47, subd. (c).) This privilege is a natural fit for nonjudicial foreclosure. The trustee's statutory duties in effectuating the foreclosure are designed, in major part, to communicate relevant information about the foreclosure to other interested persons. The statutory notice of default is intended to give notice of the trustor's default to "the trustor, the trustor's successors, to junior lienors, other interested persons, and . . . to the world." (4 Miller & Starr, *supra*, § 10:181, p. 553.) Similarly, the notice of sale is intended to communicate necessary information concerning the impending sale to the same persons. (See generally 4 Miller & Starr, *supra,* § 10:199, pp. 623-629; see also 1 Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra,* at § 2.31, p. 81.) Thus, the trustee's statutory duties in nonjudicial foreclosure are consistent with the type of communications from one interested party to another covered by the common interest privilege.

By contrast, nonjudicial foreclosure bears none of the attributes essential for absolute privilege. Though regulated by statute as a matter of public policy, nonjudicial foreclosure is a private procedure involving private parties, occurring pursuant to a private power of sale contained in a deed of trust. (See generally 4 Miller & Starr, *supra,* at § 10:179-10:180, pp. 547-551.) By definition, it does not occur in a judicial proceeding. Hence, on its face, it is not covered by the litigation privilege. It also does not occur in an "official proceeding authorized by law" (§ 47, subd. (b)(3)), a category generally reserved for "'official,' i.e. governmental proceedings: that is, proceedings involving the government, an agency or official thereof, or quasi-judicial proceedings otherwise reviewable by writ of mandate." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1377; see also *Garretson, supra,* 156 Cal.Ap.4th at pp. 1520-1521 [nonjudicial foreclosure is not an "official proceeding" within the meaning of Code Civ. Proc., § 425.16, subds. (e)(1) and (e)(2)].)

Besides the logic of applying the common interest privilege rather than the litigation or official proceeding privilege, it is apparent that granting absolute immunity would be inconsistent with the "carefully crafted balancing of the interests of beneficiaries, trustors, and trustees" reflected in the comprehensive statutory scheme governing nonjudicial foreclosure. (*I. E. Associates, supra*, 39 Cal.3d at p. 288; see also *Moeller, supra,* 25 Cal.App.4th at p. 830.) In nonjudicial foreclosure, "[b]eneficiaries . . . want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors . . . need protection against the forfeiture of valuable property rights. Trustees . . . need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. In taking all these concerns into account, the statutes strike an overall balance favoring the protection of trustors." (*I. E. Associates, supra,* 39 Cal.3d at p. 288.)

Obviously, the 1996 amendment was intended to give trustees some measure of protection from tort liability arising out of the performance of their statutory duties. The overall balance of interests reflected in the statutory scheme, however, favors protection of trustors' property rights, thus suggesting that trustors should not be entirely deprived of the ability to vindicate their property rights if wrongfully violated by the trustee. Granting absolute immunity from such wrongdoing would wholly sacrifice the trustor's interest in favor of the trustee. The qualified common interest privilege, on the other hand, would provide a significant level of protection to trustees, leaving them open to liability only if they act with malice. At the same time, it preserves the ability of trustors to protect against the wrongful loss of property caused by a trustee's malicious acts.

Moreover, the plain language of the 1996 amendment grants privilege protection not only to trustees, but also to beneficiaries insofar as they may act as trustees. Section 2924 (at the time of the 1996 amendment and now) expressly permits the *beneficiary*, as well as the trustee, to record the notice of default which commences the nonjudicial foreclosure process. (See § 2924, subd. (a)(1).) Indeed, the beneficiary may act as trustee and enforce the trustee's authority under a deed of trust, including the power of sale (although this is uncommon). (1 Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra*, § 1:40, p. 32; 4 Miller & Starr, *supra*, § 10:3, p. 20.) Thus, the plain meaning of the 1996 amendment makes the recording of the notice of default by the beneficiary, and any other statutorily authorized act of the beneficiary acting as trustee, a privileged communication under section 47. It is difficult to believe that the Legislature intended to immunize the beneficiary (the creditor under the deed of trust) from

even a *malicious* initiation of nonjudicial foreclosure that might wrongfully deprive the trustor of the property that secures the debt.[13]

Thus, the common interest privilege is more consistent with the purposes of the nonjudicial foreclosure statutes as a whole than the absolute immunity conferred by the litigation privilege of section 47, subdivision (b)(2), or the official proceeding privilege of section 47, subdivision (b)(3). Further, as we have noted, the common interest privilege, unlike the litigation or official proceeding privilege, is consistent with the nonjudicial foreclosure process. Construing the 1996 amendment in a common sense fashion in light of the statutory scheme as a whole, we conclude that the protection granted to nonjudicial foreclosure by the 1996 amendment is the qualified, common interest privilege of section 47, subdivision (c)(1).

f. *The 1999 Amendment -- Good Faith Exception to Liability*

In 1999, the following provision was added to section 2429: "In performing acts required by this article, the trustee shall incur no liability for any good faith

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[13] We recognize that the legislative history suggests that the 1996 amendment (which, as we have noted, was sponsored by the California Trustees Association) was designed to protect *trustees* against harassing lawsuits. The legislative history makes no mention of a need to protect *beneficiaries*. Nonetheless, although the language of the amendment is ambiguous as to whether absolute or qualified immunity was intended, it is unambiguous as to what conduct is deemed a privileged communication – "[t]he mailing, publication, and delivery of notices as required herein, and the performance of the procedures set forth in this article, shall constitute privileged communications." (Stats. 1996, ch. 483 (Sen. Bill No. 1488) § 1.) By its plain language, therefore, the amendment extends privilege protection to beneficiaries when they act as trustees and record the notice of default, as section 2924 authorizes them to do. (See *Halbert's Lumber, supra,* 6 Cal.App.4th at p. 1239.) Moreover, we are unable to conclude that providing qualified immunity to beneficiaries who act as trustees results in an absurdity. (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698 [disregarding statutory language to avoid absurd result is reserved only for "extreme cases"].)

error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage." (Stats. 1999, ch. 974 (Assem. Bill No. 431), § 8.) This provision, to which we refer as the 1999 amendment, was also sponsored by the California Trustee's Association, and was in effect at the time of the foreclosure in this case in 2003.[14]

The Markowitzes contend that the 1999 amendment limits the effect of the privilege created by the 1996 amendment. They assert that 1999 amendment must be understood to mean that trustees remain subject to liability where good faith is lacking either on the part of the trustee or the *beneficiary*. Thus, under their interpretation, if the Kachlons acted in bad faith in conveying information about the default to Best Alliance, Best Alliance is not entitled to privilege protection, regardless of whether Best Alliance acted in good faith.

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[14] The 1999 amendment was placed in section 2924 two sentences before the 1996 amendment. Thus, at the time of the instant case, section 2924 provided: "*In performing acts required by this article [§§ 2920-2944.5], the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage.* In performing the acts required by this article, the trustee shall not be subject to Title 1.6c (commencing with Section 1788) of Part 4. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value without notice. *The mailing, publication, and delivery of notices as required herein, and the performance of the procedures set forth in this article, shall constitute privileged communications within Section 47*." (Stats. 2000, ch. 636 (Assem. Bill No. 2284, § 6, italics added; see also Stats. 1999, ch. 974 (Assem. Bill No. 431), § 8.)

The 1999 amendment is now found in section 2924, subdivision (b).

On the face of the 1999 amendment, it is not entirely clear how it interplays with the 1996 amendment, if at all. Certainly, the placement of the two provisions in the statute, separated by two sentences at the time of this case (and under current law, in two separate subdivisions with one subdivision intervening), does not suggest an interrelationship. More importantly, the legislative history of the 1999 amendment definitively shows (see *J.A. Jones, supra,* 27 Cal.App.4th at p. 1578) that it was intended as an *expansion* of the immunity already granted to trustees in a different statute, section 2924f. That statute grants immunity to trustees for any good faith error in stating the proper amount of the unpaid balance in the notice of sale.[15] Nothing in the legislative history of the 1999 amendment suggests that it was intended as a limitation on the privilege protection of the 1996 amendment of section 2924.[16] We decline to construe the 1999 amendment in a manner

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[15] The second paragraph of section 2924f, subdivision (b)(1) states: "The notice of sale shall contain a statement of the total amount of the unpaid balance of the obligation secured by the property to be sold and reasonably estimated costs, expenses, advances at the time of the initial publication of the notice of sale, and, if republished pursuant to a cancellation of a cash equivalent pursuant to subdivision (d) of Section 2924h, a reference of that fact; *provided, that the trustee shall incur no liability for any good faith error in stating the proper amount, including any amount provided in good faith by or on behalf of the beneficiary*. An inaccurate statement of this amount shall not affect the validity of any sale to a bona fide purchaser for value." (Italics added.) It so stated at the time of the amendment.

