A146809
(Alameda County Superior Court Case No. HG12615549

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
Division 5

MEGAN E. ZAVIEH,
Petitioner,
vs.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
COUNTY OF ALAMEDA,
Respondent,

RWW PROPERTIES, LLC
Real Party in Interest

OPPOSITION OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION AND OTHER EXTRAORDINARY RELIEF SOUGHT IN EMERGENCY APPLICATION

JOHN T. SCHREIBER, SBN 131947
LAW OFFICES OF JOHN T. SCHREIBER
1255 Treat Blvd., Suite 300
Walnut Creek, CA 94597
Telephone: (925) 472-6620
Facsimile: (707) 361-5629
email: jschreiber@schreiberappeals.com
Attorney for Real Party in Interest
RWW PROPERTIES, LLC

REAL PARTY IN
INTEREST'S
OPPOSITION TO PETITION
FOR EXTRAORDINARY WRIT

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** 5	Court of Appeal Case Number: A146809
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* JOHN T. SCHREIBER, SBN 131947 LAW OFFICES OF JOHN T. SCHREIBER 1255 Treat Blvd., Suite 300 Walnut Creek, CA 94597 TELEPHONE NO.: (925)472-6620 FAX NO. *(Optional):* (707)361-5629 E-MAIL ADDRESS *(Optional):* jschreiber@schreiberappeals.com ATTORNEY FOR *(Name):* Real Party in Interest RWW Properties, LLC	Superior Court Case Number: HG126115549 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Zavieh RESPONDENT/REAL PARTY IN INTEREST: RWW Properties, LLC	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): RWW Properties, LLC

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 1/27/16

John T. Schreiber ▶

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

Following trial that resulted in a judgment in its favor, Real Party in Interest RWW PROPERTIES, LLC (hereafter "RWW") moved to expunge Petitioner MEGAN ZAVIEH's (hereafter "ZAVIEH") February 2012 lis pendens. Since ZAVIEH lost at trial, under *Mix v. Superior Court* (2004) 124 Cal.App.4th 987 the Trial Court was obligated to grant RWW's motion to expunge lis pendens unless the Trial Court believed the ruling would probably be overturned on appeal. *Mix*, 124 Cal.App.4th at 989, 996.

There is no basis for overturning the Trial Court's order expunging the lis pendens. Under the 1992 amendments to the statutes governing lis pendens, ZAVIEH, the party opposing expungement of lis pendens, bore the burden of showing the "probable validity" of her real estate claim. California Code of Civil Procedure §§ 405.30, 405.32.[1] While the "probable validity" test was formulated with a pretrial motion to expunge lis pendens in mind, in *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003 the Third District held that the "probable validity" test also applied when, as is the case here, the defendant moves to expunge following a successful result at trial and the case proceeds to appeal.

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[1] All further references to California's Code of Civil Procedure shall be to "CCP."

Amalgamated, 149 Cal.App.4th at 1016-1017. The Court in *Amalgamated* described this as a "prima facie review of the probable success of the underlying appeal." *Amalgamated*, 149 Cal.App.4th at 1017. Since the review is analogous to that of appellate review of an application for attachment or preliminary injunction, this Court should be guided by the abuse of discretion standard. *Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 320.

One of the prerequisites for the extraordinary relief sought by a writ petition is that the petitioner, ZAVIEH, provide this Court and Real Party RWW with a complete record. *Sherwood v. Superior Court* (1979) 24 Cal.3d 185, 186-187, California Rule of Court 8.486(b)(1).[2] ZAVIEH failed to do so and on that basis alone the writ petition must be denied. ZAVIEH provides neither a reporter's transcript of the October 30, 2015 hearing on RWW's motion to expunge, nor any explanation for why the transcript was not included as an exhibit to her writ petition. CRC 8.486(b)(3). ZAVIEH complains that she was deprived of the opportunity of litigating part of her case. Yet she provides no reporter's transcript of any of the arguments that occurred on or about April 6, 2015 or afterward

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[2] All further references to California Rules of Court shall be to "CRC."

with regard to the Trial Court's April 3, 2015 comments that the first and fifth causes of action, for wrongful foreclosure and quiet title (the latter of which was against RWW), were subject to nonsuit. ZAVIEH provides no explanation for why she did not include that transcript with her writ petition. CRC 8.486(b)(3). One of the most basic concepts of appellate litigation is that a judgment on appeal is presumed to be correct and the appellant bears the burden of affirmatively showing error on the record. ZAVIEH failed to do so here. On the contrary, the Trial Court's comments on April 3, and the parties' subsequent trial briefs on the topic leave the impression that those portions of the case that were not tried were not viable for good reason.

ZAVIEH argues that judgment on her fifth cause of action, for quiet title against RWW, is subject to reversal because the Trial Court did not allow her to try the issue of the legality of the trustee sale, via alleged defects in the notice of default and an untimely notice of sale. ZAVIEH's appeal does not contest the Trial Court's finding against her on her breach of contract claim for CHASE's refusal to give her a loan modification:

> The breach of contract claim was tried in a limited bench trial in April 2015, the court ruled against Plaintiff, and Plaintiff has not appealed on the merits of the court's ruling on that one cause of action and theory underlying wrongful foreclosure (Petition at p. 1, see also Record on Writ Petition

p. 197, R-203, fn. 4).[3]

In fact, ZAVIEH dismissed CHASE and CAL RECON with prejudice from the action after judgment. Those were the only two defendants named in ZAVIEH's first cause of action for wrongful foreclosure.

Without the contract issue at stake all that is left as a basis of the fifth cause of action for quiet title is the legality of the trustee sale, *based on these same alleged defects in the notice of default and an untimely notice of sale*. Those issues were resolved in RWW's favor in an earlier unlawful detainer action. The earlier proceedings bind ZAVIEH, as she admitted in her verified pleadings that not only did she appoint Murray, her father, as her agent to disclose the defects in the trustee sale at the sale itself, but she admitted to having a financial interest in the property, putting her in privity with her father for purposes of collateral estoppel.

ZAVIEH also argued that under CCP § 916, RWW's later motion to expunge lis pendens was inextricably bound up with RWW's appeal of the July 17, 2015 order of the Trial Court vacating its order expunging lis pendens, the Sept 4, 2015 order, and the September 8, 2015 order. ZAVIEH is incorrect on this point for three reasons. First, this Court's

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[3] All further references to the Record on this Writ Petition shall be to "R-" followed by the page number of the record.

docket for A145977 shows no September 17, 2015 appeal by RWW. Second, RWW's October 22, 2015 appeal was dismissed by this Court December 7, 2015, making the point moot. Regardless, RWW's October 22, 2015 appeal was from a judgment awarding attorney's fees, which did not affect or embrace the October 30, 2015 order expunging lis pendens. Finally, this Court's ruling in Case No. A142768 to issue a writ of mandate ordering the Trial Court to vacate its earlier motion to expunge the lis pendens does not conflict with the current order granting expungement that accounted for the result at trial.

