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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

MICHAEL PETERSON and MARIA PETERSON, Trustees of the Peterson Family Trust, Plaintiff, vs. RICHARD PETERSON, an individual; GETTY PETERSON, an individual, and; all persons or entities unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on plaintiff's title thereto, and all other unknown defendants as DOES 1 through 10, inclusive, Defendant	CASE NO. RIC1613703 OPPOSITION TO VERIFIED PETITION FOR FURTHER ORDERS ON JUDGMENT FOR JUDICIAL FORECLOSURE

Defendants, RICHARD PETERSON and GETTY PETERSON, respectfully submit this Opposition to Plaintiffs' Petition for Further Orders on Judgment for Judicial Foreclosure:

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

In November 2017, the Court entered a judgment granting the Plaintiffs' petition for foreclosure of mortgages on two parcels of real property. *Code of Civil Procedure* § 726(a) has particular requirements for judgments governing judicial foreclosures. It states, in pertinent part:

> In the action, the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including where the mortgage provides for payment of attorney's fees, the sum for attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

With respect to the Plaintiffs' third cause of action, the Court ruled in its statement of decision:

> The Court finds that there was no modification to suspend the accrual of interest, and there was no novation. Therefore, Note 1 is due and payable. Richard Peterson owes the principal balance on the note, plus interest from November 1, 2010 to present. The Court finds that Plaintiffs are entitled to judicial foreclosure on the Homeland Deed of Trust. And, that the real property interest of Getty Peterson shall be subordinate to plaintiff's deed of trust.

With respect to the fourth cause of action, the Court ruled similarly:

> The Court finds that there was no modification to suspect the accrual of interest, and there was no novation. Therefore, Note 2 is due and payable, and Richard Peterson owes the principal balance ojn the note, plus interest from November 1, 2010 to present. The Court finds that Plaintiffs are entitled to judicial foreclosure on the Hesperia Deed of Trust.

The Court made no other pronouncements on the third and fourth causes of action.

Despite the deficiencies in the statement of decision and the 2017 judgment with respect to the requirements of § 726, the Plaintiffs never objected to the proposed judgment or the proposed statement of decision. They never filed a motion for reconsideration and never appealed. They did nothing to ensure that the 2017 judgment conformed to § 726. Instead, they used the deficient judgment to attempt to have the Sheriffs of San Bernardino and Riverside Counties sell the properties. Both Sheriffs returned the writs with rejection letters in which they explained exactly how the judgment was incomplete and instructed Plaintiffs to provide the Sheriffs with a certified copy of a judgment containing specific information. The San Bernardino Sheriff stated that the judgment for sale must include

> a. Direction as to how the proceeds of the sale are to be applied (distributed).
> b. Who may become a purchaser at the sale.
> c. costs to be recovered, (ex. Damages, Attorney fee, costs)
> d. Direction as to whether the sale is to be in conformity with CCP 716.020 or 729.010 to 729.090. (i) If a deficiency judgment is waived or prohibited the real property shall be sold as provided in CCP 716.020. (ii) If a deficiency judgment is not waived or prohibited the property shall be sold subject to the right to redemption as provided in CCP 729.010 to 729.090 inclusive.

Likewise, the Riverside County Sheriff returned the writ for sale of that property because

> A certified copy of the Judgment of Foreclosure was not included. The judgment we received from you does not meet the requirements. It much order and direct the Levying Officer to sell and how to sell (i.e. How the proceeds are to be applied; Is the deficiency waived or not; Is there a redemption period; Per what code requirements is the Levying Officer to follow, etc.)

In April 2019, the Plaintiffs filed a motion to amend the judgment, which the Court denied. The Plaintiffs did not bring a motion for new trial or motion for reconsideration of that order. Neither did they appeal.

In June 2020, the Court issued a ruling in which it determined that it lacked the information needed to enter any further orders in this matter and continued the Plaintiffs' petition/motion until after it heard from a referee the Court would appoint to report on matters concerning the partition of properties in the case.

After the Court's June 2020 ruling, the Plaintiffs filed a motion for an order appointing an expert under Evidence Code § 730, ostensibly to provide the Court with guidance as to further orders concerning enforcement of the judgment of foreclosure. The Court denied that motion.

Now, we are before the Court again to consider the Plaintiffs' request for further orders amending the 2017 judgment.

