

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

FIRST CENTURY PLAZA, LLC,

Plaintiff and Respondent,

v.

VINH D. NGUYEN, et. al.,

Defendants and Appellants.

H037528

(Santa Clara County

Super. Ct. No. CV153711)

Appellants Vinh and Teri Nguyen seek review of a judgment entered upon the successful summary judgment motion of plaintiff First Century Plaza, LLC (First Century) in its action for breach of appellants' guaranties. On appeal, they contend that First Century failed to meet its burden to demonstrate that it had met its own obligations before foreclosing on the underlying loan of their LLC. They further contend that triable issues of fact existed as to whether the LLC was in default, whether they were in fact the true obligors on the debt, whether First Century inflated its damages, and whether the foreclosure sale was conducted properly. We agree with the superior court, however, that appellants presented no triable issues that precluded summary judgment on First Century's cause of action for breach of guaranty. We will therefore affirm the judgment.

Background

Appellants were the only members of Sorrento Pavilion, LLC (Sorrento). In 2004 they purchased a one-acre parcel in San Jose, taking title in the name of the LLC. The following year they obtained a \$4 million construction loan from United Commercial Bank (UCB), and in 2008 they completed construction on what became known as the Plaza. Plaintiff First Century was a limited liability company whose affiliate, SyWest Development, LLC, had unsuccessfully sought to purchase the Plaza from Sorrento in 2008. SyWest Development apparently was in turn a subsidiary of Syufy Enterprises, LP (Syufy).

In 2007 appellants applied to East West Bank (EWB) for a new loan of \$4.5 million to pay off the UCB loan and cover other needs of the Plaza. The branch manager there, Betty Liaw, had moved from UCB to EWB, and appellants, having known her since 1992, trusted her.

Before the transaction closed, Liaw informed appellants that the amount to be funded had been reduced to \$4 million. She assured them, however, that after this loan closed they could secure another loan for the remaining \$500,000. Accordingly, on March 28, 2008, appellants signed a "Business Loan Agreement" on behalf of Sorrento, which provided for EWB's loan to Sorrento of \$4 million. At the same time appellants executed a promissory note, each as "Manager of Sorrento Pavilion, LLC" and a deed of trust, which was recorded on April 11, 2008. The deed of trust secured not only the real property but also any attached personal property as well as all rental and other income derived from the property.

Also signed by appellants on March 28, 2008 were two documents, each of which was titled "Commercial Guaranty." The first sentence of these identical documents stated: "For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note

and the Related Documents." A subsequent provision stated, on the first page in capital letters: "THIS IS A 'CONTINUING GUARANTY' UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. . . ."

On February 11, 2009, appellants obtained an additional \$300,000 loan and signed a promissory note on behalf of Sorrento. In June 2009, they asked for the remaining \$200,000 of the amount they had requested in 2008. By this time, they were dealing with John Chen, who had replaced Liaw at EWB. According to Vinh Nguyen, appellants "withheld making the June 2009 payment under the understanding that the new 200K loan would cover the payments due during the negotiation period." EWB "at first" issued a demand for the June payment, along with three notices of intent to foreclose. Appellants understood from Chen that "this was just a matter of procedure."

On July 10, 2009, appellants met with Chen and Louis DeSieno, another EWB officer, to discuss the prospective \$200,000 loan, which appellants wanted to use for a power upgrade project at the site. According to appellants, at the meeting EWB agreed that mortgage payments (\$24,207.50 a month) could be withheld for the June-November 2009 period, during which appellants could use the money to pay for the power upgrade. The anticipated \$200,000 loan would also cover those June-November payments as well as some unpaid property taxes and tenant improvements. Appellants would resume regular payments in December 2009.

Vinh Nguyen summarized this "general understanding" in an e-mail to Chen a few days later. Chen responded, "For the additional \$200K, we never said or agreed to provide the fund. You told us that is figure [sic] you need and Louis and I said we will look into it during the meeting and we will discuss with [sic] loan committee [sic] upon you provide us [sic] the update [sic] rent roll and YTD/expense statement for Sorrento

and North Main." Nevertheless, appellants did not receive any more notices of intent to foreclose and payment demands, so they proceeded with the power upgrade in the belief that EWB had approved the six-month forbearance of payments.

