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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HERITAGE BANK OF COMMERCE,

Plaintiff and Respondent,

v.

ERIN GARNER, TRUSTEE, et al.,

Defendants and Appellants.

H037220

(Santa Clara County

Super. Ct. No. 1-11-CV202652)

This case involves business loans made by respondent Heritage Bank of Commerce ("Bank") to defendant borrowers, four named limited liability companies, for the purpose of property development. The Bank brought an action for judicial foreclosure (first cause of action against borrowers), specific performance and appointment of a receiver (second cause of action against borrowers), and breach of guaranty (third cause of action against guarantors). The Bank obtained a right to attach order and an order for issuance of a prejudgment writ of attachment against the property of Erin Garner and Susan Garner as trustees of the Erin Garner Living Trust Dated 1997 ("Trust") and other guarantors who were trustees of various trusts.

Erin Garner, Sue Garner, and the Trust appeal from that right to attach order.¹ (See § 904.1, subd. (a)(5).)² Appellants state that the "sole issue" on appeal is whether respondent Bank laid "a proper, specific evidentiary foundation" for a prejudgment writ of attachment. They argue that this court must reverse the trial court's orders because they were "totally unsupported by admissible, competent evidence." Their arguments are essentially a challenge to the admissibility of the evidence. They do not argue that the evidence, if admissible, was insufficient.

We affirm.

I

Procedural History

On June 9, 2011, the Bank filed its complaint, which was verified on information and belief by Dustin Warford, a Vice-President, Construction Loan Officer of the Bank. The complaint alleged the following. The Bank was in the business of making commercial loans and, on or about June 13, 2008, the Bank made a secured loan in the principal amount of \$1,800,000 to four named defendants, who the Bank was informed and believed were California limited liability companies. The secured loan, labeled the "Land Loan," was made pursuant to a "Business Loan Agreement" and evidenced by a promissory note, both dated June 13, 2008. The complaint stated that true copies of both the agreement and note were attached thereto as exhibits.

In the promissory note attached to the complaint, the borrowers promised to pay the principal amount of \$1,800,000 at an initial and minimum variable rate of 5.5 percent. The interest rate varied based on the Prime Rate index and was set at "a rate of 0.500

¹ Respondent Bank argues that Erin Garner and Sue Garner lack standing in this appeal as individuals. The challenged orders applied to them as trustees of the Trust and no argument has been made that they do not have standing in their capacity as trustees.

² All further statutory references are to the Code of Civil Procedure unless otherwise stated.

percentage points over the Index." The note provided for the borrowers to make a "regular monthly payment of all accrued unpaid interest due as of each payment date, beginning July 12, 2008" It also required borrowers to "pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on June 13, 2009." It provided that, upon default, the interest rate on the note immediately increased "by adding a 5.000 percent point margin ('Default Rate Margin')."

The complaint averred that the borrowers' loan obligations under the note were secured by a deed of trust, also dated June 13, 2008, on specified property in Los Gatos, California. It further indicated that, at the time the secured loan was made, the Bank concurrently made an unsecured loan of \$765,000, which was evidenced by an unsecured promissory note. The complaint stated that a true copy of this promissory note was attached as Exhibit D and incorporated by reference.

According to the complaint, a number of written guaranties, most dated March 11, 2008, had been executed. It stated that true copies of all loan guaranties were attached as exhibits and incorporated by reference.

Separate written guaranties from Erin Garner and Sue Garner as individuals were among the March 11, 2008 guaranties attached as exhibits to the complaint. The complaint alleged that "[p]ursuant to two other written guaranties, each of which is dated June 13, 2008, Olofsen, as trustee, and E. Garner and S. Garner, as trustees, guaranteed all of the obligations of Borrowers to [the Bank], including without limitation, the Land Loan and the Unsecured Loan obligations." A written "Commercial Guaranty" from the Trust, apparently signed by Erin Garner and Susan Garner as trustees, was attached as an exhibit to the complaint. In this guaranty, the Trust agreed to "pay upon demand all Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses incurred in connection with the enforcement of this Guaranty."

