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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BRANISLAV JOVANOVIC et al., Plaintiffs and Appellants, v. LARRY ABEL et al., Defendants and Respondents.	A131578 (Alameda County Super. Ct. No. RG08390054)

Branislav Jovanovic and Marianne Steele (plaintiffs) brought the underlying action against 21st Century Mortgage Company (21st Century) and its individual investors[1] to enjoin the foreclosure of a multi-unit condominium project in Oakland that defendants had funded by a so-called hard money[2] loan in excess of $3 million. The trial court granted a temporary restraining order and then a preliminary injunction against defendants that was conditioned upon plaintiffs posting an undertaking of $90,000 to cover the attorney's fees and monthly interest payments due to the defendants. Ultimately, the trial court found in favor of defendants, dissolved the preliminary

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[1] Respondents are 65 individual investors. For ease of reference, we shall refer to respondents as either the "Investors " or "defendants."

[2] "Hard money loans" carry much higher interest rates than conventional loans. (Arnold, *Mortgages: Hard Money* (2011) 44 No. 2 Mortgages & Real Estate Executives Report 7.) "The lenders are not commercial banks or traditional lenders; instead they are often private investors familiar with their local economy." (*Ibid.*) Hard money lenders rely on the value of the collateral rather than a borrower's income and credit score. (*Ibid.*)

injunction and granted the defendants' motion to enforce plaintiffs' liability on the bond pursuant to Code of Civil Procedure section 996.440.[3] Plaintiffs appeal, together with their surety, American Contractor Indemnity Company (ACIC), from the order granting the motion to enforce their liability on the bond. We affirm.

I. BACKGROUND

A. The Loan and Default

In February 2007, 21st Century arranged a $3,060,000 loan to plaintiffs that was funded by the Investors. The loan was obtained to enable plaintiffs to pay off a prior 21st Century loan in excess of $2 million and to complete a 26-unit low-income condominium project (the project) on 57th Avenue in Oakland (the property). Plaintiffs' obligation on the loan was secured by a deed of trust encumbering the property. Pursuant to the promissory note, plaintiffs were obligated to make monthly interest payments of $35,700 on the loan.

In the loan documents, plaintiffs promised to use the loan proceeds to finish the project and to repay the loan by August 1, 2007. The loan proceeds—following payment of the prior 21st Century loan ($2,483,159.14), loan origination fee to 21st Century ($38,250), and five-month interest impound ($178,500)—provided plaintiffs with $326,083.99 in construction funds to complete the project.

After the loan was funded and the trust deed was recorded, 21st Century assigned its rights to the Investors on a pro rata basis according to the Investors' contributions to the loan funding.

The loan went into default in August 2007, and the monthly interest payments accrued from that point forward; pursuant to the parties' agreement, the interest had been impounded until the time of the default. At about the same time, 21st Century, which had been servicing the loan for the Investors, ceased operations.

[3] All further undesignated statutory references are to the Code of Civil Procedure.

B. Foreclosure Proceedings and Commencement of Underlying Action

Several months after the loan went into default, the Investors commenced nonjudicial foreclosure proceedings. On May 29 2008, plaintiffs filed the underlying action against the Investors, seeking, inter alia, to invalidate the loan and trust deed and to enjoin the foreclosure. The Investors served a notice of sale, scheduling the foreclosure sale for July 2, 2008.

In their complaint, plaintiffs alleged, among other things, that they had been induced to accept the loan by false promises of when the funding would occur. Plaintiffs alleged that "[t]he failure to provide promised funds caused a four [to] six month delay in completing construction of the condominium units. That delay resulted in plaintiffs being unable to sell the units for what they would have sold for four [to] six months earlier (financing dried-up, and with it demand, forcing plaintiffs to reduce sales prices and being unable to sell timely)."

C. Injunctive Relief Granted Conditioned Upon Posting of Bond

On June 24, 2008, plaintiffs applied ex parte for a temporary restraining order to enjoin the foreclosure sale. In support of that application, plaintiffs averred that the delay in funding the loan "caused a four [to] six month delay in completing construction . . . which was a calamity in a rapidly softening real estate market." On June 25, 2008, the trial court granted the temporary restraining order and enjoined the July 2, 2008 foreclosure sale. The trial court also issued an order to show cause setting a preliminary injunction hearing for July 14, 2008. By stipulation and order, that hearing was continued to July 28, 2008.