On September 11, 2009, Chen informed appellants by e-mail that the chances of obtaining approval of the \$200,000 loan were "very slim." He then said that appellants' "proposal" for the loan had been *declined*, and he requested that they "take care of" the June, July, and August payments at their "earliest convenience." Subsequently Chen attempted to recall this message, but he did not respond to Teri Nguyen's e-mail inquiry.¹ Unbeknownst to appellants, EWB was in the process of selling Sorrento's \$4 million loan to First Century. That process was completed on September 17, 2009, when EWB assigned the promissory note, deed of trust, and "all other documents, agreements and instruments evidencing, securing[,] guaranteeing or relating to" the loan. Plaza tenants then began receiving demands to transmit their rental payments to First Century.

First Century filed its complaint on September 29, 2009, naming Sorrento and appellants. The first cause of action against Sorrento sought judicial foreclosure of the deed of trust and recovery of a deficiency judgment. The second cause of action against all three defendants was for "Foreclosure of Security Interest" in the personal property attached to the Plaza site. In the third cause of action First Century sought specific performance of a provision of the deed of trust under which Sorrento's default would result in the assignment to First Century of the right to collect rent on the property. First Century also requested the appointment of a receiver in order to facilitate the collection of those rental payments. Finally, the fourth cause of action, asserted against only appellants, sought "all amounts due and owing" under the note and deed of trust, "plus interest thereon, costs, attorneys' fees and other expenses." First Century claimed

¹ Vinh Nguyen submitted a description of a phone call between Teri Nguyen and Chen clarifying the correspondence. This is hearsay, however, and will not be considered.

damages of \$4,077,044.94 as of September 15, 2009, including principal, accrued interest, default interest, and late fees, "plus all other costs, fees, expenses and charges provided for under the terms of the Guaranties." First Century recorded a notice of default on September 30, 2009.

On November 3, 2009, the superior court appointed a receiver to manage the property and collect rent from the tenants. The following month, Sorrento filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. On September 14, 2010, the receiver's accounting was approved and he was discharged. In January 2011 the bankruptcy court granted First Century's motion for relief from the automatic stay, thus enabling First Century to proceed with a foreclosure sale of the Plaza. The sale took place on March 2, 2011. First Century obtained the property by a credit bid of \$3.5 million.

First Century filed its first motion for summary judgment against appellants on October 22, 2010. First Century argued that it was entitled to judgment on the fourth cause of action because Sorrento had defaulted on its loan, the guaranties were valid contracts, and appellants had not complied with First Century's demand for payment.

Appellants opposed the motion, denying the existence of their default, the validity of the guaranties, and First Century's assertions that it had performed all of its obligations, including notices of Sorrento's default. Appellants further argued that First Century had inflated the amount of its damages. Finally, expressly referring to allegations they had made in a complaint Sorrento had filed in the bankruptcy court against EWB and First Century, appellants reasserted estoppel against EWB, based on an alleged promise by EWB to loan them \$4.5 million.

First Century's motion was denied because First Century had failed to demonstrate entitlement to the amount of damages sought. On June 24, 2011, however, First Century filed a second summary judgment motion, citing the "changed circumstances" of its having acquired the property in the March foreclosure sale. In support of the motion,

Anthony Blanchard, a vice-president of SyWest, listed the amounts First Century claimed were due (totaling \$4,380,634.77 as of March 2, 2011), subtracted payments received between January 2010 and February 2011, and deducted the amount of the credit bid. Blanchard concluded that appellants owed \$880,634.77, exclusive of "late fees, legal fees, or other costs."

In their opposition to this second motion, appellants repeated several of the points they had made in their opposition to the first summary judgment motion: there was no default because EWB had waived the payment obligations for June-November 2009 by orally agreeing that appellants could apply the mortgage payments to the power upgrade; the guaranties were invalid; First Century had not performed all of its obligations; they had received insufficient notice of Sorrento's default; and the damages were inflated. In their view, there were no damages, because the true value of the property exceeded the amount of Sorrento's obligation. Appellants found it significant that Syufy had tried to buy the property even before the Plaza was built, and then again in March 2008. They believed that EWB had conspired with First Century to enable First Century to foreclose on the property, by withholding information about EWB's plans to sell the promissory note, and by failing to alert them to the status of their loan application and Sorrento's default on the existing \$4 million loan.