ZAVIEH has since had the opportunity to litigate on the merits the issue that this Court held was unresolved at the time RWW initially moved to expunge ZAVIEH's lis pendens: Whether Real Party in Interest JP MORGAN CHASE (hereafter "CHASE") breached a loan modification agreement. ZAVIEH lost at trial on that issue. Under the terms of her trial plan with CHASE, CHASE was *not* obligated to provide ZAVIEH with a loan modification simply because she made three payments under the trial plan. Therefore foreclosure was not wrongful. ZAVIEH does not contest the Trial Court's finding on this point in her current appeal (Petition p. 1, R-203, fn. 4). ZAVIEH has since dismissed CHASE and CAL RECON from the litigation with prejudice. There is simply no basis for holding that it is

more likely than not that ZAVIEH will win her appeal. The Trial Court properly granted RWW's motion to expunge lis pendens on October 30, 2015.

In her emergency application for a bond, order to show cause, sanctions, or other relief, ZAVIEH sought: (1) an immediate order requiring posting of a bond for two times the sales price of the property, (2) an immediate order requiring RWW to rescind the sale and rectify the unlawful recording of the October 30, 2015 order, (3) an immediate order to show cause why RWW and its counsel should not both be held in contempt and sanctioned in an amount exceeding $200,000 for their joint fraud, (4) referral of RWW's counsel to the State Bar of California for disciplinary investigation, and (5) referral of RWW executive Mr. Settlemier to the Bureau of Real Estate for disciplinary investigation.

Since December 16, 2015, when ZAVIEH filed her emergency application, this Court, following briefing by the parties, recognized that CCP § 405.35 not only prohibits recording an order expunging lis pendens during the time period in which the claimant can seek a writ challenging the order of expungement, but also provides that a prematurely recorded order is not effective so long as a writ petition challenging expungement is

pending. The Legislature by this statute therefore addressed the issue of a prematurely recorded order and protects the interests of the claimant, ZAVIEH, pending the outcome of the writ proceeding. RWW complied with this Court's order to record its order specifying that the October 30, 2015 order granting expungement of lis pendens is of no force and effect while this writ proceeding takes place.

Since ZAVIEH's interest in the property remains protected by CCP § 405.35 pending this writ proceeding, there is no reason to require any sort of bond. RWW and its prior counsel complied with this Court's December 23, 2015 order. As a result, it appears that there is no order of this Court that RWW and/or its prior counsel violated and therefore no basis on which to issue an order to show cause re contempt. RWW also, less than two weeks later, during the holiday season, substituted counsel to replace the individual who prematurely recorded the expungement order. That would seem to objectively show that RWW did not ratify that conduct by predecessor counsel. If this Court finds that there is a basis for this Court to issue an order to show cause with respect to RWW's prior counsel, then this Court seems to have the authority to directly communicate with counsel.

For all of these reasons, ZAVIEH's petition for a writ pursuant to CCP § 405.39 must be denied. Moreover, as CCP § 405.35 protected her

interest in the property pending the outcome of the writ proceeding, and RWW and its counsel have since complied with this Court's orders regarding the premature recording of the order expunging lis pendens, there is no basis for any further redress sought by ZAVIEH in her emergency application filed last month.

FACTUAL AND PROCEDURAL HISTORY

A. Statement of facts.

1. ZAVIEH purchased the property from Murray, her father.

In 2000 ZAVIEH purchased the property at issue, in Fremont, California, from her father, James Murray (R-200).

2. ZAVIEH refinanced with a loan from WaMu.

Seven years later ZAVIEH refinanced her home loan with Washington Mutual ("WaMu")®-200).

3. ZAVIEH sought a loan modification from WaMu, which was then taken over by CHASE.

Two years later ZAVIEH sought a loan modification from WaMu. Shortly afterwards, CHASE notified ZAVIEH that it had acquired the loan servicing rights to her WaMu loan (R-201).

4. During a trial plan period, ZAVIEH made several loan payments but CHASE denied her application for a permanent loan modification.

CHASE put ZAVIEH into a trial plan. During that trial plan ZAVIEH made several payments, which were each less than her regular loan payments. Later in 2010 CHASE denied ZAVIEH's application for a permanent loan modification, as her income documents and the results of the Net Present Value ("NPV") calculations to determine the cash flow for a possible loan modification meant that the owner of the loan did not approve modification ®-201, R-37).

5. ZAVIEH became tired and frustrated of dealing with CHASE and appointed Murray as her agent to deal with this situation.

"Plaintiff became frustrated with Chase and appointed her father Mr. Murray as her agent for purposes of dealing with Chase concerning issues related to the loan modification and non-judicial foreclosure process (Petition at p. 4)."

6. ZAVIEH's property entered foreclosure, as CHASE and CAL RECON filed a notice of default, then later a notice of sale.

In June 2011 ZAVIEH's property entered foreclosure, as CHASE and CAL RECON, the trustee on the deed of trust securing the loan, filed a notice of default. A notice of sale was recorded November 28, 2011 and

posted November 29, 2011 (R-127:5-7, fn.4).[4]

7. At the Trustee's sale RWW bought the property and received a Trustee's deed.

At the December 20, 2011 trustee's sale, RWW bought the property and received a trustee's deed. Murray was at the trustee's sale on ZAVIEH's behalf and announced that there were irregularities and an untimely notice of sale ®-127, 3d ¶).

8. RWW won an unlawful detainer case under Civil § 1161a against Murray, which later became final.

Two years later, RWW won an unlawful detainer action against Murray, who was staying at the property on behalf of ZAVIEH, pursuant to Civil § 1161a, which held that RWW was a bona fide purchaser for value and without notice, based on the December 20, 2011 trustee's sale ®-128, 2d and 3d full ¶¶). Murray appealed the ruling but the appeal was dismissed and the matter is now final. RWW took possession of the property in January 2014 (R-62).

B. Procedural History

1. ZAVIEH filed suit for, *inter alia*, wrongful foreclosure against CHASE and CAL RECON, and for quiet title

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[4] All evidentiary conflicts, whether by oral testimony or written declarations, are resolved in favor of the party who prevailed at trial. *Le v. Pham* (2010) 180 Cal.App.4th 1201, 1205-1206.

against RWW.

ZAVIEH filed her original complaint in this action on February 2, 2012. Her operative pleading as of trial was her Fourth Amended Complaint ("FAC") which, for purposes of lis pendens, alleged a wrongful foreclosure claim against CHASE and CAL RECON and a quiet title claim against RWW ®-197-198). ZAVIEH filed and recorded a lis pendens in February 2012, days after filing her original complaint (R-60-61).

2. RWW filed an initial motion to expunge lis pendens a year before trial.

In May 2014 RWW filed an initial motion to expunge lis pendens (R-62, 2d ¶).

3. After the Trial Court granted RWW's motion to expunge, this Court issued a writ in A142768 on the grounds that ZAVIEH had alleged a real property claim for wrongful foreclosure under CCP § 405.31 and that ZAVIEH's contract claim, as yet untried, meant that the unlawful detainer action did not yet eliminate the quiet title claim against RWW.

The Trial Court granted RWW's motion to expunge July 25,, 2014 (R-63). ZAVIEH then filed a petition for writ of mandate in this Court pursuant to CCP § 405.39 the following month, Case No. A142768 ®-63). On April 2, 2015, in Case No. A142768 this Court issued a writ directing the Trial Court to vacate its July 25, 2015 order and enter a new order

denying RWW's motion to expunge (R-72). This Court determined that ZAVIEH had alleged a real property claim for wrongful foreclosure under CCP § 405.31and that ZAVIEH's contract issues, as yet untried at that time, meant that RWW's prior unlawful detainer judgment did not completely resolve ZAVIEH's quiet title claim, assuming that privity could be shown against ZAVIEH ®-68, R-69-71).