Prior to the hearing on the preliminary injunction, plaintiffs, in their reply papers, suggested either no bond or a "bond of $100,000 (six months' of interest)[.]"[4] Citing the "*Mortgage and Deed of Trust Practice Guide*" plaintiffs asserted the following: " 'If the

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[4] Plaintiffs' calculation is based on the following argument: "If the claimed loan balance is $3,084,000, annual interest at 10% is $308,400 or $25,000/month. If plaintiffs are entitled to an offset of $1,000,000 for lost profits and $300,000 for attorney's fees, then the loan balance is only $1,700,000. Interest accrues on $1,700,000 at the rate of $15,000 per month."

security is declining in value, an Undertaking represented by monthly deposits of the interest owed on the remaining indebtedness is one alternative . . . .' " At the July 28, 2008 hearing, the trial court granted the preliminary injunction subject to further hearing, then set the hearing for November 3, 2008. In granting the preliminary injunction, the trial court adopted the methodology suggested by plaintiffs, stating: "The injunction is CONDITIONED on plaintiffs providing a bond of $90,000, to cover interest payments and reasonable attorney's fees incurred by defendants during the injunctive period."

On August 8, 2008, plaintiffs procured a $90,000 bond through surety insurer, ACIC. During the injunctive period, the interest on the loan continued to accrue at $35,700 per month, while the value of the property plummeted.

D. Injunction Dissolved

Prior to the continued hearing on the preliminary injunction held on December 5, 2008, plaintiffs filed an "Update" with the court, stating as follows: "In today's market it is impossible to sell the units to individual homeowners. No one is qualifying for financing." Plaintiffs also admitted that they were "unable to fund a further bond and unable to fund continued sprucing-up of the units." The trial court denied further extension of the preliminary injunction for several reasons, including plaintiffs' inability to obtain a further undertaking to protect the interests of the Investors.

Following the lifting of the injunction, the Investors resumed the foreclosure proceedings. To facilitate the foreclosure proceedings, the Investors formed a limited liability company, BR473 Condos, LLC (BR473). BR473 was owned by the Investors in the same percentage as their respective interests in the loan. Its sole purpose was to represent the Investors and to streamline the proceedings, by, among other things, obviating the need to get 65 signatures for each document.

On December 12, 2008, the Investors recorded an assignment of their respective rights in the deed of trust to BR473. At the foreclosure sale on December 15, 2008, there were no outside bids. Thus, the Investors, acting through BR473, submitted a credit bid of $2.2 million, which represented the waste and deterioration of the property, together with its decline in market value. In April 2010, the Investors sold the property for $1,020,000.

E. Motion to Enforce Liability on Bond

After successfully moving for summary judgment of the underlying action, the Investors filed a motion to enforce liability on the bond pursuant to section 996.440. In opposition, plaintiffs argued that the Investors did not have standing to enforce liability on the bond due to the assignment of "all of their rights in the deed of trust and promissory note" to BR473. Plaintiffs submitted no evidence in support of their opposition. Rather, the only supporting documentation was a declaration from their counsel, James L. Hand, in which he averred that he too, along with plaintiffs, was " 'on the hook' " as an indemnitor for the injunction bond. Hand further declared that he had "reviewed documents" at the Alameda County Recorder's Office that "show[ed] that the remaining Investors . . . all assigned their interests in the note and deed of trust to BR473 . . . sometime in early 2009." In an accompanying request for judicial notice, plaintiffs submitted an assignment of deed of trust recorded on December 12, 2008, which they claimed established that "most" of the Investors had "transferred their interests in the deed of trust and the promissory note to BR473." They also requested judicial notice of a grant deed recorded on April 10, 2010, which reflected BR473's transfer of ownership of the property to Fanfu Investment Company.