[16] A representative sample from the legislative history proves the point. The Floor Analysis of the Senate Committee on Judiciary stated: "Existing law provides a trustee with limited immunity for any good faith error in stating in the notice of sale the amount of the unpaid balance of the obligation secured by the property to be sold and reasonably estimated costs, expenses and advances, including any amount provided in good faith by or on behalf of the beneficiary. An inaccurate statement of this amount shall not affect the validity of the sale to a bona fide purchaser for value. (Section 2924f.) [¶] *This bill would expand the trustee's immunity to cover any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage,*

inconsistent with the unambiguous legislative intent evidenced by the legislative history. Thus, whatever else the 1999 amendment might mean, it does not affect the privilege protection provided by the 1996 amendment to Best Alliance's recording of the notice of default.

g. *Best Alliance's Privilege Protection*

Having concluded that section 2924 makes the common interest privilege (§ 47, subd. (c)(1)) applicable to statutory, nonjudicial foreclosure procedures, we now determine whether the trial court, based on that privilege, properly granted a directed verdict for Best Alliance on the Markowitzes' slander of title claim, and properly entered judgment notwithstanding the verdict for Best Alliance on the negligence claim.

As we have noted, Best Alliance's liability on the Markowitzes' slander of title and negligence claims depends upon its supposedly wrongful acts of recording the notice of default without adequate investigation and failing to rescind the notice upon being shown that the original $53,000 promissory note had been satisfied. Certainly Best Alliance's recording the notice of default – a notice required by section 2924 -- was a privileged communication, and Best Alliance's failing to rescind it is no less privileged, flowing as it does from the statutorily

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regarding all acts performed under this article including the notice of default and sale." (Italics added; underlining in original.) (Sen. Com. on Judiciary, Off. of Sen. Floor Analysis, Assem. Bill No. 431 (1999-2000 Reg. Sess.), as amended June 24, 1999, p. 2.) Similar comments can be found in other analyses of the Department of Financial Institutions and the Assembly Committee on Judiciary. (See Dept. of Fin. Institutions, Enrolled Bill Report, Assem. Bill No. 431 (1999-2000 Reg. Sess.) as amended Aug. 31, 1999, p. 2; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 431 (1999-2000 Reg. Sess.) as amended Apr. 20, 1999, p. 3.)

protected act of the recording.[17] Thus, unless Best Alliance acted with malice, it is immune from liability under the common interest privilege.

As a matter of law, the evidence failed to show that Best Alliance acted with malice. After the Kachlons substituted Best Alliance as trustee and completed a declaration of default, Best Alliance obtained a trustee's sale guaranty that indicated the deed of trust was still of record. Best Alliance then recorded a notice of default. When notified by Donald's counsel that there was a dispute over whether the debt had been satisfied, Best Alliance refused to take any further action, either to proceed with the foreclosure sale or to rescind the notice of default.

The Markowitzes assert that by failing to obtain the original note and deed of trust, Best Alliance acted with reckless disregard as to whether the notice of default was warranted. We disagree. "[M]ere negligence in making 'a sufficient inquiry into the facts on which the statement was based' does [not], of itself, relinquish the privilege. 'Mere inadvertence or forgetfulness, or careless blundering, is no evidence of malice.' [Citation.] [¶] While '[the] concept of negligence is inherent in the issue of probable cause' [citation], the decisions long ago recognized that to constitute malice the negligence must be such as 'evidenced a wanton and reckless disregard of the consequences and of the rights and of the feelings of others' [citation]." (*Roemer v. Retail Credit Co*. (1970) 3 Cal.App.3d 368, 371; see *Noel, supra,* 113 Cal.App.4th at pp. 1370-1371.)

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[17] We recognize that there are circumstances under which a trustee is statutorily required to cause a notice of rescission to be recorded. (See § 2924c, subd. (a)(2) [if trustor cures default, beneficiary shall deliver to trustee a notice of rescission of the declaration of default and demand for sale, and trustee shall cause notice of rescission to be recorded].) However, those conditions did not occur here with regard to Best Alliance, and we express no opinion regarding to what extent a trustee might be liable under such circumstances for failure to record a notice of rescission.

Best Alliance's omissions were, at worst, negligent. No evidence suggested that it acted with ill will or with reckless disregard for the truth of the notice of default. Before recording the notice of default, it obtained a trustee's sale guaranty indicating that the deed of trust was still of record, and that no prior reconveyance had been recorded. After being presented with documentation showing that the underlying debt had been paid, Best Alliance took no further action to enforce the foreclosure. Nothing remotely suggests that Best Alliance acted with malice. Thus, the trial court properly concluded that Best Alliance's conduct constituted privileged communications, and properly relieved it of liability for the Markowitzes' slander of title and negligence claims.

2. *Denial of Judgment Notwithstanding the Verdict for the Kachlons*

Best Alliance is not the only party who sought privilege protection in the trial court. The Kachlons also filed a motion for judgment notwithstanding the verdict, contending that their conduct was privileged under sections 2924 and 47. The trial court denied the motion. On appeal, the Kachlons contend that the court erred. We disagree.

First, as we have noted, the 1996 amendment is designed to protect beneficiaries when they also act as trustees in the enforcement of the power of sale in the deed of trust. The Kachlons, however, did not act as trustees. Moreover, the 1996 amendment gives protection to "the mailing, publication, and delivery of notices *as required herein*, and the performance of the procedures *set forth in this article*." (Stats 1996, ch. 483 (Sen. Bill No. 1488) § 1, italics added.) The Kachlons fail to explain how their conduct in bringing about the nonjudicial foreclosure -- presenting to Best Alliance written instructions, a declaration of

default, and a demand for sale -- may be construed as notices required by statute or as the procedures set forth in the statutory scheme.

Further, even if we were to read section 2924 more broadly to include within the scope of the privilege the actions taken by the Kachlons, we would conclude, at least as to Mordechai, that he was not entitled to privilege protection. The jury concluded that the nonjudicial foreclosures instituted by the Kachlons were wrongful, and that in pursuing the foreclosure proceedings Mordechai acted "intentionally, fraudulently and in conscious and callous disregard for the rights of the Markowitzes." These findings are tantamount to the finding of malice required to defeat a qualified privilege – reckless disregard for the Markowitzes' rights. (*Sanborn, supra,* 18 Cal.3d at p. 413.)

3. *The Kachlons and Best Alliance's Challenges to Liability for Attorney Fees Under Civil Code Section 1717*

a. *Factual and Procedural Background, and Contentions on Appeal*

Another area of dispute is the trial court's award of attorney fees to the Markowitzes under Civil Code section 1717 as prevailing parties against the Kachlons and Best Alliance.

As we have noted, the Markowitzes alleged three equitable claims against the Kachlons and Best Alliance: (1) declaratory relief to cancel the promissory note and reconvey the deed of trust; (2) injunctive relief to preclude the foreclosure proceedings; and (3) quiet title to the property. After the jury verdict on the parties' legal claims, the trial court resolved the equitable claims, and granted the Markowitzes the equitable relief they sought against the Kachlons and Best Alliance: rescission of the foreclosure, reconveyance of the deed of trust, an injunction precluding a foreclosure sale, and quiet title in the Markowitzes' favor.

The Markowitzes, who were represented by separate attorneys, filed motions for their respective attorney fees. The motions asserted two legal bases for an award of attorney fees, only one of which is relevant in this portion of our opinion. The first basis – the one we discuss here -- was that the Markowitzes were entitled to attorney fees as prevailing parties under the attorney fee clause in the deed of trust and Civil Code section 1717. This ground for an attorney fee award is based on the results of the court's determination of the Markowitzes equitable claims in the wrongful foreclosure action.[18] The trial court found the Markowitzes were entitled to attorney fees as prevailing parties, and made the Kachlons and Best Alliance jointly and severally liable for the awards. The Kachlons and Best Alliance now challenge this ruling, albeit on different grounds.

According to the Kachlons, Civil Code section 1717 does not apply, because the Markowitzes' claims for declaratory and injunctive relief and quiet title were not based on contract. Best Alliance contends that it was not liable for attorney fees under Civil Code section 1717, for essentially two reasons: (1) the Markowitzes were not prevailing parties on those claims as against Best Alliance, and (2) in any event, Best Alliance, as a trustee in nonjudicial foreclosure, is immune from attorney fees.

We conclude, in the final published portion of our opinion, that the trial court properly found the Markowitzes entitled to attorney fees under Civil Code

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[18] The second basis on which the Markowitzes sought attorney fees was Business and Professions Code section 7168, which provides for an award of reasonable attorney fees for the prevailing party "[i]n any action between a person contracting for construction of a swimming pool and a swimming pool contractor arising out of a contract for swimming pool construction." Because this ground for attorney fees is based on the results of the jury trial on Mordechai Kachlon's suit for breach of his contract for construction of home improvements, we discuss it in part II of our opinion, below.

section 1717 as prevailing parties on their equitable claims against the Kachlons and Best Alliance.

b. *Claims Based on the Note and Deed of Trust*

The Kachlons contend that section 1717 does not apply, because the Markowitzes claims for declaratory and injunctive relief and quiet title were equitable in nature, and not arising out of contract. Established law is to the contrary.