According to the complaint, the borrowers, the Bank, and the guarantors entered into a number of forbearance agreements with respect to the loans. They entered into a

further forbearance agreement, denominated "Third Amended and Restated Forbearance Agreement" with an effective date of July 13, 2010. This forbearance agreement consolidated the secured and unsecured loans into one loan and provided that the secured promissory note would be amended to reflect a principal of \$1,938,558.92 and the amended note would continue to be secured by the deed of trust and the unsecured note would be deemed satisfied. The complaint stated that a true copy of this forbearance agreement was attached as an exhibit and incorporated by reference.

The complaint specified that written modifications of the deed of trust, dated September 13, 2009 and July 13, 2010 respectively, were recorded. It stated that true copies of the deed of trust and subsequent modifications were attached as Exhibit C and incorporated by reference. The July 13, 2010 modification stated that the principal amount of the note had been increased to \$1,938,558.92.

The complaint alleged that on or about January 13, 2011, the borrowers, the Bank, and the guarantors entered into a "First Amendment to Third Amended and Restated Forbearance Agreement" (hereinafter "Final Forbearance Agreement"). It further stated that a true copy of this agreement was attached as an exhibit and incorporated by reference.

The Final Forbearance Agreement extended the termination date of forbearance conditioned upon, among other requirements, subsequent progress with respect to the funded project by certain dates. Specifically, borrowers were required to have "(i) completed the lawful subdivision of the Project into multiple lots (the 'Lots'), obtained all California Department of Real Estate approvals required for the sale of the Lots to third parties, and entered into contracts or agreements of sale with respect to no less than three (3) of the Lots by not later than April 13, 2011; and (ii) closed escrow pursuant to at least one of the contracts or agreements of sale described in (i) above by no later than May 13, 2011." It also required borrowers to pay a supplemental loan fee of \$4,734.96 on or before April 13, 2011. It terminated by its own terms by, among other occurrences,

the failure of the obligors to "fulfill each and every condition necessary to cause a forbearance period to be in effect" or by July 11, 2011, at the latest.

The complaint averred that the borrowers had failed to comply with their obligations to the Bank by not paying monthly interest payments due in April 2011 and May 2011 and by (1) not completing "by April 13, 2011 the lawful subdivision of the Project into multiple lots," (2) not obtaining "by April 13, 2011 all California Department of Real Estate approvals required for the sale of the lots in the Project to third parties," (3) not entering "into sale contracts, by April 13, 2011, for no less than three lots in the Project" and closing "at least one sale by May 13, 2011," and (4) not paying "a \$4,734.96 loan fee on or before April 16, 2011."

The complaint alleged that on or about May 26, 2011, the Bank, through its counsel sent a written notice of default under the Final Forbearance Agreement and other loan documents. It stated that a true copy of the notice of default was attached as an exhibit and incorporated by reference.

The complaint averred that as of May 26, 2011, the borrowers owed \$1,903,617.32, which consisted of a principal balance outstanding of \$1,875,696.96, interest of \$23,185.40, and a loan fee of \$4,734.96. It further stated that interest was thereafter accruing "at an annual rate equal to the greater of (i) [5.5 percent] or (ii) one and one-half [*sic*] percent (0.50%) in excess of the prime rate, plus a default margin of five percent (5%)." It alleged that due to the borrowers' default, each of the guarantors were obligated to the Bank in the amount of at least \$1,903,617.32 plus accruing interest after May 26, 2011, and costs and fees.

On June 15, 2011, the Bank filed a notice of application and hearing for a right to attach order and an order for issuance of a writ of attachment. The hearing was noticed for July 19, 2011. The application, which was signed under penalty of perjury by Dustin Warford, sought to include estimated costs of \$5,000 and estimated allowable attorney fees of \$45,000 in the amount to be secured by attachment. The Bank also filed the

supporting declarations of Dustin Warford, a bank employee, and Stephen J. Kottmeier, an attorney representing the Bank. Warford's declaration indicated that, as of June 13, 2011, a total of \$1,909,244.41 was owed under the loan, which included principal of \$1,875,696.96, interest of \$28,812.49, and a loan fee of \$4,734.96. He stated that interest was accruing at a rate of "\$312.6161" [*sic*] per day.