The trial court granted the motion to enforce plaintiffs' liability on the bond, ruling as follows: "It is clear from the express language in [the] July 28, 2008 Order that [the court] conditioned granting of the preliminary injunction on [plaintiffs]. . . 'providing a bond of $90,000 to cover interest payments and reasonable attorney's fees incurred by defendants during the injunctive period.' [] Investor Defendants proffer sufficient evidence to support that they are entitled to recover on this bond based on their loss of at least $107,100 in interest payments ($35,700 per month for at least 3 months) while the preliminary injunction was pending. []" In so ruling, the trial court expressly determined that "[p]laintiffs fail[ed] to raise a triable issue of fact in opposition." The court also rejected the argument that the Investors, in dismissing their cross-complaint, had "waived their right to recover on this bond, given that the undertaking was in connection with the preliminary injunction and therefore appears unrelated" to the cross-complaint. Finally, the court was not persuaded by plaintiffs' argument that the Investors "should be barred because of their creation of a limited liability company which assigned the members' individual interests to their proportional collective interest . . . ." In rejecting this argument, the court explained as follows: "A limited liability company is a hybrid business entity consisting of members and which allows one entity to act collectively on behalf of all members. (See [Corp. Code, §] 17001(t), (x), (z).) No evidence has been presented that the entity did not adequately or fairly represent the respective shares of the members or that plaintiffs were in any way prejudiced by [the Investors'] use of this mechanism for efficiency purposes."

The trial court entered judgment in favor of the Investors, enforcing liability on the bond, and the instant appeal followed.

II. DISCUSSION

A. Standard of Review and Burden of Proof

Preliminarily, the parties disagree about our standard of review on appeal. Plaintiffs contend that we must view the evidence in the same manner that we would on a motion for summary judgment, conducting a de novo review of the trial court's decision and resolving all doubts in favor of the party opposing the motion to enforce liability on the bond. The Investors agree that we must conduct a de novo review of the trial court's decision in a manner akin to the summary judgment procedure, but they maintain that, unlike in summary judgment, in summary bond enforcement proceedings the initial burden of proof is "squarely" upon plaintiffs.

On the question of the appropriate standard of review, we are guided by the applicable statutes on bond enforcement. When an injunction is granted, the applicant for the injunction must provide an undertaking that he or she will pay any damages—up to a specified amount—that the enjoined party may sustain as a result of the injunction. (§ 529, subd. (a); *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10.) Liability on this bond may be enforced on a motion as part of the original action. (§ 996.440, subd. (a); *Grade-Way Construction Co. v. Golden Eagle Ins. Co.* (1993) 13 Cal.App.4th 826, 829–833 (*Grade-Way*).) If sought, judgment *must* be entered against the bond's principal (and surety) *unless* an affidavit in opposition to the motion to enforce the bond is filed, showing facts "as may be deemed by the judge hearing the motion" to be sufficient to present a triable issue of fact. (§ 996.440, subd. (d).) If such a showing is made, a trial on those issues is conducted after discovery. (*Ibid.*)

The summary bond enforcement procedures established by section 996.440 differ significantly from the procedures for a motion for summary judgment under section 437c. Section 996.440 requires the trial court to enter judgment against the principal and surety—the *opponents* of the motion—unless they serve and file affidavits in opposition to the motion showing triable issues of fact. (*Grade-Way, supra,* 13 Cal.App.4th at p. 837; see § 996.440, subd. (d).) In a summary judgment proceeding, the *moving party* must show that there are no triable issues of fact. (§ 437c, subd. (c).) Thus, the Legislature places the burden of proof on different parties in summary judgment and bond enforcement proceedings. While summary judgment is disfavored as a drastic remedy, summary bond enforcement is favored in the law. (See, e.g., *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849; see also § 996.440.) To apply the summary judgment procedures that plaintiffs implicitly urge us to apply—i.e., construing the Investors' affidavits strictly and construing their own liberally—in a summary bond enforcement proceeding would be inconsistent with their (and their surety's) burden of proof as specified in the bond enforcement statute. (See § 996.440, subd. (d).)

Nevertheless, as both parties concede, albeit for different reasons, we review the judgment on a section 996.440 motion de novo, to determine whether the statute has been correctly applied and whether a triable issue of fact was raised. (See *Simmons v. California Coastal Com.* (1981) 124 Cal.App.3d 790, 796 [concerning review under section 1058a, the predecessor to section 996.440]; see also *Nintendo of America v. Lewis Galoob Toys* (9th. Cir. 1994) 16 F.3d 1032, 1036 [applying de novo review of decision to execute bond under Federal Rule of Civil Procedure, Rule 65(c)].)

