

**FILED**  
AUG 19 2013

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
By: Elizabeth Pierce DEPUTY

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA  
APPELLATE DIVISION

THE BANK OF NEW YORK MELLON,

Plaintiff and Respondent,

v.

VIDAL A. PRECIADO, ET AL.

Defendants and Appellants.

Case Nos. 1-12-AP-001360 and  
1-12-AP-001361

ORDER

The appeal by appellants Vidal Preciado ("Preciado"), Roland Luke ("Luke"), and Kenneth Henderson ("Henderson") (collectively, "Appellants") from the unlawful detainer judgments entered on March 16, 2012, came on regularly for hearing and was heard and submitted on August 16, 2013. We hereby hold as follows:

**Procedural History**

This is an appeal from two related unlawful detainer actions.<sup>1</sup> Respondent The Bank of New York Mellon ("Bank") is the owner of 1343 State Street, in Alviso, California. On July 25, 2011, Bank acquired title to this property at a trustee's sale pursuant to foreclosure upon a deed of trust. The property was previously owned by Preciado and occupied by Appellants.

<sup>1</sup> Separate Clerk's Transcripts were prepared for Case Nos. 1-11-CV-215286 (Appeal No. 1-12-AP-001360) and 1-11-CV-215288 (Appeal No. 1-12-AP-001361). In order to avoid confusion, the Clerk's Transcripts in the two cases will be cited as "CT-286" and "CT-288," respectively. A single Reporter's Transcript ("RT") was prepared as the trials took place at the same time.

1 On September 1, 2011, Bank served a written notice to Appellants to quit and deliver  
2 possession of the property within three days, 30 days, or 90 days (depending on their occupancy  
3 status).<sup>2</sup> After waiting more than 90 days, Bank filed two unlawful detainer complaints against  
4 Appellants on December 19, 2011.<sup>3</sup> The complaints incorrectly described the property as being  
5 located in San Jose instead of Alviso. Appellants filed individual answers to the complaints,  
6 and Henderson and Luke also filed individual prejudgment claims of right to possession.<sup>4</sup>

7 Trial on the unlawful detainer actions was held on March 16, 2012, before the  
8 Honorable Socrates Manoukian.<sup>5</sup> That same day, a judgment was entered in each case which  
9 awarded Bank possession of the property, rent, and damages.<sup>6</sup> However, when the sheriff  
10 sought to execute the writ, it was discovered that the property was incorrectly listed as being in  
11 San Jose. The sheriff was unable to execute the writ due to this error, and Bank moved for an  
12 ex parte order to amend the judgment.<sup>7</sup> On April 13, 2012, the court entered an order amending  
13 the judgments to change the property address to Alviso.<sup>8</sup>

14 At Appellants' request, the court stayed Appellants' eviction for 40 days, up to and  
15 including April 28, 2012.<sup>9</sup> Appellants filed individual notices of appeal from the March 16,  
16 2012 judgments.<sup>10</sup>

### 17 **Appealability**

18 A final judgment in a limited civil case is appealable to the appellate division of the  
19 superior court. (Code Civ. Proc., § 904.2, subd. (a).) The trial court entered judgment in these  
20 limited civil cases on March 16, 2012. Accordingly, the judgments are appealable to the  
21 Appellate Division.

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24 <sup>2</sup> See CT-286, pp. 9-12; CT-288, pp. 9-12.

25 <sup>3</sup> See CT-286, pp. 1-12; CT-288, pp. 1-12.

26 <sup>4</sup> See CT-286, pp. 20-25, 30-31; CT-288, pp. 20-24, 27-30, 45-46.)

27 <sup>5</sup> On that same day, Preciado filed a wrongful foreclosure action against Bank and other defendants. (See CT-286,  
pp. 206-224.)

28 <sup>6</sup> See CT-286, pp. 130-130; CT-288, pp. 83-84.

<sup>7</sup> See CT-286, pp. 132-165; CT-288, pp. 85-118.

<sup>8</sup> See CT-286, pp. 166-167; CT-288, pp. 119-120.

<sup>9</sup> See CT-286, p. 233; CT-288, pp. 129-132.

<sup>10</sup> See CT-286, pp. 263-265, 270-272; CT-288, pp. 162-164, 169-171.

1 **Issues on Appeal**

2 On appeal, Appellants make the following arguments:

- 3 1) The Appellate Division must conduct an independent review of the entire  
4 record pursuant to *People v. Wende*;
- 5 2) "The Service Process was littered with gross procedural irregularities";
- 6 3) Bank of America did not produce evidence sufficient to prove that the  
7 foreclosure sale was conducted in strict compliance with Civil Code section  
2924 and that title was duly perfected; and
- 8 4) Bank improperly filed two separate unlawful detainer actions for the same  
9 property.