On July 12, 2011, Erin Garner and Sue Garner, as trustees and as individuals, and the Trust filed a notice of opposition to the Bank's application for a writ of attachment and a legal memorandum. They filed no supporting affidavits or declarations and they did not specifically oppose the amount sought to be secured by attachment.

On July 15, 2011, the Bank filed and served a reply memorandum and Warford's and attorney Kottmeier's supplemental declarations. Warford's supplemental declaration indicated that, as of July 14, 2011, a total of \$1,951,020.85 was owed under the loan, including \$1,875,696.96 in principal, \$70,589.92 in interest at the default rate, and a loan fee of \$4,734.96; and plaintiff had incurred attorney's fees and costs in excess of \$25,000.

The court issued a tentative ruling on the application for a writ of attachment. It stated in part that "the objections to evidence are not sufficiently specific and not well taken, and are overruled."

On July 19, 2011, the court held the hearing on the Bank's application. The court made clear that it had considered the opposition papers even though it had indicated in its tentative ruling that it believed the opposition had been untimely filed.

By order filed July 26, 2011, the court determined that the Bank had a right to attach the property of certain guarantors, including Erin Garner and Susan Garner as trustees of the Trust, in the amount of \$1,943,617.32, plus per diem interest at \$312.62 from June 14, 2011 through the date of the hearing.³ It ordered the clerk to issue a writ of

³ Appellants raise no challenge to the amount of the attachment. Section 483.015, subdivision (a), generally provides that "the amount to be secured by an attachment is the sum of the following: [¶] (1) The amount of the defendant's indebtedness claimed by the

attachment. Its order did not apply to the property of Erin Garner or Susan Garner as individuals.

II

Discussion

A. Legal Background

"Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought."

(§ 484.010.) "Attachment is, of course, a prejudgment remedy; after final judgment, the plaintiff may, if necessary, proceed by way of execution." (Cal. Law Revision Com. com., 15A West's Ann. Code Civ. Proc. (2011 ed.) foll. § 484.010, p.102.)

The application must be executed under oath and must include the statutorily mandated elements. (§ 484.020.)⁴ The application for a right to attach order and a writ

plaintiff. [¶] (2) Any additional amount included by the court under Section 482.110." Subdivision (b) of section 482.110 provides: "In the discretion of the court, the amount to be secured by the attachment may include an *estimated* amount for costs and allowable attorney's fees." (Italics added.) Appellants's notice of opposition did not object to the amount sought to be secured by attachment (§ 484.060, subd. (a)) and did not claim any reduction in the amount of attachment pursuant to section 483.015, subdivision (b).

⁴ The application must "include all of the following: [¶] (a) A statement showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued. [¶] (b) A statement of the amount to be secured by the attachment. [¶] (c) A statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based. [¶] (d) A statement that the applicant has no information or belief that the claim is discharged in a proceeding under Title 11 of the United States Code (Bankruptcy) or that the prosecution of the action is stayed in a proceeding under Title 11 of the United States Code (Bankruptcy). [¶] (e) A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment. Where the defendant is a corporation, a reference to 'all corporate property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010' satisfies the requirements of this subdivision. Where the defendant is a partnership or other unincorporated association, a reference to 'all property of the partnership or other

of attachment must be "supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based." (§ 484.030.) But "the application itself may contain the necessary supporting evidence and, since it is executed under oath, it may constitute a sufficient affidavit for the purposes of this section." (Cal. Law Revision Com. com., 15A West's Ann. Code Civ. Proc. (2011 ed.) foll. § 484.030, p. 111.)

Section 482.040 states: "The facts stated in each affidavit filed pursuant to this title ['Attachment'] shall be set forth with particularity. Except where matters are specifically permitted by this title to be shown by information and belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. As to matters shown by information and belief, the affidavit shall state the facts on which the affiant's belief is based, showing the nature of his information and the reliability of his informant. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts. A verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an affidavit." (See § 2015.5 [use of declaration under penalty of perjury in lieu of affidavit].)

