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Court of Appeal, Fifth District, California.

Michael ROTH et al., Plaintiffs,
Cross-Defendants and Respondents,
v.
Charles T. ROSE, Defendant,
Cross-Complainant and Appellant.

Nos. F043178, F043603.
|
(Super.Ct.No. 292984).
|
April 26, 2005.

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurt W. Johnson III, Judge.

Attorneys and Law Firms

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OPINION

ARDAIZ, P.J.

INTRODUCTION

***1** This case concerns the status of two deeds of trust (the "Rose deeds of trust") executed in 1989 by Rodney Frazier and Debi L. Frazier in favor of appellant Charles Rose to secure two promissory notes (one for $40,000 and one for $10,000) made payable by the Fraziers to Rose. Rose's two deeds of trust were junior to another deed of trust (referred to by the parties to this litigation as the "Roth deed of trust") executed by the Fraziers in favor of an entity known as the John Roth 1978 Trust. The Roth deed of trust secured all or part of a larger $235,000 debt owed by the Fraziers to the John Roth 1978 Trust. The $50,000 owed by the Fraziers to Rose was apparently Rose's commission for arranging the $235,000 loan from the John Roth 1978 Trust to the Fraziers. The same parcel of real property (referred to by the parties as "Parcel 2") was the subject of all three deeds of trust.

In October of 1991 there was a nonjudicial foreclosure on (sometimes also called a "trustee's sale" of) the property under the Roth deed of trust. The purchaser at the trustee's sale later conveyed the property to Michael Roth and Elizabeth Dankworth. Then in 2001 Rose attempted to schedule a nonjudicial foreclosure of the property under his two deeds of trust. This litigation began when Michael Roth and Elizabeth Dankworth (the owners of Parcel 2) and Washington Mutual Bank, FA ("the bank"-a lender to Michael Roth and Elizabeth Dankworth, and the beneficiary of a 2001 deed of trust on Parcel 2 executed by Michael Roth and Elizabeth Dankworth to secure the bank's loan to them) filed suit against Rose to stop him from conducting his proposed trustee's sale of the property. We will describe the pleadings in more detail later on in this opinion, but the essence of the action was to obtain a judicial determination that Rose's two junior deeds of trust had been extinguished by the October 1991 trustee's sale under the senior Roth deed of trust, and that therefore Rose no longer held any interest in Parcel 2 and could not hold a trustee's sale to sell Parcel 2. Rose filed a cross-complaint which sought a judicial determination that his two deeds of trust had not been extinguished by the October 1991 trustee's sale under the Roth deed of trust. Rose's cross-complaint named the three plaintiffs as cross-defendants. It also sought damages from two additional cross-defendants, John Roth and Myrtle Jewett, who were alleged by Rose to have engaged in improprieties in connection with the October 1991 trustee's sale of the property.

Michael Roth and Elizabeth Dankworth filed a motion for summary adjudication addressing certain causes of action raised by the pleadings. The bank filed a similar motion for summary adjudication. The result of these motions was in essence a determination by the court that Rose's two deeds of trust had been extinguished by the October 1991 trustee's sale. After the ruling by the court

on the summary adjudication motions, the three plaintiffs dismissed one of their causes of action (for slander of title) not addressed by their summary adjudication motions. This dismissal eliminated the one cause of action involving Michael Roth, Elizabeth Dankworth, the bank and Rose that had not been addressed in the summary adjudication motions. The court entered judgment in favor of Michael Roth, Elizabeth Dankworth and the bank and against Rose. The judgment declared that Rose's two deeds of trust were now null and void, that Rose held no interest in the property, and that Michael Roth and Elizabeth Dankworth were the owners in fee simple of the property. It permanently enjoined Rose from conducting any trustee's sale under his (now null and void) two deeds of trust. The court also inexplicably entered judgment in favor of cross-defendant John Roth, who never filed any motion addressing the allegations against him in Rose's cross-complaint.

***2** Michael Roth, Elizabeth Dankworth and John Roth (all represented by the same attorney) filed a motion requesting an award of attorney fees from Rose. So did the bank. The court ordered Rose to pay attorney fees of $103,503.94 to the bank and $87,724.50 to Michael Roth, Elizabeth Dankworth and John Roth. The attorney fee awards were made pursuant to Civil Code section 1717.

Rose appeals from the judgment against him (case No. F043178) and from the post-judgment order awarding attorney fees (case No. F043603). This court issued an order consolidating both appeals. Rose again contends that his two deeds of trust survived the 1991 nonjudicial foreclosure on the Roth deed of trust. He also contends that the court erred in granting judgment in favor of John Roth because John Roth was not a moving party on either of the two motions for summary adjudication filed in this case, and has never addressed any of the three causes of action alleged against him by Rose in Rose's cross-complaint. On Rose's appeal from the order awarding attorney fees, he contends that the order awarding attorney fees to Michael Roth, Elizabeth Dankworth, John Roth and the bank is erroneous because Civil Code section 1717 does not authorize an award of attorney fees under the facts of this case.

As we shall explain, we disagree with Rose's first contention, but agree with his second and third contentions. We conclude (1) the superior court correctly determined that Rose's two deeds of trust were extinguished by the 1991 nonjudicial foreclosure on the Roth deed of trust, (2) the court erred in granting judgment in favor of the non-moving cross-defendant John Roth (but correctly granted judgment in favor of Michael Roth, Elizabeth Dankworth and the bank), and (3) the court erred in concluding that Civil Code section 1717 authorized an award of attorney fees under the facts of this case. We will affirm the judgment insofar as it grants judgment in favor of Michael Roth, Elizabeth Dankworth and the bank. We will reverse the judgment insofar as it grants judgment in favor of the non-moving cross-defendant John Roth. We will reverse the order awarding attorney fees.

