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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FARMERS & MERCHANTS BANK OF
LONG BEACH,

Plaintiff and Appellant,

v.

TANYA R. COHEN,

Defendant and Respondent.

B268587

(Los Angeles County
Super. Ct. No. NC058330)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Michael P. Vicencia, Judge. Affirmed.

Law Offices of Michael Leight, Michael Leight, Michelle Leight for Plaintiff and
Appellant.

Steinberg, Nutter & Brent, Peter T. Steinberg for Defendant and Respondent.

Appellant, Farmers & Merchants Bank of Long Beach, appeals from a judgment which was entered after a stipulated bench trial (by briefing) of a complaint for breach of personal guaranty by respondent, Tanya Cohen. Appellant asserts that the trial court erred by: applying the full credit bid rule to a guarantor of the loan transaction; concluding that a full credit bid extinguished the debt; determining respondent had not waived rights and defenses in the complaint including those under Civil Code section 2809; and failing to apply the unclean hands doctrine. We affirm.

The Loan, Foreclosure and Complaint

Both parties agree that the facts are largely undisputed. On September 1, 2006, appellant loaned \$850,000 to Alta Properties, Inc., which was memorialized by a promissory note and secured by a deed of trust on property located at 3945 Elm Avenue in Long Beach. On the same date, respondent executed a “Commercial Guaranty” in which she agreed to personally guarantee the loan. The guaranty contains an attorney fee provision for the enforcement of the guaranty.

The note originally had a maturity date of September 1, 2009. However, the maturity date was ultimately extended to December 2010 by three separate agreements amending the terms of the loan. Appellant agreed to the third extension in June 2010 because Alta was unable to pay off the loan and still owed \$828,358 in principal.

When Alta failed to make the payments under the terms of the third extension, appellant began foreclosure proceedings on the deed of trust, setting an initial sale date of February 10, 2011. However, appellant was unable to foreclose on the property until September 2012 because of several bankruptcy petitions filed by Alta and acquaintances and friends of respondent. The foreclosure was delayed by six separate petitions filed between February 2011 and July 2012. At least one of the petitions was filed in New York by a friend or relative of respondent. In granting relief from the automatic stays, the bankruptcy courts twice found that the petitions were filed as part of a scheme to delay, hinder or defraud creditors.

After all the delays caused by the bankruptcy proceedings were resolved, appellant foreclosed on the deed of trust on September 19, 2012. Farmers & Merchants Trust

Company of Long Beach purchased the property pursuant to a full credit bid of \$1,122,606.22 and conveyed the property to appellant.

On November 16, 2012, two months after acquiring title to the property through the foreclosure sale, appellant filed the current action against respondent for breach of commercial guaranty. Appellant alleged that respondent breached the following promise: “This is a ‘continuing guaranty’ under which guarantor agrees to guarantee the full and punctual payment, performance and satisfaction of the guarantor’s share of the indebtedness of borrower to lender, now existing or hereafter arising or acquired, on a continuing basis. Accordingly, any payments made on the indebtedness will not discharge or diminish guarantor’s obligations and liability under this guaranty for any remaining and succeeding indebtedness even when all or part of the outstanding indebtedness may be a zero balance from time to time.” Appellant sought \$864,687.13 in principal, \$135,462.76 in interest and \$43,410.82 in late charges.

Respondent answered the complaint and filed a cross-complaint for intentional infliction of emotional distress and breach of legal duty. The trial court struck the cross-complaint in its entirety pursuant to Code of Civil Procedure section 425.16. The trial court also awarded appellant \$8,561 in attorney fees.

The Court Trial

The parties subsequently agreed to a bench trial by submission of trial briefs. Respondent presented evidence that as of June 1, 2010, Alta owed \$828,358 in principal. The total of the fees, late charges and interest was \$220,941.54.¹ The total amount of charges owed by Alta as of the time of the September 2012 foreclosure sale was \$1,049,299.54. The property was sold at the nonjudicial foreclosure sale for a full credit bid of \$1,122,606.22. The full credit bid was \$73,306.68 more than the total amount owed by Alta on the debt.

