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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID A. WORTHINGTON,

Plaintiff and Respondent,

v.

KENNETH W. FULLER,

Defendant and Appellant.

G046018

(Super. Ct. No. 30-2009-00124025)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Ernest Mooney and W. Ernest Mooney for Defendant and Appellant.

Cadden & Fuller, Thomas H. Cadden, Ignacio J. Lazo and Kyle W. Smith for Plaintiff and Respondent.

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David A. Worthington (Worthington), a soils engineer, was persuaded to loan \$300,000 to his client, Kenneth Fuller (Fuller), a real estate investor and broker. However, Worthington had to borrow money himself in order to make the loan. Fuller signed a promissory note secured by deed of trust to document the loan. Not having received payment, Worthington filed a complaint against Fuller. The court entered a judgment of judicial foreclosure in favor of Worthington. Fuller, the appellant in this matter, claims the court erred on a number of grounds. Fuller apparently thinks he should not have to pay the money back. We don't see it that way.

However, we agree that the provision of the promissory note requiring Fuller to pay \$75,000 in interest was usurious and that the court erred in decreeing that Fuller owed Worthington that amount. We also agree that the payments made by John Turpin should have been credited to principal and we conclude that prejudgment interest should have been based on the running principal balance as reduced by the application of Turpin's payments to principal. We affirm in part, reverse in part, and remand.

## I

### FACTS

The following facts are taken from the final statement of decision and the judgment.

Turpin approached Worthington about making real estate investments with him. Worthington was aware that Turpin was Fuller's business associate. Worthington checked into Turpin's background and learned that Turpin owed taxes and other debts, evidenced by liens. He decided not to do business with Turpin.

Fuller, who was a licensed real estate broker with about 26 years of experience, held sole record title to certain property on Wallingford Lane in Huntington Beach. However, unbeknownst to Worthington, "Turpin held an unrecorded beneficial interest in the Property." Title was held in Fuller's name rather than Turpin's because Turpin was involved in marital dissolution proceedings.

In seeking the loan, Fuller falsely represented that he would be the one to repay the money. Fuller did not disclose to Worthington that he intended for Turpin to receive the loan proceeds and for Turpin to repay the same. Had Worthington known that Fuller expected him to look only to Turpin and the property for repayment, Worthington would not have made the loan.

Unaware of the setup, however, Worthington agreed to loan the money to Fuller. Worthington withdrew money from his IRA accounts and borrowed \$200,000 himself in order to come up with the cash to loan to Fuller.

Pursuant to a promissory note dated May 10, 2005, Fuller borrowed \$300,000 from Worthington, and promised to repay that principal amount, plus interest in the fixed amount of \$75,000, by September 1, 2006. The note was secured by a third deed of trust on the Wallingford Lane property. The note recited on its face that it had been arranged by real estate broker Rod Apodoca.<sup>1</sup>

In advance of the due date, Turpin told Worthington that the loan was not going to be timely repaid. Turpin proposed to pay Worthington \$2,700 per month to delay foreclosure proceedings, but he did not assume any liability on the loan, and the terms of the loan were not modified. Worthington agreed not to enforce the note and deed of trust as long as the payments were made. Turpin's payments were intended to be forbearance payments only and were not intended to constitute postdefault interest on the loan. No amount of principal or interest was ever paid to Worthington.

In Worthington's action against Fuller, the court decreed that Fuller owed Worthington \$300,000 in principal, interest in the amount of \$75,000 through September 1, 2006, interest on the amount of \$300,000 at the rate of seven percent per annum from September 1, 2006 through August 1, 2011, and daily interest of \$57.53 through the date of foreclosure, plus attorney fees and costs. The court ruled in favor of Worthington on

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<sup>1</sup> We observe that elsewhere in the record the broker's name is spelled "Apodaca."

his request for judicial foreclosure, and provided for a deficiency judgment against Fuller in the event the sale of the property did not cover the amount owing. Fuller appeals.