FACTS

The Pleadings

Plaintiffs Michael Roth, Elizabeth Dankworth, and the bank filed this action against Rose in August of 2001. It alleged the following scenario. In June of 1989 the John Roth 1978 Trust loaned to Rodney Frazier and Debi Frazier the sum of $235,000. The loan was secured by a deed of trust (deed of trust # 1) against the Frazier property. The Frazier property was located at 1100 Central Avenue in Modesto, and is referred to by the parties as "Parcel 2," a shortened version of its county parcel map designation ("Parcel 2 as shown on that certain parcel map filed October 8, 1975 in Book 21 of Parcel Maps, at page 90, Stanislaus County Records"). Also in June of 1989, Rose loaned the Fraziers $40,000. This loan was secured by a deed of trust (deed of trust # 2) on the same property. This second deed of trust was junior in priority and subordinate to the Roth deed of trust (deed of trust # 1). In August of 1989 Rose loaned an additional $10,000 to the Fraziers. This loan was secured by another deed of trust (deed of trust # 3) on Parcel 2.

***3** In October of 1991 John Roth (the trustee under deed of trust # 1) completed a trustee's sale (a nonjudicial foreclosure) under deed of trust # 1. The John Roth 1978 Trust (with Myrtle Jewett as trustee of that trust) acquired Parcel 2 at the trustee's sale, and this trustee's sale "extinguished any interest of Rose." In November of 1991 Michael Roth and Elizabeth Dankworth (said by appellant Rose to be "the children of John Roth") acquired Parcel 2 from the Trust. Michael Roth and

Elizabeth Dankworth recorded their grant deed in January of 1993.

More than nine years later in January of 2001, Rose caused to be recorded two notices of default, one pertaining to his June 1989 deed of trust (deed of trust # 2) securing his $40,000 loan to the Fraziers, and one pertaining to his August 1989 deed of trust (deed of trust # 3) securing his $10,000 loan to the Fraziers. In April of 2001, the bank loaned $305,000 to Michael Roth and Elizabeth Dankworth, and secured this loan with a deed of trust (deed of trust # 4) against Parcel 2. The complaint alleged that the bank's deed of trust (deed of trust # 4) was "in first priority position" as a result of Rose's deeds of trust (deeds of trust # 2 and # 3) having been extinguished in the 1991 trustee's sale under deed of trust # 1. It further alleged that in May of 2001 Rose caused to be recorded "two Notices of Trustee Sale, purporting to set sale dates for the Trustee's sale under the two Notices of Default" Rose had caused to be recorded in January 2001. Rose thus did not deem his two deeds of trust (deeds of trust # 2 and # 3) to have been extinguished in the 1991 nonjudicial foreclosure, and was attempting to conduct a nonjudicial foreclosure under those two deeds of trust in order to satisfy the $40,000 and $10,000 amounts owed to him by the Fraziers. Rose's conduct thus prompted the plaintiffs to file their complaint.

The plaintiffs' complaint named Rose as a defendant and included four causes of action. The first cause of action, to quiet title, sought a determination that Rose had no lien or other interest whatsoever in Parcel 2. The second cause of action, for slander of title, alleged that Parcel 2 had suffered a diminution in value as a result of Rose's conduct in causing notices of default and notices of sale to be recorded. The third cause of action, for declaratory relief, sought a judicial declaration that Rose's two deeds of trust (deeds of trust # 2 and # 3) were null and void. The fourth cause of action sought injunctive relief prohibiting Rose and anyone acting in concert with him from conducting a trustee's sale of Parcel 2.

Rose's cross-complaint named five cross-defendants. These were the three plaintiffs (Michael Roth, Elizabeth Dankworth and the bank) and two other individuals (John Roth and Myrtle Jewett) alleged to have been trustees, at various times, of the John Roth 1978 Trust. The Rose cross-complaint alleged much of the same scenario alleged in the complaint, but it also included some additional allegations. These were as follows. The $235,000 promissory note signed by the Fraziers in June of 1989 was also signed by two other couples-Leo and Evelyn Durossette ("Durossette"), and Donald and Shirley Adams ("Adams"). A portion of the debt on the note was also secured by a deed of trust on real property owned by Adams ("the Adams property," sometimes also referred to by the parties to this appeal as "Parcel B"). On February 2, 1990 (i.e., before the October 7, 1991 date of the trustee's sale alleged in the complaint), the trustee of the John Roth 1978 Trust (Jewett) filed an action in superior court seeking judicial foreclosure of deed of trust # 1. The Jewett complaint for judicial foreclosure named the Fraziers, Durosette and Adams as defendants, but not Rose. On November 16, 1990 (again before October 7, 1991), Jewett obtained a "Judgment of Foreclosure and Order of Sale of Real Property." A copy of this judgment was attached as an exhibit to Rose's cross-complaint, and it ordered that both Parcel 2 and Parcel B "will be sold in the manner proscribed [*sic*] by law, and the writ of sale will issue to the Sheriff of Stanislaus County, ordering and directing him to conduct such sale." The cross-complaint further alleged that as a result of the November 16, 1990 judgment of judicial foreclosure, "any power of foreclosure which previously existed under [deed of trust # 1] was extinguished and neither John Roth nor Jewett had any interest to foreclose upon under [deed of trust # 1]."

***4** The first cause of action of the Rose cross-complaint was against Michael Roth, Elizabeth Dankworth and the bank. It was labeled "Quiet Title" and sought an order affirming that Rose's deeds of trust (deeds of trust # 2 and # 3) "remain in full force and effect and that the lien of Washington Mutual, to the extent it exists, is junior to" Rose's deeds of trust. Rose's second and third causes of action were directed at John Roth only. The second cause of action, entitled "Breach of Statutory Duty," alleged that John Roth failed to give proper notice of the nonjudicial foreclosure sale of Parcel 2. The third cause of action, entitled "Actual Fraud," alleged that John Roth falsely represented "that notice would be given of" the date of a nonjudicial foreclosure sale of Parcel 2. The fourth cause of action, entitled "Conspiracy," was against John Roth and Myrtle Jewett. It alleged that these two "conspired to take certain actions which would result in the extinguishing of the security interests held by" Rose on Parcel 2. Rose's second, third and fourth causes of action sought monetary damages.

