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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PACIFIC CAPITAL BANK, N.A.,

Plaintiff and Respondent,

v.

RANDY RIVERA,

Defendant and Appellant.

D059465

(Super. Ct. No. 37-2010-00088902-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,
Timothy B. Taylor, Judge. Affirmed.

Pacific National Bank, N.A. (the Bank) brought this action against Randy Rivera, as the personal guarantor of a promissory note, to collect a deficiency following a non-judicial foreclosure sale of the property securing the note. In competing motions for summary judgment, the Bank prevailed. On appeal, Rivera contends that despite his express waiver in the guaranty of any defense based on the Bank's election of remedies

under Code of Civil Procedure¹ section 580d, an antideficiency statute, the statute shields him from liability. We find no triable issue of fact and affirm the judgment.

FACTUAL BACKGROUND

Rivera is a real estate investor. He applied for a Small Business Administration loan from the Bank to be secured by a deed of trust encumbering commercial property he intended to purchase in Arizona to expand his companies. On July 6, 2007, the Bank issued a commitment letter for a \$1,548,000 loan to a limited liability company (LLC) to be formed by Rivera. The commitment was contingent on Rivera providing the Bank with copies of the filed articles of organization for the LLC, an operating agreement for it, and a list of all owners, managers and members. The commitment was also contingent on Rivera personally guaranteeing the note. On July 9 Rivera signed the commitment letter as the managing member of an "LLC to be formed," and as a personal guarantor of the LLC's debt.

Rivera then formed an LLC, named R Squared Partners (R Squared), to hold the Arizona property. On July 13, 2007, articles of organization for the LLC were filed in Arizona. The articles name Rivera as the sole manager of R Squared, and give notice that under Arizona law a member of the LLC, solely by being a member, is not liable for debts of the LLC.

¹ Further statutory references are also to the Code of Civil Procedure unless otherwise specified.

The loan closed on July 27, 2007, and for reasons the record does not disclose, the borrower was initially Rivera's revocable inter vivos trust, the Randy L. Rivera Separate Property Trust (the Trust), of which he is the sole trustee, settlor, and lifetime beneficiary.² Rivera signed a promissory note on behalf of the Trust and a personal guaranty of the note. The guaranty included a specific waiver of any defense to the guaranty based on the Bank's election of remedies under section 580d.

The Trust's ownership of the property was short lived. On August 3, 2007, Rivera, as trustee, signed a conveyance of the property to R Squared. The conveyance was recorded on August 24. In an October 17 letter, Rivera notified the Bank of the change in ownership. In March 2008 the Bank approved Rivera's request that R Squared assume the loan. The Bank required an assignment agreement, which provides that notwithstanding the assignment, the Trust "shall continue to be personally obligated to observe and perform each and every term, covenant, and condition, including . . . payment of the Note."

R Squared defaulted on the note and the property was sold to a third party in a non-judicial foreclosure proceeding. In March 2010 the Bank elected to sue Rivera under his personal guaranty for the difference between the sale price and the balance on the note. Both parties moved for summary judgment, differing over whether section 580d bars a deficiency judgment against Rivera. The court agreed with the Bank,

² In deposition, Rivera testified he could not recall why the Trust was the initial purchaser of the property rather than an LLC. The Bank also offered no explanation.

granted its motion and denied Rivera's motion, and entered judgment against Rivera for \$336,439.62.

DISCUSSION

I

Standard of Review

Summary judgment may be granted only when a "moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) " 'Rulings on such motions are examined de novo.' " (*Benson v. Superior Court* (2010) 185 Cal.App.4th 1179, 1185.)

" 'We review summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, if the movant has met its burden, we consider whether the opposition raised triable issues of fact.' " (*Benson v. Superior Court, supra*, 185 Cal.App.4th at p. 1185.)

II

Deficiency Judgment

A

Legal Principles

This case involves the juxtaposition of antideficiency law and guarantor law. " 'In California, as in most states, a creditor's right to enforce a debt secured by a mortgage or deed of trust on real property is restricted by statute. Under California law

"the creditor must rely upon his security before enforcing the debt. [Citations.] If the security is insufficient, his right to a judgment against the debtor for the deficiency may be limited or barred by sections 580a, 580b, 580d, or 726." ' ' ' (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 514 (*Commonwealth*)). "[T]he beneficiary of a deed of trust cannot hold the debtor [liable] for a deficiency unless he or she uses the remedy of judicial foreclosure [citation] with its accompanying right of redemption." (4 Witkin, Summary of Cal. Law (10th ed. 2005) Security Transactions in Real Property, § 199, p. 1013, citing *Morello v. Metzenbaum* (1944) 25 Cal.2d 494, 500.)