¹ The total consisted of interest in the amount of \$135,462.76 from June 1, 2010 through September 19, 2012. Late charges on the loan were \$43,410.82. Legal fees and costs, appraisals and insurance fees totaled \$42,077.96.

Appellant presented evidence that it sold the property in February 2014 for \$1,022,500 and received \$934,776.28 after paying closing costs and realtor fees. Appellant requested damages in the amount of \$337,251. The amount represented the difference between the full credit bid of the amount owed at the time of foreclosure of \$1,122,606.23 and the net proceeds from the sale of the property of \$934,776.28. To that amount, appellant added postforeclosure costs and legal fees.²

Citing *Smith v. Allen* (1968) 68 Cal.2d 93, respondent argued that the value of the property was fixed at the full credit bid at the foreclosure sale. Supreme Court authority in *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590 (*Cornelison*) established that the nonjudicial foreclosure sale for the full credit bid extinguished the lien on the property so that appellant is not entitled to damages. The full credit bid, which exceeded the amount of Alta's debt, precluded appellant's damages claim. Respondent asserted that Civil Code section 2809 expressly prohibited her liability, as a guarantor, from being more burdensome than that of what Alta, as the principal, owed under the terms of the loan.

Appellant argued respondent's failure to pay the amounts owed when Alta defaulted on the note caused appellant to incur additional attorney fees and costs. Respondent, as a guarantor, expressly waived any protections from the antideficiency statutes in sections 580a, 580b, 580d or 726 of the Code of Civil Procedure by executing the commercial guaranty.

² The legal fees included the sum of \$8,561 in attorney fees, which had been awarded when the trial court struck the cross-complaint under Code of Civil Procedure section 425.16. Among the postforeclosure expenses incurred by appellant were legal fees and costs in connection with an unauthorized lease agreement between Alta and Mark Allen dated May 1, 2008. Allen used the premises as a substance abuse rehabilitation facility, which subleased bedrooms to tenants. After foreclosing on the property, appellant incurred legal fees and costs in the amount of \$30,230.02 to evict Allen and his tenants. Appellant also incurred \$13,519.89 in legal fees and costs in defending against an action filed by Allen to prevent eviction. The amount also included \$21,374.53 for maintenance, repairs and utilities.

Appellant asserted that the full credit bid rule did not apply to respondent because she was not the borrower, but a guarantor. Respondent, as a guarantor, cannot rely on the recitals in the trustee's deed because it is not conclusive evidence of the full amount of the unpaid debt.

Appellant argued that respondent waived the protections of Civil Code section 2809. In support of this argument, appellant cited Civil Code section 2856, which allows a guarantor to waive a number of statutory protections for guarantors or sureties. Appellant also relied on the following language in the guaranty: "Guarantor understands and agrees that the foregoing waivers are unconditional and irrevocable waivers of substantive rights and defenses to which Guarantor might otherwise be entitled under state and federal law. The rights and defenses waived include, without limitation, those provided by California laws of suretyship and guaranty, anti-deficiency laws, and the Uniform Commercial Code."

Appellant contended that the trial court should rule against respondent because of the numerous bankruptcy petitions. According to appellant, the petitions provided a means to reject respondent's defenses to the complaint under the doctrine of unclean hands.

The trial court determined that respondent had waived a number of defenses but had not waived Civil Code section 2809, which was not expressly listed in the guaranty. The provision in the guaranty cited by appellant was not a waiver of the full credit bid rule. The provision in the guaranty was also not an agreement to pay the damages that appellant is seeking in the complaint.

The trial court concluded that appellant had not established that the full credit bid rule did not apply to respondent simply because she was the guarantor and not the borrower. Authorities cited by appellant as to the conclusiveness of the value of the property did not assist appellant, which chose to make a full credit bid. The unclean hands doctrine is applicable against one seeking a remedy. The doctrine is inapplicable to respondent, who is asserting the affirmative defense of a full credit bid.

The trial court found that respondent's obligation was extinguished by appellant's full credit bid and entered judgment in favor of respondent. This timely appeal followed.

DISCUSSION

I. Standard of Review

The parties agree that the standard of review is de novo because the appeal presents only legal questions based on undisputed material facts. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531; *American Contractors Indemnity Co. v. Saladino* (2004) 115 Cal.App.4th 1262, 1267.)

