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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BARBARA DIECKMEYER, Plaintiff and Respondent, v. REDEVELOPMENT AGENCY OF THE CITY OF HUNTINGTON BEACH et al., Defendants and Appellants.	G031869 (Super. Ct. No. 02CC12956) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Reversed with directions.

Jennifer McGrath, City Attorney, and Scott F. Field, Assistant City Attorney, for Defendants and Appellants.

Craton & Switzer and Curt R. Craton for Plaintiff and Respondent.

The Redevelopment Agency of the City of Huntington Beach and the City of Huntington Beach (collectively the City unless otherwise stated) appeal from a judgment that directed issuance of a writ of mandate. The writ compelled the City to accept prepayment of Barbara Dieckmeyer's promissory note and reconvey a deed of trust securing the note. The City argues it was entitled to impose additional conditions on repayment to insure compliance with recorded affordable housing restrictions.

We conclude partial performance of a secured obligation does not extinguish the lien. Since the deed of trust secures both the note and the affordable housing restrictions, payment of the former will not affect the security for the latter. So Dieckmeyer can prepay the loan without the City's new conditions, but she is not entitled to reconveyance of the trust deed. We reverse the judgment to correct that error.

* * *

In March 1994, Dieckmeyer purchased a condominium offered under an affordable housing program. Certain restrictions were imposed as part of that program. They are reflected in a "Declaration of Covenants, Conditions, and Restrictions for Affordable Housing" (CC&R's) previously recorded by the developer. The CC&R's are binding on any successor in interest to the property "or any part thereof." They are for the benefit of the City and remain in effect for 30 years (denominated the "affordability period").

The CC&R's set an affordable price for the units. An income limit is set for initial buyers. Occupancy is restricted to lower or moderate income households, as defined. There are two limits on future purchasers and occupants. First, the developer must require all buyers to record a covenant to run with the land and bind successors "that will ensure that all subsequent Buyers and occupants qualify as low, very low or moderate income households." Second, the developer must include in each deed a provision that incorporates the CC&R's and makes them binding on successors and all occupants. There is an exception: "Owner-occupants who were qualified buyers on the

date of sale but are no longer qualified by virtue of an elevation of household income since the date of sale will not be subject to this affordability covenant."

The CC&R's further provide that units shall not be sold, leased, or transferred without written approval from the City. Any such act in violation of the CC&R's is declared void. If the City fails to respond to a request for approval within 30 days, it is deemed to consent.

Dieckmeyer's deed includes a clause by which she consents to the CC&R's. She also covenants, for herself, her successors, and assignees, that "all subsequent buyers and occupants of the Unit will qualify as Low, Very Low, or Moderate Income Households as defined in the [CC&R's]."

The City helped Dieckmeyer finance the purchase with a $23,000 loan to cover closing costs, loan fees, and the down payment. In return, Dieckmeyer executed a promissory note in favor of the City, secured by a second deed of trust. The note is payable upon sale of the property or the occurrence of various events specified in an acceleration clause. Prepayment is not one of them.[1] To the contrary, a prepayment clause states: "Privilege is reserved to make prepayments of principal on this Note without penalty or fee." The deed of trust secures not only repayment of the note, but also "[p]erformance of each and every . . . agreement of Trustor [Dieckmeyer] contained herein in the Loan Agreement between Beneficiary [City] and Trustor . . . and in that certain Affordable Housing Agreement [the CC&R's] currently recorded on the property . . . ."

The loan agreement contains a key term not found in the note. Dieckmeyer must pay the City an "equity share" if the loan becomes due prior to its 30th anniversary.

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[1] The acceleration clause provides the note is due upon the following events: (a) sale to a buyer not approved by the City as qualified to participate in the affordable housing program; (b) refinancing of a senior lien for more than its existing balance; (c) the borrower's failure to occupy the unit as a principal residence, breach of the underlying loan agreement, or breach of the CC&R's; (d) the closing of probate following the borrower's death; (e) default on the note; or (f) default on the deed of trust.

The equity share is a percentage of the profit on the sale. It declines from 50 percent, if the property is sold within 5 years of purchase, to zero if the sale takes place after 30 years. Payment of the equity share is triggered by various events that are, for present purposes, the same as those in the note's acceleration clause. The loan agreement does not link the equity share and prepayment – nowhere does it say the equity share is due on prepayment of the note.