10 **Standard of Review**

11 In an appeal from an unlawful detainer judgment, "[w]e review the trial court's findings  
12 of fact to determine whether they are supported by substantial evidence." (*Palm Property  
13 Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425.) To the extent the trial court  
14 drew conclusions of law based upon its findings of fact, we review those conclusions of law de  
15 novo. (*Id.* at pp. 1425-1426.)

16 **People v. Wende is Inapplicable to Civil Appeals**

17 Appellants' first argument is that the Appellate Division must conduct an independent  
18 review of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. However, a  
19 *Wende* review only applies to criminal appeals. (See *In re Sade C.* (1996) 13 Cal.4th 952, 984.)

20 In civil appeals, the appellate courts are *not* required to perform an unassisted study of  
21 the record or review of the law relevant to a party's contentions on appeal. (*Air Couriers  
22 Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 928; *Guthrey v. State  
23 of California* (1998) 63 Cal.App.4th 1108, 1115.) Instead, a party's failure to perform its duty  
24 to provide argument, citations to the record, and legal authority in support of a contention may  
25 be treated as a waiver of the issue. (*Annod Corp. v. Hamilton & Samuels* (2002) 100  
26 Cal.App.4th 1286, 1301; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants,  
27 Inc.* (2000) 86 Cal.App.4th 280, 284; *Guthrey, supra*, at pp. 1115-1116.) Thus, Appellants'  
28 request for an independent *Wende* review is improper.

1 **Service of Notices to Quit**

2 Appellants argue that they were not properly served with notices terminating their  
3 tenancy. As a prerequisite to filing an unlawful detainer action, a tenant must be served with  
4 either a 3, 30, or 90 days' notice, depending on the individual's status as a tenant. (Code Civ.  
5 Proc., §§ 1161, 1161a, 1161b.) Code of Civil Procedure section 1162<sup>11</sup> provides three methods  
6 of serving these notices: (1) by personal delivery to the tenant (personal service); or (2) if the  
7 tenant is absent from his residence and usual place of business, by leaving a copy with a person  
8 of suitable age and discretion at either place, and sending a copy through the mail to the tenant's  
9 residence (substituted service); or (3) if a place of residence and usual place of business cannot  
10 be ascertained or a person of suitable age or discretion cannot be found there, then by affixing a  
11 copy in a conspicuous place on the property and delivering a copy to a person residing there, if  
12 such a person can be found, and also sending a copy through the mail addressed to the tenant at  
13 the place where the property is situated (post and mail service). A notice is valid and  
14 enforceable only if the lessor has strictly complied with these statutorily mandated requirements  
15 for service. (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113-14; *Liebovich v.*  
16 *Shahrokkhany* (1997) 56 Cal.App.4th 511, 513.)

17 At trial, Henderson testified that he did not receive any notice to quit. (RT, p. 14:11-15.)  
18 In response, Bank's counsel explained that all the occupants were served with a notice to quit  
19 on September 1, 2011. Bank's counsel referred the court to Exhibit B of Bank's complaint  
20 which contained the proofs of service for the notices. (RT, p. 14:16-23.) In the proofs of  
21 service, registered process server Kris Vorsatz ("Vorsatz") declared that he served the notices  
22 on September 1, 2011. (CT-286, pp. 11-12; CT-288, pp. 11-12.) According to the proofs of  
23 service, "[a]fter due and diligent effort" Vorsatz posted a copy of the notices on 1343 State  
24 Street, San Jose, California. (*Id.*) Thereafter, Vorsatz mailed a copy of each notice to a post  
25 office box that was designated as Presiado's mailing address. (*Id.*) The court then entered  
26 judgment for Bank. (RT, p. 14:26-27.)

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<sup>11</sup> Hereafter, unless otherwise stated, all section references are to the Code of Civil Procedure.

1           Where service is carried out by a registered process server, Evidence Code section 647  
2 applies to eliminate the necessity of calling the process server as a witness at trial. (*Palm*  
3 *Property Investments, LLC v. Yadegar, supra*, 194 Cal.App.4th at p. 1427.) Under Evidence  
4 Code section 647, “[t]he return of a process server [ ] upon process or notice establishes a  
5 presumption, affecting the burden of producing evidence, of the facts stated in the return.” As  
6 Bank did not produce Vorsatz as a witness, the question is whether Vorsatz’s proofs of service  
7 established Bank complied with the notice requirements of section 1162.