"[W]here a contract provides that only one party may obtain attorney fees in litigation, [section 1717] makes the right to such fees reciprocal, such that the 'party prevailing on the contract' claim will be entitled to recovery of fees '"whether he or she is the party specified in the contract or not."' [Citations.]" (*Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1268.)[19]

In the instant case, the relevant attorney fee clauses are found, first, in the promissory note signed by the Markowitzes, which provided: "If action be instituted on this note I [the Markowitzes] promise to pay such sum as the Court may fix as attorney's fees." The second is in the deed of trust, as follows: "To Protect the Security of This Deed of Trust, Trustor [the Markowitzes] Agrees: . . .

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[19] Section 1717 states in relevant part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . . [¶] (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section . . . . [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717.)

[¶] 3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title *and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear*, and in any suit brought by Beneficiary to foreclose this Deed." (Italics added.)

Under these two unilateral clauses, the Markowitzes agreed to pay attorney fees in any action instituted on the promissory note, and in any action affecting the security of the deed of trust or the rights or powers of the Kachlons (the beneficiaries under the deed of trust) or Best Alliance (the trustee).[20] Section 1717 makes these unilateral attorney fee clauses reciprocal, and entitles the Markowitzes to attorney fees if they prevailed in an action on the note or deed of trust. (See *Huckell v. Matranga* (1979) 99 Cal.App.3d 471, 482 [in quiet title action arising out of nonjudicial foreclosure proceedings, finding applicable § 1717 based on identical language in note].)

In determining whether an action is "on the contract" under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action. (See *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 742.) Here, although the

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[20] The Kachlons parse the language in the deed of trust to argue that the attorney fee provision constituted an indemnity agreement to which section 1717 does not apply, and that this was not a suit brought by them as beneficiaries to foreclose this deed. We need not belabor the point, because we agree with the analysis of *Valley Bible Center v. Western Title Ins. Co.* (1983) 138 Cal.App.3d 931, 932-933, which held that nearly identical language in a deed of trust entitled the trustor to attorney fees after prevailing against the trustee and beneficiary in an action to block a trustee's sale. Moreover, even if the clause in the deed of trust did not entitle the Markowitzes to attorney fees, the broad language of the attorney fee clause in the promissory note certainly does.

remedy sought in the relevant causes of action was equitable, the claims were still actions "on the contract," i.e., the note and deed of trust.

In the declaratory relief claim, the Markowitzes sought a declaration that the promissory note must be cancelled because it had been paid in full, and that the deed of trust must be reconveyed because the foreclosure violated the terms of the deed of trust. "Actions for a declaration of rights based upon an agreement are 'on the contract' within the meaning of Civil Code section 1717." (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1246.)

Similarly, the claim for injunctive relief was founded on contract. "Actions seeking injunctive relief are, of course, equitable in nature. Although most arise out of torts . . . , injunctions are occasionally granted in contract actions." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 126, p. 205.) Here, the basis of the Markowitzes' claim for an injunction was, in part, contractual in nature: namely, that foreclosure violated the terms of the trust deed. The quiet title claim, too, sought to enforce the terms of the deed of trust requiring a reconveyance of title upon satisfaction of the underlying debt.

Finally, although we have found no case holding that actions seeking to enjoin nonjudicial foreclosure and clear title based on the provisions of a deed of trust are actions on a contract, several have assumed under such circumstances that an award of attorney fees under section 1717 and provisions in the deed of trust is proper. (See, e.g., *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463; *Valley Bible Center v. Western Title Ins. Co., supra,* 138 Cal.App.3d at pp. 932-933 [trustor prevailing in action to enjoin trustee's sale of property entitled to award of attorney fees against trustor]; *Wilhite v. Callihan* (1982) 135 Cal.App.3d 295 [attorney fees awarded to grantee of deed of trust with due-on-sale clause on theory trustee and beneficiary would be entitled to collect attorney fees from grantee as part of debt secured by deed of trust had grantee been

unsuccessful in enjoining foreclosure proceedings]; *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309 [same]; *Huckell v. Matranga, supra,* 99 Cal.App.3d 471 [trustor entitled to seek attorney fees arising out of quiet title action].)

Thus, the causes of action here, for declaratory and injunctive relief and to quiet title, are "action[s] on a contract" within the meaning of section 1717, subdivision (a). Therefore, section 1717 permitted the trial court to award attorney fees to "the party who is determined to be the party prevailing on the contract." (§ 1717, subd. (a).) Without question, the Markowitzes prevailed against the Kachlons on these claims, thus entitling them to an award of attorney fees from the Kachlons.

c. *Determination of Prevailing Party As Against Best Alliance*

Best Alliance first challenges the attorney fee award on the ground that the Markowitzes were not prevailing parties against Best Alliance on the equitable claims founded on the note and deed of trust. According to Best Alliance, it remained neutral throughout the litigation, and its only litigation objective, which it fully achieved through directed verdict and judgment notwithstanding the verdict, was to defend claims against it seeking tort damages. We find no abuse of discretion in the trial court's determination that the Markowitzes were entitled to attorney fees from Best Alliance as prevailing parties.

Following the trial court's granting of the Markowitzes' motions for attorney fees, the court, as we have discussed, granted judgment notwithstanding the verdict for Best Alliance on the Markowitzes' negligence claim. The court had already granted a directed verdict for Best Alliance on the Markowitzes' slander of title claim. The court issued an amended judgment deleting the award of damages against Best Alliance on the negligence claim. However, the amended judgment

still made Best Alliance jointly and severally liable with the Kachlons for the Markowitzes' attorney fees on their equitable claims.

Best Alliance then filed a "declaration of nonmonetary status" under section 2924*l*, which provides a limited procedure by which a trustee under a deed of trust may avoid participation in litigation and liability for damages, costs, and attorney fees. Best Alliance also filed a motion to vacate the judgment, arguing that because it was immune from tort liability under section 2924, the Markowitzes were not prevailing parties under section 1717 and Best Alliance was not liable for their attorney fees. The court denied the motion to vacate, leaving the attorney fee award in place. The court's ruling was sound.

Under section 1717, "'the court is given wide discretion in determining which party has prevailed on its cause(s) of action. Such a determination will not be disturbed on appeal absent a clear abuse of discretion.'" (*Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756-757.) When, as in the present case, the contract under which attorney fees are to be awarded does not define "prevailing party," "'a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise. [Citation.]'" (*Jackson v. Homeowners Assn. Monte Vista Estates – East* (2001) 93 Cal.App.4th 773, 784.)

Contrary to Best Alliance's contention, the record reasonably supports a pragmatic determination that Best Alliance did not merely defend against the tort claims, but rather consistently allied itself with the Kachlons on the essential issues relevant to the claims on the note and deed of trust. In its answer to the Markowitzes' complaint, Best Alliance, then represented by different counsel than the Kachlons, denied that it caused a false notice of default to be recorded, denied that the notice of default was improper, denied that the promissory note had been paid in full, and denied that the deed of trust improperly remained of record. It

further asserted that the Markowitzes were not entitled to injunctive relief or quiet title in their favor.

Later, Best Alliance joined in the Kachlons' opposition to Donald's motion for summary judgment. Still later, after substituting the Kachlons' counsel as its own, Best Alliance filed a joint trial brief with the Kachlons. As to the claims against Best Alliance, the trial brief declared that two essential allegations "will be hotly contested at the trial," namely, the allegation that the "$53,000 promissory note was paid in full and therefore Best Alliance improperly recorded a notice of default," and the allegation that "Best Alliance refused to stop the foreclosure even after being presented with a request for reconveyance stating that the promissory note had been paid in full." Best Alliance also asserted that even if the allegations against it were true, it intended to show at trial that it had no duty to investigate the status of the underlying debt before commencing foreclosure proceedings.

Only after the trial court's determination of the equitable claims did Best Alliance file, for the first time, a declaration of nonmonetary status pursuant to section 2924*l*.[21] In such a declaration, which can be filed at any time after a trustee is named as a defendant in an action, the trustee states its reasonable belief that it is named as a defendant in an action solely in its capacity as trustee and not due to its acts or omissions. The trustee may thereby avoid participation in the lawsuit unless another party objects, and also avoid liability for damages and attorney fees. (See fn. 5, *ante*; see also 4 Miller & Starr, *supra,* § 10:4, p. 28.) True, the Markowitzes likely would have objected to such a declaration, and therefore Best Alliance would still have been required to participate in the litigation. (§ 2924*l*, subd. (e).) But by filing such a declaration, at least prior to the trial court's

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[21] In its answer, Best Alliance included a reference to section 2924*l* as an affirmative defense, but it did not file the required declaration.

bifurcated determination of the equitable claims based on the note and deed of trust, Best Alliance would have timely articulated the position that it considered itself merely a nominal defendant on those claims with no interest in the outcome. That Best Alliance failed to do so reinforces the conclusion that it was not neutral in the litigation and that its objectives were not limited to defending against the damage claims.

