IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

APPELLATE DEPARTMENT

EARL A. DANCY, Defendant/Appellant vs. AURORA LOAN SERVICES, LLC, Plaintiff/Respondent.	)	Appellate No. CV 090724 Marin Superior Court, Limited Jurisdiction Case No. CIV-090724

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
(LIMITED JURISDICTION), MARIN COUNTY
HON. JOHN A. SUTRO, JR., JUDGE

DEFENDANT/APPELLANT'S OPENING BRIEF

Richard Hurlburt, SBN 179072
Jonathan Joiner, SBN 228697
LAW OFFICES OF RICHARD HURLBURT
870 Market Street, Suite 315
San Francisco, CA 94102
(415) 391-6496 ext. 111
Attorneys for Appellant/Defendant
EARL A. DANCY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

At issue in this appeal is whether plaintiff produced at trial sufficient evidence to carry its burden of proof under two elements of C.C.P § 1161a, whether the sale was "held in accordance with C.C. 2924" and whether plaintiff's title to the premises was "duly perfected."

Defendant/Appellant EARL A. DANCY appeals from the judgment entered against him in the underlying unlawful detainer action. In its Complaint plaintiff/respondent, AURORA LOAN SERVICES, LLC alleged: "[p]laintiff is the owner of and entitled to immediate possession of the Property" [Complaint, para. 5] and, "[t]he property was sold in accordance with Section 2924 of the Civil Code, under power of sale contained in a deed of trust executed by the Defendant(s) herein, and title under the sale has been duly perfected in Plaintiff by the recording of a Trustee's Deed Upon Sale in the Official Records, County of MARIN." [Complaint, para. 6] Mr. DANCY denied those allegations in his Answer. [Answer, at para. 2b(1)]

STATEMENT OF CASE

A. Nature of Action and Relief Sought

Unlawful detainer action in which plaintiff, the purchaser at a purported trustee sale, seeks possession of the subject property.

Defendant does not seek affirmative relief in this action. He merely prays that plaintiff take nothing, on the grounds that plaintiff has failed to present evidence essential to this C.C.P. § 1161a unlawful detainer in which plaintiff (AURORA) was the foreclosing beneficiary listed in the Trustee's Deed [Trial Exhibit 4] but was not a party to the underlying loan. [Deed of Trust, Trial Exhibit 1]

//

B. Summary of Material Facts

Defendant EARL A. DANCY took out a mortgage in 2005. The lender was American Sterling Bank. The beneficiary under the 2005 Deed of Trust was M.E.R.S. [Trial Exhibit 4, pages 1-2]

Plaintiff AUORA LOAN SERVICES LLC alleges that as the purchaser at a 2008 trustee sale, it is entitled to possession of the subject property. Plaintiff bases this contention on a Trustee's Deed Upon Sale. [Trial Exhibit 4] The Trustee's Deed indicates the sale was based on the 2005 loan but identifies plaintiff as the foreclosing beneficiary, not American Sterling Bank or M.E.R.S. [Trial Exhibit 4]

Plaintiff submitted no evidence to show it was a party to the 2005 loan. Nor did plaintiff submit any evidence to show how, or even if, AURORA later became a party to the loan such that it had any legal authority to enforce the loan terms or to elect the power of sale.

From the evidence before the Court, there is an obvious gap in title to the loan. Plaintiff was no more than a stranger to the loan when it supposedly elected to invoke the power of sale. The Trustee's Deed is nothing more than a "wild deed." Accordingly, there is insufficient evidence to demonstrate the sale was held "in accordance with Civil Code § 2924" or that plaintiff's title was "duly perfected" because there are no facts to prove AURORA ever had authority to conduct the sale in the first place. [Compare Trial Exhibit Nos. 1 & 4]

C. Judgment and Statement of Appealability

The Superior Court of California, Limited Jurisdiction, County of Marin, by the Honorable John A. Sutro, Jr., judge, entered judgment against defendant on August 19, 2009. Mr. Dancy filed his Notice of Appeal on August 25, 2009.