If a defendant desires to oppose the issuance of the right to attach order or objects to the amount sought to be secured by the attachment, the defendant must file and serve upon the plaintiff a notice of opposition, supporting affidavits regarding any disputed factual issues and points and authorities regarding any legal issues no later than five court days prior to the date set for the hearing on the application. (§ 484.060, subd. (a).) "If

unincorporated association which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section 487.010' satisfies the requirements of this subdivision. Where the defendant is a natural person, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached." (§ 484.020.)

the defendant fails to file a notice of opposition within the time prescribed, the defendant shall not be permitted to oppose the issuance of the order." (*Ibid.*)

The plaintiff is allowed to file and serve a reply to opposition two court days prior to the date set for the hearing pursuant to section 484.060, subdivision (c). That section does not expressly provide for or preclude the filing of additional affidavits or declarations. (Cf. § 484.070, subd. (f) [If the plaintiff desires to oppose a defendant's claim of exemption, the plaintiff must timely file and serve "a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised"].)

"At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order, which shall state the amount to be secured by the attachment . . . if it finds all of the following: [¶] (1) The claim upon which the attachment is based is one upon which an attachment may be issued. [¶] (2) The plaintiff has established the probable validity of the claim upon which the attachment is based. [¶] (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based. [¶] (4) The amount to be secured by the attachment is greater than zero." (§ 484.090, subd. (a).) "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (§ 481.190.) This definition "requires that, at the hearing on the application for a writ, the plaintiff must at least establish a prima facie case." (Cal. Law Revision Com. com., 15A West's Ann. Code Civ. Proc. (2011 ed.) foll. § 481.190, p. 20.)

If the court additionally "finds that the defendant has failed to prove that all the property sought to be attached is exempt from attachment, it shall order a writ of attachment to be issued upon the filing of an undertaking as provided" (§ 484.090, subd. (b).)

B. *Verified Complaint*

Citing section 482.040, section 446, and *Lorber Industries v. Turbulence, Inc.* (1985) 175 Cal.App.3d 532 ("*Lorber Industries*"), appellants assert that the Bank could not rely on its verified complaint or the exhibits attached to the complaint in support of its application for a right to attach order and a writ of attachment. As previously indicated, section 482.040 permits a verified complaint that satisfies that section's requirements to "be used in lieu of or in addition to an affidavit" supporting such application. Section 482.040 also applies to any affidavit filed in attachment proceedings so a defendant opposing an application for a right to attach order may rely on a cross-complaint if it meets the section's standards. (See Sen. Com. com., 15A West's Ann. Code Civ. Proc. (2011 ed.) foll. § 482.040, p. 31.)

In *Lorber Industries*, the defendant had relied on its cross-complaint, which was verified by its vice president, and attached documentary evidence in opposing an application for a right to attach order and a writ of attachment. (*Lorber Industries, supra*, 175 Cal.App.3d at p. 536.) The appellate court reconciled section 482.040 with former section 446, which then "specifie[d] that 'when the verification is made on behalf of a corporation or public agency by any officer thereof, . . . the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.' " (*Lorber Industries, supra*, 175 Cal.App.3d at p. 536.) The court concluded that the defendant had not made a valid evidentiary showing in opposition to an application for a right to attach order because "a verified cross-complaint cannot support an opposition to an application for a right to attach order where the verification is made by a corporate officer on behalf of a corporation. [Citation.]" (*Ibid.*)

Section 446 presently provides that "[w]hen a corporation is a party, the verification may be made by any officer thereof." It further states in pertinent part: "[W]hen the verification is made on behalf of a corporation . . . by any officer thereof, the . . . officer's affidavit shall state that he or she has read the pleading and that he or she is

informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true. *However, in those cases the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.*"

(Italics added.)

In this case, the complaint was verified by declaration under penalty of perjury by Warford, "a Vice-President, Construction Loan Officer" of the Bank. His declaration stated that he had read the complaint and was "informed and believe[d] and on that ground allege[d] that the matters stated in the document described above are true." The verified complaint did not satisfy section 482.040's requirement that it "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein" and therefore the verified complaint could not be used independently "in lieu of or in addition to an affidavit" (§ 482.040). But we see nothing in this statute to preclude an applicant for a right to attach order and a writ of attachment from relying on the doctrine of incorporation by reference in its supporting affidavits or declarations under penalty of perjury.