The Bank's Motion for Summary Adjudication

The bank moved for summary adjudication on its first (quiet title), third (declaratory relief) and fourth (injunctive relief) causes of action of its complaint against Rose, and on the first (quiet title) and only cause of action of Rose's cross-complaint against the bank. The motion argued that the October 1991 nonjudicial trustee's sale of Parcel 2 extinguished Rose's two deeds of trust (deeds of trust # 2 and # 3). It also argued that any challenge by Rose to the October 1991 trustee's sale of Parcel 2 was barred by the applicable statute of limitations and by the doctrine of laches. The bank's motion presented evidence supporting the significant allegations of its complaint.

Rose's opposition to the bank's motion did not present any significant factual dispute to the evidence presented by the bank. Rather, Rose presented evidence supporting the allegations of his cross-complaint, i.e., evidence of the November 16, 1990 judgment of foreclosure. Rose again argued that any power of foreclosure which had existed under deed of trust # 1 had been extinguished by the November 1990 judgment of foreclosure, and that his own deeds of trust (deeds of trust # 2 and # 3) had survived the November 1990 judgment because he had not been named as a defendant in the judicial foreclosure action.

The Michael Roth and Elizabeth Dankworth Motion for Summary Adjudication

The hearing on the bank's motion was heard concurrently with a hearing on a similar motion filed by plaintiffs Michael Roth and Elizabeth Dankworth. The Michael Roth and Elizabeth Dankworth motion similarly sought summary adjudication in favor of these moving parties on the first, third and fourth causes of action of their complaint, and on the Rose cross-complaint's first (quiet title) cause of action. It similarly argued that the October 7, 1991 nonjudicial foreclosure (trustee's sale) under the Roth deed of trust (deed of trust # 1) extinguished Rose's two junior liens (deeds of trust # 2 and # 3). Rose again argued in opposition that the earlier November 1990 judicial foreclosure judgment extinguished any power of sale that had existed in deed of trust # 1.

The Court's Rulings and Judgment

***5** The court orally granted both motions at the conclusion of the hearing. Twenty-three days later the court issued a written order granting the motions. Rose unsuccessfully moved for reconsideration .[1] Michael Roth, Elizabeth Dankworth and the bank dismissed their second cause of action (slander of title) of their complaint against Rose. This eliminated the only portion of the litigation involving Michael Roth, Elizabeth Dankworth, the bank, and Rose, that had not been addressed by the two summary adjudication motions. The dismissal of the slander of title cause of action enabled the court to enter judgment in favor of Michael Roth, Elizabeth Dankworth and the bank, and against Rose. The court entered such a judgment.[2] The judgment also included John Roth as a party in whose favor judgment was entered, even though John Roth was not a plaintiff and did not file a motion for summary adjudication, and even though neither of the two motions for summary adjudication addressed any of the causes of action alleged by Rose against John Roth in Rose's cross-complaint.

1 In denying Rose's motion for reconsideration, the court stated "[i]nsofar as the CCP 1008, I don't see this as any new facts have been presented to the court." A motion for reconsideration must be "based upon new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a).) Rose made no contention of any new law. Nothing on Rose's appeal attacks the court's finding of no new facts, or otherwise contends that the court erred in denying Rose's motion for reconsideration. Much of the motion for reconsideration appears to have focused on steps the John Roth 1978 Trust may or may not have taken to satisfy the debt owed to it by the Fraziers and others. Like the superior court, we fail to see the significance of any of it.

2 The judgment also states that John Roth (a cross-defendant on the Rose cross-complaint) had filed a cross-complaint of his own, and that John Roth also dismissed his cross-complaint.

Attorney Fees

The bank moved for and received an award of attorney fees in the amount of $103,503.94. Michael Roth,

Elizabeth Dankworth, and John Roth moved for and received an award of attorney fees in the amount of $87,724.50. Both of these attorney fee awards were made under the authority of Civil Code section 1717.

I.

THE JUDGMENT IN FAVOR OF JOHN ROTH MUST BE REVERSED

We agree with appellant Rose's contention that the court erred in granting judgment in favor of John Roth. John Roth never filed a motion for summary adjudication or summary judgment. So far as we can tell, the inclusion of John Roth's name on the judgment appears to have been the result of inadvertence. The attorney who represented Michael Roth and Elizabeth Dankworth apparently also represented John Roth, but John Roth clearly was not a party to the motion for summary adjudication filed by Michael Roth and Elizabeth Dankworth. Since John Roth was not a moving party on that motion, it is not surprising that the motion sought entry of an order in favor of "the individual Plaintiffs" (i.e., Michael Roth and Elizabeth Dankworth-John Roth was not a "plaintiff"). We are not impressed with John Roth's argument that if he had made a motion, he would have prevailed, and that therefore we should not reverse the judgment entered in his favor. A cross-defendant "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more of the elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc. § 437c, subd. (p)(2).) John Roth never even attempted to do this. The court therefore erred in entering judgment in his favor . [3]

[3] Rose also argues that the court entered judgment in favor of Myrtle Jewett and in favor of the John Roth 1978 Trust, and that the judgment in favor of these non-moving parties should be reversed as well. We see no mention of Myrtle Jewett or of the John Roth 1978 Trust in the judgment presented to us by Rose on this appeal, and do not read the judgment as pertaining to any parties except those named in it. Those named in it were the winners (Michael Roth, Elizabeth Dankworth, the bank, and John Roth) and the loser (Rose).

II.