II. LEGAL STANDARD

1. The Judgment May be Set Aside Only for Clerical Error.

Code of Civil Procedure § 473 provides in pertinent part:

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed.

2. A Party Must Object to a Proposed Statement of Decision within 15 Days.

California Rules of Court, Rule 3.1590, provides in pertinent part:

(g) Objections to proposed statement of decision
Any party may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment.

3. A Party Must Object to a Proposed Judgment within 10 Days.

California Rules of Court, Rule 3.1590 provides in pertinent part:

(j) Objection to proposed judgment
Any party may, within 10 days after service of the proposed judgment, serve and file objections thereto.

4. A Motion for Reconsideration Must be Made Within 10 Days after Service Upon the Party of Written Notice of the Entry of the Order.

Code of Civil Procedure Sec 1008(a) provides:

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

III. LEGAL ARGUMENT

THE PETITION FOR FURTHER ORDERS ON JUDGMENT FOR JUDICIAL FORECLOSURE SHOULD BE DENIED BECAUSE IT IS AN ATTEMPT TO IMPROPERLY CHALLENGE A FINAL NON-APPEALBLE JUDGMENT.

A. The deficiencies in the 2017 judgment are not correctible because they are not "clerical" errors.

The Court has repeatedly denied the Plaintiffs' attempts to correct an error that they should have but failed to address when the Court issued its 2017 judgment. This Court recognized in its decision of June 18, 2020, that the original judgment had deficiencies and that the record did not contain the information the Court needed to resolve those deficiencies. The Court continued the matter to allow the parties to determine if they could stipulate to the matters needed to amend the judgment or to determine alternatively whether the referee appointed might provide information that would resolve the issue. The parties could not reach agreement, and the Court found that the referee's report was not helpful.

The Plaintiffs' repeated petitions to the Court are nothing more than motions to correct a judicial error. The Plaintiffs know that they cannot attack the deficient 2017 judgment. There is no path within the *Code of Civil Procedure* or the *Rules of Court* that would allow them, more than three years after entry of the judgment, a way to correct the judgment to insert the elements of § 726 that it lacks. And they also realized that under no construct could the deficiencies in the original judgment be considered merely "clerical" errors. Therefore, they made up a device they termed a "Petition for Further Orders." The Plaintiffs cite no authority for a "Petition for Further Orders," because under the *Code of Civil Procedure* and the *Rules of Court* no such device exists. If such a thing were to exist, it would render the Objection to a Proposed Statement of Decision, the Objection to a Proposed Judgment, and a Motion for Reconsideration superfluous. Further, it would wreak havoc with the judicial system if a party could come into court years after a court rendered a final decision, just because the party realized that the judgment was deficient or would not provide the party the result it intended. *See, e.g. Estate of Watson v. Watson*, F071927 (2016) Cal.App.5th.

The Court's 2017 judgment is a final order that is no longer subject to revision except for clerical error. To the extent that the Court's 2017 judgment is deficient, it constitutes judicial error that should have been brought to the Court's attention within the appropriate statutory framework.

California courts recognize that there is a difference between a “judicial” error and a “clerical” error. It is

> elementary that “[a] court can always correct a clerical [error], as distinguished from a judicial error which appears on the face of a decree by a nunc pro tunc order. [Citation.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made.” (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544.) In *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp*. (1999) 75 Cal.App.4th 110, 117, the court elaborated on this point: “The test which distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) versus advertently (which might be judicial error, but is not clerical error). [Citation.] Unless the challenged portion of the judgment was entered inadvertently, it cannot be changed post judgment under the guise of correction of clerical error.”

Bell v. Farmers Ins. Exchange (2006) 135 Cal.App.4th 1138, 1144).

"A correctable clerical error includes one made by the court which cannot reasonably be attributed to the exercise of judicial consideration or discretion." *Aspen Internat. Capital Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204. "The signing of a judgment, which does not express the actual judicial intention of the court, is clerical rather than judicial error." *Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1035

Furthermore, a “judicial error” can only be corrected if there is an appropriate statutory basis, such as appeal or a new trial. *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp*. (1999) 75 Cal.App.4th 110, 117. The Plaintiffs are long past the time available for any appropriate statutory remedy in this case.