## II

### DISCUSSION

#### A. *Commercial Code Section 3309:*

##### (1) *Lost note—*

Commercial Code section 3309, subdivision (a) provides: “A person not in possession of an instrument is entitled to enforce the instrument if (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (2) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.”

Fuller argues that Worthington had no right to enforce the note because he neither produced the original note at trial nor proved that he was in possession of the original note when it was lost. Although the court found that “Worthington [had] misplaced the original Note while it was due and enforceable,” Fuller contends the evidence does not support this finding. We disagree.

Worthington testified that he was certain both that he had been in possession of the original note before the litigation was commenced and that he had given the original note to the attorney who filed the lawsuit on his behalf—Paul Kramer. Attorney Kramer testified that he did not remember one way or the other whether Worthington had given him the original note. Attorney Kramer further testified that he would ordinarily return an original negotiable instrument to a client, but that, in this case, he could only say that he did not remember whether he had ever received the original note or not. Worthington also testified that the issue of the whereabouts of the original

note came up in conversation with his ex-wife, and she confirmed that she did not have it.

Fuller attempts to poke several holes in the testimony. First, he says the evidence does not show that Worthington ever had possession of the original note in the first place.

At deposition and at trial, Worthington was asked about the number of pages comprising the original note. In answer to that question, he repeatedly expressed concern that he did not understand certain legal terminology. He was uncertain whether or not the deed of trust was properly characterized as an attachment to the note, but in his words they were “attached together” or “bundled into one document.” At trial, he stated both that the note was one page long (which is correct) and that it was four pages, including the deed of trust. Worthington acknowledged having said at deposition that he believed the note was two pages long, but he stated at trial that this number was incorrect. Fuller insists that this inconsistency in Worthington’s testimony shows he never had possession of the original note in the first place.

We disagree. When Worthington looked at the copies of the note and deed of trust, which were exhibits at trial, he then and there stated he did not know how many of the pages were considered to be a part of the note, because he was unfamiliar with the applicable legal terminology and he thought there was a semantics issue. The fact that, even looking at copies in court, he did not know whether he should characterize the note as being one page long or whether he should characterize it as being four pages long because the deed of trust was part and parcel of that legal document, shows that his description of the number of pages the original note had has little bearing on whether he ever had possession of it.

Despite a barrage of questions by Fuller’s counsel, Worthington steadfastly maintained that he was certain he had had possession of the original note. This testimony alone supports a finding that Worthington had been in possession of the original note. We do not reweigh the evidence or reassess the credibility of witnesses. (*Johnson v.*

*Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.)

As for what happened next, Fuller contends Worthington concocted the whole story about giving the original note to his attorney. Fuller says Attorney Kramer gave overwhelming testimony to show that Worthington never gave him the original note. This argument is disingenuous. Attorney Kramer testified repeatedly that he did not remember one way or the other whether he had received the original note. This can hardly be construed as contradicting Worthington's testimony. Even if Attorney Kramer had returned the original note to Worthington, because he commonly did return original negotiable instruments to his clients, this would not undercut Worthington's testimony that he had given the original note to Attorney Kramer. It would only support an inference that once the original note was returned to Worthington, it was misplaced while in Worthington's direct possession.

Fuller also endeavors to make much of Worthington's uncertainty as to exactly when he gave the original note to Attorney Kramer. At trial, Worthington testified that he gave the note to Attorney Kramer about the time he hired him, probably around June 2009. However, Fuller's counsel read to Worthington an excerpt from a memorandum of points and authorities signed by Worthington's subsequent attorney, Ignacio Lazo, on August 18, 2010. That excerpt stated that Worthington had delivered the original note to Attorney Kramer in February 2010, in response to discovery requests. We disagree with Fuller's conclusion that this inconsistency in the dates shows that Worthington never gave the note to Attorney Kramer. Worthington remained certain that he had given the original note to Attorney Kramer, although he did not have a recollection of the specific date. It was for the trier of fact to determine whether Worthington's testimony that he had given the original note to Attorney Kramer was credible despite the uncertainty as to the date. (*Johnson v. Pratt & Whitney Canada, Inc.*, *supra*, 28 Cal.App.4th at p. 622.)