An appeal of a ruling by a superior court judge or other judicial officer in a limited civil case is to the appellate division of the superior court. [C.C.P. § 904.2]

D. Standard of Review

Where an attack is made on the findings or judgment on the ground they are not supported by the evidence, the power of reviewing courts begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, that will sustain the findings made or the judgment rendered. [*Wheeler v. Gregg* (1993) 90 Cal.App.2nd 348, 370-371]

FACTS

Defendant specifically denied in his Answer the allegations made by plaintiff in its Complaint concerning: (1) whether plaintiff owns the premises, (2) whether the sale was held in accordance with § 2924 of the Civil Code under power of sale contained in the Deed of Trust, and (3) whether plaintiff had "duly perfected" its title to the property. [Complaint at paras. 5 & 6; Answer at para. 2b(1)]

Defendant contended throughout the unlawful detainer proceedings and on both days of trial that plaintiff was never more than a stranger to the 2005 loan, that plaintiff had no legal authority to make the critical election under C.C. § 2424(a)(1)(C) to forego other remedies and invoke the power of sale; and, as a result, plaintiff could not meet its burden under C.C.P § 1161a to prove the sale was held "in accordance with C.C. § 2924" or that plaintiff's title had been "duly perfected."

These contentions were no surprise to plaintiff at trial. Defendant raised these specific contentions in his motion for summary judgment; in his trial brief filed July 29, 2009; orally on the first day of trial [RT 4:2-10], in defendant's amended trial brief, filed August 19, 2009; and orally on the second day of trial. [RT 23:12-24:21]

//

The Trustee's Deed which plaintiff submitted and the Court admitted into evidence purports to grant "to AURORA LOAN SERVICES, LLC (herein called Grantee) but without covenant or warranty, expressed or implied, all right title and interest conveyed to and now held by it as Trustee under the Deed of Trust" in the subject property. [Trial Exhibit 4] The Deed states: "this conveyance is made in compliance with the terms of the Deed of Trust ... dated 7/28/2005 ... instrument number 2005-0063047 ... Recorder of MARIN, California..."

The Trustee's Deed also identifies AURORA as the foreclosing beneficiary: "The grantee herein IS the foreclosing beneficiary." [Trial Exhibit 4, p. 1]

Mr. Dancy testified he never borrowed money from AURORA LOAN SERVICES, LLC. [RT 21:6-8] He took out a loan from American Sterling Bank. Mr. Dancy authenticated the 2005 Deed of Trust, which the Court later admitted into evidence. [RT 21:9-23, Trial Exhibit 1]

The Deed of Trust identifies the Lender as "AMERICAN STERLING BANK, A MISSOURI CORPORATION." It identifies the Trustee as "FIRST TRUSTEE SERVICES, INC., A MISSOURI CORPORATION," and states that MERS is the "beneficiary" acting "solely as a nominee for Lender and Lender's successors and assigns. [Trial Exhibit No. 1; Deed of Trust, pages 1 & 2]

Plaintiff submitted absolutely no evidence to overcome the obvious gap in title between itself (AURORA, the foreclosing beneficiary) and the original lender and beneficiary (AMERICAN STERLING BANK and MERS). Plaintiff provided no testimony at trial concerning any assignment of the deed of trust to AURORA, nor did it produce any written evidence to explain how AURORA became a successor beneficiary or was anything more than a complete stranger to the 2005 loan with no authority to elect to conduct the sale.

//

TRIAL COURT RULINGS

The Court appeared to rule on the first day of trial that defendant could not defend on the merits because he had not tendered to plaintiff the full amount due on the loan. [4:26-5:9] On the second and final day of trial the Court entered Judgment for plaintiff, not mentioning the tender issue.

The Court consistently ruled that defendant's contentions regarding the gap in title between the Deed of Trust and the Trustee's Deed may be appropriate elsewhere but had no place in an unlawful detainer. [RT 2:18-23; 4:2-10; 11:14-25; 26:25-27:5] For this reason it appears the trial Court did not consider the issues defendant was attempting to raise: that there was no evidence presented to demonstrate that plaintiff (AURORA) had authority to elect to conduct the Trustee Sale and therefore plaintiff did not meet its burden under C.C.P. § 1161a (to prove sale "in accordance with C.C.P. 2924" and title "duly perfected.")