Even if the Court accepts the premise that the Plaintiffs can petition the Court for further orders, the Plaintiffs can still not obtain the relief they seek. As the Court stated in its ruling of June 18, 2020, “the court does not have information to support the requested orders to instruct the Sheriff. The parties have not presented any authority nor support for such instructions, other than the November 20, 2017, judgment.”

The Court correctly pointed out that the Plaintiffs have provided the Court with no citations to the record or any other authority that would allow the Court to correct the deficiencies in the 2017 judgment. The Court surmised that it would be able to use information learned from the referee appointed to handle the partition or stipulations from the parties, but the Court found the referee report unhelpful, and the parties have been unable to stipulate to any of the other missing items. Therefore, the Plaintiffs still have not supplied with the Court with the information necessary for the Court to enter additional orders, procedural or otherwise.

B. The Plaintiffs seek to substantially modify the judgment and materially alter the Defendants' rights.

In its June 2020 decision, this Court concluded that it "retains jurisdiction for purposes of enforcement of judgment" based on such language in the 2017 judgment. Further, the Court found that "Plaintiffs are not seeking to change the November 20, 2017, judgment but, for orders that would allow the Sheriff to execute the writ of sale." The Defendants respectfully take issue with this characterization. The Sheriffs' rejection letters graphically illustrate how the amendment of the judgment will substantially modify it and may materially alter the Defendants' rights as contemplated by the judge who issued the 2017 judgment. These elements that will substantially modify the judgment will materially alter, in the very least, whether the Plaintiffs will be able to seek a deficiency judgment against the Defendants, how that deficiency judgment is calculated, what additional costs can be assessed against the Defendants, and whether the Defendants will have a right to redeem the properties.

C. Because *Code of Civil Procedure* § 726 specifically lists the contents in a foreclosure judgment, those matters must by definition be in the record prior to entry of the judgment.

Code of Civil Procedure § 726 contemplates and requires that these matters will be resolved before the judgment is entered. If the 2017 judgment overlooked elements of § 726, it is inappropriate for this Court to substitute its judgment. This Court's only recourse is to discern the original judge's intent. As the court explained in *Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 891, "[I]it is not proper to amend an order nunc pro tunc to correct judicial *inadvertence, omission, oversight* or error, or to show what the court might or should have done as distinguished from what it actually did. An order made nunc pro tunc should correct clerical error by placing on the record what was actually decided by the court but was incorrectly recorded. It may not be used as a vehicle to review an order for legal or judicial error by 'correcting' the order in order to enter a new one." (Emphasis added).

Moreover, when an amendment will substantially modify the original judgment or materially alter the rights of the parties, the court may not amend the judgment "unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion." *In re Candelario* (1970) 3 Cal.3d 702, 705; see *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 233. Without specific cites to the record, it is not appropriate for the Court to enter further orders in this case concerning matters that were or could have been decided by the original court.

The Plaintiffs have shown their willingness in prior cases to delve into the record repeatedly to have the court clarify its rulings. Their attorneys have shown that they know how to file motions to reconsider and correct judgments. See, e.g. *Peterson V. Peterson*, (2014) E056412 Cal.App.4th. Yet, in this case, despite having had more than three years and ample opportunity, they have made virtually no effort to provide the Court with any of the information that would complete the 2017 judgment. The Defendants submit to the Court that the Plaintiffs have not made the effort because the information the Court needs is not in fact in the record.

In other cases, parties have used novel evidence to show the judge's intent. *See, e.g*., the recollection or testimony of the judge who issued the order, *Estate of Doane* (1964) 62 Cal.2d 68, 70, *Estate of Remick* (1946) 75 Cal.App.2d 24, 29, *Carpenter v. Pacific Mutual Life Ins. Co.* (1939) 14 Cal.2d 704, 709-710); the judge's handwritten notes, *e.g*. *In re Roberts* (1962) 200 Cal.App.2d 95, 98 and *Carpenter, supra*, at p. 709); the clerk's minutes, *e.g*. *Estate of Harris* (1962) 200 Cal.App.2d 578, 587-588; the court reporter's transcript or affidavit, *e.g. Nathanson v. Murphy* (1957) 147 Cal.App.2d 462, 468, *Carpenter, supra*, at p. 710, *Kaufman v. Shain* (1896) 111 Cal. 16, 23-24); the testimony of attorneys present when the decision was rendered, *Nathanson, supra*, at pp. 467-468. In the instant case, the Plaintiffs have not even offered references to the pleadings or the trial transcript.