Next, Fuller says the fact Worthington discussed the missing note with his ex-wife proves he never gave it to Attorney Kramer. However, Worthington did not testify, as Fuller implies, that because he did not know what he had done with the original note, he asked his ex-wife if she had it. Rather, Worthington acknowledged having checked with his ex-wife as to whether she could have obtained possession of the note by mistake. This may be construed to show nothing other than prudence once the note could not be located, especially when Attorney Kramer testified that he would ordinarily return an original negotiable instrument to his client at some point.

In addition to the foregoing, Worthington testified that he had never transferred or assigned the original note to another, and that it had never been subjected to levy. This, combined with his testimony that he had been in possession of the original note, supports a finding that Worthington had been in possession of the original note and that it became lost while in his possession, or by extension, in the possession of his attorney.

(2) *Adequate protection*—

Commercial Code section 3309, subdivision (b) provides in pertinent part: “The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.”

Here, the judgment requires that Worthington defend and indemnify Fuller against any claim for payment made by one in possession of the original note. Fuller insists that this is not adequate protection under the statute. He says that Commercial Code former section 3804 would have required the posting of a bond, and that is what the court should have required here. But the current statute, section 3309, does not require the posting of a bond. It only requires that the person required to pay the note be protected by any reasonable means. As stated in *Crystaplex Plastics, Ltd. v.*

*Redevelopment Agency* (2000) 77 Cal.App.4th 990, at page 996, “[i]n the limited cases covered by 3-309 the payee may sue . . . the drawer on a stolen (or lost) instrument, provided the payee indemnifies the drawer against the possibility of a second claim on the . . . check.’ [Citation.]” The court afforded Fuller adequate protection under the current statute.

*B. Usury:*

*(1) Introduction—*

Fuller contends that if this court should disagree with his arguments about Commercial Code section 3309, then it should at least reduce the amount of the judgment. He asserts that the interest rate payable under the note is usurious. As discussed above, the \$300,000 note dated May 10, 2005 was due and payable less than 16 months later, on September 1, 2006. The amount of interest owing on that date was a fixed sum of \$75,000.

“Article XV, section 1, of the California Constitution sets forth California’s prohibition of usury. It limits the interest rate lenders can charge on nonpersonal loans to the higher of 10 percent or 5 percent plus the Federal Reserve Bank of San Francisco’s rate on the 25th day of the month preceding the date the agreement was contracted. However, the limitation does not apply to, among others, ‘any loans, made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property . . . .’ [Citation.]” (*Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.* (2007) 153 Cal.App.4th 1373, 1379.)

*(2) Broker arrangement—*

*(a) application of Evidence Code section 622*

Here, Worthington contends the interest rate contained in the note is not usurious because the loan was arranged by a real estate broker. Fuller, however,

contends that the loan was not in fact arranged by a real estate broker, so the interest rate is usurious.

The note recites on its face: “This Note and the deed of trust securing it was arranged by Rod Apodoca, California real estate broker [license] number 01179462.” As Worthington points out, Evidence Code section 622 provides: “The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.” He argues that this court, in *Park Terrace Limited v. Teasdale* (2002) 100 Cal.App.4th 802, has previously held that section 622 is properly applied as a conclusive presumption to a promissory note which recites that it was arranged by a real estate broker.

Indeed, in that case, we stated: “First, we conclusively presume the truth of the provision in each note that a licensed real estate person ‘arranged’ the obligation. (Evid. Code, § 622.) Even were we not to rely on this conclusive presumption, the evidence supports such a conclusion.” (*Park Terrace Limited v. Teasdale, supra*, 100 Cal.App.4th at p. 806.) So, in one sentence of the opinion we made note of section 622. Then, we then devoted four pages of the opinion to a discussion of why the evidence showed that the broker had arranged the loan in that particular case and to an analysis of a split of legal authority on fact patterns similar to those then before us. (*Id.* at pp. 806-809.) We simply did not have occasion to perform an in-depth analysis of whether the section 622 conclusive presumption should apply to recitals concerning arrangements made by real estate brokers.