II. The Full Credit Bid Rule

A lender may bid on property at a nonjudicial foreclosure sale. When the lender bids at the nonjudicial foreclosure sale, it acts as a purchaser. (*Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1503 (*Passanisi*)). The lender, unlike other bidders, is not required to pay cash but may make a credit bid up to the actual amount of the indebtedness. (*Cornelison, supra*, 15 Cal.3d at p. 607.) The purpose of this rule is "to avoid the inefficiency of requiring the lender to tender cash which would only be immediately returned to it." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1238 (*Alliance*)).

However, there is no requirement that the lender make a full credit bid. A "full credit bid" is one "in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other expenses of the foreclosure." (*Cornelison, supra*, 15 Cal.3d at p. 606 & fn. 10.) "[T]he mortgagee is not required to open the bidding with a full credit bid, but may bid whatever amount he thinks the property worth. Indeed 'many creditors continually enter low credit bids . . . to provide access to additional security or additional funds.' [Citation.] It has been said that this is what the creditor should do." (*Id.* at p. 607.)

A successful full credit bid releases the borrower from any further obligations under the note. (*Smith v. Allen, supra*, 68 Cal.2d 93, 96.) Furthermore, contrary to appellant's assertions, the full credit bid rule is not limited to borrowers. In the absence of fraud, the full credit bid rule applies and prevents postsale remedies against not only

the borrower but third parties. (*Alliance, supra*, 10 Cal.4th at pp. 1238-1239, 1246; *Bank of America v. Quackenbush* (1997) 56 Cal.App.4th 1167, 1171.) “Thus, the lender is not entitled to insurance proceeds payable for prepurchase damage to the property, prepurchase net rent proceeds, or damages for waste, because lender’s only interest in the property, the repayment of its debt, has been satisfied, and any further payment would result in a double recovery. [Citation.]” (*Alliance*, at pp. 1238-1239.)

In addition, “when the beneficiary bids the full amount of all principal, interest and costs due by the terms of the note and deed of trust, the full credit bid establishes the value of the property and the amount of the debt, the debt is fully satisfied, the lien is extinguished, and the beneficiary cannot pursue any other remedy *regardless of the actual value of the property on the date of the sale.*” [Citation.]” (*Passanisi, supra*, 190 Cal.App.3d at pp. 1503-1504.) A lender in such circumstances “is precluded for purposes of collecting its debt from later claiming that the property was actually worth less than the bid. [Citations.]” (*Alliance, supra*, 10 Cal.4th at p. 1238.) Thus, the full credit bid rule is applicable even if the property is sold at a later date for an amount less than the full credit bid. “Like any other purchaser, a lender has no obligation to bid any particular amount. It should assess the property’s value at the time of the trustee’s sale and bid accordingly. [Citations.] Any subsequent decrease in the property is deemed the result of the purchaser’s bad business judgment or a severe market downturn.” (*Pacific Inland Bank v. Ainsworth* (1995) 41 Cal.App.4th 277, 281.) In sum, the full credit bid rule precludes a successful bidder from pursuing any other remedy based on the claimed actual value of the property as of the date the property is sold. (*Passanisi, supra*, 190 Cal.App.3d at p. 1503.)

In this case, appellant acquired the property by bidding the full credit value of the indebtedness on the note, plus interest and fees. The amount bid at the foreclosure sale was equivalent to the total indebtedness on the note, including principal, interest, costs and fees. As a consequence, there was no difference in the amount owed on the note and the amount the lender received at the nonjudicial foreclosure sale. Therefore, the full

credit bid rule extinguished the borrower from any further obligations under the note. (*Alliance, supra*, 10 Cal.4th at p. 1238.)