ARGUMENT

I. DEFENDANT "CAN AND MUST" CHALLENGE THE VALIDITY OF THE SALE IN THE UNLAWFUL DETAINER

Plaintiff must "prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale and the defendant may raise objections" on that phase of the issue of title. [*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 159-160]

In an action for unlawful detainer, section 1161a requires proof that the property was "duly sold in accordance with Section 2924 of the Civil Code." Title, to the extent required by section 1161a, "not only may, but must, be tried in such actions." [*Kartheiser v. Superior Court* (1959) 174 Cal.App.2d 617, 620]

The defendant is entitled to dispute the validity of the trustees sale and place the purchaser's title in issue. The burden of proof is on the purchaser to show to show the trust property had been duly sold to him and that his title was duly

perfected. [*Crummer v. Whitehead* (1964) 230 Cal.App.2d 264, 268]

Perhaps the most factually analogous controlling authority is the case of *Higgins v. Coyne* (1946) 75 Cal.App.2d 69. There, the UD defendant alleged the trustee sale was a legal nullity because, *inter alia*, the property had been deeded to her before the sale. In other words, the UD defendant contended the sale was invalid because the purported beneficiary had no legal authority to conduct the sale in the first place. The trial court rendered judgment for the plaintiff. The First District Court of Appeals reversed, holding:

> To the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes, the question of title not only may, but must, be tried in such actions... [Id. @ p. 72]
>
> Since plaintiff alleged that his title to the property was deraigned and performed through proceedings had under a power of sale contained in a deed of trust, the defendant, under the law laid down in the Hewitt and Cheny cases, was entitled to challenge the legality of those particular proceedings and to have that limited issue tried and determined in the justice's court. [Id. @ p. 74][1]

Higgins is very similar to the present matter. The defendant challenged the underlying legal right and power to conduct the sale. The appeals court held the defendant was entitled to try the issue in the unlawful detainer, despite the fact she had also attempted to raise other issues the outside the scope of the UD.

Just like the defendant in *Higgins*, Mr. Dancy here contends the sale was

---

[1] "*Hewitt* and *Cheny*" say:

It is clear, of course, that questions of title cannot generally be litigated in an unlawful detainer action. But to the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes themselves **the question of title not only may, but must, be tried in such actions** if the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified. [*Hewitt v. Justice's Court of Brooklyn Tp.* (1933) 131 Cal.App. 439, 442-443]

Plaintiff must "prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale and the defendant may raise objections" on that phase of the issue of title. [*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 159-160]

void because the party who purportedly elected to invoke the power of sale did not have the legal power or authority to do so.

II. PLAINTIFF FAILED TO MEET ITS BURDEN OF PRODUCING EVIDENCE

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. [Evid. Code § 500]

The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose. [*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113]

Where no evidence is introduced upon an issue, a finding thereon should be against the party having the burden of proof. [*Heesy v. Vaughn* (1948) 31 Cal.2d 701, 708-709]

A. The Elements of Plaintiff's Case In Chief Derive From Two Statutes: C.C.P. § 1161a and C.C. § 2924

Code of Civil Procedure § 1161a(b):

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

Civil Code § 2924(a)(1)(C):

> The Notice of Default "shall" include: A statement setting forth the nature of each breach actually known to the **beneficiary and of his or her election to sell or cause to be sold the property** to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default. [Emphasis added]

//

//

B. Plaintiff Is Required To Demonstrate Strict Compliance With These Statutes

The statutory situations in which the remedy of unlawful detainer is available are exclusive and the statutory procedure must be strictly followed. [*Berry v. Society of St. Pius X* (1999) 69 Cal.App.4th 354, 363]

A non-judicial foreclosure sale under the power-of-sale in a deed of trust or mortgage must be conducted in strict compliance with its provisions and applicable statutory law. [*Coppola v. Superior Court* (1989) 211 Cal.App.3d 848, 868]

C. Plaintiff Failed To Present Evidence The Sale Was Held "In Accordance With" Civil Code § 2924

One critical element about which plaintiff failed to present indispensable evidence was whether the party electing to conduct the sale had any authority to do so. In other words, was the electing party (AURORA) a bona fide "beneficiary" under C.C. § 2924(a)(1)(C)?