This Court cautioned that its rulings were limited to the narrow lis pendens context, that they did not mean to say how the case should be determined on its merits, and limited its rulings to "as matters now stand (R-72)."

4. After trial began, the Trial Court expressed concerns about the viability of ZAVIEH's non-contract claims and sought briefing and argument on that topic.

On April 3, 2015, trial proceedings began (A145977 Appellant's Appendix 611).[5] That day the Trial Court examined the FAC and expressed concerns that the non-contract claims were subject to nonsuit, meaning that it questioned the viability of those claims, and sought briefing and argument on that topic (APP-674:3-675:17, APP-676:3-677:20, APP-678:2-679:11,

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[5] All further references to the Appellant's Appendix in *Zavieh v. RWW Properties,* First District Court of Appeal, Div. 5, Case No. A145977, Exh. F to RWW's Request for Judicial Notice shall be to "App-" followed by the page number).

679:15-20, 679:23). Nothing in the record as provided by ZAVIEH shows ZAVIEH addressing those concerns.

`5. After trial the Trial Court found against ZAVIEH on her contract claim, then dismissed the remainder of her claims, based on collateral estoppel following the earlier unlawful detainer judgment in RWW's favor, and entered judgment.

The Trial Court heard trial on April 21, 22, 2015, found against ZAVIEH on her breach of contract claim, then dismissed the remainder of her claims, based on collateral estoppel following the earlier unlawful detainer judgment in RWW's favor, then entered judgment June 12, 2015 (R-34-38, 31-33).

6. ZAVIEH dismissed CHASE and CAL RECON from the action with prejudice.

On August 27, 2015, ZAVIEH dismissed CHASE and CAL RECON with prejudice from her suit (R-24-28, R-199). This left only RWW as a defendant in the action and ZAVIEH without a first cause of action for wrongful foreclosure (R-220:1-3).

7. ZAVIEH appealed against RWW.

ZAVIEH filed a notice of appeal from the judgment, "not on the merits on the contract claim but because the Superior Court failed to allow Plaintiff to try the majority of her case and yet dismissed the entire

action (R-188)."

8. RWW moved to expunge lis pendens.

On October 7, 2015, RWW filed a 2d motion to expunge lis pendens (R-9-42).

9. The Trial Court granted RWW's motion to expunge lis pendens.

The Trial Court granted RWW's motion to expunge, based on the judgment showing that ZAVIEH could not show the probable validity of any real property claims against RWW ®-3, 7).

10. RWW recorded the order expunging lis pendens before the time expired for ZAVIEH to file a writ petition contesting the order.

RWW recorded the order expunging lis pendens that day, October 30, 2015 (Exh. A to Alpers Dec. In Support of Emergency Application). The deadline for filing a writ petition contesting the expungement did not run until November 19, 2015. CCP § 405.39. Therefore the recording was too early under CCP § 405.35.

11. ZAVIEH filed this writ petition, then an emergency application for a bond, sanctions, osc or other relief based on the premature recording of the order expunging lis pendens and sale of the property.

On November 19, ZAVIEH filed this writ petition (RJN-Exh. E). On December 16, 2015 she filed an Emergency Application for a bond,

sanctions, osc, or other relief against RWW and its counsel at the time, for prematurely recording the October 30, 2015 order of expungement and then selling the property to a third party (Emergency Application at p.3).

12. After additional briefing on ZAVIEH's emergency application, this Court recognized that CCP § 405.35 renders any prematurely recorded orders expunging lis pendens ineffective pending the outcome of writ proceedings, and ordered RWW to record a copy of this Court's order.

This Court sought additional briefing from the parties in response to ZAVIEH's emergency application, "concerned by the issues raised by" ZAVIEH's application and searching for means of addressing whether and how the October 30, 2015 recording of the order affected the statutory stay set forth in CCP § 405.35 whether this Court's appellate jurisdiction was affected (RJN Exh. E).

After receiving further briefing from both parties, this Court issued an order December 23, 2015 recognizing that while the October 30, 2015 order expunging lis pendens was filed prematurely, because the time in which to file a writ petition had not yet expired under CCP § 405.39, CCP § 405.35 also provided that orders expunging lis pendens before the time expired in which to file a writ petition under § 405.39, were *ineffective* until such writ proceedings had concluded, and directing RWW to record a copy

of this Court's December 23, 2015 order the next day (RJN Exh. E). This Court also deferred further action on ZAVIEH's emergency application (RJN Exh. E). On January 8, 2016, this Court sought further guidance (Exh. E).

13. RWW complied with this order.

The next day RWW complied with this Court's 12/23/15 order (RJN Exh. E).

14. RWW changed counsel.

On December 29, 2015, RWW substituted present counsel in for former counsel (RJN Exh. E).

DISCUSSION

A. *Amalgamated* and *Harold Wright* govern the standard of review of this writ petition, making abuse of discretion the applicable standard.

The Trial Court granted RWW's motion to expunge lis pendens on October 30, 2015 based on the June 12, 2015 judgment in RWW's favor (R-4-5, 7). The judgment in RWW's favor was necessarily a finding on the Trial Court's part that ZAVIEH could not establish the probable validity of her real estate claim against RWW, pursuant to *Mix v. Superior Court* (2004) 124 Cal.App.4th 987 (R-7). *Mix* holds that the Trial Court was obligated to grant RWW's motion to expunge lis pendens after judgment

was entered in RWW's favor unless the Trial Court believed the ruling would probably be overturned on appeal. *Mix*, 124 Cal.App.4th at 989, 996.

Before the Legislature's 1992 revamping of the statutory scheme governing lis pendens and before *Mix*, *Peery v. Superior Court* (1981) 29 Cal.3d 837 was the governing authority for a trial court in determining whether to expunge lis pendens when the underlying case is on appeal. *Peery* held that:

> the court should deny the motion (thus keeping the lis pendens on the property during the appeal) if the appeal presents a "substantial issue" for review. (*Id.* at pp. 844-845.) *Peery* thus reflects a judicial and legislative predisposition toward keeping the status quo if there is any reasonable chance the party recording the lis pendens might ultimately prevail. *Amalgamated*, 149 Cal.App.4th at 1011.

Peery's rule was consistent with the pre-1992 version of the lis pendens statutes, which focused on the subjective good faith of the claimant and kept a lis pendens in place until the litigation was finally resolved against the party seeking to keep the lis pendens in place. *Amalgamated*, *supra* (citing *Malcolm v. Superior Court* (1981) 29 Cal.3d 518, 523-524; *Mix,* 124 Cal.App.4th at 992).

In 1992 the Legislature substantially revamped California's statutory scheme regarding lis pendens. In the Code Comment to the new CCP §

405.32, the Legislature recognized that:

> [T]he lis pendens had evolved from a simple method of giving notice of a lawsuit into a de facto injunction against transferring or encumbering the property while litigation is in progress, without the procedural safeguards that normally attend the granting of injunctive relief. (See Code Comment, par. 2, foll. 14A West's Annot. Code Civ. Proc. (2004 ed.) § 405.32, p. 345.) The financial pressure created by a recorded lis pendens provided the opportunity for abuse, permitting parties with meritless cases to use it as a bullying tactic to extract unfair settlements. *Amalgamated*, 149 Cal.App.4th at 1012.