THE JUDGMENT IN FAVOR OF MICHAEL ROTH, ELIZABETH DANKWORTH AND THE BANK WAS CORRECT

The principle of law controlling this case is well established. It is succinctly stated in *Dover Mobile Estates v. Fiber Form Products, Inc.* (1990) 220 Cal.App.3d 1494, 1498, as follows: "Title conveyed by a trustee's deed relates back to the date when the deed of trust was executed. [Citation.] The trustee's deed therefore passes the title held by the trustor at the time of execution. [Citation.] Liens which attach after the execution of the foreclosed trust deed are extinguished. The purchaser at the trustee sale therefore takes title free of those junior or subordinate liens. [Citations.]" This principle has been applied in numerous cases throughout the years. (See, e.g., *Carpenter v. Smallpage* (1934) 220 Cal. 129; *Streiff v. Darlington* (1937) 9 Cal.2d 42, 45; *Cook v. Huntley* (1941) 44 Cal.App.2d 635, 640; *Brown v. Copp* (1951) 105 Cal.App.2d 1, 6; *Hohn v. Riverside County Flood Control and Water Conservation District* (1964) 228 Cal.App.2d 605, 613; and *County of Butte v. North Burbank Public Utility Dist.* (1981) 124 Cal.App.3d 342, 345.) A statement of this rule in more modern language appears in Bernhardt, California Mortgage and Deed of Trust Practice (Cont.Ed.Bar3d ed.2004), § 2.76, pp. 109-110, as follows:

***6** "Title conveyed by a trustee's deed relates back in time to the date on which the deed of trust was executed. The trustee's deed therefore passes the title held by the trustor as of that earlier time plus any after-acquired title, rather than the title that the trustor held on the date of the foreclosure sale. *Hohn v. Riverside County Flood Control [Etc. Dist.]* (1964) 228 CA.2d 605, 39 CR 647; *Bracey v. Gray* (1942) 49 CA.2d 274, 121 P.2d 770....

"Liens that attached to the property after execution of the foreclosed deed of trust are therefore eliminated or 'sold out,' and the purchaser at the trustee sale takes title to the property free of those junior liens. *Carpenter v. Smallpage* (1934) 220 C 129, 29 P.2d 841; *Dugand v. Magnus* (1930) 107 CA 243, 290 P 309....

"The trustee's deed also conveys title free and clear of the lien of the deed of trust under which the foreclosure

sale itself was conducted. Because the sale proceeds are to be used to satisfy that lien, it no longer encumbers the property, even if the sale proceeds do not fully satisfy the claim. CC § 2910; CCP § 726; see, *e.g., Ralph C. Sutro Co. v. Paramount Plastering, Inc.* (1963) 216 CA.2d 433, 31 CR 174."

If the successful bidder at the trustee's sale purchases at a price high enough to pay off both the senior indebtedness and the junior indebtedness, then the holder of the junior or subordinate deed of trust will recover on the debt secured by that subordinate deed of trust. (*FPCI RE-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1023; *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1120-1121.) If the successful bidder purchases at a price high enough to pay off the senior indebtedness and only a portion of the junior indebtedness, then the holder of the subordinate deed of trust will receive partial payment. (Civ.Code, § 2924k, subd. (a).) If the successful bidder purchases at a price insufficient to pay off any of the junior indebtedness after the proceeds of the sale are applied to the senior indebtedness (and other statutory costs and expenses attributable to the sale-see Civil Code § 2924k, subd. (a)), then the holder of the junior deed of trust is out of luck. In any event, the junior's deed of trust is extinguished.

"Fact" # 17 of the bank's separate statement of undisputed facts in support of its motion for summary adjudication was that a nonjudical trustee's sale of Parcel 2 took place under deed of trust # 1 on October 7, 1991. The bank requested that the court take judicial notice of certain documents presented in support of the bank's motion, and the court did so. One of these documents was the "Trustee's Deed Upon Sale" pertaining to the October 7, 1991 trustee's sale. The document stated that on October 7, 1991, the trustee under the deed of trust (at that time John Roth) sold Parcel 2 to the highest bidder (the John Roth 1978 Trust, with Myrtle Jewett as trustee of that trust) for $300,000. Rose's opposition to the bank's motion presented no contrary evidence.

***7** "Fact" # 18 of Michael Roth's and Elizabeth Dankworth's separate statement in support of their motion for summary adjudication similarly asserted that a trustee's sale of Parcel 2 under deed of trust # 1 took place on October 7, 1991. In support of their motion, Michael Roth and Elizabeth Dankworth presented the declaration of John Roth. John Roth's declaration stated: "On October 7, 1991, I completed a Trustee's Sale of the Modesto Property for Three Hundred Thousand dollars ($300,000) to credit bidder, Myrtle Jewett, as trustee under the John E. Roth 1978 Trust. Myrtle Jewett was the only bidder who participated in the sale." The John Roth declaration also asserted that the purchase price ($300,000) was less than the amount owing on the Frazier's debt secured by the deed of trust ($364,501). This explains why Rose, with his two junior deeds of trust, received no proceeds from the sale. Rose's opposition to the motion presented no contrary evidence.

The court applied the principles just discussed above and concluded that Rose's two deeds of trust (deeds of trust # 2 and # 3) were extinguished as a result of the October 7, 1991 trustee's sale under deed of trust # 1.

Rose's opposition to the motions for summary adjudication was not based upon any factual dispute about what had occurred. Rose's position, as we understand it, is based upon California's "one form of action" rule. This was described in *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236, as follows:

"California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property. Most of these statutes were enacted as the result of 'the Great Depression and the corresponding legislative abhorrence of the all too common foreclosures and forfeitures [which occurred] during that era for reasons beyond the control of the debtors.' (Hetland & Hanson, *The 'Mixed Collateral' Amendments to California's Commercial Code-Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?* (1987) 75 Cal. L.Rev. 185, 187-177, fn. omitted.)

"Pursuant to this statutory scheme, there is only 'one form of action' for the recovery of any debt or the enforcement of any right secured by a mortgage or deed of trust. That action is foreclosure, which may be either judicial or nonjudicial. (Code Civ. Proc., §§ 725a, 726, subd. (a).) In a judicial foreclosure, if the property is sold for less than the amount of the outstanding indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. (*Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 [27 Cal.Rptr. 873, 378 P.2d 97].) However,

the debtor has a statutory right of redemption, or an opportunity to regain ownership of the property by paying the foreclosure sale price, for a period of time after foreclosure. (Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra,* § 3.54, p. 143; *id.,* § 3.76, p. 173; *id.,* § 3.77, p. 1734.)