B. The Trial Court Did Not Err in Entering Its Award on the Bond

"It is well settled the damage recoverable under an injunction bond, such as the bond at bench, is for all loss proximately resulting from the injunction; the factors to be considered in determining the loss depend upon the circumstances of the case; the measure of damage will vary with those circumstances; arbitrary rules do not govern; equitable principles are applied; and the allowance, although often difficult to measure accurately, should furnish just and reasonable compensation for the loss sustained. [Citations.]" (*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co.* (1970) 8 Cal.App.3d 752, 757 (*Surety Savings*).)

Plaintiffs contend, first, that the judgment should be reversed because the items of damage upon which it is predicated, viz., the lost interest, either are the product of an erroneous measure of damage or are not supported by the evidence. Plaintiffs claim that the Investors were not entitled to the interest on the loan that accrued during the injunctive period because the Investors failed to establish that their loss was proximately caused by the injunction. Second, plaintiffs insist that the award of interest violates California antideficiency judgment statutes, as well as the one-action rule. To understand this second claim, we briefly review certain background principles regarding mortgages, deeds of trust, and the foreclosure process.

1. Background Principles of Nonjudicial Foreclosure

"A real property loan generally involves two documents, a promissory note and a security instrument. The security instrument secures the promissory note. This instrument 'entitles the lender to reach some asset of the debtor if the note is not paid. In California, the security instrument is most commonly a deed of trust (with the debtor and creditor known as trustor and beneficiary and a neutral third party known as trustee). The security instrument may also be a mortgage (with mortgagor and mortgagee, as participants). In either case, the creditor is said to have a lien on the property given as security, which is also referred to as collateral.' [Citation.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235, fn. omitted (*Alliance Mortgage*).)

"California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property. Most of these statutes were enacted as the result of 'the Great Depression and the corresponding legislative abhorrence of the all too common foreclosures and forfeitures [which occurred] during that era for reasons beyond the control of the debtors.' [Citation].

"Pursuant to this statutory scheme, there is only 'one form of action' for the recovery of any debt or the enforcement of any right secured by a mortgage or deed of trust. That action is foreclosure, which may be either judicial or nonjudicial. (. . . §§ 725a, 726, subd. (a).) In a judicial foreclosure, if the property is sold for less than the amount of the outstanding indebtedness, the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. [Citation.] However, the debtor has a statutory right of redemption, or an opportunity to regain ownership of the property by paying the foreclosure sale price, for a period of time after foreclosure. [Citation.]

"In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust. [Citations.] Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption. [Citation.] However, the creditor may not seek a deficiency judgment. [Citation.] Thus, the antideficiency statutes in part 'serve to prevent creditors in private sales from buying in at deflated prices and realizing double recoveries by holding debtors for large deficiencies.' [Citation.]" (*Alliance Mortgage, supra,* 10 Cal.4th at p. 1236.)

2. Analysis

The parties dispute the applicability of the antideficiency statutes and the one action rule in the instant case. According to plaintiffs, the Investors had "no legal right, having chosen nonjudicial foreclosure, to pursue . . . unpaid interest." Plaintiffs contend that the trial court could not have used unpaid interest as the measure of damages in the motion to enforce liability on the bond because the antideficiency statutes preclude recovery of interest. The Investors maintain this argument is a "complete red herring," which "flatly contradicts the position [plaintiffs] took in the trial court," where they urged that "interest accruing during the injunctive period was an appropriate basis for setting the bond."

