

A145977 (Related cases: A142768, 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,
Plaintiff/Appellant,**

vs.

**RWW PROPERTIES, LLC,
Defendant/Respondent,**

**Appeal from a Judgment of the Alameda County Superior Court,
The Honorable Delbert C. Gee, Judge, presiding**

RESPONDENT'S BRIEF

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**RESPONDENT'S
BRIEF**

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION 5	Court of Appeal Case Number: <p align="center">A145977</p>
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Megan E. Zavieh	
RESPONDENT/REAL PARTY IN INTEREST: RWW Properties, LLC	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> 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: 2/4/16

John T. Schreiber

 (TYPE OR PRINT NAME)



 (SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

The premise of Appellant MEGAN ZAVIEH's (hereafter "ZAVIEH") appeal of the Trial Court's judgment against her and in favor of Respondent "RWW PROPERTIES, LLC" (hereafter "RWW") is that the Trial Court improperly denied her the opportunity to try part of her case after the Trial Court found against her in her claim for breach of contract and HAMP regulations against JP MORGAN CHASE (hereafter "CHASE"). She asserted that CHASE breached a loan modification agreement with her and as a result wrongfully foreclosed on her property. The Trial Court found otherwise. She does not contest that result in her appeal.

ZAVIEH failed to meet her burden as an appellant to provide this Court with a record showing error. On the first day of trial proceedings, the Trial Court reviewed ZAVIEH's operative pleading, her Fourth Amended Complaint (hereafter "FAC"). Except for the contract claims, the Trial Court raised concerns that all of ZAVIEH's other claims, including those against RWW, were subject to nonsuit, i.e. facially invalid, specifically based on RWW's unlawful detainer judgment. Before deciding as much, the Trial Court sought briefing and argument on the issue the following week.

However, nothing in the limited record ZAVIEH provided on appeal showed any argument or briefing on why her non-contract claims were subject to dismissal short of full-blown testimony on the matter. Nothing in the record showed any attempt by ZAVIEH to seek reopening of her case to assert statutory defects in the trustee sale at the time the Trial Court made that determination. ZAVIEH did not designate a reporter's transcript as part of the record on appeal. She only provided portions of three days of trial, attached to trial briefs, out of a period from April 3, 2015 to late April 2015, only two (2) of which contained testimony, none of which contained any argument on ZAVIEH's part against "short-circuiting" the trial.

These were not matters ZAVIEH could object to in objecting to defects in a statement of decision. Like offers of proof or objections to evidence, the time to preserve the record was when the trial court could do something about it. The record was devoid of any such assertions on ZAVIEH's part. Not only did she provide an inadequate record she failed to raise the issue below, forfeiting it on appeal.

ZAVIEH argues that not only was the foreclosure wrongful because of CHASE's breach, but that CHASE and the trustee on the deed of trust, CALIFORNIA RECONVEYANCE (hereafter "CAL RECON") held a statutorily invalid trustee's sale based on defects in the notice of default and

notice of trustee's sale. However, RWW purchased the property for value and without notice at the trustee's sale. It received a trustee's deed reciting compliance with the statutory requirements for a valid trustee's sale. Under California Civil Code § 2924(c), that meant that RWW took title to the property without notice of ZAVIEH's asserted statutory violations.¹

RWW subsequently obtained an unlawful detainer judgment pursuant to California Code of Civil Procedure § 1161a against ZAVIEH's father and agent, who stayed at the property after ZAVIEH moved away.² That unlawful detainer judgment became final, meaning that under CCP § 1161a(b)(3) and Civil § 2924(c) RWW took title to the property at the trustee sale as a bona fide purchaser ("BFP") without notice. RWW's unlawful detainer judgment became final well before ZAVIEH's trial. The parties were well aware of the unlawful detainer judgment by the time of trial.

RWW's unlawful detainer judgment collaterally estopped ZAVIEH from asserting the statutory defects in the trustee's sale against RWW once the Trial Court ruled against ZAVIEH on her contract claim. Her appeal

¹

All further references to California's Civil Code shall be to "Civil."