***8** "In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust. (Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra,* § 1.28, p. 37; *id.,* § 2.1, p. 51.) Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption. (Sherman, Cal. Foreclosure: Law and Practice (1994) § 6.01, p. 6-3.) However, the creditor may not seek a deficiency judgment. (*Roseleaf Corp. v. Chierighino, supra,* 59 Cal.2d at pp. 43-44.) Thus, the antideficiency status in part 'serve to prevent creditors in private sales from buying in at deflated prices and realizing double recoveries by holding debtors for large deficiencies.' (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 514 [259 Cal.Rptr. 425].)"

Both of the motions for summary adjudication presented evidence of the making and recording (on July 3, 1989) of deed of trust # 1. The Fraziers were the trustors. They granted Parcel 2 to Ticor Title Insurance Company of California as trustee with a power of sale, for the benefit of "Myrtle Jewett, as trustee under the John Roth 1978 Trust" as beneficiary.[4] Both motions also presented the above-described and undisputed evidence of the October 7, 1991 trustee's sale (nonjudicial foreclosure) of Parcel 2. Rose, however, relies on other evidence presented on the motions. Both motions also presented evidence of the judicial foreclosure action filed on February 2, 1990 and of the resulting November 16, 1990 judgment of foreclosure. The existence of the February 2, 1990 complaint for judicial foreclosure and of the November 16, 1990 judgment of foreclosure were not disputed by Rose. Rose contends that the beneficiary's obtaining of the February 16, 1990 judgment of foreclosure was an election of remedies by the beneficiary. Rose argues that the one form of action rule barred the beneficiary from later pursuing a second remedy, the October 7, 1991 nonjudicial foreclosure (trustee's sale). The difficulty we have with Rose's argument is that it appears to completely ignore what we have described as the controlling principle of law in this case-the October 7, 1991 nonjudicial foreclosure (trustee's sale) did in fact take place, and it extinguished Rose's two junior deeds of trust.

4 It is not disputed that John Roth later became the trustee under this deed of trust (in place of Ticor) and was the trustee at the time of the October 7, 1991 trustee's sale of Parcel 2.

Rose argues that he "seeks not to invalidate respondents' title, but to show that they took title subject to his lien, which was preserved by the foreclosure judgment through operation of Code of Civil Procedure section 726(c)." It is not disputed that after the John Roth 1978 Trust purchased Parcel 2 at the October 7, 1991 trustee's sale, the John Roth 1978 Trust conveyed Parcel 2 to Michael Roth and Elizabeth Dankworth in January of 1993. Rose's two deeds of trust did indeed survive the November 16, 1990 judgment of judicial foreclosure. (*Carpentier v. Brenham* (1870) 40 Cal. 221, 234; *Fox v. California Title Ins. Co.* (1932) 120 Cal.App. 264, 266; Bernhardt, Cal. Mortgage and Deed of Trust Practice, *supra,* § 3.33 at p. 167 (2/04); Code Civ. Proc., § 726, subd. (c).) No one contends otherwise. But Rose's two deeds of trust did not survive the October 7, 1991 nonjudicial foreclosure.

***9** The parties' briefs address the issue of whether the February 16, 1990 judgment of judicial foreclosure did or did not bar a subsequent nonjudicial foreclosure (trustee's sale) of Parcel 2. The superior court addressed this issue and concluded that "[t]he non-executed judicial foreclosure does not preclude non-judicial foreclosure in 1991." It is now clear that a beneficiary under a deed of trust can file an action for judicial foreclosure, then abandon it and pursue a trustee's sale instead. (*Flack v. Boland* (1938) 11 Cal.2d 103, 107.) The beneficiary can also begin trustee's sale proceedings, terminate them, and then file an action for judicial foreclosure instead. (*Carpenter v. Hamilton* (1943) 59 Cal.App.2d 146, 148.) The beneficiary can also institute both methods of foreclosure at the same time, and then later complete the one the beneficiary selects. (*Vlahovich v. Cruz* (1989) 213 Cal.App.3d 317, 322.) In *Flack, supra,* the court expressly left open the question of whether a beneficiary who obtains a judgment in a judicial foreclosure action can then institute a post-judgment trustee's sale. (*Flack v. Boland, supra,* 11 Cal.2d at p. 108.) Two subsequent cases appear to have held that the beneficiary under a deed of trust cannot institute a trustee's sale after having obtained

a judgment in a judicial foreclosure action. (*Vlahovich v.. Cruz, supra;* and *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664; see also Miller & Starr, *supra,* § 10:124.) We see no need even to reach this issue, however, in the case presently before us. If the trustee's sale was improper, and if Rose wished to prevent the extinguishing of his two deeds of trust, his remedy was an action to set aside the trustee's sale. (*Bank of Seoul & Trust Co. v. Marcione* (1988) 198 Cal.App.3d 113; *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc., supra,* 72 Cal.App.4th at p. 1121; see also Miller & Starr, *supra,* § 10:210.) Apparently Rose filed no such action. Nor does his cross-complaint in the present case seek to set aside the October 7, 1991 trustee's sale. Whether such an action would have been successful if it had been filed was not an issue properly before the trial court and is not an issue properly before us now. The parties argue at length about whether such an action would be barred by a statute of limitations, but the argument is speculative-no action to set aside the October 7, 1991 trustee's sale has been filed. The October 7, 1991 trustee's sale (nonjudicial foreclosure) took place. No one took any action to enjoin it before it occurred, and no one has taken any action to set it aside since it occurred. Nor did Rose's cross-complaint in the present case seek to set aside the October 1991 trustee's sale. The seller and buyer at the October 1991 trustee's sale (John Roth and Myrtle Jewett) were not parties to either of the motions leading to the judgment in this case. Nothing in the record presented to us on these appeals contains any indication that Myrtle Jewett was ever served or has ever appeared in this case. The trustee's sale extinguished Rose's junior deeds of trust (*Dover Mobile Estates v. Fiber Form Products, Inc., supra,* 220 Cal.App.3d 1494), and that is where we stand today. The court thus did not err in entering judgment in favor of Michael Roth, Elizabeth Dankworth, and the bank.

