

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

CIVIL APPELLATE DIVISION
DIVISION ONE

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BY ROSEMARIE LEV
D&S

TDR SERVICING LLC, as Trustee)
For Point Loma Trust #5095)
Plaintiff Appellee)
)
LESLIE CRAWFORD)
ROBERT SMITH (by Amendment)
)
Defendants Appellants)
)
)
)

Superior Court Case No.
37-2010-00042429
CL-UD-CTE

Appeal from a Judgment
of the Superior Court, County of San Diego
Hon. Cynthia Davis
Superior Court Commissioner

APPELLANT'S OPENING BRIEF

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SUPERIOR COURT OF CALIFORNIA

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DIVISION ONE**

TDR SERVICING LLC, as Trustee)	Superior Court Case No.
For Point Loma Trust #5095)	37-2010-00042429
Plaintiff/Appellee)	CL-UD-CTL
v.)	
LESYLE CRAWFORD)	
ROBERT SMITH (by Amendment)	
)	
Defendants/Appellants)	
)	
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Appeal from a Judgment
of the Superior Court, County of San Diego
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STATEMENT OF THE CASE/NATURE OF ACTION

On January 26, 2010, TDR Servicing, LLC as Trustee for Point Loma #5095 (hereafter "TDR SERVICING .") filed an unlawful detainer complaint ("Foreclosure Holdover") alleging Appellant LESLYE CRAWFORD (here after "CRAWFORD") and Does 1 to 10 had failed to move out of a residential premises after service of proper notice pursuant to California Code of Civil Procedure Section 1161(a), and thus were holdover occupants.

Both Defendant/Appellants CRAWFORD and ROBERT SMITH (hereafter "SMITH") filed Answers (See RT page 12, lines 6-7). SMITH also had filed a prejudgment claim of right to possession (See RT page 25, lines 11-21).

RELIEF SOUGHT BY APPELLANTS

1. Reversal of Court's granting judgment in favor of Plaintiff TDR SERVICING as against SMITH for possession (See 1 CT 8-9); and

2. Reversal of Court's granting judgment in favor of Plaintiff TDR SERVICING as against CRAWFORD for possession and monetary damages in the amount of \$8,250 dollars (See 1 CT 8-9).

STATEMENT OF APPEAL ABILITY

This appeal is from a final judgment of the San Diego County Superior Court entered on July 1, 2010, after a bench trial held on May 21, 2010 (See I CT 8) and is authorized by the California Code of Civil Procedure, section 904.2, subdivision (a). The appeal was timely filed and served on July 12, 2010 (See CT 10-14). On July 15, 2010, the Notice of Appeal was amended adding Appellant CRAWFORD as a joint appellant and properly served (See I CT 15-19).

STATEMENT OF SIGNIFICANT FACTS

Appellant CRAWFORD is the former homeowner of the subject residential premises (See 1 CT 34) and was an occupant of the premises at time of trial of this matter (See RT page 14, line 7-9).

The subject residence was foreclosed upon by then Trustee Unifund Financial Group, including recordation of a Notice of Default (See TR page 15, line 20 through page 16, line 11). On December 7, 2009, Unifund Financial Group prepared a "Forebearance Agreement" that CRAWFORD accepted. (See I CT 75-81).

Plaintiff TDR SERVICING purchased the subject residential premises at a post-foreclosure trustee's sale on December 24, 2009. (See TR p.14, lines 17-19(See also I CT 33-38).

On January 11, 2010, prior to the present action, CRAWFORD filed a Quiet Title action as against TDR SERVICING, and other defendants on January 11, 2010. (See I CT 83) On or about the same date, a lis pendens was concurrently filed. The amended or operative lis pendens was filed on January 19, 2010, one week prior to the filing of the underlying complaint that forms the basis of this appeal (See I CT 83-84).

On or about May 12, 2010, CRAWFORD filed a Request for default judgment as against Plaintiff TDR SERVICING in this Quiet Title Action (See I CT 88-89).

Co-Defendant Appellant ROBERT SMITH (hereafter "SMITH") was a tenant of CRAWFORD'S at the subject residence since April 1, 2005 (See I CT 4-7) SMITH had a written lease agreement with CRAWFORD and was in possession of one room of the premises since 2005. SMITH had paid the sum of \$500 plus utilities each month since 2005. (See also RT p. 22, lines 1-28). (See also I CT 5).

Prior to filing the present action, SMITH was never served any type of notice to vacate including a 3 day 60 day, or 90 day or other notice (See RT p. 23, lines 1-9).

ARGUMENT

I

.The Court's granting judgment in favor of Plaintiff TDR
SERVICING as against SMITH for possession should be reversed

A. Standard of Review

A judgment must be supported by substantial evidence.