The loan agreement includes a further assurances clause: "[Dieckmeyer] shall execute any further documents consistent with the terms of this Agreement, including documents in recordable form, as the [City] shall from time to time find necessary or appropriate to effectuate its purposes in entering into this Agreement and making the Loan."[2]

In 2001, Dieckmeyer asked the City for a loan payoff amount. She explained she was thinking of prepaying the loan or selling the condominium. Later, Dieckmeyer decided to prepay. The City provided the payoff amount. At first, it demanded payment of the equity share. After further correspondence, the City changed its mind and told Dieckmeyer she could prepay the loan without the equity share. But there was a hitch. The City wanted Dieckmeyer to execute a "zero promissory note and second deed of trust." The new trust deed would secure payment of the equity share and performance of the affordable housing restrictions. According to the City, this was necessary to give notice of the restrictions to any subsequent purchaser, and to give notice of any pending sale to the City (presumably because a buyer would have to contact the City regarding the new trust deed).

Dieckmeyer responded with the instant writ petition. After reciting the facts set out in the preceding paragraph, the petition alleges the loan documents do not

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[2] Mention should also be made of a rider to the trust deed, which repeats the equity share provision of the loan agreement. The CC&R's, the deed to Dieckmeyer, and the deed of trust were all duly recorded. The remaining documents were not.

require Dieckmeyer to execute a zero note or deed of trust as a condition of prepayment. She prays for a peremptory writ of mandate to compel the City to provide a payoff amount, accept payment, cancel the note, and reconvey the deed of trust.

The answer sets out several affirmative defenses. Two are relevant to this appeal. The City asserts Dieckmeyer breached the loan documents (the alleged breach is not specified), and the equity share is due because the note was accelerated under the loan agreement. The City also submitted opposing declarations from two officials, in which they describe the affordable housing program and explain why the City needs the zero note and deed of trust.

The trial court received in evidence the loan documents and correspondence referred to above, and it heard oral argument. In a statement of decision, the court found the loan documents did not require Dieckmeyer to execute the zero note and trust deed as a condition of prepayment. It did not explain why. The court also determined Dieckmeyer was no longer subject to the CC&R's, since she could take refuge under the increased income exception. And the court found the equity share was not due, none of the triggering events having occurred.

Judgment was entered granting the petition. A later order awarded Dieckmeyer attorney fees of $23,405.50, finding reciprocal a provision in the note that the borrower is liable for fees in an action to enforce or construe the note or trust deed.

I

The City argues it is entitled to demand the zero note and trust deed under the further assurances clause, and it needs those documents to preserve the restrictions in the CC&R's and its equity share. We disagree.

A mortgage or deed of trust is security "for the performance of an act." (Civ. Code, § 2920, subd. (a)). While the obligation most often secured is payment of a note, it may also be performance of a contract. (*Stub v. Belmont* (1942) 20 Cal.2d 208,

213-214; 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:10, pp. 39-40.) Partial performance of the obligation secured does not extinguish the lien. (Civ. Code, § 2912.)

The City has no need for the zero deed of trust to protect its interests. The existing trust deed secures both the note *and* performance of the CC&R's and loan agreement. If the note is paid, that will be part performance of the secured obligation. But such payment does not extinguish the security. The trust deed will remain as security for Dieckmeyer's obligations under the CC&R's and the loan agreement. Since the protection sought by the City already exists, we need not consider the scope of the further assurances clause, nor its consistency with the note clause allowing prepayment without penalty.

II

The City appears to argue the equity share is due on prepayment. We say "appears" because there are ambiguous statements in the City's reply brief that first back away from the argument, then return to it. In any event, there is nothing to the point.

Section 12 of the loan agreement requires payment of equity share if the loan "becomes due and payable prior to the thirtieth anniversary of the date of this Agreement." Two provisions bear on when that happens. Section 1 states the loan is payable upon sale to a non-qualified buyer, breach of the loan agreement, deed of trust, CC&R's, "any other law, requirement or condition of the Affordable Housing Program or governmental entity." Section 3, the acceleration clause, provides the loan is also payable on: sale, transfer, or other disposition to a purchaser not approved by the City; refinancing the first mortgage for an amount in excess of the then-current balance; default under the loan agreement, CC&R's, note or deed of trust; or death of the borrower unless survived by a household member who is qualified to participate in the affordable housing program.