At a hearing on the content of the final amended judgment, Best Alliance's counsel objected to the court's ruling that the Markowitzes were prevailing parties, arguing in part that on the equitable claims, "we weren't fighting." The court aptly responded: "Somebody was fighting in your name." The record supports the court's pragmatic conclusion, and does not show an abuse of discretion in the court's implicit determination that Best Alliance failed to obtain its litigation objectives on the equitable claims founded on the note and trust deed.

d. *Privilege and Its Relationship to Attorney Fees*

Best Alliance also contends that because it was immune from tort liability based on privilege, it cannot be liable for attorney fees based on contract. But no such relationship between the privileges of section 47 and liability for attorney fees under section 1717 exists.

The section 47 privileges limit tort liability. (*Rusheen, supra,* 37 Cal.4th at p. 1057.) A motion for attorney fees is not analogous to a tort claim. Attorney fees, when authorized by statute or contract, are not awarded as damages, but rather as reimbursement for "allowable . . . costs" of litigation under Code of Civil Procedure section 1032. (Code Civ. Proc., § 1033.5, subds. (a)(10)(A) & (a)(10)(B).) On similar reasoning, the court in *Washburn v. City of Berkeley*

(1987) 195 Cal.App.3d 578, 586-587, held that the availability of attorney fees pursuant to the private attorney general statute, Code of Civil Procedure section 1021.5, is not affected by section 47 privilege for communications in official proceedings. Likewise, the availability of attorney fees under the contractual clauses here is not affected by the common interest privilege of section 47.

Furthermore, nothing in the statutory scheme regulating nonjudicial foreclosure suggests a policy of immunizing trustees from liability for attorney fees. To the contrary, as we have noted, section 2924*l* provides a limited procedure by which a trustee may avoid attorney fee liability. The trustee must file a declaration of nonmonetary status stating that it reasonably believes it was named as a defendant solely in its capacity as trustee, and not for misconduct in its duties. If no party timely objects, "the trustee shall not be required to participate any further in the action or proceeding, [and] shall not be subject to any monetary awards as and for damages, *attorneys' fee*s or costs." (2924*l*, subd. (d), italics added.) On the other hand, if a party does timely object, "the trustee shall thereafter be required to participate in the action or proceeding" (§ 2924*l*, subd. (e)), and by implication may be liable for attorney fees. Section 2924*l* was adopted in 1995 (stats. 1995, ch. 752), the year before the 1996 amendment to section 2924 that incorporated the common interest privilege of section 47. In creating privilege protection for trustees, the 1996 amendment did not purport to alter the procedure of section 2924*l* so as to immunize trustees from liability for attorney fees apart from that procedure. Thus, Best Alliance enjoyed no statutory immunity from attorney fees.

4. *Donald's Challenge to the Amount of His Attorney Fee Award Under Civil Code Section 1717*

Donald contests the amount of the award he received under Civil Code section 1717. He contends that the court denied his attorney an enhanced lodestar rate, not as an exercise of discretion, but because the court erroneously believed the law required an award limited to the rate stated in Donald's fee agreement with his attorney. The record does not support the contention.

In his initial motion for attorney fees under the attorney fee clause in the deed of trust, Donald sought $201,622.50 for attorney time spent on the equitable claims in the wrongful foreclosure portion of the case. His attorney calculated he had spent 1,068.05 hours on this portion of the case, and anticipated spending an additional 40 hours, for a total of 1,108.05 hours. Donald sought attorney fees for these hours at a lodestar rate of $150 an hour, which was the actual rate in Donald's fee contract with his attorney. Of the total claimed hours, Donald's attorney calculated that 236 hours were spent in trial. For these trial hours only, Donald sought an adjustment of the lodestar rate to $300 an hour (an additional $150) "based on the complexity of the issues and the skill displayed in presenting them."

In granting Donald's motion for attorney fees, the court awarded fees for all hours claimed, but limited the rate to the $150 lodestar rate, resulting in an award of $166,207.50. The court did not apply an adjusted higher rate for trial time. In its tentative decision on the issue (which the court adopted as its final ruling), as well as in its formal statement of decision, the court stated that it was "of the opinion that [Donald] is only entitled to the attorneys fees actually expended *and that these fees were necessary and reasonable.*" (Italics added.) The court's initial "Judgment Following Jury Trial on Legal Issues and Court Trial on Equitable Issues" contained the $166,207.50 award, as did the first amended judgment

following the court's granting of Best Alliance's motion for judgment notwithstanding the verdict. In its final amended judgment, the court awarded Donald attorney fees related to the nonjudicial foreclosure action against the Kachlons and Best Alliance, jointly and severally, in the total sum of $180,779.70, which was the prior award of $166,207.50, plus an additional $14,572.20 related to later litigation calculated at the lodestar $150 rate.

Thus, the record reveals that the court calculated Donald's fee award using the lodestar rate requested by Donald, $150 an hour, which was also the rate Donald was to pay under his fee agreement with his attorney. The court's use of the lodestar method was in line with the typical way in which California court's calculate attorney fees under Civil Code section 1717. (See *PLCM, supra*, 22 Cal.4th at pp. 1095-1096.) In its tentative decision and later statement of decision, the court, in deciding on this rate, expressly concluded that its award was reasonable. By expressly finding the award reasonable, the court implicitly exercised its discretion to *not* apply an enhanced rate for trial time. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139 [lodestar rate itself includes consideration of attorney's skill and level of case complexity].) Donald concedes that the trial court had discretion to make such a determination, but contends that the court failed to exercise such discretion. On this record, we disagree.

5. *Debra's Challenge to the Amount of Her Attorney Fee Award Under Civil Code section 1717*

Debra contends that the court incorrectly believed that it was limited by law to awarding her, as the prevailing party in the foreclosure action, the attorney fees she incurred pursuant to her contingency fee contract, that is, "40 % of all amounts recovered by way of settlement, judgment or otherwise." Moreover, she argues that, in any event, her attorney fee agreement provided for an additional award of

reasonable attorney fees, so even if the court thought it was limited by the terms of her fee agreement, it had discretion under the terms of that agreement to award fees in addition to a percentage of the amount of her recovery. We agree with both of Debra's contentions, and therefore reverse the portion of the judgment awarding Debra $16,000 in attorney fees for the foreclosure action. We remand the matter for a redetermination of the attorney fees to which Debra is entitled under Civil Code section 1717.

Like so many things in this case, the history of litigation involving Debra's attorney fees was protracted. In her initial motion for attorney fees, Debra sought fees of $206,160, based on a total of 687.2 attorney hours at a requested rate of $300 an hour. Debra's attorney did not attempt to allocate his time between the equitable claims in the wrongful foreclosure portion of the case, to which Debra was entitled to fees as a prevailing party under Civil Code section 1717, and the portion related to Mordechai's home improvement claims, to which she was entitled to fees under Business and Professions Code section 7168. (See fn. 18, *ante*.)

Her motion was heard on January 7, 2005. Before the hearing, the court issued a tentative decision in which it granted Debra's motion, but limited her award "to the amount of the contingency fee contract" she had with her attorney. In support, the court cited *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 479-480.

At the hearing, Debra's attorney challenged the tentative ruling. He argued that the *Gonzales* decision, cited by the court, had been disapproved in *PLCM, supra,* 22 Cal.4th 1084. He asserted that the court was not restricted to awarding attorney fees pursuant to a party's contingency fee contract, but rather the court could determine the amount of reasonable attorney fees to be awarded. The court responded: "I didn't read the Supreme Court disapproving it the way you

apparently did." When Debra's counsel reiterated his interpretation of the law, the court replied, "300 South Spring, sir," referring to the address of the Court of Appeal. The court further stated: "I tried to get you guys to settle. Nobody wanted to settle, and everybody wanted to go and fight to the death. When you fight to the death, bad things happen."

After further argument, the court adopted its tentative ruling as its final ruling. It later filed a statement of decision formally granting Debra's motion for attorney fees, but limiting the award to the amount stated in her contingency fee contract. The court did not set a figure.

Later, in its initial "Judgment Following Jury Trial on Legal Issues and Court Trial on Equitable Issues," the court elaborated on its ruling on Debra's attorney fees, as follows: "since [Debra] had a contingency fee agreement, the award is limited to the amount of the contingency fee contract. [The] contingency fee contract provides for the following compensation: 'Client agrees to pay to Edwin B. Stegman, for his professional services, after deducting costs and disbursements incurred in the prosecution of said claims, . . . 40% of all amounts recovered by way of settlement, judgment or otherwise. . . . [¶] If the court awards attorney's fees as costs or pursuant to contract or sanctions as attorney's fees, such fees shall compensate Attorney in addition to the fees set forth herein.' Since the amount and the allocation of such fees were not decided, then such issues shall be resolved pursuant to C.C.P. § 1033.5 and California Rules of Court, Rule 870.2, which sets forth the procedure for claiming attorney fees as costs when attorney's fees are provided by contract and/or statute."

After executing this judgment, the court, as previously described, granted judgment notwithstanding the verdict for Best Alliance on the Markowitzes' negligence claim (it had earlier granted a directed verdict for Best Alliance on the

slander of title claim). Thereafter, the court entered an amended judgment repeating Debra's award of attorney fees.