Williams v. Wraxall 33 Cal. App. 4th 120, 132 (1995) *Estate of Olvera* 062007 CAAPP4, eo40937 (4th Dist. 2007)

B. The Court's ruling that the Protecting Tenants in Foreclosure Act (Title VII Sections 701-704 (Public Law 11-22)) was not applicable in a residential foreclosure action constituted clear error.

In making it's ruling, the Court stated

"I don't think the federal statute applies in this case because you still have the owner—the prior owner residing there on site and basically subleasing a room to a tenant.

At it's very essence, SMITH is appealing the ruling and judgment that a sub-tenant of a former owner is never afforded the protection of the PTFA, and thus the 90 Day Notice does not need to be served.

However, this ruling flies in the face of the clear statutory requirements and language of the PTFA which states:

b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if--

(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

(2) the lease or tenancy was the result of an arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy

Unlike, California statutory restrictions, properly interpreted by the Court in this action, there is absolutely no language excluding sub-tenants unless they are the child, spouse or parent of the mortgagor. In the present action there was no evidence presented that SMITH was the child, spouse or parent of CRAWFORD.

Therefore, standing alone the PTFA was applicable and a 90 day notice should have been served prior to initiating the litigation even if it turned out that no "bona fide tenant" ultimately Answered or otherwise filed a responsive pleading. Otherwise how could a bona fide tenant even know of their rights under federal law unless and until such a Notice was served. Therefore, failure to serve a 90 day notice is fatal in all cases if it is not served properly prior to initiation of a post foreclosure eviction in California¹.

¹ Defendant/Appellant is not asserting that a child, spouse or parent of the mortgagor would thereby need to be served with a 90 day notice as they are specifically excluded by the statutory language without further analysis.

In the present action, there is unrefuted and substantial evidence that Plaintiff only served a 3 day notice (TR 17, line5-14) and that this was the only Notice served and attached to the Complaint (TR 17 lines 6,7) and the only Notice introduced as evidence at trial by Plaintiff (TR 18, lines, 4-6). SMITH testified he was never served either a 60 or 90 day notices (TR 23, lines 6-9).

Despite, ruling that the PTFA did not apply, the Court determined that SMITH was not a "bona fide tenant" as required by the PTFA. (TR page 41 lines 4-18. The court concluded that because his "room" rent was \$500 and was less than the worth of the [fair market rental] of the "premises" then SMITH was not a "bona fide tenant under the PTFA. Again, this would preclude all sub-tenants, not merely those who were sub-tenants of former homeowners who also resided at the foreclosed premises.

There is a dearth of case law covering the specific language of who qualifies as a "bonafide tenant". There is unfortunately no case law interpreting whether or not a sub-tenant of a portion of a homeowner's residence is de facto not a bona fide tenant and not afforded the protections of the PTFA. This fact was acknowledged by the commissioner in her ruling (TR 41, lines 21-26). This is a further argument for taking the statute on its face.

The PTFA did not exclude sub-tenants as a protected class. The PTFA did exclude the spouses, children, and parents of the mortgagor from those who were a protected class.

It is a basic principle of statutory interpretation that where as here the legislature included exceptions, then necessarily intended to not include those classes or individuals that were not listed in the statutory language. In the absence of case law authority interpreting the statute otherwise the trial court was bound by this clear rule of statutory interpretation and in this case failed to follow such a rule.

In the present case, the complaint failed to allege that any defendant including Appellant SMITH had been served a 90 day Notice required under the federal 2009 statute entitled "Protecting Tenants in Foreclosure" (hereafter PTFA) prior to initiation of a post-foreclosure residential unlawful detainer action.

The PTFA required 90 day notice was also not attached as an Exhibit to the operative Complaint.

Said Complaint also failed to allege that Appellant Robert Smith (hereafter "SMITH" had been served with a 60 day notice. Additionally, Plaintiff also failed to produce any evidence that SMITH had been served with any type of notice to quit (See RT pgs 14-20, line 13). As admitted, by Plaintiff's key witness, the only notice served on any "defendant" was a 3 day notice to quit (See RT

p. 17, lines 5-23). The PTFA is applicable here where SMITH is a tenant. The Court's ruling that a sub-tenant of a portion of a home is not a bona fide tenant under the PTFA is clear error and violates basic rules of statutory interpretation.

II

The Court's granting judgment in favor of Plaintiff TDR SERVICING as against CRAWFORD for possession and monetary damages of \$8,250 dollars should be reversed.

A. Standard of Review.

A judgment and monetary damages must be supported by substantial evidence.