C. Warford's Original Declaration

Appellants maintain that Warford's original declaration was the only document that the trial court could properly consider and it was insufficient.

1. Specific Objections Preserved

Respondent Bank argues that appellants' failure to secure a final ruling on their evidentiary objections resulted in the forfeiture of those objections. As a general rule, "a party objecting to the admission of evidence must press for an actual ruling or the point is not preserved for appeal. [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 619; but see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 532 [where written evidentiary objections are properly filed before summary judgment hearing, they are not waived by trial court's failure to rule].) Evidentiary objections may be preserved for appellate review, however, where further objection would clearly have been a fruitless or idle act.

(See *City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784-785, disapproved to the extent it holds "that litigants must raise written objections orally at the [summary judgment] hearing to preserve them on appeal" in *Reid v. Google, Inc.*, *supra*, 50 Cal.4th 512, 532, fn. 7; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [an objection in the trial court is not required to preserve a claim for appeal if the objection would have been futile].)

We reach the merits of appellants' specific evidentiary claims. First, the court expressly adopted the tentative ruling, which impliedly includes its evidentiary ruling. Second, under the circumstances, their counsel could have reasonably believed that renewing the objections to obtain an express evidentiary ruling at the hearing would have been fruitless. (Cf. *People v. Hovarter* (2008) 44 Cal.4th 983, 1007.)

2. *Personal Knowledge*

Appellants now argue that Warford's original declaration did not establish his personal knowledge "to separately establish the authenticity and foundation for any of the exhibits attached to the complaint." In their written opposition below, they asserted that Warford lacked personal knowledge as to certain facts but they did not object that Warford lacked personal knowledge of the documents that were attached as exhibits to the verified complaint.

Evidence Code section 702, subdivision (a), states the general rule that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." "A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 702, subd. (b).) Evidence sufficient to support a reasonable finding that a witness has personal knowledge meets the evidentiary threshold with respect to the foundational or preliminary fact of "personal knowledge." (See Evid. Code, § 403; Assem. Com. on Judiciary com., 29B Pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 403, p. 19.)

Evidence Code section 702, subdivision (a), also provides that "[a]gainst the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." A "defendant's failure to object timely on the basis of Evidence Code section 702, subdivision (a), constitutes a waiver of this claim on appeal. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 622 . . . [party must object to witness's lack of testimonial competence to preserve this claim on appeal].)" (*People v. Lewis* (2001) 26 Cal.4th 334, 357; see Evid. Code, § 353, subd. (a); Assem. Com. on Judiciary com., 29B Pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 353, p. 599 ["Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence . . . [and] the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. [Citation.]"].)

Appellants did not, by a timely and specific objection in the trial court, preserve for appellate review the foundational claim that Warford lacked personal knowledge of the exhibits. In any event, such contention has no merit.

Warford stated in his declaration: "I am employed by" the Bank "in the capacity of Vice-President, Construction Loan Officer" and "[m]y knowledge of the facts set forth in this declaration arises from the fact that I am one of the lead employees of the bank charged with responsibility for the administration and collection of the loan made to" borrowers. He further stated: "Except for any matter stated on information and belief, I have personal knowledge of each and every fact set forth in this declaration based upon either or both my personal inspection of [the Bank's] business records and the information provided to us by the Borrowers and their representatives, with whom I have been dealing directly since October 2007."

Warford declared that the complaint "set forth in detail the nature of the transaction at issue," the Bank's "rights, privileges, and entitlement to enforce the terms

and conditions of the transaction at issue," "the defendants' defaults," and "the defendants' failure to pay their obligations under the loan agreements and guarantees." He stated that the Bank was in the business of making commercial loans. He reiterated that, in June 2008, the Bank had made two loans to the borrowers that were eventually consolidated into one secured loan. He described the funded development project as involving "the acquisition of two parcels of land and subdivision of those parcels into seven fairly large residential lots with entitlements to enable them to be sold to persons intending to build residences upon them."