More importantly, the sale extinguished the debt and left nothing upon which the guaranty could operate. (*White v. Seitzman* (1964) 230 Cal.App.2d 756, 765.) This is because the full credit bid at the foreclosure sale was sufficient to satisfy the full amount of indebtedness, including principal, interest, costs and fees. (*Ibid.*) “If the creditor-beneficiary makes a ‘full credit bid’ for the property and is the successful bidder, then the proceeds from the trustee’s sale are exactly sufficient to satisfy the debt. In that case, there is no deficiency and no surplus.” (*Passanisi, supra*, 190 Cal.App.3d at p. 1503, citing *Brown v. Critchfield* (1980) 100 Cal.App.3d 858, 868-869.) Under the circumstances, the trial court correctly concluded that the full credit bid rule was applicable because there was no deficiency and nothing upon which the guaranty could thereby operate. (*Passanisi*, at p. 1503; *White*, at p. 765.)

For the aforementioned reasons, we are not persuaded by appellant’s contention that a different result is required based on statements in *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 357 (*Kolodge*), concerning the effects of the full credit bid rule on the relationship between the lender and the borrower. Appellant argues that *Kolodge* supports the conclusion that the full credit bid rule does not preclude lawsuits against all third parties because the bid is only a legal fiction which serves a purpose between the lender and the borrower. (*Ibid.*) Appellant asserts that, because the trustee’s deed is not conclusive as to the full amount of the unpaid debt in all cases, but is limited to the lender and borrower, respondent cannot rely on the full credit bid rule.

Kolodge involved a lawsuit by a lender who made three loans totaling \$660,000 (\$400,000, \$80,000 and \$180,000) that were secured by three trust deeds on two properties. (88 Cal.App.4th at p. 354.) When the borrower defaulted on the loans, the lender foreclosed on the third loan of \$180,000 by making a full credit bid. (*Ibid.*) The lender brought claims against the appraiser of the property for negligence and misrepresentation in inducing lender to make the loans. (*Id.* at p. 355.) *Kolodge* concluded that the appraiser could not rely on the full credit bid rule to avoid liability

when the lender claimed that he had reasonably relied on the appraisals when the credit bid was made. (*Id.* at pp. 363, 372.)

Under the circumstances, appellant's reliance on *Kolodge* is misplaced. Contrary to appellant's implicit claims, *Kolodge* does not limit the full credit bid rule to lawsuits between a lender and borrower. *Kolodge* also did not consider the full credit bid rule in the context of a guaranty. More importantly, subsequent authorities have noted that *Kolodge* is limited in its application. (See *Najah v. Scottsdale Ins. Co.* (2014) 230 Cal.App.4th 125, 140-141; *Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857, 866.) *Kolodge* "stand[s] for nothing more than that the full credit bid rule is inapplicable where the lender is fraudulently or negligently induced to make the bid." (*Track Mortgage*, at p. 866.)

III. Waiver

Notwithstanding the full credit bid rule, appellant asserts that the trial court erred in refusing to apply the express waivers in the guaranty, which would have allowed appellant to recover its damages.

The guaranty states: "Guarantor waives all rights and defenses that Guarantor may have because Borrower's obligation is secured by real property. This means among other things: (1) Lender may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by Borrower. (2) If Lender forecloses on any real property collateral pledged by Borrower: (a) the amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. (b) Lender may collect from Guarantor even if Lender, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Borrower. This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because Borrower's obligation is secured by real property. These rights and defenses include, but are not limited to, any rights and defenses based upon Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure."

Appellant also relies on the following language in the guaranty: “Guarantor understands and agrees that the foregoing waivers are unconditional and irrevocable waivers of substantive rights and defenses to which Guarantor might otherwise be entitled under state and federal law. The rights and defenses waived include, without limitation, those provided by California laws of suretyship and guaranty, anti-deficiency laws, and the Uniform Commercial Code.”

According to appellant, by executing the guaranty respondent waived any defenses to the complaint including the statutory defense of Civil Code section 2809, which provides: “The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.”