> The Notice of Default "shall" include: A statement setting forth the nature of each breach actually known to the **beneficiary and of his or her election to sell or cause to be sold the property** to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default. [Emphasis added]

Under the statute, a stranger to the loan cannot elect to invoke the power of sale in the Deed of Trust. This power is reserved exclusively for the "beneficiary." [C.C. § 2924(a)(1)(C)] The language of this part of the statute stands in marked contrast to the other parts of the statute which provide for the ministerial aspects of § 2924 to be carried out by delegates of the beneficiary: "the trustee, mortgagee, or beneficiary, or any of their authorized agents." [C.C. § 2924(a)(1)] But the statute empowers only the "beneficiary" to make the critical election of remedies and invoke the power of sale.

It is axiomatic that for the sale to have been held "in accordance with Section 2924" the party electing to conduct the sale must have had legal authority

to do so. The statute does not empower a stranger to elect the remedy of sale. The "electing beneficiary" must have legal power deriving from the original Note or Deed of Trust. Otherwise, the statute does not permit a sale to take place.

Statutory provisions regarding the exercise of the power of sale provide substantive rights to the trustor and limit the power of sale for the protection of the trustor. [*Bank of America, N.A. v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 712]

Here, plaintiff was not the original beneficiary. The original lender was American Sterling Bank and the beneficiary was MERS. [Deed of Trust, Trial Exhibit # 1] But according to the Trustee's Deed, Plaintiff/AURORA "WAS the foreclosing beneficiary." [Trial Exhibit 4]

But plaintiff failed to produce any evidence to bridge this obvious gap in title. There is absolutely no evidence plaintiff had any right to cause the sale to take place. According to the evidence at trial, plaintiff had no more right to sell this property than did the Man in the Moon.

Strictly speaking, it may not have been necessary for plaintiff to prove it actually owned the Note at the time of election of sale. But unless plaintiff proves who owned the Note at the time of election it is impossible to discern whether the sale was held in accordance with § 2924. As a matter of law, the Note and Deed of Trust cannot be separated. "The assignment of a debt secured by mortgage carries with it the security." [C.C. § 2936] Assignment of the Note carries the mortgage (Deed of Trust) with it. The purported assignment of a mortgage without an assignment of the debt secured is a legal nullity. [*Kelley v. Upshaw* (1952) 39 Cal.2d 179, 192]

In order to carry it's burden to demonstrate the sale was held in accordance with the law, plaintiff needed to present evidence at trial showing the party that

elected to conduct the sale under § 2924(a)(1)(C) had the requisite legal authority to do so.

D. Plaintiff Failed To Present Evidence That Its Title Has Been "Duly Perfected"

Plaintiff must prove affirmatively that the property was duly sold and that "the title under the sale has been duly perfected." Contrary to the rule applying to unlawful detainer where the landlord-tenant relationship is involved, title thus becomes an issue. [*Kelliher v. Kelliher* (1950) 101 Cal.App.2d 226, 232]

Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt. [*Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, 649]

This includes good record title [*Gwin v. Calegaris* (1903) 139 Cal. 384; *Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837, 841]

Here, plaintiff has failed to prove its title is "valid and good beyond all reasonable doubt." On the contrary, from the evidence at trial it would appear there is a gap in title the size of the Grand Canyon between the parties to the 2005 loan (Sterling/MERS) [Trial Exhibit 1] and the 2008 Trustee's Deed (AURORA). [Trial Exhibit 4]

Plaintiff provided no evidence the Note or Deed of Trust was ever assigned. All such assignments are required by law to be written, notarized and recorded. The power of sale may only "be exercised by the assignee of the assignment" after it is "duly acknowledged and recorded." [C.C. § 2932.5]

Not only did plaintiff fail to produce such documents from the Recorder's Office, it also failed to produce any evidence whatsoever about any assignment or other legal circumstances which might have bridged this obvious gap in title.