The 1992 revisions changed the focus from the good faith and proper purpose of the claimant, to placing the burden on a real property claimant to show the "probable validity" of their real estate claim. "Probable validity" was defined as "more likely than not" that the claimant would prevail on their real estate claim. *Amalgamated*, 149 Cal.App.4th at 1011; CCP §§ 405.3, 405.32.

> This represents a sea change in the law. Now, a claimant must prove more than that he recorded the lis pendens in good faith and without ulterior motives. He must make a showing that he is *likely to prevail on the merits*, in much the same fashion as one seeking an attachment must show the probable merit of the underlying lawsuit. (See §§ 481.190, 484.090, subd. (a)(2).) *Amalgamated*, 149 Cal.App.4th at 1011-1012 (emphasis original).

As a result, *Malcom* and *Peery* were rejected, along with their focus on subjective good faith and their reluctance to conduct a "minitrial" on the

merits of a lis pendens. Code Comment to CCP § 405.32, par. 3, p. 346; *Amalgamated*, 149 Cal.App.4th at 1014-1015; *Mix*, 124 Cal.App.4th at 994.

Mix accounts for the standard to apply on expungement of lis pendens in the trial court after judgment is entered against the real property claimant and the underlying matter is appealed. *Mix* does not provide much, if any, guidance *to the appellate court* in determining what standard of review to apply when the unsuccessful real property claimant, such as ZAVIEH, files a writ petition under CCP § 405.39 for appellate relief from expungement of lis pendens. That is the guidance this Court sought in its briefing instructions as to this writ petition.

Another case that post-dated *Mix, Behniwal v. Superior Court* (2005) 133 Cal.App.4th 1048, short-circuited the process by expediting the appeal and deciding its merits, rather than engaging in the "probable validity" analysis for the writ petition. *Behniwal,* 133 Cal.App.4th at 1049-1050. That method was inconsistent with the 1992 revisions to the lis pendens statutes. *Amalgamated*, 149 Cal.App.4th at 1015.

The *Amalgamated* Court gleaned from the Code Comment that "CCP § 405.32 section contemplates a 'minitrial' on the merits in an abbreviated proceeding that parallels the procedure long used by a trial court in deciding whether to issue a writ of attachment or possession, or to

grant a preliminary injunction. (See Code Comment, supra, pars. 3 & 4, p. 346, citing §§ 484.090, 512.060; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.)." *Amalgamated*, 149 Cal.App.4th at 1016. The *Amalgamated* Court also reasoned that while the Legislature provided for appellate review of an order expunging a lis pendens, and a stay pending the writ proceeding, it provided for appellate review short of a full appeal. *Amalgamated*, *supra*.

The petitioner in *Amalgamated* argued that the appellate court should conduct a "searching assessment of the merits for purposes of determining whether [the] lis pendens should remain in place pending appeal." *Amalgamated*, *supra*. The Court in *Amalgamated* disagreed:

> In our mind, a searching examination of the merits is hardly distinguishable from resolving the appeal itself. Processing an appeal takes time. And, as long as the lis pendens remains, the passage of time prejudices the successful property owner who has secured the expungement order. As our sister court in the Court of Appeal, First Appellate District, Division Five, noted, "the apparent legislative purpose for making an order expunging a notice of lis pendens reviewable only by writ was to expedite the review process so as not to tie up title conveyances. If we were to wait for an appeal to be perfected on the order removing the lien so as to decide the two matters together, the delay would defeat the purpose of speedy writ review." *(Harold S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319 (*Harold S. Wright*).) *Amalgamated*, 149 Cal.App.4th at 1016.

The *Amalgamated* Court concluded that:

> By enacting a significant overhaul of lis pendens law, the Legislature has signaled its intent that, unless a real property claim is likely to succeed in court, a lis pendens should not remain in place while the litigation wends its way to final disposition. Applying the "probable validity" standard in the Court of Appeal as well as the trial court best serves that goal. We therefore conclude that, in deciding a writ petition under section 405.39 after judgment and pending appeal, an appellate court must assess whether the underlying real property claim has "probable validity" as that term is used in section 405.3, i.e., whether it is more likely than not the real property claim will prevail at the end of the appellate process. This is...the same standard the appellate court applied in *Harold S. Wright*, although in that case the court was deciding whether to grant mandamus relief from a pretrial, rather than a postjudgment, expungement order. (*Harold S. Wright*, *supra*, 106 Cal.App.4th at pp. 318, 326.) *Amalgamated*, 149 Cal.App.4th at 1016-1017.

One element remains in determining the proper standard of review in this context, however. When the *Amalgamated* Court proceeded to apply its newly-determined test to the case before it, it did not assign a standard of review in the traditional sense to its analysis, i.e. how much deference to give to the trial court in providing appellate review. "'[A] standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review.'" *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667 (citation omitted). The *Amalgamated* Court relied at length on this Court's holding in *Harold Wright*, in which this Court likewise sought to ascertain

the proper standard of review following expungement of lis pendens after 1992, albeit in the pretrial context. *Amalgamated*, 149 Cal.App.4th at 1016-1017; *Harold Wright*, 106 Cal.App.4th at 319-320.

In *Harold Wright*, this Court looked to the Legislature's intent, illustrated by the State Bar Report, which analogized the "probable validity" standard involved in pretrial determinations regarding attachment, writ of possession, and appointment of receiver, to the "likelihood of success" test used for preliminary injunctions. *Harold Wright*, 106 Cal.App. 4th at 319-320. From there, this Court employed the same standard of review, abuse of discretion, as used in reviewing the grant or denial of a preliminary injunction, abuse of discretion. *Harold Wright*, 106 Cal.App. 4th at 320. Abuse of discretion is the standard of review that should apply here.

Considering the purpose behind the 1992 revisions, making it harder to keep a lis pendens on real estate that is the subject of litigation, an unsuccessful trial court litigant trying to use a lis pendens after the 1992 revisions to the statutory scheme should be entitled to no more advantage than any other party seeking appellate review following an unsuccessful result in the court below.[6]

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[6] The procedural posture of this case is somewhat unique, in that unlike most situations in which the underlying case is on appeal, but briefing has not

The abuse of discretion standard provides that "'[d]iscretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" *Denham v. Superior Court* (1971) 2 Cal.3d 557, 566. "'[T]he showing on appeal is wholly insufficient if it presents a state of facts ...which...merely affords an opportunity for a difference in opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" *Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (citation omitted). "On review of the trial court's ruling, the appellate court does not reweigh conflicting evidence or determine the credibility of witnesses. The reviewing court's task is simply to ensure that the trial court's factual determinations are supported by substantial evidence." *Harold Wright*, 106 Cal.App.4th at 320.

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begun yet, here the AOB was filed and is part of ZAVIEH's record on the writ petition (R-190). With the AOB also comes the appendix, which likewise provides a larger canvass than normal, from which to assess the "probable validity" of the appeal.

B. *Pursuant to Sherwood v. Superior Court* and CRC 8.486, ZAVIEH failed to provide a complete record in her writ petition, meriting denial of her petition.