As Fuller points out, some years after our decision in *Park Terrace Limited v. Teasdale, supra*, 100 Cal.App.4th 802, another court decided *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P., supra*, 153 Cal.App.4th 1373. In *Stoneridge*, the court aptly observed that Evidence Code section 622, by its terms, “‘does not apply to the recital of a consideration.’” (*Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P., supra*, 153 Cal.App.4th at p. 1382.) The *Stoneridge* court

opined that a recital about a loan having been arranged by a broker was a recital that affected consideration. It explained that inasmuch as the recital affected whether an otherwise usurious rate of interest could be lawfully charged, it affected the amount of consideration flowing to the lender under the note. Therefore, it reasoned, the section 622 presumption did not apply to a recital concerning arrangements by a real estate broker. (*Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.*, *supra*, 153 Cal.App.4th at p. 1382.) We find that reasoning persuasive. Indeed, we observe that another court has followed *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.C.*, *supra*, 153 Cal.App.4th 1373, albeit without analysis. (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1443.)

Here, Worthington made a loan to Fuller in exchange for certain consideration, that being repayment of interest at a certain rate. Because the Evidence Code section 622 conclusive presumption does not apply to recitals of consideration, the conclusive presumption does not apply in this instance. Consequently, we turn to the evidence.

*(b) evidence*

Worthington testified that he, Fuller and Turpin came up with the amount of \$75,000 in interest to be charged under the note. He explained that the figure was selected so that he could get approximately 25 percent interest on the loan. According to Worthington, “Mr. Fuller educated me that it was a handsome interest rate and that a broker would be required.” Worthington left it to Fuller and Turpin to identify a broker to be involved in the transaction. Worthington further testified that he never met Apodoca and had no information pertaining to what, if anything, Apodoca did in connection with the loan. He had no information to the effect that Apodoca facilitated the entering into the note and deed of trust. Furthermore, Worthington acknowledged that he had no information to the effect that Apodoca performed a title search, drafted any of the terms of the documents, or even reviewed any of the documents. Finally,

Worthington testified that he was not present when the documents were drafted and that Turpin delivered the documents to him.

Fuller testified that the \$75,000 figure was included in the note because that was what Worthington wanted. He further testified that Apodoca's name was placed in the note "because [Worthington] wanted to circumvent the usury laws and . . . he was told that you need a . . . broker to orchestrate the loan to do so." Fuller further testified that Apodoca's involvement in the transaction was "absolutely none." He said he was not aware of Apodoca having any role in setting the interest rate, performing a title search, or preparing or reviewing the documents. In addition, Fuller testified that he never met with Apodoca in connection with the transaction, Apodoca did not participate in meetings, and he was never told that Apodoca played any role in the matter.

In its statement of decision, the trial court correctly stated that Fuller had the burden of proof on the defense of usury. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798-799.) Although it found that neither Worthington nor Fuller ever spoke with Apodoca, or "had any personal knowledge of what [Apodoca] did or did not do concerning this transaction[,] " "[n]o credible evidence was offered to show that [Apodoca] did not arrange the Note."

Substantial evidence does not support the last finding. The testimony showed that the loan terms were negotiated by Worthington, Fuller and Turpin, and that neither Worthington, as lender, nor Fuller, as borrower, had ever met Apodoca or been aware of his involvement in any way. How can a broker "arrange" a loan if he or she has no involvement whatsoever with either the lender or the borrower?