III.

ATTORNEY FEES

***10** As aforementioned, the court ordered Rose to pay attorney fees in the amount of $103,503.94 to the bank, and in the amount of $87,724.50 to Michael Roth, Elizabeth Dankworth and John Roth. The awards were made under the authority of Civil Code section 1717. Rose contends that Civil Code section 1717 does not authorize the awards of attorney fees under the facts of this case, and that the attorney fee awards were therefore erroneous. As we shall explain, we agree with Rose.

A. The Bank's Attorney Fee Award

Civil Code section 1717 states in pertinent 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."

The bank presented two theories to support its request for attorney fees. First, it relied on its deed of trust recorded in April of 2001. By that document, Michael Roth and Elizabeth Dankworth (the "Grantor") granted their interest in Parcel 2 to First American Title (the "Trustee" under the deed of trust), for the benefit of the bank (the "Beneficiary"). Paragraph 9 of this deed of trust stated:

> "9. Fees and Costs. Grantor shall pay Beneficiary's and Trustee's reasonable cost of searching records, other reasonable expenses as allowed by law, and reasonable attorney's fees. In any lawsuit or other proceeding to foreclose this Deed of Trust; in any lawsuit or proceeding which Beneficiary or Trustee prosecutes or defends to protect the lien of this Deed of Trust; and, in any other action taken by Beneficiary to collect the Debt, including without limitation any disposition of the Property under the State Uniform Commercial Code; and, any action taken in bankruptcy proceedings as well as any appellate proceedings."

Under the plain language of paragraph 9, Michael Roth and Elizabeth Dankworth (the "Grantor") agreed to pay the bank's ("Beneficiary's") and First American Title's ("Trustee's") reasonable attorney fees under certain circumstances. Rose was not a party to this deed of trust and did not sign this deed of trust. Nor does anyone contend that Rose was a party to this deed of trust. "Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party [citations], and to prevent oppressive use of one-sided attorney's fees provisions. [Citations.]" (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) Thus Michael Roth and Elizabeth Dankworth could recover attorney fees under paragraph 9 if they were to prevail in a contractual dispute with the bank or with First American Title. "Its purposes require section 1717 to be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at p. 128.) In *Reynolds,* a corporate defendant defaulted on two promissory notes containing attorney fees clauses. The obligee on the notes sued individuals (including Alperson) on the theory that the individuals were the alter egos of the corporation and thus were liable on the promissory notes. The trial court rejected the alter ego theory and absolved the individual defendants from personal liability for the corporate obligations. The California Supreme Court nevertheless concluded that each individual defendant "sued on a contract as if he were a party to it" could recover attorney fees under Civil Code section 1717. (*Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at p. 128.) In the case presently before us, however, Rose was not a party to the bank's deed of trust and did not sign this deed of trust. Nor does anyone contend that Rose was a party to the bank's deed of trust.

***11** The bank argues that Rose "sought to establish the invalidity of a contract (the Bank's deed of trust)" and that therefore the bank is entitled to attorney fees under the attorney fee clause of the deed of trust executed by Michael Roth and Elizabeth Dankworth to First American Title for the benefit of the bank. We are not persuaded. The bank sued Rose and sought to obtain a judicial determination that Rose had no interest in Parcel 2, i.e., that Rose's deeds of trust had been extinguished by the October 1991 trustee's sale. Rose's cross-complaint sought a determination that his deeds of trust "remain in full force and effect" and that the bank's deed of trust "to the extent it exists, is junior to that of" Rose." The bank cites several cases which it says stand for the proposition that an action on a contract includes an attempt to establish the invalidity of that contract, as well as the enforcement of a contract. None of them, however, stands for the proposition that an attorney fee clause applies when neither the plaintiff nor the defendant claims that a contract exists between the two of them.

Hsu v. Abbara (1995) 9 Cal.4th 863, states the "now settled" rule that "a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.' " (*Hsu, supra,* 9 Cal.4th at p. 870.) In *Hsu* the Hsus sued the Abbaras for breach of contract. Abbaras' defense was that there was no contract between the Hsus and the Abbaras. The court concluded that no contract was ever formed. The document the Hsus' contended was a written contract had an attorney fee clause. The California Supreme Court applied the rule just quoted above and concluded that the Abbaras were entitled to attorney fees under Civil Code section 1717. The other cases cited by the bank similarly do not support the bank's argument. Instead, they support Rose's argument of no attorney fee liability on the bank's deed of trust. In *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, the court reversed an attorney fee award in favor of a successful defendant because he was not a party to the agreement containing the attorney fee clause and could not have been liable for attorney fees even if the plaintiff had prevailed. In *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, the court held that a plaintiff who successfully sued to rescind a written agreement on the theory that the agreement had been obtained by fraud could obtain an award of attorney fees based upon the attorney fee clause in the document. The court noted that if the defendant had prevailed, and if the contract had not been rescinded, the defendant could have recovered attorney fees under the attorney fee clause. (*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc., supra,* 121 Cal.App.3d at p. 463.) *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, restated the rule of *Star Pacific.* (*Hastings v. Matlock, supra,* 171 Cal.App.3d at 341.)