ZAVIEH's Petition also runs afoul of some of the most basic principles of appellate litigation. "The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*." Eisenberg, Horvitz, & Wiener, J. (Ret.), *Cal. Prac. Guide: Civil Appeals and Writs* (The Rutter Group 2015), Ch. 8-B, "Presumption of Correctness," ¶ 8:15. A ruling that is correct for any reason must be affirmed, regardless of the reason provided by the trial court. *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329-330. "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." *Denham*, 2 Cal.3d at 564. Failure to provide an adequate record on appeal on an issue requires that the issue be decided against appellant. *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Foust v. San Jose Const. Co.* (2011) 198 Cal.App.4th 181, 187 (argument on appeal forfeited where appellant included only excerpts from clerk's record and failed to include reporter's transcripts or exhibits, preventing meaningful review).

Consistent with that principle, writ petitions are subject to denial for an incomplete record. *Sherwood v. Superior Court* (1979) 24 Cal.3d 185, 186-187. That holding is now formalized in CRC 8.486(b)(1), which provides that:

> **(b) Contents of supporting documents**
>
> (1)A petition that seeks review of a trial court ruling must be accompanied by an adequate record, including copies of:
>
> (A)The ruling from which the petition seeks relief;
>
> (B)All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;
>
> (C)Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review; and
>
> (D)A reporter's transcript of the oral proceedings that resulted in the ruling under review.

One of ZAVIEH's key arguments, both in her writ petition and on appeal, is that:

> The remaining bases for Plaintiff's wrongful foreclosure claim are that Chase issued a Notice of Default ("NOD") which did not state an actual default and that Chase and Cal Recon issued a Notice of Sale ("NOS") that both falsely stated the amount due and was not served in accordance with statute. ...These claims have not been tried or otherwise resolved in any way by the trial court. Nevertheless, after trying a narrow issue on the breach of contract claim only, the trial court dismissed the entire action. Thus, Plaintiff appealed the Superior Court's

> post-trial judgment dismissing the entire action on the grounds that the bulk of the case has yet to be tried. That appeal is pending before this court (*Zavieh v. RWW Properties LLC*, Case No. A145977). Appellant's Opening Brief is included herewith at R-190 (ZAVIEH Petition at pp. 5-6)...
>
> In order to establish RWW's status, Plaintiff must be permitted to litigate the issue, or at least litigate whether collateral estoppel is properly applied to preclude her from litigating the issue. At this point she has been denied the opportunity to litigate any of these points (ZAVIEH Petition at p. 15).

Assuming *arguendo* that ZAVIEH satisfied CRC 8.486(b)(1)(B) by including all moving and opposing papers on RWW'S motion to expunge heard October 30, 2015, *nothing* in ZAVIEH's supporting documents in her current writ petition, let alone even the record in Case No. A145977, shows that the Trial Court's dismissal of the entire action following trial on the breach of contract claim comprised error (R-1-244, APP-1-1,375).

That omission is especially critical. The Trial Court on April 3, 2015, at the first session of trial, reviewed the operative Fourth Amended Complaint (hereafter "FAC") and stated that the fifth cause of action for quiet title, against RWW, was possibly subject to nonsuit because of the earlier unlawful detainer judgment in RWW's favor, and that under that judgment RWW was already declared a BFP for value (APP-611, 674:3-

675:17, 679:15-20). The Trial Court was looking forward to briefing and argument on these issues the following Monday, April 6, 2015 (APP-680:8-14, 683:14-19). Yet the record provides nothing showing ZAVIEH's arguments against those positions, no briefing nor arguments at court on subsequent days at trial, including April 6, 2015, which would provide a "a complete understanding of the case and the ruling under review," let alone argue that nonsuit or resolution of this claim short of a full trial was erroneous ®-1-244, APP-1-1,375).

ZAVIEH's trial brief filed April 7, 2015, after the April 3, 2015 proceedings, says nothing about the prospect of being prevented from trying part of her case (APP-858-863). The only reporters' transcripts ZAVIEH provided for appeal were for April 3, 2015, when the Trial Court made those comments, and for April 21 and 22, 2015, for testimony on the contract claim (APP- 91-252 (4/21/15, 4/22/15), 611, 674:3-675:17, 679:15-20, 680:8-14, 683:14-19(April 3, 2015)). Nothing at the end of the April 22, 2015 proceedings, including the closing arguments following testimony, nor the Trial Court's statements following closing arguments on the contract claim, regarding how the matter will proceed, shows any argument by ZAVIEH against being deprived of the opportunity to litigate the forementioned portion of her case (APP-825:21-831:21, 843:8-846:23):

> THE COURT: Thank you. Just so we are clear procedurally, I have given you the direction. I'm heading in terms of how we are going to proceed. And if I find for defendants, I take it procedurally that you would now move for judgment.
>
> MR. BLOCK: Yes, Your Honor.
>
> THE COURT: Which would trigger my obligation to issue a statement of decision.
>
> MR. ALPERS: Can I add one last thing?
>
> THE COURT: No.
>
> MR. ALPERS: Since I'm the plaintiff with the burden of proof?
>
> THE COURT: No. You'll get your opportunity with your written brief...(APP-534:8-22).

Nor did ZAVIEH's closing brief following testimony, as per the Trial Court's direction (APP-69-87)(CRC 8.486(b)(1)©. ZAVIEH simply failed to assert error on the record.

In addition, ZAVIEH failed to include a reporter's transcript of the October 30, 2015 hearing on RWW's motion to expunge, as is normally required pursuant to CRC 8.486(b)(1)(D) (R-1-244). Nor did ZAVIEH provide, as is required by CRC 8.486(b)(3), if the transcript was unavailable:

> a declaration:
>
> (A)Explaining why the transcript is unavailable and fairly summarizing the proceedings, including the parties'

> arguments and any statement by the court supporting its ruling. This declaration may omit a full summary of the proceedings if part of the relief sought is an order to prepare a transcript for use by an indigent criminal defendant in support of the petition and if the declaration demonstrates the need for and entitlement to the transcript; or
>
> (B)Stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record. CRC 8.486(b)(3)(R-1-244).

The consequences for failing to provide a complete record can be severe:

CRC 8.486(b)(4) provides that:

> (4)If the petition does not include the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both.

On appeal, such an omission is fatal. An appellant cannot obtain reversal of a trial court order on the basis of abuse of discretion when there is no record explaining what occurred at the underlying hearing or the trial court's reasoning. *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259. A fatal error on appeal necessarily means that the appellant cannot show the "probable validity" of their appeal. This Court can and should exercise its discretion to summarily deny ZAVIEH's opinion on this basis.[7]

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[7] ZAVIEH's Petition contains additional shortfalls. Her statement of facts (pp. 3-6) is devoid of any references to the record to bolster her statements.

C. ZAVIEH failed to raise these issues when the Trial Court was deciding them, thereby waiving these issues for appellate consideration.

By failing to raise those issues at the time the Trial Court sought argument or guidance on them, ZAVIEH also forfeited raising them on appeal. *Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1. In *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, the appellant claimed that the trial court improperly excluded relevant evidence bearing on its punitive damages, but without a reporter's transcript or settled statement of sidebar proceedings discussing an offer of proof, the appellate court in *Wysinger* held that: "Where the record is silent we must presume the court correctly ruled based on what occurred in the unreported proceedings." *Wysinger*, 157 Cal.App.4th at 429. That would in turn render impossible her attempt to show the probable validity of her appeal. CCP § 405.32.