Section 580d provides: " 'No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property . . . in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust.' [] The purpose of this section is to discourage the overvaluing of the security; the risk of inadequate security because of overvaluation is placed on the lender. [Citation.] The antideficiency statutes further serve to prevent creditors in private sales from buying in at deflated prices and realizing double recoveries by holding debtors for large deficiencies." (*Commonwealth, supra*, 211 Cal.App.3d at p. 514.) Because of the public purpose of the antideficiency legislation, a debtor cannot be compelled to waive antideficiency protections in advance. (*Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927, 932 (*Cadle*)).

A "guarantor is one who promises to answer for the debt, default, or miscarriage of another." (Civ. Code, § 2787.) " 'A contract of guaranty gives rise to a separate and

independent obligation from that which binds the principal debtor.' " (*Talbott v. Hustwit* (2008) 164 Cal.App.4th 148, 151.) A guarantor of a principal's note secured by a deed of trust on real property may waive all rights and defenses under section 580d. (Civ. Code, § 2856, subd. (a)(3).) "[I]f a guarantor expressly waives the protections of the antideficiency laws, a lender may recover the deficiency judgment against the guarantor even though the antideficiency laws would bar the lender from collecting that same deficiency from the primary obligor." (*Cadle, supra*, 83 Cal.App.4th at p. 932.)

It is established, however, that "to collect a deficiency from a guarantor, he must be a *true guarantor* and not merely the principal debtor under a different name. The protections afforded debtors under the antideficiency laws cannot be subverted by artifice [citation], and a substantial body of law has developed to protect the principal debtor against personal liability in cases in which the principal debtor purports to take on additional liability as a guarantor. Under these circumstances, the courts have concluded the guaranty adds nothing to the primary obligation." (*Cadle, supra*, 83 Cal.App.4th at p. 932, italics added.)

"The correct inquiry . . . is whether the purported debtor is anything other than an instrumentality used by the individuals who guaranteed the debtor's obligation, and whether such instrumentality actually removed the individuals from their status and obligations as debtors. [Citation.] Put another way, are the supposed guarantors nothing more than the principal obligors under another name? [Citation.] . . . [T]he legislative purpose of the antideficiency law may not be subverted by attempting to separate the primary obligor's interests by making a related entity the debtor while relegating the true

principal obligors to the position of guarantors.' " (*Cadle, supra*, 83 Cal.App.4th at pp. 932-933.) The "sham guaranty doctrine" applies when a lender extracts a personal guaranty from a primary obligor on the debt. (*Id.* at pp. 933, 934, fn. 8.)

B

Analysis

Rivera contends the trial court erred by finding section 580d is inapplicable because he is a true guarantor of the Trust's debt. Rivera asserts the facts here mirror *Cadle, supra*, 83 Cal.App.4th 927, and "*Cadle* mandates [he] be construed as a primary obligor of the loan . . . because [he] and the Trust were essentially the same."

In *Cadle, supra*, 83 Cal.App.4th at page 933, we held that a guarantor who was the trustee, settlor, and lifetime beneficiary of a revocable living trust was not a true guarantor of the trust's note secured by a deed of trust encumbering property. In *Cadle*, we relied on our opinion in *Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308 (*Torrey Pines*). In *Torrey Pines*, we held that a husband and wife, the trustees, trustors, and sole lifetime beneficiaries of a revocable inter vivos family trust, were not true guarantors of a construction loan a bank made to the trust. We concluded there was "a significant identity between these individuals [guarantors] and their inter vivos trust during their lifetimes, such that their trust should be deemed to be a 'mere instrumentality' [citation] through which they operated, but which never served to remove them from the status of primary obligors." (*Id.* at p. 321.)

Here, the trial court declined to rely on *Cadle, supra*, 83 Cal.App.4th 927, because it followed *Torrey Pines*, without discussing Probate Code section 18000.

Torrey Pines was based on a former version of Probate Code section 18000, under which a trustee was personally liable for a contract entered into on behalf of the trust unless the contract otherwise specified. (*Torrey Pines, supra*, 231 Cal.App.3d at p. 321.) Effective July 1, 1991, the Legislature amended Probate Code section 18000 to provide the converse, that a trustee is not personally liable for a debt of the trust unless the contract otherwise provides. (Prob. Code, § 18000, subd. (a).) The trial court suggested we reconsider *Cadle* in light of the amendment.