As directed in the original and amended judgment, Debra filed a motion for an order for reasonable attorney fees as an element of costs, seeking an award of attorney fees as to both the wrongful foreclosure action and the home improvement action. In the motion, Debra's counsel pointed out, as here relevant, that in successfully obtaining an injunction against the foreclosure of the Markowitzes' residence, Debra received no monetary recovery upon which to base a contingency fee which she would be required to pay to him. He argued instead for an award of reasonable attorney fees for the services he performed. Specifically, he presented evidence that he spent 778 hours on the case, and would normally bill clients at the rate of $300 per hour. He requested an award of 40 percent of the resulting amount, or $93,372, based on his estimate that 40 percent of his time was attributable to the wrongful foreclosure portion of the case.

The Kachlons opposed the motion. They argued in response that the court had already determined that Debra was entitled to fees only in accordance with her contingency fee contract. Thus, Debra's award should be limited to $16,000, which was 40 percent of the $40,000 monetary award she received against them on her tort claims in the wrongful foreclosure action.

The matter was heard on April 22, 2005. The court adopted the approach suggested by the Kachlons, and awarded Debra attorney fees under Civil Code section 1717 in the sum of $16,000, which was 40 percent of the $40,000 tort damage award. The court denied Debra's counsel's request for an additional award of reasonable attorney fees pursuant to his fee contract with Debra. This award was incorporated into the final amended judgment.

We conclude that the court abused its discretion in its award of attorney fees to Debra. Debra was entitled, under Civil Code section 1717, to an award of

reasonable attorney fees for her attorney's work on the contract-based equitable claims in the wrongful foreclosure action. Here, the record of Debra's attorney fee requests, especially the court's comments at the hearing of January 7, 2005, strongly suggests that the court either believed it was bound to award fees solely in accord with Debra's contingency fee arrangement, or arbitrarily decided to do so without consideration of any other relevant factor. Although a court may certainly consider the terms of a prevailing party's contract with his or her attorney in determining the reasonableness of an attorney fee award, the court is not bound by it, and the ultimate determination is one of objective reasonableness "'after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*PLCM, supra,* 22 Cal.4th at p. 1096.) The usual method of calculating fees under Civil Code section 1717 is the lodestar method, as was used by the court in calculating Donald's fee award, "the number of hours reasonably expended multiplied by the reasonable hourly rate" and then "[t]he lodestar figure may be then adjusted, based on consideration of factors specific to the case." (*PLCM, supra,* 22 Cal.4th at p. 1095.)

In the present case, the court calculated Debra's attorney fees on her *contract-based* claims based solely on the contingency fee percentage of the recovery on Debra's *tort* claims. On its face, and without explanation, we see no rational basis for such an award under Civil Code section 1717. To the extent the court relied on *Gonzales v. Personal Storage, Inc., supra,* 56 Cal.App.4th at pages 479-480, the reason for the court's reliance is unclear. Although Debra's counsel was incorrect in asserting that *Gonzales* was overruled in *PLCM, supra***,** *Gonzales* has no apparent relevance to this case. There, the appellate court held that the trial court abused its discretion by denying attorney fees to a party who had a

contingency fee agreement with her counsel. We find nothing in the *Gonzales* opinion that would justify the attorney fee calculation made by the trial court here.

We reverse the trial court's award of attorney fees to Debra under Civil Code section 1717, and remand the matter for a redetermination. To avoid any further confusion, we direct the court to apply the lodestar method as described in *PLCM, supra,* 22 Cal. 4th at pages 1095-1096. We leave the amount of the award under that method to the trial court's sound discretion.

6. *Inconsistency in the Verdict*

The final series of issues we address in this part of our opinion concern the Kachlons' contention that fatal inconsistencies in the jury verdict require reversal of the damage judgment against them. We conclude that no such inconsistencies exist. We begin with a brief review of the relevant pleadings, evidence, and instructions.

a. *The Pleadings, Instructions, and Findings*

As against the Kachlons, the Markowitzes alleged two causes of action seeking damages: breach of the Kachlons' asserted statutory duty to secure a reconveyance of the deed of trust under section 2941, subdivision (b) (formerly (b)(3), now (b)(1));[22] and (2) slander of title (also styled attempting to obtain title by fraud), based on the Kachlons' initiating nonjudicial foreclosure proceedings despite knowing they had no right to do so.

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[22] Section 2941, subdivision (b), provides in relevant part that "[w]ithin 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary . . . shall execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust." (§ 2941, subd. (b)(1), formerly subd. (b)(3).)

At trial, the Markowitzes pursued these two claims as different theories under which the Kachlons wrongfully foreclosed on their home. The evidentiary basis of the claims was as follows. In July 2002, to help resolve a monetary claim by Mordechai, Debra signed an unsecured promissory note in his favor that stated, in part, that the note was executed "in return for the forgiveness of" $7,000 on the original $53,000 note. Later in 2002, in the transaction in which Donald sought a line of credit from City National Bank, Mordechai delivered a beneficiary's demand to Fidelity National Title Company, which stated, in effect, that $12,000 remained due under the original $53,000 note, and requested a check in that amount. Mordechai also delivered a request for reconveyance authorizing reconveyance of the deed of trust upon payment. Mordechai signed these documents for himself; Debra Markowitz, however, signed Monica Kachlon's name. In addition, Mordechai delivered the original note and deed of trust. Thereafter, he received from Fidelity a check for $12,000, payable to both Mordechai and Monica. Mordechai and Monica endorsed the check and deposited it in their joint account. Fidelity recorded a new deed of trust in favor of the Bank, but failed to record a reconveyance of the Kachlons' deed of trust. Later, Mordechai objected when notified that Fidelity intended to release the trust deed. He told Fidelity that the noted was not satisfied and that Debra had forged his wife's signatures on the beneficiary statement and request for reconveyance. Based on Mordechai's objection, Fidelity did not record a reconveyance, and retained possession of the original note and trust deed. Thereafter, Mordechai initiated two nonjudicial foreclosure proceedings on the Markowitzes' home.

Based on this evidence, regarding the claim for breach of statutory duty under section 2941, subdivision (b), the jury was instructed that the Markowitzes

had the burden of proving, inter alia, that "[t]he $53,000 Promissory Note was fully satisfied," and that "[w]ithin 30 days after satisfaction, the Kachlons failed to cause the Deed of Trust to be reconveyed." The jury was also instructed, consistent with section 2941, subdivision (b), on the beneficiary's duty to provide documents necessary for a reconveyance.

As to the slander of title claim, the jury was instructed that the Markowitzes had the burden of proving, in part, that "[i]n 2003, the Kachlons pursued two successive non-judicial foreclosure proceedings against property belonging to the Markowitzes," and that "the Kachlons either (a) knew that the amount claimed was false; and/or (b) knew that they had no lawful right to claim a default and commence a non-judicial foreclosure proceeding." The jury was also instructed that the lien under a secured obligation is discharged "[o]n payment of the amount [stated in a beneficiary's] demand," and that "[i]f the underlying obligation no longer exists, a foreclosure proceeding cannot be pursued."

The verdict form did not identify the causes of action. It first contained certain special interrogatories under the headings "Delivery of Instruments," "Signature on Instruments," and "Beneficiary's Demand." In these sections, as here relevant, the jury found: (1) that Mordechai delivered to Fidelity National Title Company the beneficiary's demand, the original request for reconveyance, the original promissory note for $53,000, and the original deed of trust for the promissory note; (2) that "estoppel appl[ied] to prevent the Kachlons from contending that the Beneficiary's Demand is incorrect" and (3) that Mordechai's "acceptance of the $7,000 promissory note [did not] operate as an accord and satisfaction such that the note was accepted in full satisfaction of the claims for home improvements, unsecured loans and the $53,000 promissory note."

Under the heading "Breach of Duty and Damages," the jury found that the Kachlons did not breach any duty by failing to cause a reconveyance of their deed

of trust. But the jury also found that "the 2003 non-judicial foreclosures [were] wrongful."

b. *The Purported Inconsistencies*

The Kachlons contend these latter two findings -- that the Kachlons did not breach any duty by failing to cause a reconveyance of the deed of trust, but that the subsequent foreclosures were wrongful – are fatally inconsistent. "A verdict should be interpreted so as to uphold it and to give it the effect intended by the jury." (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 366, p. 427; *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1223.) The court must construe a jury's finding in a manner consistent with the other findings and to uphold the verdict. In construing a verdict, the court may use its language, the pleadings, the evidence, and the instructions. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456; *Snodgrass v. Hand* (1934) 220 Cal. 446, 448.) "The first principle of inconsistent general and special verdicts is that they must be harmonized if there is any 'possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them.' [Citation.]" (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1183.)

Here, in the first finding cited by the Kachlons, the jury simply determined, consistent with the evidence of Mordechai's delivery of documents to Fidelity and the relevant jury instructions, that the Kachlons did not fail to provide the documents necessary for reconveyance under section 2941, subdivision (b). Indeed, the jury specifically found that Mordechai delivered the necessary documents to Fidelity.