***12** We should perhaps also explicitly say that Rose has never contended that he is entitled to attorney fees under the attorney fee clause of the bank's deed of trust. The bank argues that Rose's answer to the bank's complaint prayed for attorney fees against the bank. This is true. But Rose's answer stated as an affirmative defense that "[p]laintiff's action against this answering defendant is not based on good faith, is frivolous, and entitles this answering defendant to receive reasonable expenses and attorney fees ." Rose's answer never claimed that its prayer for attorney fees was based upon the deed of trust the bank obtained from Michael Roth and Elizabeth Dankworth. To the extent the bank might be contending that Rose's prayer for attorney fees in his answer to the bank's complaint somehow estops Rose from urging any inapplicability of Civil Code section 1717, we disagree. Cases suggesting that Civil Code section 1717 liability for attorney fees rests upon an estoppel theory have been disapproved as inconsistent with the California Supreme Court's holdings in *Hsu v. Abbara, supra,* 9 Cal.4th 863, and *Reynold's Metals Co. v. Alperson, supra,* 25 Cal.3d 124. [5] And even if a theory of estoppel could be used to justify a Civil Code section 1717 award of attorney fees under some circumstances, we fail to see how an estoppel theory could be found to apply in a case such as this, where Rose has never contended that he is entitled to an award of attorney fees under any contract.

5 Respondents Michael Roth, Elizabeth Dankworth and John Roth call our attention to *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175. In *International Billing* the Third Appellate District announced a rule stating: "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (*Id.* at P. 1190.) Three years later in *M. Perez Co., Inc., v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, the Third District expressly disapproved its own earlier *International Billing* opinion. "[T]here is no sound policy or legal basis for the broad rule adopted by this court in *International Billing Services.* ... We agree with the many state court decisions refusing to apply estoppel against a losing party who sought attorney fees under circumstances where that party would not have been entitled to such fees had it prevailed." (*M. Perez Co., Inc., v. Base Camp Condominiums Assn. No. One, supra,* 111 Cal.App.4th at p. 470.) The *M. Perez Co., Inc.* case described the "correct rule" to be as follows: "Consistent with both *Reynolds Metals Co.* and Civil Code section 1717, a prevailing party is entitled to attorney fees only if it can prove it would have been liable for attorney fees had the opponent prevailed." (*M. Perez Co., Inc., v. Base Camp Condominiums Assn. No. One, supra,* 111 Cal.App.4th at p. 467.) This rule has been stated repeatedly by the California Supreme Court (see *Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611; *Hsu v. Abbara, supra,* 9 Cal.4th at pp. 870-871; *Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at p. 129) and by the Courts of Appeal (see *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677-680; *Super 7 Motel Associates v. Wang, supra,* 16 Cal.App.4th at pp. 548-549; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 962, fn. 12; *Wilson's Heating & Air Conditioning v. Wells Fargo Bank* (1988) 202 Cal.App.3d 1326, 1333, fn. 7; *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal.App.3d 1295; 1306-1307). We adhere to it in this case as well.

The bank's reliance on *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503 is likewise unavailing. In *Manier* a potential buyer signed a real estate purchase agreement and sent it to the potential seller. The potential seller added a new provision (not agreed to by the potential buyer) and signed the document. The document contained an attorney fee clause. The potential buyer sued for specific enforcement and lost. The court concluded there was no contract. The trial court, because there was no contract, refused to award the defendant attorney fees. The appellate court reversed the order denying attorney fees. This result is easily explained by application of the rule quoted above from *Hsu v. Abbara, supra,* 9 Cal.4th 863. If the potential buyer had prevailed and the document had been ruled to be a valid contract, the buyer would have been entitled to attorney fees under the document's attorney fee clause. In the case presently before us, however, if Rose had prevailed on his theory that his two deeds of trust had not been extinguished, this result would not have made Rose a party to the bank's deed of trust. The bank's deed of trust thus provides no basis for an award of attorney fees to the bank from Rose. [6]

6 To the extent *Manier* reads Civil Code section 1717 as having codified an estoppel theory, *Manier* has been expressly and repeatedly disapproved. See *Leach v. Home Savings & Loan Assn ., supra,* 185 Cal.App.3d at pp. 1306,1307; *Myers Building Industries, Ltd. v.*

Interface Technology, Inc., supra, 13 Cal.App.4th at p. 962, fn. 12; *Super 7 Motel Associates v. Wang, supra,* 16 Cal.App.4th at pp. 548-549.

At oral argument counsel for the bank cited *Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309 as authority for an award of attorney fees to the bank. Again, we are not persuaded. In *Saucedo* a lender (Mercury) held a deed of trust executed by buyers, the McKernies. The McKernies then sold the property to the Saucedos. The Saucedos wished to assume the obligations of the McKernies to Mercury. The promissory note executed by the McKernies to Mercury contained a due-on-sale clause providing that the entire unpaid balance of the note would immediately become due and payable in the event the McKernies sold the property unless Mercury consented in writing to the transfer. Mercury would not consent. Mercury instead elected to enforce the due-on-sale clause, and filed a notice of default and election to sell under the deed of trust. The Saucedos sued to prevent the foreclosure. The Saucedos succeeded in preventing foreclosure on the authority of a then-recent court decision, *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, which held that a commercial lender could exercise a due-on-sale clause only if the lender could demonstrate that the sale or transfer resulted in an impairment of the lender's security. The Court of Appeal concluded that the Saucedos could recover attorney fees because "the trustee and/or beneficiary would have been entitled to attorney fees under the provisions of the deed of trust had they prevailed...." (*Saucedo v. Mercury Sav. & Loan Assn., supra,* 111 Cal.App.3d at p. 315.) Although this premise appears to us to be questionable, *Saucedo* does not appear to us to help the bank in this case because Rose would not have been entitled to attorney fees from the bank if Rose had prevailed. In *Saucedo,* the non-signatory plaintiff was a successor in interest to the signatory trustor; here, Rose has no connection to the Bank's deed of trust. (See *Leach v. Home Savings & Loan Assn., supra,* 185 Cal.App.3d at p. 1306.)