Appellants further represented that they had tendered the undisputed amounts due in order to reinstate the loan, even though they were disputing the alleged default. First Century, they claimed, had unreasonably rejected their tender and refused to postpone the sale. In addition, appellants argued that they were not "real" guarantors, but instead were, in effect, the borrowers and therefore were not liable for any deficiency judgment. Finally, appellants asserted grounds for finding wrongful foreclosure and an improper foreclosure sale as well as fraud by EWB (which should be "imputed to First Century either via conspiracy or in the nature of the assignment." They protested that the sale was

improperly conducted because the public was not present, and the \$3.5 million sale price "was very inadequate and [did] not represent the true value of the property."

On September 1, 2011, after considering the parties' moving and opposition papers and hearing oral argument, the superior court granted First Century's June 2011 motion. The court determined that First Century had met its initial burden to show entitlement to judgment. Appellants had then failed to point to any evidence indicating a triable issue as to any of its defenses, including the asserted oral agreement to waive the June-November 2009 payments² and the amount of damages. The court further rejected appellants' claimed borrower status as an attempt to "use the alter ego doctrine to somehow shield them from a breach of guaranty agreement," and it noted that no evidence demonstrated their execution of the guaranties as individuals. The assertions of fraud and conspiracy not only were unsupported by evidence, but were outside the scope of the issues defined by the pleadings. The court entered judgment for First Century the same day, awarding it \$880,634.77.

Discussion

1. Standard and Scope of Review

The rules governing judicial review of summary judgment motions are well established. Code of Civil Procedure section 437c permits a court "to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The motion will be properly granted if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244,

² Echoing the bankruptcy court's ruling, the superior court added that the alleged oral agreement violated the Statute of Frauds (Civ. Code, § 1624, subd. (a)(7)) and was therefore invalid.

1250.) Where, as in this case, the plaintiff is the moving party, it must establish that there is no defense to the causes of action asserted. (Code Civ. Proc., § 437c, subds. (a), (p)(1).) The plaintiff can meet this burden by proving each element of a cause of action entitling it to judgment on that cause of action. (Code Civ. Proc., § 437c, subd. (p)(1); *Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1049.) "Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th at p. 849; *Gramercy Inv. Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 908.) When reviewing a summary judgment ruling, we "independently determine the construction and effect of the facts presented to the trial court as a matter of law." (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 356.)

2. *First Century's Complaint*

Because summary judgment review is defined by the issues raised in the pleadings, we first direct our attention to the material allegations of First Century's complaint. Of the two claims against appellants, only the fourth cause of action, for breach of guaranty, appears to be the focus of this appeal.³ First Century alleged that appellants, having agreed to pay "all amounts due and owing to Lender from Sorrento pursuant to the Note and Deed of Trust, plus interest thereon, costs, attorneys' fees and other expenses," were liable for Sorrento's debt.

³ The court did not expressly rule on the second cause of action for foreclosure of the security interest, but appellants do not assert error resulting from this omission. The court granted summary judgment, not summary adjudication of a single cause of action.

3. First Century's Showing

In support of its June 2011 motion, First Century asserted the following preliminary facts, most of which were designated "Agreed" by appellants. First Century stated that the loan agreement between EWB and Sorrento was for \$4 million, executed concurrently with the promissory note in that amount and secured by the deed of trust. It quoted the guaranty provision in which each defendant "absolutely and unconditionally" guaranteed "full and punctual payment and satisfaction" of Sorrento's indebtedness to the lender, which was originally EWB and later First Century.