²

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

specifically disclaims any argument against CHASE and CAL RECON for breach of contract and any asserted violations of HAMP. She dismissed CHASE and CAL RECON with prejudice after trial.

Before trial, this Court issued a writ in Case No. A142768, directing the Trial Court to vacate a 2014 order expunging ZAVIEH's lis pendens. This Court did so on the grounds that as of that time in the proceedings, ZAVIEH stated a real property claim for wrongful foreclosure under CCP § 405.31 and was not going to determine the probable validity of that claim as of that time. As to the quiet title claim against RWW, this Court held that as of the time of the order ZAVIEH still had a claim for quiet title based on her contract/HAMP claim, that was outside the scope of what was previously litigated in RWW's unlawful detainer action. Therefore, assuming that ZAVIEH was in privity with Murray in the unlawful detainer action, collateral estoppel did not bar ZAVIEH's argument that defects in the notice of default and notice of sale rendered the trustee sale to RWW void. However, the order in Case No. A142768 cautioned that:

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)(APP-1370)

Matters stand differently now.

Once the Trial Court ruled against ZAVIEH on her contract/HAMP claim and she waived those issues on appeal, the only issues she asserts remained to void the trustee's sale were those previously decided in the unlawful detainer matter in RWW's favor. That decision was long since final. ZAVIEH claimed a financial or pecuniary stake in the property sold at the trustee's sale and she appointed Murray as her agent at the trustee's sale, both steps putting her in privity with Murray for collateral estoppel purposes.

Moreover, lawfully buying a piece of real estate at a trustee sale cannot possibly comprise the kind of outrageous conduct that forms a basis for finding intentional infliction of emotional distress by RWW in ZAVIEH's favor and filing an unlawful detainer action is covered by the absolute litigation privilege set forth in Civil § 47(b). There was simply nothing left of ZAVIEH's suit to try. The judgment in RWW's favor must be affirmed.

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 (AOB at p.5).

2. ZAVIEH refinanced with a loan from WaMu.

Seven years later ZAVIEH refinanced her home loan with Washington Mutual (“WaMu”) (AOB at p. 5).

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 (APP-101:19-21).

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

ZAVIEH fell behind in her loan payments. 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 (APP-2-3, 4, 161:22-24, Exh. 30).

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

ZAVIEH became frustrated with CHASE. She 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 (APP-1198).

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 (APP-1237-1239, APP-1206 (bottom of page)-1207, APP-1358:8-10, fn.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 (APP-1228-1229). Murray was at the trustee's sale on ZAVIEH's behalf and announced that there were irregularities and an untimely notice of sale (APP-1358, 3d ¶).

8. RWW won an unlawful detainer case under CCP § 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

CCP § 1161a, which held that RWW was a bona fide purchaser for value and without notice, based on the December 20, 2011 trustee's sale (APP-1359, 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 (APP-1360).

B. Procedural History

1. ZAVIEH filed suit for, *inter alia*, wrongful foreclosure against CHASE and CAL RECON, and for quiet title 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 alleged a wrongful foreclosure claim against CHASE and CAL RECON and a quiet title claim against RWW (APP-970:1-977:24, APP-989:22-990:16). ZAVIEH also alleged negligent infliction of emotional distress and intentional infliction of emotional distress against RWW, based on RWW's purchase of the property at the trustee's sale with knowledge of the statutory violations (APP- 987:10-989:21). ZAVIEH filed and recorded a lis pendens in February 2012, days after filing her original complaint (APP-1358-1359).

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

(APP-1360, 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 (APP-1361). ZAVIEH then filed a petition for writ of mandate in this Court pursuant to CCP § 405.39 the following month, Case No. A142768 (APP-1355). On April 2, 2015, in Case No. A142768 this Court issued a writ directing the Trial Court to vacate its July 30, 2015 order and enter a new order denying RWW's motion to expunge (APP-1370). This Court determined that ZAVIEH had alleged a real property claim for wrongful foreclosure under CCP § 405.31 and 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 (APP-1366, APP-1367-1369).