In his declaration, Warford further explained that "[e]ach of the guarantees alleged in the Complaint and attached to it as Exhibits E through Q, inclusive, was taken in contemplation of the loans to be made to fund" the development project. His declaration indicated that, as set forth in the complaint, the Bank had entered into a series of forbearance agreements with the borrowers and guarantors but the borrowers had failed to meet certain terms and conditions of the Final Forbearance Agreement. It set forth with particularity the borrowers' breaches and default. It stated that "the forbearance (Exhibits R and S to the Complaint) terminated according to its terms." Warford declared under penalty of perjury that his statements were true and correct.

The superior court understood from the declaration that Warford was adopting the complaint's factual allegations. "[I]t has long been established in this state that an affidavit may incorporate by reference other papers on file in the same action. [Citations.]" (*Newport v. City of Los Angeles* (1960) 184 Cal.App.2d 229, 235.) "An affidavit need not be complete in itself. It may be read together with papers it refers to on file in the same action, under the principle of incorporation by reference. Furthermore, defects or omissions that would be fatal standing alone do not invalidate an affidavit that is sufficient when read together with the pleadings, motions, or papers to which it refers." (2B Cal. Jur. 3d, Affidavits, § 26, pp. 130-131, fns. omitted.)

While perhaps not an ideal model of incorporation by reference, Warford's original declaration implicitly incorporated the complaint's factual allegations and the attached exhibits, all of which the complaint identified as true copies. It may be reasonably inferred from Warford's statements, including those regarding his position at the Bank and responsibilities with regard to administration and collection of the loan, that he had the requisite personal knowledge of the material facts set forth in his declaration and the complaint and of the exhibits attached to the complaint.

3. *Authentication*

Appellants argue that Warford merely referred to the exhibits attached to the verified complaint but failed to authenticate those exhibits. In the trial court, appellants contended that Warford's declaration "discusses a number of documents relating [to] the loan agreement, but it does not authenticate or provide foundation for any of the documents mentioned therein."

As to any document attached to the complaint as an exhibit but not specifically discussed in Warford's original declaration, appellants' authentication claim on appeal was forfeited by their failure to raise any authentication objection directed at such document in the court below. (*People v. Farnam* (2002) 28 Cal.4th 107, 159; Evid. Code, § 353.) In any case, appellant's authentication claim lacks merit.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that *it is the writing that the proponent of the evidence claims it is* or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400, italics added; see Evid. Code, § 250 ["writing" broadly defined].)

"Authentication of a writing is required before it may be received in evidence" or "before secondary evidence of its content may be received in evidence." (Evid. Code, § 1401.)

"The 'writing' referred to in subdivision (a) [of Evidence Code section 1401] is any writing offered in evidence; although it may be either an original or a copy, it must be

authenticated before it may be received in evidence." (Assem. Com. on Judiciary com., 29B Pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1401, p. 444.)

"[A] writing may be authenticated by the presentation of evidence sufficient to sustain a finding of its authenticity. See *Verzan v. McGregor*, 23 Cal. 339, 342-343 (1863)." (Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440.) The statutory means for authenticating a writing are not exclusive. (Evid. Code, § 1410 ["Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved".]) Authentication of a writing may be established by circumstantial evidence and its contents. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187-1188; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435; see Evid. Code, § 600 [inference defined].) "Section 1410 is included in this article [Evid. Code, §§ 1410-1421 ('Means of Authenticating and Proving Writings')] in recognition of the fact that it would be impossible to specify all of the varieties of circumstantial evidence that may be sufficient in particular cases to sustain a finding of the authenticity of a writing." (Cal. Law Revision Com. com., 29B. Pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1410, p. 452.)

"When the requisite preliminary showing has been made, the judge admits the writing into evidence for consideration by the trier of fact. However, the fact that the judge permits the writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic. The trier of fact independently determines the question of authenticity, and, if the trier of fact does not believe the evidence of authenticity, it may find that the writing is not authentic despite the fact that the judge has determined that it was 'authenticated.' See 7 Wigmore, Evidence §§ 2129-2135 (3d ed. 1940)." (Cal. Law Revision Com. com., 29B Pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440.)