ZAVIEH may argue that objections to the Trial Court's tentative statement of decision suffice to preserve the issue (APP-54-61), but like

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Nor is there any reference to the record as to when her lis pendens was recorded. CRC 8.4(2), 8.204(a)(1)©, 8.485(a). Her exhibits do not appear to even include a copy of the lis pendens, which showed no reference to her exhibits (p. 8). CRC 8.486(b)(1). She cited an unpublished case at p. 11, fn. 5, in violation of CRC 8.1115(a).

failing to object to introduction of evidence or provide an offer of proof when that piece of evidence is introduced or objected to waives that argument on appeal (Evidence Code §§ 353(a), 354, *SCI Calif. Funeral Services v. Five Bridges Found.* (2012) 203 Cal.App.4th 549, 563-565), so does failing to object or argue at the time the Trial Court is determining the matter. The timing allows the trial court to take remedial action to address potential error. See *SCI,* 203 Cal.App.4th at 564. Objections to statements of decision, assuming *arguendo* that the Trial Court's initial document was a statement of decision subject to objection, derive from the trial court's omission of a controverted fact or issue, or that its findings were ambiguous, not from the procedure used by the trial court in deciding the controverted issue itself. A statement of decision explains the legal and factual basis of the decision as to each of the principal controverted issues. CCP §§ 632, 634; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380. It was too little, too late in this instance.

D. ZAVIEH cannot show the probable validity of her claims based on the propriety of the trustee sale to RWW.

1. The Trial Court did not deprive ZAVIEH of her opportunity to litigate the issue of the propriety of the trustee sale to RWW, as the Trial Court questioned the viability of ZAVIEH's claims on the record at trial and wanted briefing and argument, based on the unlawful detainer judgment finding RWW a BFP without notice.

As shown above, ZAVIEH's argument in her appeal and thus her writ petition focuses on the Trial Court's supposed error in denying her the opportunity to litigate the issue of whether the trustee's sale of her property to RWW was proper, based on defects in the notice of default and the notice of sale, and thus whether RWW was a BFP without notice of the defects. ZAVIEH tries to argue as if the Trial Court's statement of decision and judgment were a bolt of lightning from nowhere, with no notice nor opportunity to argue against that result. The limited record put forth by ZAVIEH shows otherwise.

On the first day of trial, April 3, 2015 (APP-611), the Trial Court examined the FAC and stated the following:

> THE COURT: Okay. Well, I want to talk about the Fourth Amended Complaint. I've got some big questions here.
>
> MR. HOLLINS: Thanks.
>
> THE COURT: So I went over the Fourth Amended Complaint. The way I read the first cause of action is for wrongful foreclosure, which alleges that Chase and Cal Recon failed to provide the 20 days notice of trustee sale as required under Civil Code Section 2924f (b)(1).
>
> I was under the impression -- and I could be wrong because the defense hasn't brought this up -- but I thought that the only remedy permitted under that Civil Code section was essentially to stop the trustee

sale from proceeding.

I didn't think you could collect damages for it after it had already happened. That's a different cause of action. But I don't think -- at least I thought that was what you were limited to. So if that's true, it seems to me that the first cause of action could be subject to *nonsuit*, but I could be wrong about this. I would like some *briefing* on that question (APP-674:3-674:25)(emphasis added)....

The Trial Court then discussed the second cause of action, for breach of contract against CHASE, for an alleged breach of a loan modification agreement, and how the parties would try that part of the case, what part would be held with and without a jury (APP-675:1-676:2). That was the part of the case that ZAVIEH acknowledges was tried (Petition p. 7, R-182, bottom of page).

Then the Trial Court began describing causes of action for which he wanted briefing:

Now we're getting into something that I'm definitely going to need some briefing on. Third cause of action for negligent infliction of emotional distress against RWW only.

I'm wondering if that -- it's against RWW only because of a previous demurrer. I'm wondering if RWW is going to be entitled to a nonsuit on that cause of action because of the collateral estoppel effect of the judgment in the lawful detainer action, which is RG13676304, that RWW was the bona fide purchaser of the

property.

I don't think this should be a surprise to anybody if you read my order on the motion to expunge the lis pendens. When I made that determination, and if RWW was a bona fide purchase of a value, how in the world could they be possibly liable for negligent infliction of emotional distress for doing something that they're a bona fide purchaser for?

MR. ALPERS: Could I ask the Court, when it's looking over these items, to look over the writ 23 decision –

THE COURT: Oh, yeah. You know what, thank you for pointing that out. I was going to say that. I heard that the court of appeal issued some sort of decision on Friday.
Does somebody have a copy of that?

MR. ALPERS: Yes.

THE COURT: Okay. And I'm wondering if that might have some effect on what I'm talking about here.

MR. ALPERS: It does.

THE COURT: Okay. Well, I'm happy to take a look at that.

MR. BORNSTEIN: I don't think it does.

THE COURT: Well, you know what, I'm glad somebody has produced it, and *I'll be happy to hear argument about it on Monday. So that's something you can brief, as well.*

Because I'll be reading this to see if they said something that's going to make me change my mind

and say that this is not collateral estoppel, but we'll see.

MR. BORNSTEIN: I think they'll tell you how brilliant you are, Your Honor.

THE COURT: Didn't they reverse me?

MR. HOLLINS: You're missing the real point of the –

THE COURT: Actually, I have no idea. We got a phone call saying they issued something, and I didn't know what it was.

So fourth cause of action for intentional infliction of emotional distress against Chase, Cal Recon and RWW.

Again, I think that could be subject to a nonsuit by RWW only because of the judgment in the unlawful detainer action and determination that RWW was the bona fide purchaser of the property for value and therefore couldn't possibly be liable -- and that's just RWW only -- for intentional infliction of emotional distress.

I also think it's possible that Chase and Cal Recon could be entitled to a nonsuit if it's determined that Chase was not governed by the HAMP program.

Fifth cause of action for quiet title against RWW.

Again, possibly subject to nonsuit because of the judgment in the @ case, that RWW was a bona fide purchase of property for value. It seems to me that -- I thought that was decided previously.

> Six cause of action for injunctive relief. I made the same observation –
>
> MR. ALPERS: I think that may be moot.
>
> THE COURT: Right. Because of the Court's ruling, I think it's become moot (APP-676:3-679:25)(emphasis added).

The Trial Court therefore advised the parties, including ZAVIEH, that it wanted briefing and argument on the viability of those claims.

2. ZAVIEH was collaterally estopped after trial from relitigating the issue of defects in the notice of default and notice of sale, since those matters were previously decided against her on this property.