Williams v. Wraxall 33 Cal. App. 4th 120, 132 (1995) *Estate of Olvera* 062007 CAAPP4, eo40937 (4th Dist. 2007)

The trial court erred in entering judgment against Appellant/Defendant CRAWFORD as there was substantial evidence that California Civil Code Section 2924 had not been complied with by both the lender and Trustee during the foreclosure process. Evidence was also presented that Civil Code Section 2924c requirement to cure had been met by CRAWFORD in the form of payments required by a forbearance agreement.

B. The Court's ruling that TDR SERVICING received the benefits of the Trustee's Deed upon Sale recital that Civil Code Section 2924 had been complied with was in error as not supported by the evidence.

During the bench trial the Trustee's Deed upon Sale (I CT 55-58) was introduced into evidence as Plaintiff's Exhibit 1 (See TR page 15, lines 17-18). The Court in their ruling in favor of Plaintiff stated that Plaintiff received the benefit of the presumption that Civil Code Section 2924 was "filed"[complied with] (See TR page 43, lines 26-28)

In *Tomczak v. Ortega* 240 Cal App. 2d 902; 50 Cal Rptr. 20 1st Dist 1966) the Court reversed the trial court's granting of possession to Plaintiff after a post foreclosure eviction. The *Tomczak* Court held that the foreclosure sale was invalid based on the fact the mortgagor had complied with California Civil Code Sect. 2924C by meeting the conditions of the notice and the trustees were bound by the notice as modified. *Id* at 907.

In reaching this holding the Court specifically stated that Civil Code Section 2953 [provided] in pertinent part

"Any express agreement made or entered [***11] into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, . . . whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924, 2924b, [or] 2924c of the Civil Code . . . shall be void and of no effect."

Tomczak v. Ortega 240 Cal App 2d at 907.

In the present case, on December 7, 2009, CRAWFORD entered into a forbearance agreement with Unifund, TDR SERVICING'S, predecessor in interest. (I CT 77-81) Pursuant to the terms of the forbearance agreement CRAWFORD had to make 2 payments. In exchange, Unifund agreed to not to sell the house at a foreclosure sale. However, the agreement specifically stated that

Unifund would not "cancel any foreclosure actions" even if CRAWFORD met the conditions of the forbearance agreement (I CT 76). In essence, CRAWFORD agreed to waive her rights under Civil Code 2924c. As quoted in Tomczack this waiver was null and void.

In fact, CRAWFORD made the first payment to the Trustee Secured Servicing and the second payment was refused by the Trustee even though timely submitted. Regardless, CRAWFORD met the statutory requirement by "curing the default as required by the forbearance agreement.

CRAWFORD made the initial payment and tendered the second payment timely(See CT page 44, lines 10-17. The Court acknowledged review of the forbearance agreement and the Pleadings in the Quiet Title Action initiated by CRAWFORD (TR 26, lines 26-28) Both documents were specifically referenced in CRAWFORD'S affirmative defenses. Upon motion by Plaintiff's counsel this Answer was judicially noticed² (See TR 27 lines 3-TR 28, line 7).

The evidence introduced at trial clearly established that 2924c had been complied with by CRAWFORD. Necessarily, by holding the sale the Trustee had failed to comply with 2924, and the presumption of the accuracy of such recital in the Trustee's Deed upon Sale had been rebutted by Defendant CRAWFORD. In essence, the default no longer existed at time of the sale.

² The Court's discussion was limited to a separate declaration by CRAWFORD, however Plaintiff's counsel request was as to the Answer, and this was not objected to by Defendants.

The *Tomczak* Court stated as a primary basis for its reversal of the trial court's judgment

The trustee's deed here refers to the recordation of the notice of default and then recites that "Such default *still existed* at the time of sale." (Italics added.) There is no substantial evidence to support this recital and it cannot be upheld in this instance

Tomczak v. Ortega 240 Cal. App. 2d at 907.

In sum, Breach of Forebearance Agreement by lender Unifund coupled with knowledge of breach by Trustee Secured Servicing Inc. establishes clear evidence of non-compliance with Civil Code Section 2924c voiding Trustee's sale and Respondent's presumed benefit of such compliance was overcome by substantial evidence.

The payment due on December 9, 2009, was received by the subsequent Trustee Secured Servicing LL, who still sold the residence at a later foreclosure sale despite specific knowledge of this payment. (See I CT 74). (See also I CT 55-58).

C. Prior to Foreclosure Sale the Trustee had agreed to give CRAWFORD until after the foreclosure sale to cure the default

On the same date that CRAWFORD made her first payment, under the forbearance agreement the Trustee provided the "Beneficiaries Demand for Payoff" (I CT 63). The date of expiration is crucial to the rights of the Trustee to hold a valid and Civil Code Section 2924 compliant foreclosure sale on December 24, 2009.

