



Featured Article

California Court of Appeals Confirms the Qualified Privilege for Foreclosure Trustees: *Schep V. Capital One, N.A.*

By Marvin B. Adviento, Esq., and T. Robert Finlay, Esq., Wright, Finlay & Zak, LLP

Ofentimes, a litigious borrower will needlessly include the Trustee as a defendant in a wrongful foreclosure lawsuit, solely because it was a party who recorded the various foreclosure notices. If the allegations do not allege any wrongdoing against the Trustee, it can usually avoid expensive litigation by filing a Declaration of Non-Monetary Status under *Civil Code* 2924I (DNMS). But, when that's not possible, Trustee's must fall back on the qualified privilege under *Civil Code* 2924(d)(1). While this privilege is not absolute, the recent decision in *Schep v. Capital One, N.A.*¹ will help protect Trustees. In *Schep*, TD

“While the ruling in *Schep* will not prevent disgruntled borrowers from dragging the Trustee into court, it will limit Trustees' potential exposure and increase their chances of getting dismissed earlier.”

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Service Company filled the traditional role of any foreclosing trustee. It recorded the Notice of Default, Notice of Trustee's Sale and Trustee's Deed Upon Sale. Following the sale, *Schep* sued TD Service for, among other claims, slander of title for recording the foreclosure notices. TD Service demurred on the grounds that the recordings were privileged communications.² The trial court sustained TD Service's Demurrer without leave to amend. *Schep* appealed to the Fourth District Court of Appeals.



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Wright, Finlay & Zak, LLP provides high quality and cost-effective representation in mortgage banking, loan servicing, and foreclosure related matters throughout California, Nevada, Arizona, Washington, Oregon, Utah, New Mexico and Hawaii.



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In analyzing Schep's slander of title cause of action, the Appellate Court held that the recordings of the foreclosure notices are part and parcel of a foreclosure trustee's statutory duties. Specifically, the Appellate Court acknowledged California *Civil Code*, section 2924(d)(1), which expressly states that "[t]he mailing, publication, and delivery of notices as required" under California *Civil Code*, section 2924 are privileged communications under California *Civil Code* 47 (Section 47). In addition, performance of procedures under this section (such as conducting the trustee's sale and recording a Trustee's Deed Upon Sale) are also privileged under Section 47.

The Appellate Court noted that the purpose of making such communications privileged was to provide "trustees some measure of protection from tort liability arising out of performance of their statutory duties." The Appellate Court further held that this purpose is met only if "all of the procedural steps attendant to a nonjudicial foreclosure are privileged". That includes recording a Notice of Default, Notice of Trustee's Sale and Trustee's Deed Upon Sale.

Looking at Section 47, the Appellate Court also noted that TD Service was protected by the *qualified* privilege under the statute. In that vein, Schep was required to prove that TD Service acted with malice in recording the Notice of Default, Notice of Trustee's Sale, and Trustee's Deed Upon Sale. In other words, to establish a claim for slander of title in the shadow of Section 47, Schep had to allege facts that TD Service was "motivated by hatred or ill will toward" him, or that TD Service "lacked reasonable grounds for its believe in the truth of the publication and therefore acted in reckless disregard" of Schep's rights.

Needless to say, Schep could not meet the high "hatred" standard. Moreover, Schep did not allege sufficient facts demonstrating a lack of reasonable grounds for TD Service to believe the foreclosure notices were inaccurate. Almost comically, Schep argued that because someone recorded an unauthorized Substitution of Trustee and Full Reconveyance of the Deed of Trust in favor of Schep, TD Service lacked reasonable grounds for believing their foreclosure notices were accurate. The Appellate Court disagreed, instead holding that the judicially noticed Deed of Trust, Assignment of Deed of Trust and foreclosure notices all "establish an unbroken chain of title" which makes TD Service's belief in the legitimacy of

the foreclosure reasonable, and thus privileged. Under these circumstances, the Appellate Court affirmed the judgment of dismissal in favor of TD Service.

While the ruling in *Schep* will not prevent disgruntled borrowers from dragging the Trustee into court, it will limit Trustees' potential exposure and increase their chances of getting dismissed earlier. Thus, reducing the cost of litigation to Trustees.

¹*Schep v. Capital One* (2017) 12 Ca.App.5th 1331.

²TD Service also demurred on the grounds that Schep lacked standing to bring this cause of action, since he was no longer on title to the property at that time, by virtue of the sale.



Prior to joining Wright, Finlay & Zak, Mr. Adviento worked as a Deputy District Attorney in the San Bernardino County District Attorney's Office and tried over 19 jury trials. Mr. Adviento focuses primarily on mortgage banking litigation, including loan servicer and trustee defense, title litigation and bankruptcy and eviction matters. He can be reached at madviento@wrightlegal.net.



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