The Plaintiffs have failed to challenge any decision of this Court. They failed to object to the proposed statement of decision. They failed to object to the proposed judgment. They failed to appeal the final judgment. They cannot now challenge a final non-appealable judgment by asking this Court to guess at evidence that was or should have been in the trial record or to speculate the intent of the trial judge.

D. The Court should not consider testimony from the Plaintiffs' "expert."

The Plaintiffs have offered the Court a statement from Harold C. Klaskin, another lawyer that the Plaintiffs deem a "qualified expert," to fill in the gaps in the original judgment. The Court should not consider this testimony for two reasons.

First, it is an apparent attempt to perform an end run around the Court's decision of November 18, 2020, denying the Plaintiff's Motion for Orders Appointing Expert Under Evid Code § 730. The Court has already ruled that the Plaintiffs are not entitled to introduce "expert" testimony.

Second, even if the Court allows Mr. Klaskin's testimony, his "evidence" is merely a recitation of the types of information required by § 726. His statement does not and cannot provide any evidence that would tend to clarify the original Court's intent.

For the Sheriffs to carry out their duty to seize and sell the two parcels, they must be provided with a judgment that fulfils the requirements of § 726. That section speaks for itself and the Court does not need any "expert" to tell the Court what a judgment of foreclosure should include. As the record stands, this Court is in the same position it was in at the time it issued its June 2020 ruling. Defendants submit that the Plaintiffs have not and cannot cite to the record or indeed any other evidence that could answer the questions posed by § 726, including:

1. How is the sale to be conducted?
2. How will the sale proceeds be applied?
3. To whom will the sale proceeds be distributed?
4. How will the costs of sale and other costs be accounted for?
5. Have the Plaintiffs waived their right to a deficiency judgment?
6. Will the Defendants have a right to redeem the property?

The answers to these questions, necessary for a complete and executable foreclosure judgment, either can be found in the record or not. If the answers are in the record, the Plaintiffs have not cited to them. To the extent they are not in the record, the Plaintiffs cannot now be allowed to re-open the record to supply the missing evidence.

E. Plaintiffs could have but failed to ask the court to include the correct and complete elements of § 726 in the statement of decision and 2017 judgment.

The Plaintiffs had ample opportunity to ensure that the 2017 judgment and the statement of decision included the items necessary for the Sheriffs to levy on the properties, yet their counsel failed repeatedly to ensure that the necessary facts were in the record and that the statement of decision and the judgment correctly and completely fulfilled the mandate of § 726. Recognizing that their counsel failed them, they brought suit for legal malpractice. See *Peterson v. Strecker*, Superior Court for the State of California, Orange County, Case No. 30-2020-01123201. But, asking the Court now to enter further orders in a misguided attempt to supposedly make them whole is not appropriate. They missed their opportunity in this case, and their only recourse is to seek damages from their former counsel.

F. **The Plaintiffs' cases highlight the deficiencies in the court's original judgment and do not support their argument that this Court has authority to enter further orders**.

In support of their petition, the Plaintiffs cite cases to illustrate two main points: 1) the minimum amount of information necessary to make a foreclosure judgment sufficient under § 726, and 2) the assertion that a court of equity has the jurisdiction to reform its decrees to give them effect. Unfortunately, they have misconstrued every case they cited, and in fact, their cases highlight the ways in which the original judgment, the statement of decision, and the record in this case fail to address the requirements of § 726 and the Sheriffs' rejection letters.

For instance, the Plaintiffs argue that the first three cases stand for the proposition that the foreclosure judgment "need or should only contain a statement of the amount due plaintiff, the defendants personally liable, a direction that the property, or so much thereof as may be necessary, be sold according to law and the proceeds applied to the payment of the expenses of the sale the cost of the action, and the debt." This is not a correct and complete statement of the law. The requirements of § 726 are specific, and the Sheriffs' rejection letters illustrate the information they need to carry out their duties as levying officers, including how the property is to be sold, to whom the proceeds will be distributed, how the proceeds will be applied, whether the plaintiffs have waived their right to a deficiency judgment, and whether the Defendants retain the right to redeem,