Warford's original declaration shows he was one of the bank employees charged with administration and collection of the loan and he had been dealing directly with the borrowers and their representatives since October 2007, a time prior to all the documents attached as exhibits to the complaint. The original documents were impliedly in the Bank's possession as the lender and forbearing party; Warford indicated that he had personally inspected the Bank's business records. We previously concluded that Warford's declaration incorporated the complaint's factual allegations and its attached exhibits, including the guaranties at issue here, and sufficiently established his personal knowledge of those exhibits. It may be reasonably inferred from his declaration and the incorporated complaint that the exhibits to the complaint are true copies. Warford appears as a signatory to a number of the exhibits attached to the complaint, including the Business Loan Agreement, the Deed of Trust modifications, the Third Amended and Restated Forbearance Agreement, and the Final Forbearance Agreement. The Bank met its burden and the exhibits to the complaint now at issue were sufficiently authenticated for purposes of admissibility.

4. *Hearsay*

Appellants charge that Warford "simply reviewed the otherwise hearsay records attached to the verified complaint" and assert that "[t]his was an improper tender of hearsay." They maintain that Warford's original declaration "wholly failed to establish that [Warford] was a custodian of records, or otherwise possessed sufficient personal knowledge to lay a foundation under the business records exception [to] the hearsay rule." They suggest that Warford was required to lay a foundation for a hearsay exception based on upon his personal knowledge.

No hearsay objections concerning the exhibits were raised below. Consequently, appellants did not preserve the issue for review on appeal. (Evid. Code, § 353.) Moreover, where a document is *not* being offered to prove the truth of the matters stated therein, but rather is being offered to show its existence and contents, there is no hearsay

problem. (See Evid. Code, § 1200; see also Sen. Com. on Judiciary com., 29B Pt. 4 West's Ann. Evid.Code (1995 ed.) foll. 1200, p. 4 [A "statement that is offered for some purpose other than to prove the fact stated therein is not hearsay"]; *Pfister v. Dascey* (1886) 68 Cal. 572, 574 ["There is a class of cases in which the very fact in controversy is whether certain things were said or done, and not whether they were true or false; in which cases the words or acts are admissible, not as hearsay, but as original, evidence"]; cf. *Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1042 ["The Promissory Note document itself is not a business record as that term is used in the law of hearsay, but rather is an operative contractual document admissible merely upon adequate evidence of authenticity"].)

5. *Particularity*

Appellants now assert that Warford's original declaration was not sufficiently particular to meet the Bank's evidentiary burden under attachment law. In the court below, appellants argued that Warford's "declaration does not set forth with particularity the terms of the subject loan agreements."

As indicated above, section 482.040, requires that "[t]he facts stated . . . be set forth with particularity." We understand that to mean that the declaration must state evidentiary facts, rather than ultimate facts or conclusions of law, sufficient to establish entitlement to a right to attach order and writ of attachment. (See *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 80.)

By impliedly incorporating by reference the exhibits to the complaint, Warford's declaration "set forth with particularity" the terms of those written documents, including the Final Forbearance Agreement and the Trust's guaranty. His declaration specifically stated the particular ways in which the Borrowers failed to meet the terms and conditions of the Final Forbearance Agreement.

Appellants have not demonstrated that respondent Bank failed to set forth sufficient evidentiary facts to show that it was more likely than not that the Bank will

obtain a judgment against appellants on a claim subject to attachment or otherwise meet its evidentiary burden. Appellants have not specifically argued or demonstrated that Warford's statements that appear based on information or belief were essential to obtaining a right to attach order or an order for issuance of a writ of attachment.⁵

6. *General Objection of Lack of Foundation*

Appellants assert that Warford's original declaration did not lay a sufficient foundation. In the court below, appellants made essentially the same argument.

As stated, an evidentiary objection must be specific, not general. (Evid. Code, § 353, subd. (a); see Assem. Com. on Judiciary com., 29B Pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 353, p. 599.) "Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 854.) "An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.)