The Trial Court's concerns and ultimately its conclusions about the validity of the non-contract claims were correct. The Trial Court found against ZAVIEH on her claim for breach of contract for the loan modification, including her arguments that in process of breaching the loan modification agreement that CHASE and CAL RECON violated HAMP regulations (R-34-38). The Trial Court's ruling in CHASE's and CAL RECON's favor triggered carried the following consequences:

- Dismissal of the action with prejudice against CHASE and CAL RECON, leaving RWW as the only remaining defendant and eliminating one of the two real estate claims pointed to by this Court in its April 2, 2015 order ®-24-28, R-65-68, R-199, R-220:1-3);

- ZAVIEH's appeal does not challenge the Trial Court's ruling on her contract claim, making that ruling final (Petition at p. 1, see also R-197, R-203, fn. 4). Statements made in briefs are binding admissions. *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152;
- Since ZAVIEH's contract claim for breach of the loan modification was resolved against her, all that remained of ZAVIEH's case depended on her claim that the trustee sale was void for defects regarding the notice of default and notice of sale, that, according to ZAVIEH, caused the trustee's sale to RWW to be void (Petition at p. 1); however,
- RWW's judgment in its unlawful detainer action RG13676304, that RWW was the bona fide purchaser of the property without notice, *after* resolution of the contract claims against ZAVIEH, became binding on ZAVIEH by collateral estoppel.

Civil Code § 2924© provides that:

> A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with these requirements

> and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

RWW was therefore a BFP without notice at the trustee sale under Civil § 2924(c)(APP-1228-1229). Civil § 1161a provides for an exception to the general rule that unlawful detainer actions have limited preclusive effect. *Vella v. Hudgins* (1977) 20 Cal.3d 251, 255). Section 1161a "provides for a *narrow and sharply focused* examination of title. To establish that he is a proper plaintiff, one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter 'duly perfected' his title." *Vella*, *supra* (emphasis added); Civil § 1161a(b)(3). As this Court pointed out earlier in the litigation:

> Thus, in an unlawful detainer action brought under section 1161a, the court necessarily must decide whether the purchaser at the trustee's sale acquired legal title to the property at issue in accordance with Civil Code section 2924. (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 974.) The resulting unlawful detainer judgment is therefore a determination that the foreclosure sale was conducted in accordance with Civil Code section 2924. (*Ibid.*) (R-69).

Collateral estoppel applies when: 1) The issue sought to be precluded from relitigation is identical to that decided in a prior proceeding; 2) This issue must have been actually litigated in a prior proceeding; 3) The issue must

have been necessarily decided in the former proceeding; 4) The decision in the prior proceeding must be final and on the merits; and 5) The party against whom collateral estoppel is sought must the same as or in privity with the party to the former proceeding. *People v. Sims* (1982) 32 Cal.3d 468, 484.

Now that the contract and HAMP-related claims are resolved against ZAVIEH, and the wrongful foreclosure claim against CHASE was dismissed, the issues at stake are now identical to those resolved in the unlawful detainer action: whether the asserted defects in the notice of default and notice of sale leading up to the December 20, 2011 trustee sale affected RWW's status at the December 20, 2011 Trustee Sale as a BFP for value without notice (R-24-28, R-34-38, R-65-68, R-220:1-3, RJN Exh. A 9:1-4).

The issue was actually litigated and decided in the former proceeding. Trial occurred in the prior proceeding and ultimately resulted in judgment on the merits in RWW's favor on this particular issue (RJN Exh. A, 4-7, 9, R-61). Since the sole basis upon which the buyer asserted its right to possession of the property was its "duly perfected" legal title obtained in the nonjudicial foreclosure sale, the validity of the buyer's title was necessarily resolved in the unlawful detainer action. *Malkoskie*, *supra*.

Murray appealed but his appeal was dismissed (RJN Exh. B, R-62). The earlier proceeding is therefore final.

ZAVIEH was in privity with MURRAY, her father. She claimed ownership of the property, a financial or pecuniary interest in the property at stake or determination of fact or law with reference to the same subject matter, the property, putting her in privity with her father James Murray (APP-968:19-24, 969:7-17). *Stafford v. Russell* (1953) 117 Cal.App.2d 319, 320. ZAVIEH admitted in her verified FAC that Murray was acting as her agent at the trustee sale by asserting defects in the sale, demands to stop violation of her rights and to cancel or postpone the sale (R-222:11-15). *Grinham v. Fielder* (2002) 99 Cal.App.4th 1049, 1054. Murray asserted the same thing in the unlawful detainer action (RJN Exh. A, 9:1-4, R-61). ZAVIEH admitted in her FAC and exhibits thereto that RWW purchased the property at the December 2011 Trustee's sale (APP-968:27-28, 970:4-6, 990:13-15, 1228-1229). As statements of fact in the operative complaint in effect at trial, those are judicial admissions on her part. *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271. Indeed, she would have had no standing to sue if she had *not* had such an interest in the property.

3. RWW's appeal from the Trial Court's July 17, 2015,

September 4, 2015, and September 8, 2015 orders does not embrace or affect the October 30, 2015 order expunging lis pendens under CCP § 916.

a. RWW's appeal was dismissed, removing any possibility of the expungement being subject to CCP § 916.

ZAVIEH argues that under CCP § 916, RWW's September 17, 2015 appeal from the Trial Court's July 17, 2015, September 4, 2015, and September 8, 2015 orders embraced or affected RWW's second motion for expungement of lis pendens, heard and granted on October 30, 2015, and that therefore the Trial Court was stayed from granting the October 30, 2015 order. ZAVIEH is wrong on this point for three (3) reasons.

First, the First District docket for Case No. A145977 shows *no September 17, 2015 RWW appeal* whatever the RWW September 17, 2015 appeal was from (RJN Exh. C). http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=2117565&doc_no=A145977. Therefore there was no appeal that could possibly create any CCP § 916 issues. The website shows an October 22, 2015 RWW appeal from a September 23, 2015 judgment for attorney's fees that was later dismissed on December 7, 2015 RWW's appeal was dismissed by this Court, rendering the matter moot (RJN Exh. D).

The October 22, 2015 RWW appeal could not possibly have embraced or affected RWW's October 30, 2015 order to expunge. The October 22, 2015 RWW appeal was from the September 23, 2015 judgment that awarded ZAVIEH *attorney's fees* following issuance of this Court's writ in Case No. A142768 (RJN Exh. D, p.5, R-146).[8] By contrast, the October 30, 2015 order expunging lis pendens was simply for that; to expunge the lis pendens "at any time following" recording, pursuant to CCP § 405.30 and the Trial Court's specific invitation to file a later, renewed motion to expunge lis pendens based on the later, June 2015 judgment dismissing the case ®-74). The Trial Court was *required* grant RWW's October 30, 2015 motion pursuant to *Mix*, 124 Cal.App.4th at 989, 996. See *supra*.

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[8] The only thing that makes sense is that the July 17, 2015 order awarding ZAVIEH attorney's fees following this Court's issuance of a writ in A142768 and denying RWW's objection to Plaintiff's Motion to Enforce the Writ, the September 4, 2015 denial of RWW's motion for reconsideration of the July 17, 2015 order, and the September 8, 2015 order denying RWW's motion for attorney's fees were subsequently wrapped up into the September 23, 2015 judgment for ZAVIEH's attorney's fees, and took into consideration the other issues pursuant to CCP § 906 (RJN Exh. D). The fees motions were appealable while the motion for reconsideration was not. CCP § 904.1(a)(2), *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1015 (fees); CCP § 1008(g)(reconsideration). Regardless, it does not change the analysis that those fee motions and motion to enforce the earlier writ were distinct and unaffected by the October 30, 2015 hearing and order on the later expungement of lis pendens.

b. This Court's order in Case No. A142768 arose at an earlier stage of the proceedings and did not preclude later expungement.