The evidence only admits of the possibility that Turpin, unbeknownst to either Worthington or Fuller, could have had Apodoca draft the documents after the terms had been negotiated, or perhaps review documents Turpin himself had prepared. However, this alone would not constitute "arranging" the loan so as to defeat a claim of

usury. (*Gibbo v. Berger* (2004) 123 Cal.App.4th 396, 402-403; Civ. Code, § 1916.1.<sup>2</sup>) “When viewed in the context of ‘arranging a loan,’ the phrase ‘arranged by’ must refer to some conduct by a real estate broker, acting as a third party intermediary . . . , that causes a loan to be obtained or procured. Such conduct by a broker includes structuring the loan as the agent for the lender [citation]; setting the interest rate and points to be paid, setting the terms of the forbearance agreement, reviewing the loan and forbearance documents, conducting title searches, or drafting the terms of the loan [citations].” (*Gibbo v. Berger, supra*, 123 Cal.App.4th at p. 402, fn. omitted.) Merely, drafting forms in conformity with a deal struck by the principals does not suffice. (*Id.* at p. 403.) Consequently, the evidence compels the conclusion that Apodoca did not arrange the note, and the exception to the usury prohibition does not apply.

(3) *Estoppel*—

By order of October 5, 2012, we requested that the parties file supplemental letter briefs addressing whether Fuller, having testified that the recital about Apodoca was included in the promissory note in order to circumvent the usury laws, should be estopped from arguing that the interest rate under the note was usurious. Having reviewed the parties’ cited authorities, as well as others, we observe that in most cases the courts leave the parties to obviously usurious loans where they find them. (See, e.g., *Teichner v. Klassman* (1966) 240 Cal.App.2d 514, 523; *Martin v. Ajax Construction Co.* (1954) 124 Cal.App.2d 425; *Stock v. Meek* (1950) 35 Cal.2d 809.) Furthermore, the

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<sup>2</sup> Civil Code section 1916.1 provides in pertinent part: “[A] loan or forbearance is arranged by a person licensed as a real estate broker when the broker (1) acts for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another, (2) acts for compensation or in expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business for another . . . , or (3) arranges or negotiates for another a forbearance, extension, or refinancing of any loan secured by real property in connection with a past transaction in which the broker had acted for compensation or in expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business.”

parties before us have cited no case in which a lender in a deliberately usurious transaction was permitted to work an estoppel against the borrower so as to be able to collect the previously uncollected interest from the borrower. Rather, in *Teichner v. Klassman*, *supra*, 240 Cal.App.2d 514, the case most nearly on point, the court allowed the plaintiff lender to recover only the principal owed, not interest at the usurious rate. (*Id.* at pp. 522-524.) Applying the principles of *Teichner v. Klassman*, *supra*, 240 Cal.App.2d 514, we conclude that Fuller is not estopped to argue usury.

(4) *Reformation*—

By order of October 10, 2012, we requested that the parties be prepared to address, at oral argument, whether the note should be reformed to bear interest at the maximum rate permitted by law. However, Worthington's second amended complaint contains no cause of action for reformation. Furthermore, this is not a situation, such as the one in *First American Title Ins. & Trust Co. v. Cook* (1970) 12 Cal.App.3d 592, where the usurious provision was inserted due to scrivener error. Where the parties have deliberately included a usurious provision in the note, we leave them where we find them. (*Teichner v. Klassman*, *supra*, 240 Cal.App.2d 514.)

(5) *Conclusion*—

We conclude that the loan provision requiring the payment of a fixed sum of \$75,000 in interest was usurious and that the court erred in awarding that sum to Worthington.

*C. Offset against Principal:*

Worthington testified that, for a time, Turpin paid him \$2,700 per month to hold off on foreclosure proceedings. According to Worthington, Turpin started making payments on October 1, 2006. Worthington said there were some partial payments, and he thought the first payment was only \$2,000. He believed either full or partial payments were made for about 26 months. Worthington thought Turpin stopped making payments

about December 2008, but may have made a final payment in March 2009. Worthington testified that the total amount Turpin had paid to him was probably between \$50,000 and \$72,000.

Worthington said that he had never discussed the Turpin arrangement with Fuller and he had believed that Fuller was not a party to his oral agreement with Turpin. Along the same lines, Fuller testified that he never authorized Turpin to make a new agreement with Worthington on his behalf. The trial court found that the arrangement with Turpin did not change the loan terms and that “[n]o part of [Turpin’s] payments was to be applied against principal or interest due on the note.”