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 (APP-1370)."

- 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 (APP-611).³ 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, 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 in RWW's, CHASE's, and CAL RECON's favor.**

The Trial Court heard testimony 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 (APP-1-9).

- 6. ZAVIEH dismissed CHASE and CAL RECON from the**

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All further references to the Appellant's Appendix shall be to "APP-" followed by the page number).

action with prejudice.

On August 27, 2015, ZAVIEH dismissed CHASE and CAL RECON with prejudice from her suit (Respondent’s Appendix 5-8).⁴ This left only RWW as a defendant in the action and ZAVIEH without a first cause of action for wrongful foreclosure (APP-970:1-3).

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 (RA-9-10, Request for Judicial Notice Exh. A, pp. 5-6).⁵

DISCUSSION

A. Standards of Review.

Trial Court application of collateral estoppel is subject to de novo review. *Roos v. Red* (2005) 130 Cal.App.4th 870, 878. Interpretation of a court order is a question of law subject to this Court’s independent review. *In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429. So would be a nonsuit. *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC*

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All further references to the Respondent’s Appendix shall be to “RA.”

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All further references to Respondent’s Request for Judicial Notice shall be to “RJN.”

(2010) 185 Cal.App.4th 1050, 1060. However, as shown below, ZAVIEH's arguments are subject to her failure to meet her burden as an appellant to affirmatively show error on the record, and for waiver or forfeiture for failing to timely raise issues to preserve them for appeal.

B. 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 sought briefing and argument, based on the unlawful detainer judgment finding RWW a BFP for value without notice, yet the record shows that ZAVIEH did not object or argue otherwise at the time.

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 in the sale.

ZAVIEH argues as if the Trial Court's statement of decision and judgment were a bolt of lightning from nowhere, that provided ZAVIEH with no notice nor opportunity to argue against that result. The limited record put forth by ZAVIEH shows otherwise.

“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 v. Superior Court* (1971) 2 Cal.3d 557, 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).

ZAVIEH’s key argument 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 (RJN Exh. A 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 (RJN, Exh. A at p. 15).

Nothing in ZAVIEH's record in this appeal shows that the Trial Court's dismissal of the entire action following trial on the breach of contract claim comprised error timely objected to or argued against (APP-1-1,375).

That omission is especially critical. 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 (APP-1).

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 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.

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 disclosed that the Trial Court *unexpectedly* dismissed ZAVIEH's case in the face of her arguments that resolution of this claim short of trial on all of her claims was erroneous (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 in the record 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)). Those were primarily part of trial briefs (APP-88:1-23). ZAVIEH elected to proceed without a reporter's

transcript on appeal (RA at 1, Item 2.a).

A necessary corollary to this rule [regarding an appellant's burden to show error on the record is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.

Osgood v. Landon (2005) 127 Cal.App.4th 425, 435 (citation omitted).

Alternatively, CRC 8.163 provides that: "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record." 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 aforementioned 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). ZAVIEH failed to assert error on the record.

In *Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 Cal.App.4th 831, a wheelchair bound man rented an apartment from defendant that did not have a permanent wheelchair ramp from the assigned parking spot to the sidewalk leading to the apartment's front door. Instead, for the plaintiff's benefit management kept a temporary wooden ramp there. The apartment complex's leasing office was open to the public and had a wheelchair access ramp there. At one point the ramp was removed in front of the plaintiff's apartment, during which time the wheelchair tipped over at the now-raised curb, injuring plaintiff and his wife. *Coronado*, 163 Cal.App.4th at 836-837.