ZAVIEH's CCP § 916 argument fails for a third reason: This Court's April 2, 2015 order .specifically cautioned that its ruling with respect to ZAVIEH's first cause of action for wrongful foreclosure was based on CCP § 405.31, which questioned whether the cause of action even involved a real property claim (R-65, R-67, R-68). This Court cautioned that:

> The trial court did not address the probable validity of this claim, and we will not do so in the first instance because it would necessarily entail an examination of the facts and evidence. (See Code com., 14A West's Ann. Code Civ. Proc. (2004 ed.) foll. § 405.32, p. 346.)(R-68).

Although this Court's analysis of the fifth cause of action for quiet title against RWW was based on CCP § 405.32, for probable validity, its outcome was likewise determined by the fact that trial had not yet taken place on ZAVIEH's contract issues and that therefore the prior unlawful detainer action did not entirely dispose of ZAVIEH's quiet title claim (R-70-R-71).

This Court's April 2, 2015 order ended with a cautionary note:

> For the reasons set forth above, we hold the trial court erred in granting RWW's motion to expunge the lis pendens. We emphasize that our holding is limited to that narrow issue.

> "We do not mean to suggest how this case should be determined on its merits. We hold only that as matters now stand it should be heard upon its merits for the reasons we have stated and that the lis pendens was erroneously expunged." (Citation omitted)

This Court issued these cautions for good reason: When this Court issued its April 2, 2015 order, trial had not yet been completed (R-57, APP- 611, 677:21-23). Completion of trial changed the posture of the case and "tied up the loose ends" this Court saw as shown by its April 2, 2015 order**.**

E. Since CCP § 405.35 protects ZAVIEH's interests pending the outcome of the writ petition, there is no basis for any further relief pursuant to ZAVIEH's emergency application.

In its December 23, 2015 and January 8, 2016 orders this Court reserved further action on ZAVIEH's December 16, 2015 Emergency Application for Bond, Order to Show Cause, Sanctions, and other Appropriate Relief and sought guidance on what effect, if any, RWW's December 29, 2015 substitution of counsel, has on the pending relief sought in ZAVIEH's emergency petition. This Court also sought guidance on how to go about serving RWW's predecessor counsel should this Court decide to pursue further relief against him. RWW's input follows.

1. The Legislature provided for a remedy in situations like this, where an order to expunge lis pendens was recorded prior to the expiration of time in which to file a writ petition under CCP § 405.39, making the order ineffective while such a writ petition is pending and thereby

protecting ZAVIEH's interests in the meantime.

This Court's December 23, 2015 order recognized that CCP § 405.35 renders ineffective any order expunging lis pendens recorded before the time expires for a claimant to file a writ petition challenging such an order pursuant to CCP § 405.39. RWW complied with this Court's order the next day by also recording this Court's December 23, 2015 order (RJN Exh. E). The Legislature's enactment of CCP § 405.35 and recordation of this Court's December 23, 2015 order therefore protects ZAVIEH's interest in the Fremont property pending the outcome of this writ petition by putting the world on constructive notice that the October 30, 2015 order is ineffective until this writ petition is adjudicated.

CCP § 405.61 clarifies this result by limiting the effect of expungement to those instances in which expungement is recorded "pursuant to this title." CCP § 405.35, like § 405.61, are part of the same title, 4.5 of California's Code of Civil Procedure, "Recording Notice of Certain Actions." Therefore expungement is only effective if it is done in compliance with the terms of this title, which includes § 405.35. See also CCP § 405.24, which is also part of the same title. The Legislature itself anticipated problems such as the premature recording of an order expunging lis pendens and provided a remedy in those situations.

2. Since ZAVIEH's interests are protected pending the outcome of this writ petition, there is no reason to compel RWW to post a bond, especially since she cannot show the probable validity of her claim.

RWW complied with this Court's December 23, 2015 order and substituted counsel less than a week later, during the chaotic holiday season (RJN Exh. E).[9] RWW and its counsel, present and former, have complied with this Court's orders. As shown above, for several reasons the October 30, 2015 order expunging lis pendens should be upheld. ZAVIEH cannot show the probable validity of her real property claim in this Court. ZAVIEH's interest has been protected pending these writ proceedings. There appears to be no need for RWW to post a bond or to hold RWW or its counsel in contempt.

3. This Court has the authority under CCP §§ 177, 177.5, 178, CRC 8.492, among other bases, to take action and impose sanctions on counsel appearing before them.

This Court has authority over the proceedings before it, to hold parties and counsel in contempt, and to fine them for violations of lawful court orders. CCP §§ 177, 177.5, 178. Under CRC 8.492 this Court has the

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[9] The substitution may be an objective indication that RWW did not necessarily ratify the acts of former counsel. In so stating RWW does not by any means intend to waive attorney-client privilege or the duty to keep client confidences.

authority by motion of a party or on its own motion to sanction parties or an attorney for filing a frivolous petition or one filed solely for delay or for committing any other unreasonable violation of these rules. CRC 8.492(a). CRC 8.492(a) seems also to give the court the authority to deal *directly* with counsel by use of the phrase "party or attorney," not "party or its attorney."

However, ZAVIEH's interests are protected pending the outcome of this writ proceeding. RWW and its counsel promptly complied with this Court's December 23, 2015 order. RWW substituted counsel. Any further measures stemming from the December 16, 2015 emergency application therefore seem punitive and unnecessary.

CONCLUSION

For all of the above-stated reasons, ZAVIEH's Petition for Writ of Mandate pursuant to CCP § 405.39 should be denied, as should the remaining requests raised in ZAVIEH's emergency application

Dated: January 27, 2016 Respectfully submitted,

LAW OFFICES OF JOHN T. SCHREIBER

By s/ John T. Schreiber
Attorney for Real Party in Interest
RWW PROPERTIES, LLC

CERTIFICATE OF WORD COUNT

The text of this brief contains 10,669 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: January 27, 2016

s/ John T. Schreiber
John T. Schreiber

Re: Zavieh v. Alameda County Superior Court
First District Court of Appeal, Case No. A146809
Alameda County Superior Court Case No. HG12615549

PROOF OF SERVICE

I, John T. Schreiber, declare:

I declare that I am a citizen of the United States and employed in Contra Costa County, State of California, over the age of eighteen years, and not a party to the within action. My business address is 1255 Treat Blvd., Suite 300, Walnut Creek, California 94597. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On January 27, 2016, I served the within:

REAL PARTY'S IN INTEREST OPPOSITION TO PETITION FOR WRIT OF MANDATE

on the parties in this action by placing a true copy thereof in a sealed envelope, and each envelope addressed as follows:

Honorable Delbert Gee, Judge
Department 510
Alameda County Superior Court
Hayward Hall of Justice
24405 Amador Street
Hayward, CA 94544
.

[xx] (By Mail) I caused each such envelope to be served by depositing same, with postage thereon fully prepaid, to be placed in the United States Postal Service in the ordinary course of business at Walnut Creek, California. Said envelope was placed for collection and mailing on that date following ordinary business practices.

[ ] (By Personal Service) I caused each such envelope to be delivered by hand to the address(es) listed above.

[ ] (By Facsimile) I caused the said document to be transmitted by Facsimile machine to the address(es) whose fax number is indicated above.

Executed at Benicia, California on January 27, 2016. I declare under penalty of perjury that the foregoing is true and correct.

_____
John T. Schreiber