In the second finding, consistent with the evidence showing that the $53,000 note had been paid, and consistent with the instruction that "a foreclosure proceeding cannot be pursued" if the underlying obligation has been satisfied, the jury determined that the foreclosures were nonetheless wrongful. There is nothing inconsistent in the two findings. In substance, the jury concluded that the Kachlons did not improperly fail to secure a reconveyance of the deed of trust, but did wrongfully pursue two foreclosures knowing that the underlying debt was satisfied.[23]

The Kachlons contend that a further inconsistency exists in the jury's finding that Mordechai did not accept Debra's unsecured $7,000 promissory note as "full satisfaction of the claims for home improvements, unsecured loans and the $53,000 promissory note." According to the Kachlons, this finding necessarily means that the jury concluded that the Markowitzes still owed money on the original $53,000 promissory note. Therefore, according to the Kachlons, foreclosures were not wrongful.

The contention relies on a non sequitur. The jury found that Mordechai did not accept Debra's $7,000 promissory note in satisfaction of all the debts listed in the finding. The jury did *not* find that the $53,000 note was unpaid so as to support a foreclosure under the deed of trust.

To the contrary, the evidence showed that the Kachlons submitted a beneficiary's demand to Fidelity stating that $12,000 remained owing on the

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[23] In *Markowitz v. Fidelity Nat. Title Co., supra,* 142 Cal.App.4th at pages 521-525, we concluded that Fidelity, acting as the subescrow holder for the Bank, did not have the statutory duty to record the deed of reconveyance. The Legislature, in amending section 2941, expressed the intention that the trustee (which at that time was apparently Old Republic Title Company) remained obligated to do so. We note that Best Alliance was substituted as trustee of the deed of trust about one year after the beneficiary's demand was executed by Mordechai.

$53,000 note. Fidelity paid the Kachlons that sum. As we have noted, the jury was instructed that the lien under a secured obligation is discharged "[o]n payment of the amount [stated in a beneficiary's] demand," and that "[i]f the underlying obligation no longer exists, a foreclosure proceeding cannot be pursued." The jury's finding that the foreclosure was wrongful is consistent with the evidence and relevant instructions. Further, the jury found that the Kachlons were estopped "from contending that the Beneficiary's Demand is incorrect," meaning that the Kachlons could not contend that some additional amount remained due under the $53,000 note, or that such an amount justified an attempt to foreclose. The finding that Mordechai did not accept Debra's $7,000 debt in satisfaction of all the debts he claimed were owed had nothing to do with the finding that the foreclosures were wrongful.[24]

II. Issues Regarding the Home Improvement Contract and Related Claims

We now discuss, in part II of our opinion, the issues raised on appeal relating to Mordechai's claim that the Markowitzes breached his contract to perform home improvement work, and issues raised by other related claims.

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[24] In their opening brief, the Kachlons contend that because there was no foreclosure sale, the Markowitzes suffered no legally cognizable monetary damage, and the trial court incorrectly instructed the jury on the measure of damages using the standard tort measure. In their reply brief, conceding that they cannot challenge the jury instruction on damages, the Kachlons "withdraw their argument that the error can be assigned to the jury instruction itself." Although the concession and withdrawal are somewhat unclear, we deem them to be an abandonment of the entirety of the Kachlons' challenge to the damages award. The damage award was proper under the instruction given, and the Kachlons cannot contend that the instruction was incorrect.

A. Statement of Facts

Mordechai is a licensed general contractor. Debra is an attorney. Debra began performing legal work for Mordechai shortly after they met. The jury concluded she was his attorney from June 1998 until May 2002. Their sexual relationship began at about the same time.

Mordechai contended that the parties agreed in May 1998 on a price of $250,000 for the entire home improvement project, and that it was a single project, all of the terms of which he and Debra agreed to at that time. The Markowitzes presented evidence to dispute that contention. Donald testified that only limited work was agreed to before escrow closed, mainly involving home security, and that it was to be done at cost as part of the purchase agreement. Other decisions and additional projects followed later. According to Donald, the parties did not enter into a single agreement for $250,000. At the time they purchased the house, Donald was not working, they were borrowing money to meet their expenses, and they had not yet decided on many of the home improvements, including the installation of a swimming pool.

Similarly, Debra testified that Mordechai gave her estimates and they agreed on a sum for each separate project as it was conceived and discussed. They did not enter into one single agreement in May 1998 for the entire scope of work that was eventually performed. She testified that she ultimately paid Mordechai $14,000 over the costs of construction, and that this was the profit they had agreed he would make.

Consistent with the Markowitzes' testimony, Mordechai stated, in responses to interrogatories, that he gave Debra separate cost estimates for each project as it was proposed. He also stated that the home improvement work began before escrow closed, and continued for approximately four years. He acknowledged that Debra had paid about $103,000 directly to suppliers, subcontractors, and laborers.

The Markowitzes also testified that Mordechai did more work than they had authorized, and that the workmanship was substandard in some cases. The home improvement work included installation of a swimming pool. Mordechai also built a guest house (sometimes referred to as a pool house), and installed a redwood deck, stonework, and fencing. Mordechai also performed landscaping work. Work performed inside the house included installation of a fireplace, hardwood floors, windows, and doors.

Debra admitted the home improvement work was performed while she was acting as Mordechai's lawyer, and that she breached Rule 3-300 of the Rules of Professional Conduct. That rule provides that in entering into a business transaction with a client, an attorney must fully disclose the terms of the agreement in writing, advise the client in writing that the client may seek independent legal advice, and obtain the client's written consent to the terms of the transaction. Here, Debra did not advise Mordechai that he could seek independent legal advice. Debra also acted as Mordechai's bookkeeper during the time the home improvements were being done, and he relied on her to keep track of the payments she made. Monica had previously handled Mordechai's bookkeeping.

In his testimony, Mordechai said that the swimming pool construction cost $55,000. He admitted that he knew the law required home improvement contracts to be in writing. He was required to pass a written examination in order to be licensed, and the requirement that his contracts be in writing was part of what he learned in that context. Yet he admitted that he often performed home improvement projects without having a written contract. He stated that he did not use written contracts with "people who I trust." Further, Debra advised Mordechai that his home improvement contracts should be in writing. She told him that she would take care of doing that for him with his new projects (though apparently not her own), and he agreed that she should do that.

Mordechai testified that the Jaguar payments were initially to be offset against the $53,000 promissory note, but the parties later agreed that the payments instead were offset against the Markowitzes' home improvement obligations. The Markowitzes testified that the only agreement regarding the Jaguar payments was that they would serve to offset the amount owing on the promissory note.

Donald moved out of the family home in October 2000, and filed for divorce in June 2001. The affair between Debra and Mordechai lasted approximately another year.

In March 2003, Mordechai filed a complaint against the Markowitzes (Los Angeles County Superior Court case No. BC291979) relating to the home improvements and unsecured loans, stating causes of action for breach of oral contract, account stated, reasonable value of services rendered, and money lent. He asserted that they owed him $118,375 for the home improvement work, and $60,000 for loans that had not been repaid.

In August 2003, the Markowitzes filed their complaint arising out of the nonjudicial foreclosure proceedings (which we have discussed in part I). In March 2004, the Kachlons filed a cross-complaint in that action (Los Angeles County Superior Court case No. BC301492). The first cause of action was for professional negligence based on Debra's failure to reduce various agreements to writing, failure to advise Mordechai to seek independent legal advice, entering into a sexual relationship with Mordechai, and coercing the Kachlons to sign documents (including the $41,000 reduction agreement) under false pretenses. The second cause of action, for breach of fiduciary duty, alleged that Debra, acting as Donald's agent, breached her fiduciary duty by doing the same acts as alleged in the first cause of action, and also by threatening to expose her sexual relationship with Mordechai to Monica unless he agreed to sign the $41,000 reduction agreement.

In the third cause of action, for fraud in the inducement, the Kachlons alleged Debra induced the Kachlons to sign the reduction agreement by saying she and Donald would repay in full the amounts owed under the $53,000 promissory note, for the home improvements, and for the $60,000 loans. The Kachlons further alleged that Debra agreed she would not use the documents signed by the Kachlons (including the beneficiary's demand and related documents they executed and gave to the subescrow holder as part of Donald's line of credit transaction) as proof that only $12,000 was owed on the promissory note.

In their fourth and fifth causes of action for specific recovery of community property and for an accounting, the Kachlons alleged that Mordechai disposed of community property for less than fair and reasonable value, in favor of Debra, and that Monica was entitled to recovery and possession of such community property, and to an accounting. In the sixth cause of action for a constructive trust, Monica alleged that the Markowitzes held, in constructive trust for Monica's benefit, community property belonging to the Kachlons.

B. The Jury Verdict on the Kachlons' Claims

1. *The Home Improvement Agreement*

The jury found that Mordechai and the Markowitzes had entered into an agreement for performance of home improvement services, but the agreement was unenforceable. The jury therefore did not answer the questions whether Mordechai performed his obligations under the agreement, whether the Markowitzes breached the agreement, and if so, what damages the breach caused to Mordechai.