***13** The bank's other theory for justification of its award of attorney fees is that the attorney fee clause in Rose's deeds of trust entitles the bank to attorney fees.[7] This theory also lacks merit because no one contends that the bank was a party to these deeds of trust. Under the deed of trust recorded on July 3, 1989, the Fraziers ("Trustor") transferred Parcel 2 to Ticor Title Insurance Company ("Trustee") in trust to secure a debt of $40,000 owed by the Fraziers to Rose ("Beneficiary"). Under the deed of trust recorded on August 16, 1989, the Fraziers ("Trustor") transferred Parcel 2 to Ticor Title Insurance Company ("Trustee") in trust to secure a debt of an additional $10,000 owed by the Fraziers to Rose ("Beneficiary"). The attorney fee clause in each of these deeds of trust states:

"(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 of Trust."

Under this clause, the Fraziers (as "Trustor") agreed to pay reasonable attorney fees of Ticor (the "Trustee") or Rose (the "Beneficiary") under certain circumstances. The mutuality of remedy language of Civil Code section 1717 would thus require Ticor or Rose to pay the Fraziers' attorney fees under comparable circumstances. But the Fraziers are not a party to this litigation at all. Nothing in this language can be construed as requiring Rose to pay attorney fees to Washington Mutual Bank. Nor has Rose himself ever contended that any attorney fee clause in any of these deeds of trust would entitle him to recover attorney fees if he prevailed in this case. Instead, he expressly concedes that he could not recover attorney fees under Civil Code section 1717 if he won this case. Rose's brief states "respondents have not and cannot, as a matter

[7] The parties to this appeal all appear to assume that the Rose deeds of trust and the bank's deed of trust are written contracts. Our analysis here in part III of this opinion makes the same assumption. We observe, however, that the copies of the Rose deeds of trust and the bank's deed of trust presented to us on this appeal are signed only by the grantors, and not by the trustees or the beneficiaries. As we mention in the text, the grantors of the bank's deed of trust were Michael Roth and Elizabeth Dankworth. The trustee was a title company. The beneficiary was the bank. The document contains signatures of Michael Roth and Elizabeth Dankworth, but not of anyone representing the title company or the bank. The grantors (or "trustors") of the Rose deeds of trust were the Fraziers. The trustee was a title company. The beneficiary was Rose. The Rose deeds of trust are signed by the Fraziers, but not by anyone representing the title company and not by Rose.

of law, show, that they would have been liable to Rose for attorney fees, if he had prevailed in establishing that they assumed title to Parcel 2 *subject* to the lien of Rose's deed of trust."

B. ***The Award of Attorney Fees to Michael Roth, Elizabeth Dankworth and John Roth***

The award of attorney fees to Michael Roth, Elizabeth Dankworth and John Roth also appears to be unsupported by any recognized principle of law. Like the bank, none of these three persons was a party to any contract with Rose. Nor do any of them claim to have been a party to a contract with Rose. Nor does Rose claim to have had a contractual relationship with any of them. These three individuals, like the bank, argue that Rose would have been entitled to an award of attorney fees if Rose had prevailed, and that therefore the rule of mutuality of remedy (see *Reynolds Metals, supra;* and *Hsu, supra*) allows them to recover attorney fees from Rose. But also like the bank, they fail to explain what principle of law would have allowed Rose to recover attorney fees from them if Rose had prevailed. Again, we see none.

***14** Michael Roth, Elizabeth Dankworth and John Roth present an additional argument not made by the bank. These three individuals (or at least two of them-Michael Roth and Elizabeth Dankworth) attempt to establish a contractual relationship between themselves and Rose by virtue of paragraph B(8) of the Rose deeds of trust. This paragraph states:

> "It is mutually agreed: [¶] ... [¶] (8) That this Deed applies to, insures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the owner and holder, including pledges, of the note secured hereby, whether or not named as Beneficiary herein. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or number, and the singular number includes the plural."

Michael Roth and Elizabeth Dankworth argue that they are "successors" to the Fraziers (the trustors under the Rose deeds of trust), and that therefore under paragraph B(8) they have a contractual relationship with Rose. We are not persuaded. Michael Roth and Elizabeth Dankworth are "successors" to the Fraziers only in the sense that ownership of Parcel 2 went from the Fraziers to the John Roth 1978 Trust (at the October 1991 nonjudicial foreclosure) and then from the John Roth 1978 Trust to Michael Roth and Elizabeth Dankworth in a 1993 conveyance. Michael Roth and Elizabeth Dankworth thus might be considered "successors" to the Fraziers only in the sense that Michael Roth and Elizabeth Dankworth ultimately became owners of the same parcel of land (Parcel 2) the Fraziers had once owned. But Michael Roth and Elizabeth Dankworth never agreed to undertake any of the Fraziers' contractual obligations to Rose. Respondents do not call our attention to any authority that would bind Michael Roth and Elizabeth Dankworth to provisions of a contract they never entered into, and which no one contends they ever entered into. Nor do respondents call our attention to any authority which would bind Michael Roth and Elizabeth Dankworth to the contractual obligations of another (the Fraziers) which Michael Roth and Elizabeth Dankworth never themselves agreed to assume. A non-party to a contract is not obligated under that contract absent any evidence that the non-party expressly assumed the obligations of that contract. (*Selma Auto Mall II v. Appellate Dept.* (1990) 44 Cal.App.4th 1672, 1682-1683.)

There is also another reason why respondent John Roth was not entitled to an award of attorney fees. The judgment in his favor was erroneous. He never filed a motion addressing the three causes of action directed at him by the Rose cross-complaint. He should not have been a prevailing party, and thus was not entitled to an award of attorney fees under section 1717.

DISPOSITION

In F043178, the judgment in favor of Michael Roth and Elizabeth Dankworth is affirmed. The judgment in favor of John Roth is reversed. Each party shall bear its own costs on appeal.

***15** In F043603, the order awarding attorney fees to the bank, and to Michael Roth, Elizabeth Dankworth and John Roth, is reversed in its entirety. Each party shall bear its own costs on appeal.

WE CONCUR: DIBIASO and LEVY, JJ.

All Citations

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