We agree that the arrangement between Worthington and Turpin did not serve to modify the terms of Fuller’s loan. However, we disagree with the court’s determination that their arrangement controlled whether Turpin’s payments were to be credited against amounts owing under the loan. It is clear that Turpin made the payments because Fuller was not making payments himself and Turpin did not want Worthington to foreclose. In other words, Turpin’s payments were not a gift, but were made with respect to the loan, and Worthington accepted them as such.

Given this, Fuller claims that, if nothing else, the forbearance payments Turpin made should have been offset against the principal balance of the note. The cases he cites, *District Bond Co. v. Haley* (1935) 2 Cal.2d 308, *Westman v. Dye* (1931) 214 Cal. 28, and *Shirley v. Britt* (1957) 152 Cal.App.2d 666, all support the general proposition that an innocent borrower’s interest payments, made at a usurious rate, should be credited against the principal owing by him. However, the cases do not address either the situation where the payments in question are made not by the borrower, but by a third party who is trying to protect his own ownership interest in the property, or the situation where a sophisticated borrower knowingly participates in a transaction designed to circumvent the usury laws.

However, we observe that the case of *Paillet v. Vroman* (1942) 52 Cal.App.2d 297 provides support for the assertion that usurious interest payments made by a third party may be credited to the principal owing by the borrower in a proper case. (*Id.* at pp. 306-308.) The *Paillet* court stated: “If the usurious interest was received by [the lender], we can see no difference whether the payments were directly made by [the borrower] or by a third party on his behalf . . . . A statutory penalty is imposed upon the receipt of usurious interest, and not upon the source of its payment.” (*Id.* at p. 306.)

We find this reasoning persuasive and conclude that each payment made by Turpin should have been credited against principal. On remand, the court shall conduct a trial on the amount of the payments made by Turpin to be so credited.

*D. Prejudgment Interest:*

Civil Code section 3287, subdivision (a), permits an award of prejudgment interest to a person who is entitled to recover a sum certain as of a particular day. In the matter before us, the court, in its September 6, 2011 judgment for judicial foreclosure, awarded Worthington “[i]nterest on the principal balance of \$300,000.00 at the legal rate of seven percent (7%) from and after September 1, 2006 through August 1, 2011 in the total amount of \$97,463.04, plus daily interest thereafter at the rate of \$57.53 per day through the date of entry of this Foreclosure Judgment[.]”

Fuller claims that it was error to award prejudgment interest. We disagree, for the law permits the recovery of interest at the legal rate from the date of maturity of a usurious loan. (*Epstein v. Frank* (1981) 125 Cal.App.3d 111, 122-123.) “The denial of interest up until the maturity of the note is a sufficient deterrent against the exacting of usurious interest. The payee, notwithstanding the usury, has the right to recover the principal of the note in full on the date of its maturity. If the obligor improperly withholds payment of this obligation it is neither unjust nor contrary to policy that he be chargeable with interest at the legal rate from the date he was obligated to pay the note

until the date he discharges that obligation, or to the date a judgment is rendered against him.” (*Id.* at p. 123.)

As Fuller views it, the fact that a judgment of judicial foreclosure is at issue should make a difference. However, he cites no authority for this proposition in his opening brief. In his reply brief, he cites only Code of Civil Procedure section 726, albeit without citation to any of its various subdivisions and without discussion of any language of the statute.

We note that Code of Civil Procedure section 726, subdivision (b) provides that a decree of foreclosure “shall declare the amount of the indebtedness or right . . . secured and, . . . shall determine the personal liability of any defendant for the payment of the debt secured . . . .” It does not state that the amount so determined may not include interest as permitted by law. Fuller having provided no authority to show that prejudgment interest must be excluded from the amount of indebtedness determined under a judgment of judicial foreclosure, he has failed to meet his burden to show that the trial court erred in awarding prejudgment interest under Civil Code section 3287.

However, we conclude that the court erred in the amount of prejudgment interest it awarded. On remand, the court shall determine not only the amount of the payments Turpin made, but the timing of those payments. Those payments shall be credited 100 percent to principal and the court shall calculate prejudgment interest at the rate of seven percent per annum on the running balance owed by Fuller to Worthington, beginning September 1, 2006.