Plaintiff sued for premises liability, constructive eviction, violation of the Unruh Civil Rights Act and for injunctive relief under the Disabled

Persons Act. *Coronado*, 163 Cal.App.4th at 837. On the eighth day of trial, shortly before it was time to instruct the jury, the trial court ruled on its own motion that the Unruh and Disabled Persons claims did not apply to this case and would not go to the jury. At the conclusion of trial, after the jury returned a defense verdict on the premises liability and constructive eviction claims, the trial court entered judgment in defendants' favor. Plaintiff appealed from the trial court's dismissal of the Unruh and Disabled Persons claims. *Coronado*, 163 Cal.App.4th at 838.

Like the instant case, on appeal the plaintiff in *Coronado* contested the shortcutting of their case at trial, asserting that the "trial court failed to comply with standard procedures governing nonsuit motions (see Code Civ. Proc., § 581c)." *Coronado*, 163 Cal.App.4th at 838, fn. 6. The Court in *Coronado* rejected that argument in ways highly analogous to this case:

Although the trial court's sua sponte order was unusual, no basis for reversal is shown. First, it is clear the trial court was acting to fulfill its judicial duty to ensure the jury was properly instructed on the law applicable to the case. Once the trial court concluded the disability access statutes were inapplicable in the context of this case, and hence claims based thereon could not as a matter of law go to the jury, it promptly informed the parties of its decision. Second, plaintiff made no objection below on grounds of procedural error or unfairness, and it is apparent the parties understood this was a legal issue that had to be resolved in the case. Third, since the instant appeal requires us to resolve the same legal issues as the trial court faced, and we agree that no cause of action existed under the statutes in question, it would be an idle act

for us to reverse the case on procedural grounds simply to have the trial court enter a dismissal. (See § 3532.)
Coronado, supra.

From the outset in this case, even more so than in *Coronado*, the trial court kept the parties apprised of its position on the weaknesses in ZAVIEH's non-contract claims. As shown, ZAVIEH made no objection at trial on grounds of procedural error or unfairness. The parties understood these infirmities were legal issues to be decided. Finally, the parties and this Court address the issue of whether these procedural shortcomings, assuming *arguendo* that they were procedural shortcomings, comprised harmless error, by addressing the issue of whether collateral estoppel barred relitigation of ZAVIEH's arguments regarding defects in the notice of default and notice of sale as harmless error. Just as it would have been an idle act in *Coronado* for the appellate court to reverse the case on procedural grounds simply to have the trial court enter a dismissal, it would be an equally idle act for this Court to reverse on procedural grounds simply to have the trial court enter a dismissal. *Coronado*, 163 Cal.App.4th at 838, fn. 6.

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.

ZAVIEH may argue that objections to the Trial Court's tentative statement of decision suffice to preserve the issue (APP-54-61), but just as 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. Objecting or arguing at that time allows the trial court to take prompt remedial action to address potential error. See *SCI*, 203 Cal.App.4th at 564.

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. 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. It was too little, too late in this instance.

D. 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 (APP-1-5). 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 (RA 5-8, RA 1363-1366, AOB at p.4, RA 970:1-3);

- ZAVIEH's appeal does not challenge the Trial Court's ruling on her contract claim, making that ruling final (RJV Exh.A at p. 1, AOB at pp.2, 8, 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 (RJV Exh. A at p. 1). ZAVIEH's argument regarding Civil § 1058.5(b) no longer applies, since in this case it depended on the viability of ZAVIEH's contract/HAMP claim; 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(c) 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). CCP § 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); CCP § 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.*) (APP-1367).

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 be 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 (RA 5-8, APP-1-5, APP-1363-1366, APP-970:1-3, RJN Exh. B, 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. B, 4-7, 9, APP-1359). 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. C). The earlier proceeding is therefore final.

ZAVIEH was in privity with MURRAY, her father. She claimed 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 (APP-972:11-15). *Grinham v. Fielder* (2002) 99 Cal.App.4th 1049, 1054. Murray asserted the same thing in the unlawful detainer action (RJN Exh. B, 9:1-4). 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, ZAVIEH would have had no standing to sue if she had *not* had such an interest in the property.