In this Demand for Payoff, CRAWFORD was given until December 31, 2009, to cure the default. Even without the second payment being accepted by the Trustee, this separate document standing alone shows that by this Noticed Demand that CRAWFORD had until December 31, 2009, to comply with the requirements of Civil Code Section 2924c.

The court's basis of ruling that the presumption that 2924 was complied with and that TDR SERVICING was entitled to such benefit was clear error and should be reversed.

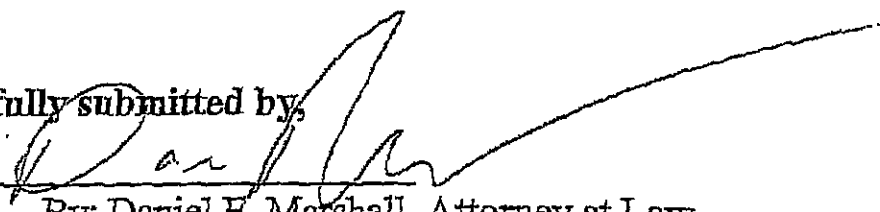
III

CONCLUSION

For the foregoing reasons, the judgment as to both
CRAWFORD AND SMITH should be reversed.

December 29, 2010

Respectfully submitted by,


By: Daniel E. Marshall, Attorney at Law
Attorneys for Appellants
LESLYE CRAWFORD and
ROBERT SMITH.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.883 (b)(1) I hereby certify that this brief

Contains 2,498 words, including footnotes. In making this certification, I have relied on the word count

of the computer program used to prepare this brief

A handwritten signature in black ink, appearing to read "D. Marshall", written over a horizontal line.

By: Daniel E. Marshall, esq. .

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): DANIEL E. MARSHALL, esq. SB#151328 MARSHALL LAW PC 2333 CAMINO DEL RIO SOUTH 120 SAN DIEGO, CA 92108 TELEPHONE NO.: 619-993-5778 FAX NO. (Optional): 619-374-7396 E-MAIL ADDRESS (Optional): marslawbmw@yahoo.com ATTORNEY FOR (Name):	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO-Appellate Div. STREET ADDRESS: 220 W. BROADWAY, Third Floor MAILING ADDRESS: SAN DIEGO CALIFORNIA 92101 CITY AND ZIP CODE: BRANCH NAME: central courthouse	
PLAINTIFF/PETITIONER: LESLYE CRAWFORD, ROBERT SMITH DEFENDANT/RESPONDENT TDR SERVICING LLC	CASE NUMBER: 37-2010-00042429-cl-ud-ctl
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input checked="" type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service	JUDGE: DEPT.:

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.
2. My residence or business address is:
 2333 CAMINO DEL RIO SOUTH #120 SAN DIEGO, CA 92108
3. The fax number or electronic notification address from which I served the documents is (complete if service was by fax or electronic service):
4. On (date): **12/29/10** I served the following documents (specify):
APPELLANT'S OPENING BRIEF

The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

5. I served the documents on the person or persons below, as follows:
 - a. Name of person served: **MICOLE SIMIS ESQ.**
 - b. (Complete if service was by personal service, mail, overnight delivery, or messenger service.)

Business or residential address where person was served:
 31877 Del Obispo St. Ste. 201 San Juan Capistrano, CA 92675

- c. (Complete if service was by fax or electronic service.)
 - (1) Fax number or electronic notification address where person was served:
msimis@simislawgroup.com

(2) Time of service: **3:00 p.m. 5:00 P.m.**

The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

6. The documents were served by the following means (specify):

- a. By personal service. I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

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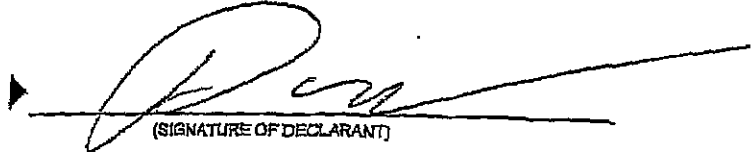
CASE NAME CRAWFORD V. TDR SERVICING LLC	CASE NUMBER: 37-2010-00042429-cl-ud-ctl
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6. b. By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (specify one):
- (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (2) placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):
- c. By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)
- e. By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. By electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 12/29/10

DANIEL E. MARSHALL, ESQ.
 (TYPE OR PRINT NAME OF DECLARANT)


 (SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

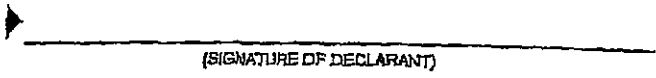
At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

 (NAME OF DECLARANT)


 (SIGNATURE OF DECLARANT)