We first consider whether the trial court's use of unpaid interest as the measure of damages, if error, was invited error. As we have recited, plaintiffs themselves suggested that a bond of $100,000, representing "six months' of interest" at $15,000 per month (instead of the $35,700 per month proposed by the Investors) would be appropriate. Relying on a practice guide, plaintiffs argued that " 'an Undertaking represented by monthly deposits of the interest owed on the remaining indebtedness is one alternative. . . .' " The trial court ultimately set the bond for "$90,000, to cover interest payments and reasonable attorney's fees incurred by defendants during the injunctive period." Thereafter, in opposing the motion to enforce liability on the bond, plaintiffs did not argue that lost interest was an improper measure of damages.[5] We must conclude, therefore, that if there was error, it was invited. A party who affirmatively proposes a legal principle and/or who fails to oppose a ruling based on that principle by the trial court cannot complain about such ruling for the first time on appeal, under either the doctrine of estoppel, waiver, or invited error. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403; [invited error]; *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486, [waiver]; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 420-421 [estoppel].)

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[5] In their opposition to the motion to recover on the bond, plaintiffs asked whether defendants had shown "a quantifiable loss proximately caused by the court's issuing . . . a [three]-month injunction," but provided no analysis or argument whatsoever on this issue.

In the "Conclusion" portion of their opposition plaintiffs make the bare assertion that defendants "have not shown they sustained a financial loss due to the court's issuance of a [three]-month injunction." Plaintiffs' only substantial contention was that the Investors had no standing to pursue the claim.

Plaintiffs assert that the Investors induced the error by making the original request to require an undertaking sufficient to cover interest accruing under the loan. Plaintiffs maintain that they merely made " 'the best of a bad situation' " by proposing either no bond or $100,000 for six months of (lower) interest. This contention, however, in no way explains plaintiffs' complete failure to oppose defendants' proposed *theory* of damage (loss of interest), nor does it explain plaintiffs' own proposed basis for issuance of a bond (loss of interest, at a lower rate).[6] In short, plaintiffs both proposed and acquiesced in the court's use of lost interest in establishing the amount of the bond and in setting damages under the bond. They, therefore, cannot complain on appeal that this was error.

We turn, next, to plaintiffs' contention that the antideficiency statutes and the one judgment rule preclude an award of damages under the bond. Plaintiffs argue that "the strong policy behind California's antideficiency statutes . . . ." preclude the Investors from recovering the lost interest amount. The antideficiency statutes and the one action rule, however, are immaterial to the issue at hand. By seeking the interest accrued during the injunctive period, the Investors were not attempting to obtain the difference between the amount of the indebtedness and the fair market value of the property following a foreclosure. (See *Alliance Mortgage, supra,* 10 Cal.4th at p. 1236.) Rather, the Investors were pursuing damages for the wrongful delay in the foreclosure sale.

Plaintiffs argue, nonetheless, that *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 (*Union Bank*), casts doubt on the award of interest in the instant case. Not so. *Union*

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6 We recognize it is at least arguable that a lender might not be entitled to damages based on "lost interest" under the *actual* note, but, rather would be entitled to "lost interest" on the monies that were tied up in the property subject to the injunction which could be utilized to generate interest income. (See, e.g., *Surety Savings, supra,* 8 Cal.App.3d at pp. 757, 760.) In this case, however, the distinction makes no difference. Plaintiffs themselves suggested a reasonable amount of interest would be 10 percent of the loan balance of $3,084,000 (as distinguished from 14 percent on the actual loan). Under this formula, the $90,000 in damages would have accrued in only three months; whereas the injunction remained in effect for nearly five months. Accordingly, even if the trial court erred in awarding *actual* interest payments due under the note, plaintiffs were not prejudiced. (See § 475 [judgment reversed only for prejudicial error]; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802.)

Bank does not involve a bond or otherwise discuss the measure of damages in summary bond enforcement proceedings. Rather, *Union Bank* merely holds that a creditor cannot recover from a guarantor the unpaid balance on a note following a nonjudicial foreclosure. (*Id.* at p. 41.) As we have explained, the antideficiency statutes are simply not at issue in the instant case.

Plaintiffs assert that the $90,000 award was inflated and "particularly inappropriate" here due to the facts that the Investors made a $2.2 million credit bid in December 2008, and they eventually sold the property in April 2010 for $1 million. According to plaintiffs, the Investors could not have claimed a loss of investment value of the full $3 million loan, because when they ultimately foreclosed the property, the Investors' credit bid was only $2.2 million and 16 months later the property was worth only $1 million. The problem with this argument, however, is that plaintiffs did not present any evidence that the property was worth only $2.2 million (or $1 million) in *July 2008* when plaintiffs sought to enjoin the sale. Indeed, it was *plaintiffs'* opinion that in June 2008, the units could be sold, generating gross sale proceeds of $4.9 million. Thus, plaintiffs' own estimation of the property's value belies their claim on appeal that the $90,000 was inflated and "particularly inappropriate" in the instant case.

