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Please note:

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorneys for Plaintiff
ABIGAIL SMITH

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF GRANITE

ABIGAIL SMITH,

Case No. 123-456-7

Plaintiff,

TRIAL BRIEF OF PLAINTIFF
ABIGAIL SMITH

vs.

SAGE BANK,

Date:
Time:
Dept.
Complaint filed:
Trial date:

Defendant.
_____ /

FACTS

This action arises out of a loan evidenced by a promissory note and secured by a second deed of trust on plaintiff Abigail Smith’s home. In 2___, plaintiff fell behind on payments due under the promissory note. Defendant Sage Bank elected not to pursue nonjudicial foreclosure on the deed of trust, but instead sued plaintiff on the promissory note. Defendant obtained a monetary judgment against plaintiff, and recorded an abstract of judgment in Granite County on or about June 1, 2___.

After entry of the judgment, defendant agreed to accept plaintiff’s payment of \$150,000 in \$1,000 monthly installments as full satisfaction of the judgment. Plaintiff made the \$1,000 monthly payments until 2___, when she undertook to refinance her home. As part of that process, plaintiff contacted defendant’s then-attorney, to whom she had been making the \$1,000 monthly payments, and negotiated a lump-sum payoff.

1 Plaintiff gave the attorney a cashier's check for the agreed sum payable to defendant and
2 clearly marked "settlement in full." In return, defendant's attorney gave plaintiff an
3 executed Acknowledgment of Satisfaction of Judgment. Defendant thereafter discharged
4 the attorney and attempted to block filing of the Acknowledgment, but nevertheless
5 negotiated the "settlement in full" cashier's check a few days later.

6 Despite the foregoing, defendant failed and refused to clear plaintiff's title to her
7 home by reconveying the deed of trust. Furthermore, defendant continued to report
8 plaintiff's loan as a \$330,000 "charge off" and refused to confirm that there was a zero
9 balance due. As a result, plaintiff lost two otherwise-approved refinance loans and
10 suffered other deleterious consequences. Plaintiff's complaint alleges claims for: (1)
11 failure to reconvey the deed of trust in violation of Civil Code § 2941; (2) slander of title;
12 (3) breach of contract; and (4) breach of the implied covenant of good faith and fair
13 dealing. The evidence will establish plaintiff's right to recover under each of these
14 theories.

15 16 **ARGUMENT**

17 **1. Defendant's refusal to reconvey the deed of trust, continued reporting of** 18 **plaintiff's loan as a \$330,000 "charge off," and refusal to confirm a zero** 19 **balance due were entirely without justification.**

20 Code of Civil Procedure § 726 provides that there can be "but one form of action"
21 for the recovery of any debt secured by a deed of trust. Under this one-action rule, a trust
22 deed beneficiary who sues on the underlying debt to recover a personal judgment against
23 the trustor without foreclosing on the deed of trust waives the security of the deed of trust.
24 *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 1004; 4 Miller & Starr,
25 CALIFORNIA REAL ESTATE (3rd ed. 2000) § 10:156, at 456. Thus, even apart from
26 defendant's agreement to accept plaintiff's lump-sum payment as full satisfaction of the
27 judgment, defendant waived the security of the deed of trust simply by suing plaintiff on
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1 the promissory note and obtaining a personal judgment against her. Defendant thereafter
2 had no reason whatsoever not to reconvey the deed of trust.

3 Defendant was also obligated to reconvey the deed of trust because the judgment
4 on the promissory note was fully satisfied. “A money judgment may be satisfied by
5 payment of the full amount required to satisfy the judgment or by acceptance by the
6 judgment creditor of a lesser sum in full satisfaction of the judgment.” Code Civ. Proc.
7 § 724.010(a). The attorney who negotiated the lump-sum payoff, accepted the settlement-
8 in-full cashier’s check, and executed the Acknowledgment of Satisfaction of Judgment
9 was defendant’s attorney when he took those actions. Section 724.060(c)(3) expressly
10 provides that an Acknowledgment of Satisfaction of Judgment may be executed by the
11 “attorney for the judgment creditor . . . unless a revocation of the attorney’s authority is
12 filed.” Here, no such revocation was filed before the attorney executed the
13 Acknowledgment. And although defendant later discharged the attorney and attempted to
14 block filing of the Acknowledgment, it nevertheless negotiated the settlement-in-full
15 cashier’s check shortly thereafter. Knowingly cashing a check with such a notation
16 discharges the debtor’s obligation. *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d
17 592, 597; *In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058-1060; Civ.
18 Code § 1526.