First Century further stated that Sorrento had been in default since June 15, 2009 and that "Lender" had notified them of the defaults and demanded a cure. Both guarantors, First Century added, had "failed and refused" to repay the loan to First Century. First Century noted that it had foreclosed on March 2, 2011 through the \$3.5 million credit bid, and it pointed to its claim of \$880,634.77 as damages remaining after deduction of the credit bid. As an alternative theory, First Century asserted the remaining amount owed as \$543,101.41, the result of the missed June-December 2009 payments (\$4,043,101.41 as of January 15, 2011) less the credit bid. In support of these factual representations, First Century referred to the declaration of Anthony Blanchard. As SyWest's vice-president, he had borne the responsibility for overseeing the Sorrento loan. Blanchard described each of the pertinent documents. He asserted that "Lender" had performed "all of its obligations under the Loan Documents and had notified Sorrento and each guarantor of the existing defaults. Sorrento and the guarantors, however, had "failed to cure" those defaults. Blanchard attached the document in which he had listed Sorrento's missed payments and the result of its default, i.e., the outstanding \$880,634.77.

The documents submitted by First Century alone support its statement of undisputed facts. First Century's motion thus established that each defendant promised to guarantee the full payment of Sorrento's indebtedness to the lender, which originally was

EWB. The burden therefore shifted to appellants to present a triable issue of fact material to the breach of guaranty claim or to a viable defense.

Appellants contend, however, that First Century did not meet its initial burden because Blanchard's statement that "Lender" had performed all of its obligations was merely a "conclusionary" allegation without elaboration. According to appellants, the statement was insufficient because "First Century did not make clear whether 'Lender' meant EWB or First Century." This argument echoes appellants' objection below, in which they complained that Blanchard's statement was inadmissible because it was "[c]onfusing and misleading: Between EWB and First Century, who has performed . . . ?"

Like the superior court, we have no difficulty understanding Blanchard's statement of performance. Furthermore, as the officer in charge of overseeing the Sorrento loan, Blanchard was "personally involved in managing the account" since its acquisition by First Century. He identified the pertinent documents and accurately described them, including the terms of the guaranties. Blanchard thus supplied an undisputed factual foundation for his assertion of performance. Any specific question as to his veracity, the authenticity of the documents, or the meaning of the contract language was for appellants to raise in their opposition. They offered no evidence raising a triable issue on those points; indeed, in their responsive Statement of Disputed Facts, they merely wrote "Disagreed" without elaboration as to how First Century had failed to perform all of its obligations.⁴ Nor did they present evidence that they were in fact confused by the word

⁴ In appellants' Statement of Disputed Facts in opposition to the earlier summary judgment motion, they opposed First Century's assertion of performance by citing two paragraphs of Teri Nguyen's 2010 declaration. Appellants did not include this declaration in opposing the current motion, presumably in recognition of the inadequacy of the declaration to address the statement. The cited paragraphs consisted of speculation about First Century's intent rather than facts within Teri Nguyen's knowledge.

"Lender," and on appeal they do not relate any asserted ambiguity to First Century's contractual right to recover on the guaranties. Appellants' objection was properly overruled.

Thus, having presented evidence of the terms of the guaranties, its own performance thereunder, and appellants' failure to perform their obligation, First Century met its initial burden to show entitlement to judgment as a matter of law. The burden then shifted to appellants to show triable issues of fact material to the elements of First Century's claim or a viable defense. Whether they met this burden is the question to which we turn next.

4. Appellants' Opposition

In their responsive "Statement of Disputed Facts," appellants disputed First Century's statements that they had guaranteed full payment of Sorrento's obligations, that Sorrento was in default, that they were notified of the default but refused to repay the loan, and that First Century's damages were \$880,634.77 after the foreclosure sale. Beyond the notation "Disagreed," however, they did not point to *any* evidence contradicting First Century's proffered facts, with the exception of one reference to a paragraph in Vinh Nguyen's declaration. In that document Vinh Nguyen stated that EWB had "hastily made" him and Teri sign the guaranties. Appellants were "[u]nder pressure to close escrow by Liaw" and therefore "signed this document in a rush and did not have a chance to read the content of the document." Appellants used this declaration to contradict First Century's statement that appellants "each signed a written Guaranty 'absolutely and unconditionally guarantee[d] full and punctual payment' of the obligations of Sorrento."

It is long settled, however, that "[a] provision on a form agreement signed by the party against whom enforcement is sought is binding even if the party was unaware of the provision. [Citation.] 'A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.'" (*C9 Ventures v. SVC-West, L.P.* (2012) 202

Cal.App.4th 1483, 1501, quoting *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1049; *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1589 [no relief from settlement terms merely because plaintiff failed to read agreement].) No other evidence was offered to rebut or invalidate the plain language of their promise to pay the amounts Sorrento owed the lender upon Sorrento's default.