We next address plaintiffs' claim that the injunction did not proximately cause the Investors any harm because they "never collected interest for the twelve months prior to the injunction or for the fourteen months after the injunction up to dismissal of their cross-complaint that sought unpaid interest." According to plaintiffs, "[t]his clearly shows the injunction did not hamper the Investors in collecting interest for August, September and October 2008." This specious argument fails to recognize that the injunction delayed the sale of the property from July 2008 to December 2008, and thus prevented the Investors from receiving the proceeds of the sale in payment of the loan. It was the inability to sell the property during this five-month period that caused the Investor's damages, not the Investors' purported failure to seek the collection of interest payments from plaintiffs either before or after the injunctive period.

In sum, the trial court did not err in entering its award on the bond.

C. Effect of Assignment

Plaintiffs argued below, and argue here, that the Investors forfeited their right to damages because they assigned their interest to BR473, a limited liability company. This contention is without merit.

"[A] limited liability company is a hybrid business entity formed under the Corporations Code consisting of at least two members who own membership interests. The company has a legal existence separate from its members. While members actively participate in the management and control of the company, they have limited liability for the company's debts and obligations to the same extent enjoyed by corporate shareholders. [Citations.]" (*Kwok v. Transnation Title Ins. Co.* (2009) 170 Cal.App.4th 1562, 1571 (*Kwok*).) Under Corporations Code section 17300, a member of a limited liability company "has no interest in specific limited liability company property." (Accord, *Kwok*, *supra*, 170 Cal.App.4th at pp. 1570–1571.) Furthermore, while a limited liability company is usually regarded as an entity separate and distinct from its members, under the alter ego doctrine, when necessary to avoid inequitable results, a court may disregard the corporate entity and treat it and its members as one and the same. (See Corp. Code, § 17101, subd. (b); see also *Katenkamp v. Superior Court* (1940) 16 Cal.2d 696, 700; *People v. Pacific Landmark LLC* (2005) 129 Cal.App.4th 1203, 1212; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248, 257-258.)

"The alter ego doctrine traditionally is applied to pierce the corporate veil so that a shareholder may be held liable for the debts or conduct of the corporation. Some courts recognize the corporate veil may be pierced in reverse so that a corporation may be held liable for the debts or conduct of a shareholder. (See Annot., Acceptance and Application of Reverse Veil–Piercing—Third–Party Claimant (2005) 2 A.L.R.6th 195, § 2.) 'The typical "reverse pierce" case involves a corporate insider, or someone claiming through such individual, attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.' (1 Fletcher Cyclopedia of the Law of Corporations (2006 rev. vol.) § 41.70, p. 258.) This is sometimes called '[i]nside reverse piercing.' (*In re Phillips* (Colo.2006) 139 P.3d 639, 644–645.)" (*Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1518.)

Plaintiffs argue that the Investors were not entitled to recover on the bond because they assigned their respective interests to BR473. According to plaintiffs, "reverse piercing" of the corporate veil is not needed to avoid any inequitable results. We disagree. " 'The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court.' " (*Talbot v. Fresno-Pacific Corp.* (1960) 181 Cal.App.2d 425, 431-432 (*Talbot*), italics omitted.)

From a recitation of the facts and the application of the rules in the cases above-cited we conclude there was sufficient evidence to support the findings of the court and judgment entered. *Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344 (*Capon*), upon which plaintiffs rely, does not compel a contrary conclusion.

