TOO TENDER FOR THIS WORLD?

THE RISE (AND POSSIBLE FALL) OF THE TENDER RULE

by Todd E. Chvat, Esq. and T. Robert Finlay, Esq.

Like the erosion of even the tallest peak, so too is the once-mighty, and often cited, Tender Rule being slowly worn away by judicial opinions. Not long ago, a foreclosure defense attorney could simply protest to the court, "Your honor, the tender rule applies," to which the judge would usually respond, "case dismissed for lack of tender." In the words of Bob Dylan, "the times they are a changin'."

In the context of California wrongful foreclosure practice, the Tender Rule was born well over a hundred years ago, beginning with cases such as *Humboldt Savings Bank v. McCleverty* (1911) 161 Cal. 285. In 1911, the California Supreme Court held that, "an action to set aside a sale by trustees or on foreclosure for irregularities *of any kind* should ordinarily be accompanied by an offer to redeem by paying the sum due." (emphasis added). *Humboldt*, supra, at 290. The Rule was "based upon the equitable maxim that a court of equity will not order a useless act performed." *F.P.B.I. Rehab 01 v. E&G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1021. In essence, it was deemed that any irregularities in the foreclosure sale would be harmless to the borrower if the borrower could not otherwise have avoided the foreclosure sale by the payment of all the indebtedness under the loan. *Id*.; See 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 9:154, pp. 507–508.

Beginning in the 80's, courts expanded the Tender Rule beyond its application to mere equitable causes of action to include *any* cause of action that was "implicitly integrated" with the allegations of an irregular foreclosure sale. *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579. Further hampering the borrower's ability to challenge the enforcement of their loans, the California courts had long since held that to be valid, an offer to tender required the party to plead facts to show that they actually had the funds requisite to make good on the offer. *T.G. McCarthy v. Grider* (1925) 72 Cal.App.393, 405. As borrowers facing foreclosure were likely already in dire financial circumstances, this proved to be a major roadblock to a borrower's foreclosure challenges and, accordingly, was heavily relied upon by lenders and loan servicers alike.

However, beginning with the enactment of *Civil Code* section 2923.5 and its interpretation by the courts, the Tender Rule's sway began to weaken. Under section 2923.5, a notice of default (which is a necessary recording to initiate a non-judicial foreclosure proceeding) could not be recorded until at least 30 days after the borrower had been contacted to "assess" and "explore" alternatives to foreclosure. After much debate, the landmark *Mabry* case made it clear that the Tender Rule did not apply to any claimed violation of section 2923.5. Per *Mabry*, "the whole point of section 2923.5 is to create a new, even if limited, right to be contacted about the possibility of *alternatives* to full payment of arrearages. It would be contradictory to thwart the very operation of the statute if enforcement were predicated on full tender." *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 225-226.

And with respect to non-2923.5 claims, the California appellate courts slowly began recognizing additional "exceptions" to the Tender Rule. In 2011, *Lona v. Citibank* laid out the recognized exceptions in one opinion:

- First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt.

- Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary.

- Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale.

- Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face.

Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 112-113.

Thereafter, the effect of the Tender Rule was further diminished by cases such as *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1053-1054 [holding that the tender requirement "does not apply to actions seeking to *enjoin* a foreclosure sale"] and *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 198-199 [holding that a borrower's failure to tender the amount due did not preclude her claim that her bank improperly assessed late charges and other fees that would not have otherwise been incurred]. Thus, in addition to the above exceptions, the Tender Rule was now deemed inapplicable to actions seeking to stop a sale from occurring and cases where a borrower challenged the accuracy of the amount of their default.

Then, in 2014/2015, the Tender Rule was further eviscerated by cases such as *Rufini v. CitiMortgage* (2014) 227 Cal.App.4th 299 [holding that a tender is not required where a borrower is seeking damages and not seeking to set aside the foreclosure sale], *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267 [holding that it was not necessary for a borrower to tender the loan balance in an action to set aside a trustee's sale based on alleged violations of the Homeowner's Bill of Rights], and *Majd v. Bank of America* (2015) 243 Cal.App.4th 1293 [holding that a borrower is not required to tender the amount owed on the debt where a lender allegedly fails to comply with requirements for considering a modification of the loan].

Arguably, under these cases, the Tender rule would now only apply to cases where the borrower does not dispute his/her default and only seeks to set aside a conducted foreclosure sale based on a procedural formality. If so, even a non-attorney borrower would theoretically be able to creatively plead around this rule with a one sentence allegation in a complaint.

However, the Rule has not been rendered obsolete, or even toothless. Instead, while many old, established paths to invoking the Rule have been worn away by time and the tide of changing judicial views, a few still remain and new ones may yet be discovered. The key is to hire the right guide.

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Todd E. Chvat, Esq.
tchvat@wrightlegal.net

Todd Chvat is a Senior Associate in WFZ's California Office.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.