This result would be the same regardless of whether or not ZAVIEH had shown that she had properly raised arguments against how the Trial Court arrived at its conclusions. Thus, even *assuming arguendo* that the Trial Court improperly deprived ZAVIEH of the opportunity to raise this issue at trial, any error would have comprised harmless error.

E. This Court's order in Case No. A142768 arose at an earlier stage of the proceedings and did not make any final determinations on the merits.

ZAVIEH argues that this Court's April 2, 2015 order prevented the Trial Court from finding that collateral estoppel barred ZAVIEH's arguments that statutory defects in the notice of default and notice of sale rendered void the trustee's sale to RWW. This Court's April 2, 2015 order itself guards against the expansive interpretation ZAVIEH gives it. The 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 (APP-1366, APP-1369, APP-1370). With respect to ZAVIEH's wrongful foreclosure claim, 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.)(APP-1366).

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 (APP-1368-1369).

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)(APP-1370)

This Court issued these cautions for good reason: When this Court issued its April 2, 2015 order, trial had not yet been completed (APP-1355, 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.

F. There is simply nothing left of this case to appeal.

The Trial Court was correct. There was nothing left of ZAVIEH's

case after the Trial Court ruled against her on her contract claim. That claim against CHASE and CAL RECON, alleged that CHASE breached a loan modification agreement with ZAVIEH, and in the process violated HAMP regulations, was what remained of her quiet title claim against RWW. ZAVIEH admitted that this appeal does not contest the Trial Court's ruling on those points. These last claims just resolved at trial are what this Court saw as unresolved when it issued its Writ in Case No. A142768. Since those claims are now resolved against her, RWW's judgment in the unlawful detainer action, based on Civ. § 1161a, collaterally estopped ZAVIEH from relitigating her arguments that statutory defects in the notice of default and notice of sale rendered void the trustee's sale to RWW. That trustee sale made RWW a BFP for value and without notice, giving RWW's trustee deed a *conclusive* presumption of validity pursuant to Civ. § 2924(c).

The unlawful detainer judgment specifically litigated and decided that issue. ZAVIEH was in privity with her father, Murray, the defendant in the unlawful detainer action. She had a financial stake in that property. She designated Murray as her agent for the trustee's sale.

There is no longer any basis for the Trial Court to order CHASE or CAL RECON, the trustee on the deed of trust, to void the trustee sale to

RWW. ZAVIEH has since dismissed CHASE and CAL RECON from this case with prejudice. ZAVIEH dismissed her negligent infliction of emotional distress claim against RWW during trial, by ZAVIEH's own admission (AOB at pp. 3-4). RWW cannot be liable for intentional infliction of emotional distress, as RWW took title to the property as a BFP for value without notice. 5 Witkin, *Summary of California Law* (10th Ed. 2005, "Torts," § 455 at 674 (privilege to assert own economic interests). RWW's subsequent unlawful detainer actions were privileged under Civ. §47(b); *Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1549. Nor would unlawful detainer actions brought against Murray comprise outrageous conduct against ZAVIEH. The conduct must be directed primarily at plaintiff. *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 903. RWW did nothing but exercise their rights as a bidder at a trustee's sale and then gain possession of their property.

CONCLUSION

For all of the above-stated reasons, the Trial Court judgment in RWW's favor against ZAVIEH must be affirmed.

Dated: February 3, 2016 Respectfully submitted,

LAW OFFICES OF JOHN T. SCHREIBER

By s/ John T. Schreiber
Attorney for Respondent

RWW PROPERTIES, LLC

**RESPONDENT'S
BRIEF**

CERTIFICATE OF WORD COUNT

The text of this brief contains 7,270 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: February 4, 2016

s/ John T. Schreiber
John T. Schreiber

Re: Zavieh v. Alameda County Superior Court
First District Court of Appeal, Case No. A145977
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 February 4, 2016, I served the within:

RESPONDENT'S BRIEF

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
.

- (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 February 4, 2016. I declare under penalty of perjury that the foregoing is true and correct.

s/ John T. Schreiber
John T. Schreiber