In *Capon, supra,* 193 Cal.App.4th 344, which was decided by a different panel of this court, a limited liability company was the purchaser of property in foreclosure but an individual who was the principal of the entity claimed he would reside in the home and that the entity was his "alter ego." (*Id.* at pp. 348, 351, 352-353.) The trial court had held that this intention satisfied the exemption from Home Equity Sales Contract Act (Civ. Code, §§ 1695 et seq. [HESCA]) for a purchaser who intended to use the property as a residence. (*Capon, supra,* 193 Cal.App.4th. at p. 351.) The appellate court reversed, holding that in order for the exemption to apply, the person who takes title must be the same person who resides on the property, and refusing to allow the equitable doctrine of alter ego to be used to perpetrate an evasion of the statute by enabling legal entities to structure transactions, have employees live in the property for a brief period of time, and then re-sell the property for use by others. (*Id.* at pp. 355-357.) The court further observed that typically the alter ego doctrine is used to disregard a corporate entity where it is being used by an individual to perpetuate fraud, or accomplish some other wrongful purpose. (*Id.* at p. 357.) There, however, the trial court had relied upon the doctrine to *shield* the defendants from liability under HESCA. (*Capon, supra,* 193 Cal.App.4th at p. 357.) In refusing to apply the doctrine, the court reasoned that the defendants failed to identify inequitable results that would follow from the defendants' attempt to disregard the legal separateness of the limited liability company. (*Ibid.*)

The rule to be derived from *Capon* is that the alter ego doctrine is applied to avoid inequitable results not to eliminate the consequences of corporate operations. (*Capon, supra,* 193 Cal.App.4th at pp. 356-357.) Here, the Investors did not form BR473 to shield them from any liability. Indeed, quite the contrary is evident from the record. The Investors assigned their pro rata interest in the promissory note and deed of trust in order to handle the foreclosure proceedings in an efficient manner; rather than proceeding with 65 individual notices and related recordings, the matter was effectively consolidated into one unitary proceeding. Plaintiffs have not established either below or on appeal any inequitable results that would follow from disregarding the legal separateness of BR473. Indeed, inequitable results would follow from *failing* to disregard the corporate form in the instant case. Here, plaintiffs, the defaulting borrowers who wrongfully enjoined a foreclosure sale, are trying to shield themselves from their own liability on the bond by using BR473's corporate status to defeat the rights of the Investors. Equity will not countenance such a result. (See *Talbot, supra,* 181 Cal.App.2d at pp. 431-432 ["A wrongdoer may not urge separate entity as a shield. [Citation.]"].)

In short, the trial court did not err in concluding that the Investors' assignment of their proportional collective interest did not bar their rights to enforce the undertaking and recover therefrom.

D. Attorney Fees on Appeal

"Where attorney's fees are authorized by statute they are authorized on appeal as well as in the trial court." (*People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1985) 165 Cal.App.3d 378, 387; see *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Section 996.480, subdivision (a)(2), provides: "If the beneficiary makes a claim for payment on a bond given in an action or proceeding after the liability of the principal is . . . established and the surety fails to make payment, the surety is liable for costs incurred in obtaining a judgment against the surety, including a reasonable attorney's fee, and interest on the judgment from the date of the claim, notwithstanding Section 996.470[, which otherwise limits the liability of sureties]." (§ 996.480, subd. (a)(2).)

Based on this section, the Investors ask in their respondents' brief that they be awarded attorney fees on appeal if we affirm the judgment, which we do. We may entertain a request for fees by motion in a brief, instead of by separate motion, if the brief offers "argument or analysis on the subject." (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 459 [denying award when these criteria not met]; *Akins v. Enterprise Rent–A–Car Co.* (2000) 79 Cal.App.4th 1127, 1130, 1134–1135 [awarding fees sought in brief].) Plaintiffs make no response to this request in their reply brief.

The language of section 996.480, subdivision (a)(2), mandates an award of fees against a nonpaying surety. Accordingly, the Investors are entitled to recover reasonable attorney fees in successfully defending the judgment against the surety on appeal. (See *Grade-Way, supra,* 13 Cal.App.4th at pp. 837–838 [awarding fees and costs on appeal based on section 996.480].) The amount of fees shall be determined by the trial court pursuant to a properly noticed motion. (See § 1033.5, subd. (c)(5); Cal. Rules of Court, rule 3.1702(c).)

III. DISPOSITION

The judgment is affirmed. The Investors are entitled to costs on appeal, and also to reasonable attorney fees on appeal to be determined by the trial court.

RIVERA, J.

We concur:

RUVOLO, P. J.

REARDON, J.