Appellant is correct that the guaranty does appear to waive a plethora of antideficiency statutory rights and numerous other rights. Appellant is also correct that, contrary to the trial court’s conclusion, Civil Code section 2856 provides support for the claim that a guarantor may waive the benefit of Civil Code section 2809 without an express reference to the Civil Code section 2809. Section 2856 provides in that regard: “(a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following: [¶] (1) The guarantor or other surety’s rights of subrogation, reimbursement, indemnification, and contribution and any other rights and defenses that are or may become available to the guarantor or other surety by reason of Sections 2787 to 2855, inclusive. [¶] (2) Any rights or defenses the guarantor or other surety may have in respect of his or her obligations as a guarantor or other surety by reason of any election of remedies by the creditor. [¶] (3) Any rights or defenses the guarantor or other surety may have because the principal’s note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon, directly or indirectly, the application of Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal’s note or other obligation. [¶] (b) *A contractual provision that expresses an intent to waive any or all of the rights*

and defenses described in subdivision (a) shall be effective to waive these rights and defenses without regard to the inclusion of any particular language or phrases in the contract to waive any rights and defenses or any references to statutory provisions or judicial decisions.” (Italics added.)

Civil Code section 2856 thus provides that a guarantor may waive a number of statutory rights and defenses regarding statutory protections for deficiencies in the event of a foreclosure. Furthermore, we agree with appellant that judicial decisions support the conclusion that a guarantor may waive the benefit of Civil Code section 2809. (*Bloom v. Bender* (1957) 48 Cal.2d 793, 804.) The benefit of Civil Code section 2809 may be waived without precise language in the guaranty. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1417 (*River Bank America*)).³ The trial court thus erred in its conclusion that respondent had not waived Civil Code section 2809 simply because the guaranty did not specifically cite it.

However, even if the guaranty resulted in waivers of a number of antideficiency protections or the substance of Civil Code section 2809, reversal is unwarranted in this case, which is predicated upon the full credit bid rule. Nothing in the language of the guaranty or Civil Code section 2856’s authorization permitting guarantors to waive antideficiency statutes addresses the effect of the full credit bid rule on a guaranty. Appellant’s authorities do not support its theory that appellant may now prosecute an action on the guaranty when the debt was extinguished by the full credit bid. The debt

³ *River Bank America, supra*, 38 Cal.App.4th 1400, 1418, explained that subdivision (b) of Civil Code section 2856 was enacted in response to *Cathay Bank v. Lee* (1993) 14 Cal.App.4th 1533. *Cathay Bank* considered whether a defendant had waived the so-called “*Gradsky* defense” by executing a guaranty on a bank loan. In *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40, the court concluded that a lender was estopped from recovering a deficiency judgment against a guarantor when the lender elected to proceed against the security by nonjudicial foreclosure, because this election cut off the guarantor’s subrogation rights against the debtor. (*Id.* at p. 48.) *Cathay Bank*, in turn, determined that the language in the guaranty agreement before it did not constitute an adequate waiver of the *Gradsky* defense. (*Cathay Bank*, at p. 1537.)

was extinguished by the full credit bid so there is no deficiency. If there is no deficiency, there is no resulting damage from a breach of the guaranty. Therefore, trial court properly concluded that the waivers in the guaranty did not preclude respondent from relying on the full credit bid rule in defense of the breach of guaranty cause of action.

IV. The Unclean Hands Doctrine

Appellant contends that the trial court erred in refusing to apply the unclean hands doctrine to respondent's full credit bid defense. We disagree.

“The [unclean hands] doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands . . . or he will be denied relief, regardless of the merits of his claim.” (*Kendall–Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) “The doctrine of unclean hands requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy. [Citations.] Unclean hands applies when it would be inequitable to provide the plaintiff any relief, and provides a complete defense to both legal and equitable causes of action.” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 56.) The doctrine prevents a plaintiff from obtaining relief from a court when his or her misconduct is of such a prejudicial nature that it would be unfair for the court to grant relief. (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1400.)

We agree with respondent that the doctrine is inapplicable to this case because respondent was being sued and was not seeking the active intervention of the court. “[T]he ‘clean hands’ doctrine operates only against one who seeks active intervention of the court and should not be applied to a defendant who is not voluntarily seeking relief in equity but was merely brought there at the suit of another.” (*Behm v. Fireside Thrift Co.* (1969) 272 Cal.App.2d 15, 22.) Accordingly, the trial court did not err in refusing to apply the doctrine to the legal defense of the full credit bid rule.

DISPOSITION

The judgment is affirmed. Respondent Tanya Cohen is awarded her costs on appeal from appellant Farmers & Merchants Bank of Long Beach.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.