2. *The Unsecured Loan Agreement*

The jury found Mordechai had entered into one or more enforceable unsecured loan agreements with Debra, but there was no breach of any such loan agreement.

3. *Professional Negligence and Breach of Fiduciary Duty*

The jury found that Debra provided legal services to Mordechai from June 1988 until May 2002. Her services fell below the standard of care, and she breached her fiduciary duties to Mordechai. However, no damage resulted from her breaches of duty.

4. *Fraud*

The jury found that Debra did not make a false promise of an important fact to induce the Kachlons to sign the $41,000 loan reduction agreement.

C. Discussion

1. *Estoppel to Rely on the Statute of Frauds Defense Based on Breach of Rules of Professional Conduct*

In the trial court, Mordechai alleged that he entered an oral contract with the Markowitzes to build home improvements, and that they breached the contract by failing to pay all he was owed. In defense, the Markowitzes' asserted that any such contract (they claimed that there were several successive agreements) was unenforceable under the statute of frauds codified in Business and Professions Code section 7159, which requires that home improvement contracts must be in writing. The Kachlons countered that the Markowitzes were estopped from relying

on the statute of frauds because of Debra's professional misconduct in acting as Mordechai's attorney.

At the outset of jury trial, the court announced its intention to permit Mordechai to present the estoppel issue to the jury, but noted that the court would ultimately decide the issue. Mordechai agreed to this procedure. The jury found that Mordechai and the Markowitzes had entered into an agreement for performance of home improvement services, but the agreement was unenforceable.

After the jury verdict, the parties filed supplemental briefs on the equitable issues remaining to be decided by the court, including Mordechai's claim that the Markowitzes were estopped from relying on the statute of frauds. In his trial brief, however, Mordechai made only brief mention of the issue, arguing that Debra breached her ethical, professional and fiduciary duty to put the home improvement agreement in writing. He did not specifically contend that the Markowitzes should have been estopped from asserting the statute of frauds because Debra failed to adhere to the Rules of Professional Conduct. In response, Donald pointed out that Mordechai had not adequately raised the estoppel issue, and argued that the jury's decision not to apply estoppel was explained by the fact Mordechai admitted that he knew contracts for home improvement must be in writing. Donald argued the court would necessarily have to reach the same conclusion.

The court ruled that "[a] review of all of the evidence leads the court to conclude that the jury was correct in its factual determinations. The court thus denies the Kachlons . . . any equitable relief." The court's ruling implicitly included a finding that the Markowitzes were not estopped from relying on the statute of frauds.

When the court announced its ruling on January 7, 2005, the Kachlons orally requested a statement of decision, but did not specify which issues they wanted the court to address. In objecting to the proposed statement of decision, the

Kachlons merely objected in general that it failed to explain the factual and legal basis for the court's decision. When the court later entered the statement of decision as its order, the court noted that the Kachlons and Best Alliance were required to specify those controverted issues as to which they requested a statement of decision, but had failed to do so.

The Kachlons now contend that the Markowitzes were equitably estopped from relying on the statute of frauds, as a matter of law, because Debra violated Rule 3-300 of the Rules of Professional Conduct. We disagree.

The parties agree that the determination whether estoppel applies is an equitable issue, to be determined by the trial court rather than by a jury. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.) The parties also agree that it was proper for the trial court to proceed as it did here, by submitting the matter to the jury to decide the issue in an advisory capacity. "'There can be no question that there may be an advisory jury in an equitable action, and that a trial court has the discretion to submit issues to a jury and adopt the jury's findings on factual matters.' (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1147.)" (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 22, fn. 4.)

Mordechai complains, however, that the court was required to elaborate on its factual findings or reasoning in its statement of decision. But the Kachlons failed to specify the controverted issues as to which they wanted the trial court to explain its factual and legal bases. Thus, they have forfeited any claim that the statement of decision is defective, and on appeal we are required to infer that the trial court made all factual findings necessary to support the order or judgment. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Substantial evidence supports the trial court's implied finding that the Markowitzes were not estopped to rely on the statute of frauds. Debra conceded

that she violated Rule 3-300. However, that violation, in itself, does not establish the elements of estoppel. "'[E]stoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts. [Citations.]' [¶] 'Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citation.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd., supra,* 30 Cal.App.4th at p. 59.) Mordechai has cited no authority, and we are aware of none, that even remotely suggests that an attorney's violation of the Rules of Professional Conduct is alone sufficient to prove all the required elements of estoppel should a lawsuit arise from a transaction related to the violation.

To the contrary, in order to prevail on the estoppel argument, Mordechai was required to prove that by failing to adhere to Rule 3-300 and to ensure that the home improvement contract was in writing, Debra intended that Mordechai would rely on her advice (or lack thereof), and that he did so and was injured as a result. Substantial evidence supports the trial court's finding that he failed to meet this burden. In particular, Mordechai admitted that he knew the law required home improvement contracts to be in writing. Thus, the trial court could reasonably find that Mordechai was not ignorant of the relevant facts, and that Debra's violation of Rule 3-300 did not cause him injury.

Mordechai argues on appeal, however, that even though he knew such contracts had to be in writing, there was no evidence that he knew that the consequence of failing to secure a written contract was that the agreement would be considered unenforceable. Mordechai testified, however, that he learned of the

legal requirement that home improvement contracts must be in writing in the context of preparing for the contractors' licensing examination. He was also an experienced contractor. From this evidence, the trial court could reasonably infer that he knew both the legal requirement of having a written contract, and also the primary legal consequence of failing to meet the requirement, i.e., unenforceability. Indeed, it is difficult to understand how one could know that the law requires such contracts to be in writing, and not therefore expect that they would be unenforceable if not in writing.

Mordechai further contends that he was not aware that Rule 3-300 required Debra to set forth their agreement in writing, to advise him to seek independent legal counsel, and to obtain his written consent. However, his ignorance of those facts does not change the estoppel analysis. The damage he suffered was that the home improvement contract was rendered potentially unenforceable because it was not in writing. Even if he had known of an additional reason for the contract to be in writing (i.e., Rule 3-300), and even if he had sought independent legal counsel, whose advice undoubtedly would have been to execute a written contract,[25] he already knew the contract should be in writing. His ignorance of the requirements of Rule 3-300 does not alter the analysis whether the Markowitzes were estopped from asserting the statute of frauds.

Mordechai also asserts he did not know that he could be held liable for attorney fees if he unsuccessfully sought to enforce an oral home improvement contract. As we explain in discussing the issue of attorney fees, below, the liability for such fees arose from Business and Professions Code section 7168, which

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[25] Mordechai does not argue that the terms of the oral contract—at least his description of its terms—were unfair, such that independent legal counsel would have advised him against it.

applies in actions "arising out of a contract for swimming pool construction." There was no evidence Debra had knowledge of the availability of attorney fees pursuant to section 7168, and no evidence that she intended that Mordechai would rely on the absence of knowledge that he could ultimately be liable for attorney fees. However, even if Mordechai was unaware of section 7168, such lack of knowledge is also inadequate to give rise to an estoppel.

We conclude that the trial court correctly found that Mordechai failed to establish the requisite elements of estoppel.

2. *The Quantum Meruit Claim*

Mordechai contends that, even if the home improvement contract was properly found to be unenforceable, the trial court erred by denying him equitable relief in the form of a quantum meruit recovery for the reasonable value of the work he performed, without first making a finding whether he had been fairly compensated for his work.[26] He asserts that the trial court's statement that "[a] review of all of the evidence leads the court to conclude that the jury was correct in its factual determinations" was inadequate to resolve the issue because the jury did not make a factual finding determining the reasonable value of Mordechai's services. The jury also did not determine how much the Markowitzes paid him.[27] We disagree.

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[26] As we shall explain, whether advanced as a claim for quantum meruit or for relief under the doctrine of part performance, Mordechai's argument fails.

[27] The parties also discuss on appeal whether recovery in quantum meruit is available where an express agreement has been found to exist, but was found to be unenforceable. We need not decide that issue because we conclude, assuming for the purposes of this appeal that such recovery was available here, it was properly denied.

Although the special verdict did not require the jury to enter numerical findings as to the value of Mordechai's services and the amount he had received, the jury necessarily found that Mordechai was not owed any money. The jury found that the legal services Debra provided to Mordechai fell below the standard of care and she breached her fiduciary duties, but it also found that no damage resulted from her breaches of duty. Mordechai asserted he was damaged by Debra's professional negligence and breach of fiduciary duties because her failure to advise him that the home improvement contract needed to be in writing resulted in the contract being unenforceable. However, by finding that no damage resulted from Debra's breaches of duty, the jury necessarily made the factual finding that no additional money was owed on the home improvement contract. This finding was applicable to both the damages issue on the negligence and breach of fiduciary duty claims (which were jury issues), and also to the jury's advisory role on the equitable claims.[28] Whether the jury credited Debra's testimony that the amount she paid was the agreed upon amount (and discredited Mordechai's contrary testimony), or determined that Mordechai had already received the reasonable value of his services, the result is the same: he suffered no compensable damage. Thus, the jury made a factual determination, which the court determined to be correct when it considered the equitable claim for quantum meruit recovery.