*E. Statement of Decision:*

On April 20, 2011, the court issued a four-page tentative ruling following a court trial. The ruling recited that the parties had requested a statement of decision and it directed Worthington to prepare a proposed statement of decision consistent with the tentative ruling. The ruling further stated: “The court will review that document, make

any necessary additions and/or revisions, and then serve its proposed statement of decision, subject then to any proposals or objections by the parties. At that time, the court will take the matter under submission. Once the court considers any proposals and/or objections, then [the] court will issue its final statement of decision.”

Worthington submitted a proposed statement of decision on May 2, 2011, and served a copy on Fuller. The court adopted the proposed statement of decision as its final statement of decision on June 6, 2011. In its minute order adopting the proposed statement of decision, the court stated that it had not received any objections or proposals regarding the proposed statement of decision.

Fuller filed an ex parte application to set aside the final statement of decision and to allow objections and counterproposals to the proposed statement of decision. In that application, Fuller quoted the portion of the April 20, 2011 tentative ruling wherein it stated that the court would serve its proposed statement of decision and give the parties an opportunity to object. Fuller pointed out that the court had failed to serve a proposed statement of decision and to give him an opportunity to object. The court granted Fuller’s ex parte application, set aside the final statement of decision, and gave Fuller 13 days to submit objections and counterproposals to the proposed statement of decision prepared by Worthington.

Fuller thereafter filed 10 pages of objections. He asserted, inter alia, that the court had failed to comply with Code of Civil Procedure section 632 because: (1) it did not give him an opportunity to file a request for statement of decision specifying controverted issues; (2) the proposed statement of decision failed to set forth controverted issues; (3) the 81 findings of fact contained in the proposed statement of decision were not tied to any principal controverted issues; and (4) the proposed statement of decision did not set forth any legal bases for any principal controverted issues. In addition, Fuller made specific objections to 13 proposed statements, one conclusion of law, and the entirety of the proposed statement of decision. The court thereafter overruled Fuller’s

objections and adopted Worthington's eight-page proposed statement of decision as its final statement of decision.

On appeal, Fuller renews his argument that the court failed to comply with Code of Civil Procedure section 632 and thus erred in issuing the statement of decision. He also argues in a general way that the final statement of decision fails to address any of the principal controverted issues in the case or set forth the legal bases for the principal controverted issues.

However, the reporter's transcript shows that, after the conclusion of closing argument, the court explained to the parties the procedure it intended to follow, as later documented in the April 20, 2011 order, with respect to the preparation of a proposed statement of decision and the filing of objections thereto. Neither party objected to the procedure. When the court granted Fuller's ex parte application, Fuller was given an opportunity to file objections to the proposed statement of decision and indeed did so. He could have, at that time, specified any controverted issues which he thought were unaddressed in the proposed statement of decision, instead of simply complaining in a generic way that controverted issues were not addressed. Having failed to identify specific controverted issues to be addressed, he is deemed to have waived his right to object to the statement of decision for failure to address those issues. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292.) Furthermore, Fuller had his opportunity to make proposals to the content of the statement of decision and in fact offered nine pages of specific objections to the proposed statement of decision.

Fuller has not shown either that the court failed to afford him an opportunity to raise the issues Code of Civil Procedure section 632 permits, or that he was prejudiced by the procedure the court used. Moreover, when the court described the procedure it intended to utilize, Fuller made no objection. He has not shown error.

III  
DISPOSITION

The judgment is reversed to the extent it awards Worthington a fixed payment of \$75,000 in interest from Fuller, fails to credit Turpin's payments to principal, and awards prejudgment interest based on the principal balance of \$300,000 from September 1, 2006 through August 1, 2011, rather than on the running principal balance as reduced by the application of Turpin's payments to principal. The judgment is affirmed in all other respects. The matter is remanded to the trial court for further proceedings consistent with this opinion. In the interests of justice, each party shall bear his own costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.