8           In *Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, the court analyzed  
9 whether there was sufficient evidence that the landlord complied with the “post and mail”  
10 provision of section 1162. The court noted that this code section does not require a showing of  
11 reasonable diligence in attempting personal service before utilizing the substituted service  
12 provisions, as required in Code of Civil Procedure section 415.20, subdivision (b). (*Id.* at p. 6.)  
13 It does require, however, “that if the tenant cannot be located for personal service that the  
14 person making this substituted service first determine either that the tenant’s ‘. . . place of  
15 residence and business cannot be ascertained, or that a person of suitable age or discretion there  
16 cannot be found. . . .’ ” (*Id.*) In *Highland Plastics*, the deputy marshal testified that when he  
17 attempted to serve the 30-day notice on defendant, no one answered his knock on the door of  
18 the premises which had been identified to him as the place of residence and business of  
19 defendant. (*Id.* at pp. 6-7.) When there was no response to the deputy’s knock, he then posted  
20 the notice “in a conspicuous place on the property” and mailed a copy to the place where the  
21 property was situated. (*Id.* at p. 7.) Thus, the court concluded that there was substantial  
22 evidence supporting the trial court’s finding that there had been a proper service of the notice  
23 utilizing the “post and mail” provisions as neither the defendant nor a person of suitable age and  
24 discretion could be found. (*Id.*)

25           Similarly, in *Hozz v. Lewis* (1989) 215 Cal.App.3d 314, the court held that trial court  
26 properly found that the landlord’s “post and mail” procedure of service of a three-day notice  
27 pursuant to section 1162 was adequate. In that case, testimony at trial established that the  
28 landlord’s agent went to the apartment, rang the bell and knocked on the door. When no one

1 answered, the employee taped a copy of the notice to the door and slipped another copy under  
2 the door. He then posted another copy by mail addressed to the tenant. (*Id.* at p. 316.) Since no  
3 one was present when the process server went to the apartment, "post and mail" service was  
4 authorized under section 1162. (*Id.* at p. 317.)

5 As explained above, no showing of reasonable diligence in attempting personal service  
6 before utilizing the substituted service provisions is required under the statute. (*See Hozz v.*  
7 *Lewis, supra*, 215 Cal.App.3d at p. 317.) Nevertheless, "post and mail" service is not  
8 authorized as a first-resort method of service. Here, Vorsatz's declaration does not establish  
9 that Bank complied with section 1162 as it does show that personal service was *ever* attempted.  
10 The proofs of service do not state that Appellants were not home or that no one of a suitable age  
11 was home when the server posted the notice "in a conspicuous place."

12 In its opposition brief, Bank argues that Appellants may not challenge service of the  
13 notices as they did not include this as an affirmative defense in their answers. Bank is mistaken.  
14 An affirmative defense is an allegation of new matter in the answer that is not responsive to an  
15 essential allegation in the complaint. In other words, an affirmative defense is an allegation  
16 relied on by the defendant that is not put in issue by the plaintiff's complaint. (*Bevill v. Zoura*  
17 (1994) 27 Cal.App.4th 694, 698; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228  
18 Cal.App.3d 721, 725.) Where the answer alleges facts showing that some essential allegation of  
19 the complaint is not true, those facts are not "new matter," but only a traverse. (*Ibid.*) Because  
20 proper service of the termination notices was an essential element of Bank's unlawful detainer  
21 actions, Appellants' general denial of each statement of the complaint sufficiently put the  
22 service of the notices at issue and Appellants were not required to plead ineffective notice as an  
23 affirmative defense. (*See Bevill v. Zoura, supra*, 27 Cal.App.4th at p. 698.)

24 Accordingly, the judgment for possession must be reversed because Bank failed to  
25 establish proper service of the notices. (*See Liebovich v. Shahrokhkhany, supra*, 56  
26 Cal.App.4th at p. 514.)

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1 **Sale in Compliance with Civil Code § 2924 et seq. and the Deed of Trust**

2 "Historically a cause of action for unlawful detainer was available only to a landlord  
3 against his tenant." (*Gross v. Superior Court* (1985) 171 Cal.App.3d 265, 271.) The remedy  
4 has been expanded by statute to additional categories of plaintiffs (see Code Civ. Proc., § 1161)  
5 and defendants (see Code Civ. Proc., § 1161a). The purpose of section 1161a of the Code of  
6 Civil Procedure was to make clear that one acquiring ownership through foreclosure could also  
7 evict by a summary procedure. (See *Gross v. Superior Court, supra*, 171 Cal.App.3d at p. 271.)