It is true that *Cadle* cites *Torrey Pines* without discussing Probate Code section 18000 and the amendment thereto. We decline to revisit *Cadle* in this case, however, because we agree with the trial court's alternative finding that the opinion is distinguishable and inapplicable to the unique circumstances here.³ The record establishes that the parties did not intend that the Trust would be involved in the transaction. Rather, they always intended that an LLC would be the borrower and owner of the encumbered property, and Rivera would personally guaranty the LLC's debt. The Bank issued a commitment letter specifying the LLC and personal guaranty

³ We note, however, that Probate Code section 18000 does not expressly apply to revocable inter vivos trusts, whereas Probate Code section 18200 does. Under Probate Code section 18200, there is generally "no distinction in California law between property owned by the revocable trust and property owned by the settlor of such a revocable trust during the lifetime of the settlor." "Under California law, a revocable inter vivos trust is recognized as simply "a probate avoidance device" . . . Property transferred to, or held in, a revocable inter vivos trust is nonetheless deemed the property of the settlor" [Citations.] [¶] "[A] settlor with the power to revoke a living trust effectively retains full ownership and control over any property transferred to that trust." (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2010) 184 Cal.App.4th 196, 208, citing Prob. Code, § 18200.)

requirements, and Rivera accepted the terms and signed the letter as the manager of an LLC to be formed, and as a personal guarantor of the LLC's debt. Under Arizona law, as well as California law, no member of an LLC is personally liable for its debts merely by virtue of the membership (Ariz. Rev. Stats., § 29-651; Corp. Code, § 17101, subd. (a)), and thus Rivera is not a primary obligor on a debt of the LLC.

Further, the parties carried through with their original plan. Rivera formed an LLC, R Squared, and the Trust conveyed the property to it a mere week after the loan closed. The Trust's fleeting involvement was obviously some type of temporary expedient to closing the deal, and that scenario does not suggest any artifice intended to circumvent antideficiency laws. The court's order explains, "The business bargain between the parties was that R Squared . . . was to be the principal obligor," and, "Far from being a 'sham' guarantor, Rivera was a true guarantor; the only 'sham' here is his reliance on the [Trust] which held title [to the encumbered property] for about a week." (Underscoring omitted.)

Rivera asserts we should ignore the circumstances surrounding the parties' deal, i.e., the Bank's commitment letter, and rely exclusively on the language of the note and guaranty, which does not refer to an LLC. The note and guaranty are subject to the usual rules of contract interpretation (*Central Building, LLC v. Cooper* (2005) 127 Cal.App.4th 1053, 1058), and a contract must be interpreted to give effect to the parties' mutual intent as it existed at the time of contracting. (Civ. Code, § 1636.) The parties' intent is to be inferred, if possible, solely from the written provisions of the contract. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.) Parol evidence

may be introduced to explain the terms of an ambiguous contract, meaning one that is susceptible of two or more reasonable meanings. (*Ibid.*)

To any extent parol evidence was excludable because the note and guaranty are unambiguous, Rivera forfeited the issue by not objecting to the Bank's submission of the commitment letter. In summary judgment proceedings, "[e]videntiary objections not made at the hearing shall be deemed waived." (§ 437c, subd. (b)(5).) "[W]ritten evidentiary objections made *before* the hearing, as well as oral objections made at the hearing are deemed made 'at the hearing' under section 437c, subdivisions (b)(5) and (d), so that either method of objection avoids waiver." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532.) Rivera made no written objection, and at the hearing he merely asked the court not to "focus" on the loan commitment letter. He did not challenge its admissibility, and thus the court properly relied on it in determining the parties' intent. The court may look at the "purpose and effect" of a guaranty to determine whether it is an attempt to recover a deficiency in violation of section 580d. (*Commonwealth, supra*, 211 Cal.App.3d at p. 515; *Torrey Pines, supra*, 231 Cal.App.3d at p. 320.)⁴

The judgment is proper because there are no triable issues of material fact as to Rivera's defense under section 580d. Rivera is a true guarantor of R Squared's debt, rather than a principal debtor.

⁴ Additionally, Rivera asserts the commitment letter is immaterial because after R Squared assumed the note, the Bank required the Trust to remain an obligor. We are unpersuaded. As discussed, from the outset the parties intended that Rivera would personally guarantee the note as additional security for the LLC's debt.

DISPOSITION

The judgment is affirmed. The Bank is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

McINTYRE, J.