19 When an obligation secured by a deed of trust is satisfied, the deed of trust
20 terminates and title to the property automatically reverts in the trustor without a
21 reconveyance. *Snider v. Basinger* (1976) 61 Cal.App.3d 819, 823. The trustor is entitled
22 to a reconveyance, “but the legal effect of reconveyance is only to clear the title of
23 record.” *Ibid.* Here, the deed of trust had terminated because (1) defendant waived the
24 security of the deed of trust by suing on the promissory note; and (2) plaintiff paid and
25 defendant accepted an agreed sum as full satisfaction of the judgment on the note.
26 Thereafter, defendant had no rights under the deed of trust. But it nevertheless refused to
27 clear plaintiff’s title by reconveyance, continued to report plaintiff’s loan as a \$330,000
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1 “charge off,” and refused to confirm a zero balance due, all without justification.

2
3 **2. Defendant is liable for failure to reconvey the deed of trust in violation**
4 **of Civil Code § 2941.**

5 When an obligor satisfies an obligation secured by a deed of trust, the beneficiary
6 must reconvey the deed of trust. If the beneficiary fails to do so, the violator is liable in
7 damages. Civil Code § 2941.¹ In this case, the evidence will show that the obligation
8 secured by the deed of trust was satisfied, and that defendant wrongfully refused to
9 execute and deliver to the trustee a request for reconveyance. This breach of statutory
10 duty is a tort, which entitles plaintiff to all the damages proximately caused thereby,
11 including damages for emotional distress. *Pintor v. Ong* (1989) 211 Cal.App.3d 837,
12 841-842; 4 Miller & Starr, *supra*, § 10:115, at 335-336.

13 Furthermore, the evidence will show that an award of punitive damages is justified
14 because defendant is guilty of malice and/or oppression. “Malice” means conduct that is
15 intended to cause injury or despicable conduct carried on by the defendant with willful
16 and conscious disregard of the rights or safety of others. Civ. Code § 3294(c)(1).
17 “Oppression” means despicable conduct that subjects the plaintiff to cruel and unjust
18 hardship in conscious disregard of his rights. *Id.* § 3294(c)(2). It is almost inconceivable
19 that defendant did not realize the deed of trust had terminated, both because it waived the
20 security of the deed of trust when it sued on the promissory note without foreclosing, and

21
22 ¹Civil Code § 2941 provides in relevant part:

23 (b)(1) When the obligation secured by any deed of trust has been satisfied, the
24 beneficiary or the assignee of the beneficiary shall execute and deliver to the
25 trustee the original note, deed of trust, request for full reconveyance, and other
26 documents as may be necessary to reconvey, or cause to be reconveyed, the deed
27 of trust.

28 * * *

(e) The violation of this section shall make the violator liable to the person
affected by the violation for all damages which that person may sustain by reason
of the violation, and shall require that the violator forfeit to that person the sum
of three hundred dollars (\$300).

1 because plaintiff paid and defendant accepted an agreed sum as full satisfaction of the
2 judgment. For that reason, together with defendant’s continued reporting of plaintiff’s
3 loan as a \$330,000 “charge off” and refusal to confirm a zero balance due, the trier of fact
4 can easily conclude that defendant’s refusal to reconvey was willful, was intended to
5 injure plaintiff, and was done with conscious disregard of her rights.

6
7 **3. Defendant is liable for slander of title.**

8 Slander of title is “the publication of a false statement disparaging another’s
9 property rights in land, chattels or intangible things, that the publisher should recognize as
10 likely to result in pecuniary harm to the other through the conduct of third persons in
11 respect to the other’s interest in the property.” 5 Miller & Starr, *supra*, § 11:40, at 109,
12 quoting REST.2D TORTS, § 624. The elements of the tort are: (1) a publication; (2)
13 without privilege or justification and thus with malice, express or implied; (3) false, either
14 knowingly so or made without regard to its truthfulness; and (4) causing direct and
15 immediate pecuniary loss. *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 264.