None of these events has yet occurred so prepayment of the note does not entitle the City to the equity share. Prepayment is not a breach of the loan documents,

CC&R's, or any law pointed to by the City, nor is it one of the events listed in the acceleration clause. While the City could have written the loan agreement to make the equity share due upon prepayment of the note, it did not.

The City's arguments to correct this oversight, if such it was, are not persuasive. It contends section 12 of the loan agreement provides the equity share is due if the loan "was paid" prior to its 30th anniversary. But that misstates the record. Section 12 says the equity share is payable if the loan becomes "due and payable" before the 30-year mark. Prepayment does not make the loan due and payable, so section 12 does not help the City.

Equally wide of the mark is the contention that under section 5 of the loan agreement, the only time the equity share is not due is upon sale to an approved buyer who assumes the loan. That is not so. Section 5 excuses the obligation upon sale to a qualified, assuming buyer. But saying when an obligation is *excused* cannot create an obligation that does not exist. Other provisions, set out above, state when the equity share is due. That happens only upon certain events, and prepayment is not one of them. So the equity share is not due upon prepayment of the note.

III

We address briefly whether Dieckmeyer is released from the obligations of the CC&R's under the increased income exception. She is not.

The exception states that "[o]wner-occupants who were qualified buyers on the date of sale but are no longer qualified by virtue of an elevation of household income since the date of sale will not be subject to this affordability covenant." The term "affordability covenant" is not defined in the CC&R's.

We think the only reasonable interpretation of the exception is that it frees an owner from the occupancy restriction (low/moderate income households), but nothing more. This allows an owner to keep his home despite an increase in income, and it preserves the remaining restrictions. It also accords with the obvious purpose of

preserving the condominium project as low/moderate income housing for the 30-year duration of the CC&R's. Nothing suggests the parties intended to undercut the 30-year restrictions by allowing each unit to be sold at market price when the owner's income increases, and we are unwilling to interpret the exception in a way that leads to such an anomalous result. This accords with our duty to interpret a declaration of covenants, conditions and restrictions in a way that is both reasonable and carries out the intended purpose of the contract. (*Battram v. Emerald Bay Community Assn.* (1984) 157 Cal.App.3d 1184, 1189.)

IV

The City argues the fee award should be reversed because Dieckmeyer sought a writ of mandate rather than commencing an action for breach of contract. We cannot agree.

The City concedes the note and deed of trust contain fee clauses that would be reciprocal had Dieckmeyer sued for breach of contract or declaratory relief. But, it says, Civil Code section 1717 only makes a fee clause reciprocal in an "action on a contract," and this is a special proceeding. Granted there is a distinction between an action and a special proceeding. (Code Civ. Proc., §§ 20-23.) But the City makes no effort to explain the scope of that procedural distinction, why "action" in Civil Code section 1717 should not be read as synonymous with "lawsuit," or what policy would be served by the narrow reading it advocates. While we cannot say how we would decide the issue if appropriately briefed, in this case the appellant has failed to carry its burden of affirmatively demonstrating error in the judgment below.

Alternatively, the City argues that if we reverse in part, the fee award should also be reversed. Its reasoning goes like this: If we hold Dieckmeyer remains subject to the CC&R's, it will have won in part, requiring reconsideration of the prevailing party question. Again, we disagree.

There can be no question that Dieckmeyer is the prevailing party, defined as "the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717 subd. (b)(1).) Dieckmeyer sued for the right to prepay the note without the conditions demanded by the City – and she won. The fact that the City won on the exception issue does not tip the balance in its favor. Moreover, the City fails to cite any authority suggesting that a party who wins the main relief sought, but loses on one legal theory, is to be denied prevailing party status. There was no error in the fee award.

In sum, Dieckmeyer can prepay the loan without executing the zero note and deed of trust demanded by the City. She is not entitled to reconveyance of the deed of trust, since it also secures performance of the CC&R's and loan agreement.

The judgment is reversed. The trial court shall enter a new judgment that directs the issuance of a writ of mandate to compel the City to provide Dieckmeyer with a payoff amount for the note, accept payment, and cancel the note. Dieckmeyer shall not be required to pay the equity share, nor to execute a zero note or new deed of trust. The City shall not be required to reconvey the existing deed of trust upon prepayment of the note. Appellant is entitled to costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.