Rather than "perfect title" what plaintiff has now is nothing more than a "wild deed," which is probably uninsurable.

E. Plaintiff's Failure to Present "Clear And Positive" Evidence of Assignment or Overcoming the Gap In Title Is Fatal To Plaintiff's Cause of Action

If plaintiff really had possessed legal authority to elect the power of sale, it would not have been an undue burden for plaintiff to present evidence of such authority at trial. We know plaintiff was the purported "foreclosing beneficiary." [Trustee's Deed, Trial Exhibit #4] Plaintiff was supposed to have executed, notarized & recorded the chain of title documents before conducting the sale. Assignments of the Note and Substitutions of the Trustee must be in writing and recorded. [Civil Code §§ 2932.5, 2934a(a)(1) & 2934a(a)(4)]

The burden of proving an assignment falls upon the party asserting rights thereunder. Such evidence must not only be sufficient to establish the fact of the assignment, but **the measure of sufficiency requires that the evidence of assignment be "clear and positive..."** (*Cockerell v. Title Insurance & Trust Co.* (1954) 42 Cal.2d 284, 292 [plaintiffs failed to prove valid assignment of note and deed of trust to them. ... must prove their chain of title to the note in question.]) (Emphasis added.)

The assignment of a contract required to be in writing under the statute of frauds must also be made by written instrument, subscribed by the party disposing of the same, unless the assignment be by operation of law. Moreover, under the statute of frauds, a purported assignment of the Note or Deed of Trust would be void if not in writing or by operation of law (C.C. §§ 1091 & 1624; *Maron v. Howard* (1968) 258 Cal.App.2d 473, 485 [assignment of lease])

//

//

F. The Recitation Language In the Trustee's Deed Is Insufficient

Plaintiff argued at trial the recitation language in the trustee's deed is sufficient to carry its burden of proof as to whether the sale was held in compliance with C.C. § 2924. [RT 26:16-24]

This is not the case. First, C.C. § 2924 permits such recitations concerning the notice requirements of the trustee sale process, not whether plaintiff had the power to conduct the sale in the first place. [C.C. § 2924(c)]

Furthermore, the recitation in the instant Trustee's Deed [Trial Exhibit # 4] says nothing about whether the party electing to invoke the power of sale had a legal right to do so. The recitation is silent about the one issue before the court, whether the Section 2924(a)(1)(C) election was made by a true "beneficiary" with power of election deriving from the 2005 Note or Deed of Trust.

III. DEFENDANT IS ENTITLED TO DISPUTE ELEMENTS OF PLAINTIFF'S CAUSE OF ACTION NOTWITHSTANDING THE "TENDER" ISSUE

It is unclear from the record what the trial court ultimately decided with regard to the issue of tender. On the first day of trial the Court appeared to suggest defendant could not challenge whether plaintiff had met it's burden of proof because defendant had not tendered the full amount of the loan to plaintiff. [RT 4:26-5:9] Defendant addressed the issue in his Amended Trial Brief and the court did not mention the tender issue again.

In any event, plaintiff must prove the elements of its cause of action under C.C.P. § 1161a and C.C. § 2924, whether or not defendant tendered the loan amount. The statutes cannot be reasonably interpreted to exempt plaintiff from having to prove the elements of its own case.

All the "tender" cases plaintiff cited at trial and in it's trial brief are hybrids, unlawful detainer actions joined or consolidated with requests for equitable relief,

in which the defaulting homeowner sought affirmative equitable relief in the form of setting aside the trustee sale. The tender issue arises in those cases only as a result of the equitable cross-actions.