Even if the Plaintiffs' statement of the law were correct, the cases they cite do not help their argument because in each of those cases the court easily found the missing elements in the record. In *Leviston v. Swan* (1867) 33 Cal 480, the defendant challenged the judgment because it did not specifically authorize a deficiency judgment and did not declare the party personally liable on the note and mortgage. The court held 1) that it was not necessary for the decree to authorize the deficiency judgment because that was already provided by law itself, and 2) the name of the party who was personally liable was easily discernible from the findings. In *Hooper v. McDate* (1905), 11 Cal. App. 733, the court held that the sheriff is not required to report the amount of the deficiency after the sale because that was a calculation the court itself could easily accomplish. The Plaintiffs cite *Ewing v. Richvale Land Co.* (1918), 37 Cal. App. 53, for this and for a related proposition. That court held that a foreclosure judgment is not defective if the missing facts can be found in the record. In this case, like the *Leviston* case above, the only missing fact was the name of the entity personally liable on the debt.

The three cases cited by the Plaintiffs would be helpful to their argument if this Court could find the missing elements merely by reaching into the record and the statement of decision. But here the Court cannot because, as the Court acknowledged in its June 2020 ruling, the information the Court needs is simply not there.

The Plaintiffs' remaining cases are equally unhelpful.

In *County Bank of San Luis Obispo v. Goldtree* (1900) 129 Cal. 160, the court did not find that "A decree substantially following the provisions of the statute is in proper form." Instead, the court proclaimed that the decree in that case "was in the usual form" without describing the "usual form" or enumerating the elements other than to note that it provided for an attorney's fee and a deficiency judgment.

The Plaintiffs cite *May v. Hatcher* (1900), 130 Cal. 627, for the proposition that "The absence of separate findings, or the incorporation of findings in the judgment of foreclosure, cannot render the judgment void on its face." The *May* case does not support the Plaintiffs' position because it was a default judgment. The *May* court concluded that the findings in that judgment were sufficient, although "irregularly put in the judgment itself instead of being in a separate document called 'findings.'" In the instant case, the court's original 2017 judgment did not contain most of the findings required by § 726, and the court has noted that it does not have enough information to supplement the judgment.

The Plaintiffs argue that "No form for the judgment of foreclosure is prescribed by the statute" and supports the argument with *Morris v. Hartley* (1914), 26 Cal. App. 61. The "form" in *Morris* was not a reference to the elements of a foreclosure judgment. The "form" referred to the wording of the judgment. The judgment contained all the necessary information, but the defendant took exception to how the judgment worded some of the elements, which the court held did not render the judgment insufficient.

The Plaintiffs cite *Lawrence v. Oakes* (1931), 117 Cal. App. 32 for the premise that "a trial court in a foreclosure proceeding, sitting as a court of equity, can properly shape its decrees to afford complete relief as between the parties." In *Lawrence* the court was not addressing deficiencies in the original judgment or record. The mortgage in that case was a lien on "all crops growing or to be grown" until the debt was paid. The court clarified that the plaintiffs could satisfy the debt with crops that were growing after the initial judgment was entered. Unlike the instant case, *Lawrence* had nothing to do with missing elements required by § 726.

Code of Civil Procedure § 726 is clear and unequivocal. So that the Sheriffs can fulfill their duty as levying officers, the foreclosure judgment must contain at a minimum:

- The amount of the debt.
- The parties who are personally liable.
- What property is to be sold.
- How the property is to be sold.
- How the proceeds are to be applied.
- What expenses are to be assessed.
- Whether the Plaintiffs have waived their right to a deficiency judgment.
- Whether the Defendants have a right to redeem the properties.

With the exception of stating which parties are personally liable and the amount of the notes, the 2017 judgment and statement of decision lack each and every element required by § 726. The Plaintiffs have been unable to cite to the Court where any of the missing information can be found in the record despite multiple opportunities. The Defendants contend that the deficiencies of the 2017 judgment are judicial error that the Plaintiffs can only challenge by appeal, motion for reconsideration, or motion for new trial, the time for which has long since passed. Even so, if this Court concludes that it has the jurisdiction to enter "further orders" in this case, the record does not support those orders, and the Plaintiffs cannot now craft those findings out of whole cloth. They simply are not there.

III. CONCLUSION

Defendants request that this court deny Plaintiff's' Petition for Further Orders on Judgment for Judicial Foreclosure.

Dated:

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____

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