Instead of elaborating on the simple "Disagreed" response to each of the other statements of undisputed fact, appellants relied on their points and authorities, in which they objected to some of First Century's evidence and raised new facts that purportedly excused their nonperformance of the guaranties: their reliance on EWB's oral promise to allow them to withhold the June-November 2009 payments; First Century's unreasonable refusal of appellants' tender of the "undisputed" amounts; and the excessive amount of default interest claimed by First Century. Appellants further argued that factual issues existed as to the value of the property, which (rather than the amount of the credit bid) was the proper basis for establishing damages, in order to prevent unjust enrichment of the lender. Finally, appellants listed several facts indicating an issue as to whether they were the true borrowers notwithstanding their ostensible status as guarantors.

To support these points appellants cited Vinh Nguyen's declaration. He described the meeting on July 10, 2009, at which appellants and EWB's loan officer, John Chen, had reached a "tentative" agreement that EWB would forbear the June-November mortgage payments so that appellants could use that money for the power upgrade. The expected \$200,000 loan would be advanced to cover those payments as well as unpaid property taxes and tenant improvements. Appellants proceeded with the power upgrade and other work in reliance on the "accepted forbearance." Vinh Nguyen also supplied a letter requesting reinstatement, in which he offered \$366,810.94 to cure the existing

default. As to the property value of the Plaza, he included copies of professional appraisals obtained by the parties in 2010.⁵

In his declaration Vinh Nguyen represented himself and Teri as the "borrowers" of the \$4 million loan. Sorrento "was then a brand new entity and had neither income no[r] credit rating for the bank's consideration." Vinh and Teri Nguyen, he pointed out, were the only members of the LLC. Accordingly, Vinh Nguyen asserted, EWB had "actually considered [the Nguyens] as the loan applicants, evidenced by the fact that the Loan Application was done [i]n our names as individuals, and with details on our individual financial qualifications."

Appellants' reliance on EWB's oral promise to allow them to withhold the June-November 2009 payments was properly rejected by the superior court. It is unnecessary to address the parties' debate on the general viability of a promissory estoppel defense to an oral contract in light of the statute of frauds. (Civ. Code, § 1624; see the *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623-624; *Garcia v. World Sav., FSB* (2010) 183 Cal.App.4th 1031, 1041-1042.) Vinh Nguyen's declaration—which, as noted, was not referenced in appellants' Separate Statement of Disputed Facts—related the terms of the oral agreement as interdependent, in which the forbearance was premised on the loan of \$200,000 "advanced" to appellants to "cover the mortgage payments forborne" and other costs. There is no evidence that the forbearance was unconditional. On the contrary, three days after the July 10, 2009 meeting, Chen cautioned appellants that "[f]or the additional \$200K, we never said or agreed to provide the fund [*sic*]." Chen reminded them that he and DeSieno had promised to "look into it" and discuss it with the loan committee once EWB received an updated "rent roll" and "YTD/expense statement." Chen's cautionary e-mail was sent in response to Vinh Nguyen's July 10 e-mail setting

⁵ First Century's appraiser valued the property "in its as-is condition" at \$4,420,000 with a hypothetical market value of \$4,700,000. Sorrento's appraiser suggested \$4,880,000.

forth his understanding of the meeting that day. Nguyen had written that the bank "will provide a loan in the amount of \$200,000, to be used specifically for" the power upgrade, delinquent property taxes on properties used as collateral for EWB loans, and the shortage in monthly payments on the Plaza. Vinh Nguyen asked Chen to correct him if Chen's understanding was different, and Chen unequivocally did so. It is clear from this correspondence that no promise was made to forbear monthly payments independent of the anticipated \$200,000 loan. Vinh Nguyen's declaration does not permit a contrary inference. Appellants thus failed to present a triable issue of fact on this defense.