For example, in *Crummer v. Whitehead* (1964) 230 Cal.App.2d 264, the issue was whether the trial Court had abused it's discretion in "refusing to set aside the trustee's sale." [*Id.* @ p. 268] There was an unlawful detainer action at issue, but the appellant had also made affirmative equitable claims on which she obtained a temporary restraining order ex parte restraining the sale. The restraining order was set aside and the sale went forward. The case was tried in the Superior Court, presumably as a result of the equitable action, appellant's "demand for a judgment cancelling the trustee's sale." [*Id.*] The tender issue is mentioned only in the last five lines of the decision and only as a prerequisite to "her demand for a judgment cancelling the trustee sale."

The *MCA* case is also a hybrid, UD plus equitable action for affirmative relief. The defendant there claimed the sale was improperly held, sought monetary damages and "that the trustee's sale be declared null and void." [*MCA, Inc. v. Universal Diversified Enterprises Corp.* (1972) 27 Cal.App.3d 170, 174]

Citing *Crummer*, the *MCA* decision states, "Some disposition on the part of (defendant) to do equity by tendering the amount of the debt due is a prerequisite to a demand for a judgement cancelling the trustee's sale." [*MCA* @ p. 177] Again, the tender requirement is applied only to the claim in equity.

Unlike *Crummer* and *MCA*, the present case between plaintiff and Mr. Dancy is purely statutory. Mr. Dancy did not seek equitable relief. He is not seeking to invalidate the 2005 Note or Deed of Trust. Nor did he pray for a judgement setting aside the 2008 trustee sale. Indeed, such relief is beyond the scope of this unlawful detainer. (*Vasey v. California Dance Co.* (1977) 70

Cal.App.3d 742, 747 [Unlawful detainer action may not be tried in conjunction with other causes or claims except perhaps by mutual consent of parties.])

A. "Tender" Arises From A Request For Equitable Relief

The tender issue arises only in the context of an equitable claim. The requirement that a trustor seeking equitable relief to set aside a foreclosure sale must make a proper tender is based upon the principle that one seeking equity must do equity. [*MCA, Inc. v. Universal Diversified Enterprises Corp.*, *supra*, 27 Cal.App.3d @ 177; *Leonard v. Bank of America* (1936) 16 Cal.App.2d 341, 344]

There is no tender requirement contained in the unlawful detainer statute(s).

B. The Present Unlawful Detainer Is Purely Statutory

Here, there is no request for equitable relief. Plaintiff's cause of action is purely statutory. Defendant did not seek affirmative relief. He merely denied elements of plaintiff's statutory cause of action.

"It is well established in California that unlawful detainer actions are purely statutory." [*Balassy v. Superior Court* (1986) 181 Cal.App.3d 1148, 1151]

It is well established that unlawful detainer actions are wholly created and strictly controlled by statute in California. The "mode and measure of plaintiff's recovery" are limited by these statutes. **The statutes prevail over inconsistent general principles of law and procedure** because of the special function of unlawful detainer actions to restore immediate possession of real property. [*Ibid*. (emphasis added); citing *Markham v. Fralick* (1934) 2 Cal.2d 221, 225-227, *Kwok v. Bergren* (1982) 130 Cal.App.3d 596, 599, and *Vasey v. Calif. Dance Co.* (1977) 70 Cal.App.3d 742, 748]

Neither statute (C.C.P. § 1161a, C.C. § 2924) contains a requirement that defendant tender the loan amount before plaintiff is required to prove the elements of the cause of action.

CONCLUSION

What Mr. Dancy seeks here is proof the entity that purports to have sold his home is something more than a complete stranger to the 2005 loan. Such proof is routinely required in other contract actions where the plaintiff was not a party to the original transaction. If AURORA really did have legal authority to elect the power of sale then it would not have been an undue burden for plaintiff to present such evidence, which in most cases would be a recorded assignment.

Plaintiff brought itself within the requirements of Civil Code § 1161a. In so doing, plaintiff chose to accept the benefits of the summary proceeding in exchange for the obligation to strictly comply with the statute. The statute requires plaintiff demonstrate the sale was held in accordance with C.C.P. § 2924 and that title was duly perfected. Plaintiff failed to present evidence on these two issues, evidence which was indispensable to its chosen cause of action.

Dated: November __, 2009

_____
Richard Hurlburt
Attorney for Defendant/Appellant,
Earl A. Dancy