16 The evidence will establish each of the required elements. First, there was a false
17 publication. “The recordation of an instrument facially valid but without underlying
18 merit will, of course, give rise to an action for slander of title.” *Seeley v. Seymour* (1987)
19 190 Cal.App.3d 844, 857. Here, defendant refused to reconvey the deed of trust, and thus
20 left it as a matter of record, even though it had terminated as a result of defendant’s
21 waiver of the security when it sued on the promissory note and when plaintiff satisfied the
22 underlying obligation. Defendant made the publication in violation of a statutory duty,
23 and thus without privilege or justification. Moreover, the fact that defendant must have
24 known the deed of trust was terminated, together with other conduct such as continuing to
25 report plaintiff’s loan as a \$330,000 “charge off” and refusing to confirm a zero balance
26 due, shows that the publication was made with malice.

27 Finally, plaintiff has suffered direct and immediate pecuniary loss. The two
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1 elements of damages generally recoverable for slander of title are: (1) pecuniary loss
2 resulting directly and immediately from the conduct of third persons, and (2) the expense
3 of measures reasonably necessary to counteract the publication, including litigation to
4 remove the doubt the publication caused regarding plaintiff's title. *Appel v. Burman*
5 (1984) 159 Cal.App.3d 1209, 1215. The latter category of damages includes the
6 attorney's fees incurred in the slander of title action itself (not as costs, but as damages).
7 *Id.* at 1216. In the present case, plaintiff has suffered substantial damages directly caused
8 by third persons' conduct, including the loss of two refinance loans and her disquali-
9 fication from applying for a general-manager position where she was employed. Plaintiff
10 is entitled to recover all such sums, together with her attorney's fees.

11 In addition to compensatory damages, a slander-of-title plaintiff may also recover
12 punitive damages. *Castaic Clay Manufacturing Co. v. Dedes* (1987) 195 Cal.App.3d 444,
13 450-451. The evidence will show that defendant is guilty of malice and/or oppression,
14 and that plaintiff is therefore entitled to recover punitive damages.

15
16 **4. Defendant is liable for breach of contract.**

17 The elements of a cause of action for breach of contract are: (1) the contract; (2)
18 plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4)
19 damage to the plaintiff. 4 Witkin, CALIFORNIA PROCEDURE (4th ed. 1997) "Pleading,"
20 § 476, at 570. Again, the evidence will establish each of the requisite elements.

21 Plaintiff and defendant's then-attorney agreed to accept the lump-sum payoff as
22 full satisfaction of the judgment against plaintiff. Plaintiff fully performed the agreement
23 by delivering a cashier's check for the agreed amount marked "settlement in full," and
24 defendant's attorney executed an Acknowledgment of Satisfaction of Judgment.

25 Although defendant discharged the attorney and attempted to block filing of the
26 Acknowledgment, it nevertheless accepted plaintiff's performance by negotiating the
27 settlement-in-full cashier's check. Because a client may ratify an attorney's unauthorized
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1 acts and thereby be barred from denying the attorney’s authority, that fact also precludes
2 any claim that the attorney acted in excess of his authority. 1 Witkin, *supra*, “Attorneys,”
3 § 275, at 300. Defendant breached the agreement by refusing to reconvey the deed of
4 trust, continuing to report plaintiff’s loan as a \$330,000 “charge off,” and refusing to
5 confirm a zero balance due.

6 Although punitive damages and damages for emotional distress cannot be
7 recovered on a breach of contract theory, defendant’s breach entitles plaintiff to recover
8 all other damages “which will compensate the party aggrieved for all the detriment
9 proximately caused thereby, or which, in the ordinary course of things, would be likely to
10 result therefrom.” Civ. Code § 3300.

11
12 **5. Defendant is liable for breach of the implied covenant of good faith and**
13 **fair dealing.**

14 In every contract there is an implied covenant that neither party will do anything
15 that will have the effect of destroying or injuring the other party’s right to receive the
16 fruits of the contract. *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 363. In the
17 present case, plaintiff entered into the lump-sum-payoff agreement to satisfy the judgment
18 against her and clear her title to the property so as to permit her to refinance her home.
19 Defendant’s refusal to reconvey the deed of trust, continued reporting of plaintiff’s loan
20 as a \$330,000 “charge off,” and refusal to confirm a zero balance due had the precise
21 effect of denying plaintiff the benefits she sought by entering into the contract.
22 Defendant may therefore be held liable for breach of the implied covenant.

23
24 Dated: _____, 2____

Respectfully submitted,

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26 _____
Attorneys for Plaintiff