8 In an unlawful detainer action brought pursuant to Code of Civil Procedure section  
9 1161a, subdivision (b)(3), the plaintiff must show that he acquired the property at a regularly  
10 conducted sale and thereafter "duly perfected" his title. (*Stephens v. Hollis* (1987) 196  
11 Cal.App.3d 948, 952; *Evans v. Superior Court* (1977) 67 Cal.App.3d 162, 169.) "[W]here the  
12 plaintiff in the unlawful detainer action is the purchaser at a trustee's sale, he or she 'need only  
13 prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale,  
14 and the defendant may raise objections only on that phase of the issue of title.' " (*Old Nat'l*  
15 *Fin. Servs. v. Seibert* (1987) 194 Cal.App.3d 460, 465.) "The statute" with which a post-  
16 foreclosure plaintiff must prove compliance is Civil Code section 2924. (*Seidell v. Anglo-*  
17 *California Trust Co.* (1942) 55 Cal.App.2d 913, 920.) On appeal, Appellants asserted that Bank  
18 did not meet its affirmative burden in this regard.

19 At trial, Bank provided the Trustee's Deed Upon Sale, recorded August 8, 2011. (See  
20 RT, p. 5:1-11.) The Trustee's Deed Upon Sale purportedly showed that Bank purchased the  
21 property at the trustee's sale held on July 25, 2011. (See CT-286, pp. 6-8.) Luke then testified  
22 that he was at the auction, and that the property "went back to Bank of America." (See RT, p.  
23 6:25-26.) Preciado testified that the loan was originally with Countrywide, and then  
24 Countrywide was "taken over by Bank of America." (See RT, p. 6:27-28.) The court  
25 responded, "Well, I don't know what Bank of America did or didn't do, but they have a deed  
26 here showing it's duly authenticated, the deed that Bank of New York Mellon owns the property  
27 here." (See RT, p. 7:16-19.) When Appellants pressed Bank to prove it owned the property, the  
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1 court stated, "They have a deed showing that they own the property, and that's all they need to  
2 do." (See RT, p. 8:21-23.)

3 The trial court erred when it found that the Trustee's Deed Upon Sale was sufficient  
4 proof that Bank acquired the property at a regularly conducted sale and thereafter "duly  
5 perfected" its title. "[T]itle is duly perfected when all steps have been taken to make it perfect,  
6 i.e., to convey to the purchaser that which he has purchased, valid and good beyond all  
7 reasonable doubt, which includes good record title, but is not limited to good record title, as  
8 between the parties to the transaction. The term 'duly' implies that all of those elements  
9 necessary to a valid sale exist, else there would not be a sale at all. (*Kessler v. Bridge* (1958)  
10 161 Cal.App.2d Supp. 837, 841 [internal citations omitted].) Under a deed of trust, power of  
11 sale upon the trustor's default vests in the trustee. (*Calvo v. HSBC Bank USA, N.A.* (2011) 199  
12 Cal.App.4th 118, 122.) Therefore, in order to prove compliance with section 2924, the plaintiff  
13 must necessarily prove the sale was conducted by the trustee.

14 Here, the Trustee's Deed Upon Sale indicates the property was sold by Recontrust  
15 Company, N.A. acting as trustee. However, the Deed of Trust identifies Commonwealth Land  
16 Title Company as the trustee. (See CT-286, p. 121.) Bank did not provide any evidence  
17 establishing Recontrust's authority to conduct the trustee's sale. As Bank failed to provide any  
18 evidence that Recontrust was substituted for the original trustee, Bank was not entitled to  
19 judgment.

#### 20 **Appellants' Remaining Arguments**

21 Given our decision to reverse the judgments, we need not reach Appellants' remaining  
22 arguments.

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1 **Conclusion**

2 The judgments entered on March 16, 2012, are REVERSED and the trial court is  
3 instructed to entered judgments in favor of Appellants. Appellants are the prevailing party and  
4 are entitled to costs on appeal. (See Cal. Rules of Court, rule 8.891(a)(2).)

5  
6 Date: 8/16/13

*Patricia M. Lucas*  
Honorable Patricia M. Lucas  
Presiding Judge of the Appellate Division

7  
8  
9 Date: 8-16-13

*Deborah A. Ryan*  
Honorable Deborah A. Ryan  
Judge, Appellate Division

10  
11  
12 Date: 8/16/13

*Julia Alloggiamento*  
Honorable Julia Alloggiamento  
Judge, Appellate Division