Moreover, as we have explained, Mordechai failed to specify the controverted issues he wanted the court to address in its statement of decision, and also failed to specify in his objections to the proposed statement of decision the issues the court had not adequately addressed. He therefore has forfeited his right

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[28] The jury was instructed regarding the applicable measure of damages if it decided that the services provided by Mordechai were not paid for and he was entitled to the reasonable value of those unpaid services.

to claim on appeal that the statement was deficient. (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at pp. 1133-1134.) We imply all findings necessary to support the judgment, including that Mordechai failed to prove that he was owed additional money on the home improvement project under any theory.

3. *Award of Attorney Fees Pursuant to Business and Professions Code section 7168*

The trial court awarded attorney fees to the Markowitzes, as prevailing parties regarding Mordechai's home improvement claims, under Business and Professions Code section 7168.[29] That statute provides for an award of attorney fees as follows: "In any action between a person contracting for construction of a swimming pool and a swimming pool contractor arising out of a contract for swimming pool construction, the court shall award reasonable attorney's fees to the prevailing party."

Mordechai contends on appeal that the court erred by awarding attorney fees to Donald and Debra because the home improvement agreement at issue involved a substantial amount of work other than construction of a swimming pool. He further contends that, even if attorney fees were properly awarded, the trial court erred when it did not apportion Donald's fee award to only those fees incurred in litigating regarding the swimming pool construction. The court did apportion Debra's award of attorney fees to cover only swimming pool-related fees,[30] and in

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[29] All undesignated statutory references in this part of the opinion are to the Business and Professions Code.

[30] Donald was awarded attorney fees of $116,452 against Mordechai based on the cost of defending the action on the home improvement contract. Debra was awarded attorney fees of $37,200, based on the court's finding that issues related to the swimming pool construction consumed 40 percent of the time spent litigating Mordechai's claims.

her cross-appeal, Debra contends that the apportionment was improper. We affirm the award of attorney fees in its entirety as to both Donald and Debra.

a. *Standard of Review*

"'The standard of review on issues of attorney's fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.' (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545, fns. omitted.)" (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.) We also review for an abuse of discretion the court's decision whether to apportion attorney fees. (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1642.) The determination whether the trial court had the statutory authority to award attorney fees is a question of law that an appellate court reviews de novo. (*Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 460.)

b. *Section 7168*

The wording of section 7168 is ambiguous whether litigation regarding a single contract which includes construction *in addition to* installation of a swimming pool gives rise to an award of attorney fees. However, we need not resolve the ambiguity because the record amply supports the conclusion that the parties did not enter into a single agreement for all of the construction work.

The Markowitzes, and particularly Debra, testified in some detail that the home improvement work, which spanned four years, resulted from a series of oral agreements, one of which involved construction of the swimming pool. There is nothing in the record which indicates that the jury or the trial court credited Mordechai's testimony that only one contract was involved. True, the jury answered "Yes" to the question whether Mordechai and the Markowitzes had entered into "an agreement to provide home improvement services." That finding, however, does not mean that the jury believed Mordechai's testimony that there was *only one* single, comprehensive agreement reached in May 1998. The jury was not asked to determine whether there was only one contract or a succession of separate contracts. Moreover, the jury repeatedly credited Debra's and Donald's testimony over Mordechai's. As we concluded in the preceding part of this opinion, the jury's finding that Mordechai did not suffer any damage as a result of Debra's professional negligence and breach of fiduciary duties necessarily indicates the jury did not believe the Markowitzes owed Mordechai any additional money for the home improvement work. The jury rejected Mordechai's claim that Debra breached any loan agreements, or committed fraud to induce the Kachlons to sign the loan reduction agreement. After reviewing the evidence and the jury verdict, the trial court concluded "that the jury was correct in its factual determinations."

Where, as here, the record is silent, we presume in support of the order that the court based its award of attorney fees on there being a separate oral contract for the construction of the swimming pool. Thus, the court had the authority to award attorney fees pursuant to section 7168, regardless of the scope of application intended by the Legislature.

c. *Apportionment*

Mordechai contends that, even if attorney fees were properly awarded, the court should have limited the award to Donald to the portion attributable to the litigation regarding the swimming pool, as the court did with Debra's award. We disagree.

In the context of discussing awards of attorney fees pursuant to the policy of reciprocity set forth in Civil Code section 1717, the court in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 recognized that Civil Code section 1717 permits recovery of attorney fees only for causes of action based on the contract. Accordingly, "'[w]here a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they relate to the contract action.' The court clarified that fees need not be apportioned 'when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed. All expenses incurred with respect to the [issues common to all causes of action] qualify for award.' ([*Id.*] at pp. 129-130.) Thus, allocation is not required when the issues are 'so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not.' (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133.) [¶] Where fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion. (*Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083.)" (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555.)

In his motion requesting an award of attorney fees pursuant to section 7168, Donald presented a thorough explanation of why the issues regarding the swimming pool were inextricably intertwined with the other issues involving the

home improvements. He noted: "the complaint did not allege that the pool was a separate contract. A detailed accounting was thus necessary to demonstrate: (a) the true nature of the home improvement agreement (i.e., that Debra agreed to directly pay all overhead plus a sum for Mordechai Kachlon's own work or profit); and (b) that all home improvement items (including the pool) were paid in full. This task required accounting for the personal loans as well. Only a global accounting (identifying all checks and establishing why each was written) would convincingly demonstrate full payment of all home improvement items, including the pool." Other common defenses included the statute of limitations and the application of section 7159. The latter defense resulted in Mordechai filing his cross-complaint alleging Debra's breach of duties as his attorney, which then had to be litigated. Mordechai also took the position that in January 2000 the parties had agreed that the payments on the Jaguar would be applied to the home improvement project rather than the promissory note, and therefore the accounting and discovery had to be expanded to include issues relating to the Jaguar payments.

Based on this exposition, the trial court could reasonably conclude that apportionment of fees was not required. The court acted well within the bounds of reason in awarding to Donald, without apportionment, the fees incurred in litigating the home improvement action.[31]

In contrast, in awarding attorney fees to Debra, the court ruled that the "action was for far more than the swimming pool. Therefore any award of attorneys fees would have to be apportioned because the law suit involved more

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[31] As we decided in part I.B.4, the trial court based the award to Donald on a lodestar rate of $150 per hour, and acted well within the bounds of its discretion in so doing. The same conclusion applies with regard to Donald's award of fees pursuant to section 7168.

than the swimming pool construction. Counsel has estimated his attorneys fees in defending the construction part of the case amounted to $93,000.00. However, he cannot be awarded that amount because the case involved other construction as well. The Court will apportion the pool construction part of the case to 40 percent of the total trial. Therefore, in case BC291979 [Debra] is awarded attorneys' fees in the sum of $37,200."

However, Debra did not present a description similar to Donald's of her counsel's approach to litigating the case in order to justify an unapportioned award of attorney fees. The trial court was not required to assume that Debra's counsel approached the litigation in the same manner as Donald's counsel. Indeed, from our review of the record, it is apparent that Donald's attorney took the lead role at trial. Having heard the entire case, the trial court was in the best position to determine whether an allocation of attorney's fees was required as to each party. We will not interfere with a trial court's exercise of discretion unless its ruling exceeds the bounds of reason, all of the circumstances before it being considered. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale, supra,* 155 Cal.App.4th at p. 555.) Debra has not demonstrated that the trial court abused its discretion under the circumstances of this case in its award of attorney fees under section 7168.

DISPOSITION

The portion of the judgment awarding Debra $16,000 in attorney fees for the wrongful foreclosure portion of the case under Civil Code section 1717 is reversed. The matter is remanded to the trial court with directions to recalculate the attorney fees to which Debra is entitled using the lodestar method as described in *PLCM, supra*, 22 Cal.4th at pages 1095-1096. In all other respects, the judgment is affirmed. Costs on appeal are awarded to Debra Markowitz and Donald

Markowitz, and these costs are to be borne by Mordechai Kachlon and Monica Kachlon. Best Alliance shall bear its own costs on appeal.

As between each of the Markowitzes, on the one hand, and the Kachlons, on the other, the Markowitzes are determined to be the prevailing parties on appeal. Donald and Debra are thus each entitled to an award of attorney fees on appeal. "'[F]ees, if recoverable at all--pursuant either to statute or parties' agreement--are available for services at trial *and on appeal.*' (Italics added.)" (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927, quoting *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) Although we could appraise and fix the amount of attorney fees to which Donald and Debra are entitled, we deem the more appropriate course of practice is to remand the case to the trial court to determine the appropriate amount of fees.

As between the Markowitzes and Best Alliance, we determine there to be no prevailing party for purposes of the appeal. These parties shall bear their own attorney fees on appeal relative to one another.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.