Accordingly, appellants' general "lack of foundation" objection did not preserve any evidentiary claims other than those more specifically raised below because it did not specify what foundational or "preliminary fact" required for admission of evidence was missing. (See *People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8 [as a general rule,

⁵ For example, Warford stated in his original declaration that "[b]ased on limited liability company documents provided to us and representations made to us by the Borrowers, it is [the Bank's] understanding . . . that the various guarantors alleged in the Complaint in paragraph 17 are the members of the various limited liability companies that are the Borrowers on the Loan." He further stated that "we have been advised by various members of the Borrowers that there are existing disputes among them regarding who is authorized to take action with respect to development of the Project and the Project appears stalled." He also reported that "[w]e are advised that at least another \$400,000.00 will need to be funded to complete the Project."

"where the objection is lack of proper foundation, counsel must point out specifically in what respect the foundation is deficient"]; *People v. Modell* (1956) 143 Cal.App.2d 724, 728-729 [objection on the ground that "proper foundation has not been laid in this" did not preserve appellate claim]; but see *People v. Cowan* (2010) 50 Cal.4th 401, 502, fn. 36 [hearsay claim was preserved for review where trial court had apparently understood objections to testimony, which included lack of foundation, "as encompassing a hearsay objection"].)

D. Warford's Supplemental Declaration

The appellate record does not disclose that appellants filed any written objections to the supplemental declaration. At the hearing in the court below, appellants' counsel indicated that he had "a problem" with Warford's supplemental declaration because it was given to him a day before the hearing and it did not address the guaranty. Appellants' counsel did not cite any authority or present any evidence in support of his implied claim that the declaration was untimely.

Warford's supplemental declaration stated that he had personal knowledge of the facts stated therein except as to matters stated on information and belief and he could competently testify as a witness. He indicated that the forbearance period under the Final Forbearance Agreement had terminated on July 11, 2011, at which time the full amount of the loan had become due. An exhibit attached to his supplemental declaration was identified as a true and correct copy of the Final Forbearance Agreement, which, as previously stated, provided for the agreement's termination on July 11, 2011, at the latest. There were no other exhibits to the declaration.

On appeal, appellants are not arguing that the reply was untimely. (See § 484.060, subd. (c) ["The plaintiff may file and serve upon the opposing party a reply two court days prior to the date set for the hearing"].) Rather, insofar as we can discern, they now seem to be arguing that the trial court could not consider Warford's supplemental declaration because all supporting declarations must be filed within the time frame

established by section 484.040 and, therefore, the supplemental declaration was untimely filed. They quote a practice guide that cites section 484.040 and warns plaintiffs applying for a right to attach order and writ of attachment that most courts refuse to consider "supplemental" declarations and they should not count on being able to remedy evidentiary gaps in supporting declarations. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) [¶] 9:12, p. 9(II)-85.)

Section 484.040 provides in pertinent part: "At the times prescribed by subdivision (b) of Section 1005, the defendant shall be served with all of the following: [¶] (a) A copy of the summons and complaint. [¶] (b) A notice of application and hearing. [¶] (c) A copy of the application and of *any affidavit in support of the application.*" (Italics added.) Section 1005 requires service and filing of moving and supporting papers at least 16 court days before the hearing.⁶ In the trial court, appellants never objected to the supplemental declaration on the ground that it was not timely filed pursuant to section 484.040. Neither did they argue that section 484.060, subdivision (c), does not permit a plaintiff to file and serve any supplemental declarations with a reply or that Warford's supplemental declaration was not properly served and filed within the time statutorily allowed for a reply. Consequently, such claims were not preserved for appeal.

"The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.]" (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) "Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 . . .)" (*People v. French* (2009) 43 Cal.4th 36, 46.) "The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' (*People v. Vera* (1997) 15 Cal.4th 269, 276 . . . ; *Saunders, supra*, 5 Cal.4th at p. 590 . . .) '[T]he

⁶ Section 1005 increases the time requirements when service is by mail.

forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 . . .)" (*Ibid.*)

Appellants also argue that Warford's supplemental declaration failed to remedy his original declaration's foundational deficiencies concerning admission of the guaranties. Since his original declaration was not deficient with respect to any foundational fact specifically and timely raised by appellants, this argument is unavailing.

DISPOSITION

The July 26, 2011 right to attach order and order for issuance of a writ of attachment is affirmed.

ELIA, Acting P. J.

WE CONCUR:

MIHARA, J.

MÁRQUEZ, J.