Appellants further maintain that First Century inflated its damages claim by charging them with default interest. In their opposition below, they argued that default interest of \$334,415.90 had been erroneously included in First Century's reinstatement calculation.⁶ First, they claimed, there was no default, a position the superior court properly rejected, as it depended on the untenable premise of a forbearance agreement. Second, they challenged the loan provision that increased the interest rate by five percent upon default. Citing *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, appellants regarded such an increase as excessive and therefore voidable under Civil Code section 1671.

But appellants did not present either evidence refuting Anthony Blanchard's calculations or argument as to why this default interest provision was improper; they only suggested that "when this issue is litigated, there will be a high chance that the 5% default interest will be found voidable." On appeal, they likewise have not shown a legal or factual basis for invalidating the contract provision, nor a recognition and application of

⁶ First Century correctly notes that the context of this point was the contention that the foreclosure itself was wrongful.

the changes in statutory and case law after *Garrett*.⁷ Appellants also provide no basis for finding their obligation excused by the "form" nature of the contract or the "pressure" they felt to sign it in time for the close of escrow.

Appellants' disagreement with First Century's statement that they had "failed and refused to repay the Loan to First Century" again was unaccompanied by any explanation in their Statement of Disputed Facts, but their points and authorities included references to their efforts to reinstate the loan. In February 2011 they asked for and received a reinstatement amount from First Century, which was revised shortly thereafter to list \$1,128,911.32 as the amount due (including property taxes, legal fees, trustee fees, and collection costs). Although appellants questioned the accuracy of the amount demanded, they did not refute the statement that they had failed to cure the default or reinstate the loan. They did provide evidence of a tender of \$366,810.94, but this was the amount they believed was necessary to cure the default. The remaining amounts claimed by First Century were, in appellants' view, simply subject to determination in the December 2010 adversary proceeding Sorrento had brought in the bankruptcy court.⁸

Appellants did not offer any argument or evidence specifically directed at the asserted improper rejection of their tender. Even if this issue were not forfeited for purposes of appellate review, appellants supply no facts that would create a triable issue

⁷ Civil Code section 1671 was amended effective July 1, 1978, to establish a general presumption that a provision for liquidated damages upon breach of a contract (with specific exceptions explained in the accompanying comments) "is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

⁸ Sorrento brought this "adversary proceeding" to establish that (1) they were entitled to withhold the June-November 2009 mortgage payments and therefore were never in default; (2) EWB was obligated to perform its "agreement" to loan Sorrento \$200,000; (3) the default interest provision was void; and (4) the foreclosure proceedings initiated by First Century were wrongful.

on the question of the proper amount owed under the terms of the loan agreement, promissory note, and guaranty.

Appellants next renew their protest that the conduct of the foreclosure sale was improper because "the public was not present when the auctioneer purportedly accepted First Century's credit bid." Appellants presented no evidence, however, to support the inference that any impropriety occurred in the conduct of the sale. Their affidavits contained only a description of a protracted auction of multiple properties, culminating in the sale of the Plaza to First Century, when the previous crowd was no longer present. Nothing in appellants' account of the auction permitted the inference that the sale was "designed" to occur when the public was absent, as appellants asserted below. The bare fact that the price First Century paid was "far less" than the \$4.42 million at which First Century's own appraiser valued the property is insufficient. (See *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1258, quoting *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1284-1285 ["mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price or otherwise injured the trustor, is insufficient to set aside a nonjudicial foreclosure sale"].) Appellants have thus failed to present facts that could overcome the acknowledged presumption that "a sale under a deed of trust is presumed to have been conducted regularly and fairly." (*Ibid.*)

In their opposition below, appellants argued that First Century's damages were excessive because the sale price was "very inadequate" in light of the \$4.42 million value placed on the property by its own appraiser. Appellants did not cite supporting authority for the underlying premise that the fair market value was the proper benchmark for a deficiency calculation, and on appeal they do not revisit this position. Instead, appellants now suggest that a trier of fact could find that the damages awarded would give First Century an unjust windfall, contrary to Civil Code section 3358. Appellants amplify this assertion in their reply brief, extensively discussing the bargain they had reached with

EWB, which did not, they maintain, allow the lender to recover more from them than "the value of full performance under the Sorrento note." Having failed to present this argument in their opposition below, however, and having given it only the slightest mention in their opening brief, appellants have forfeited the issue of the application of Civil Code section 3358 to the circumstances presented. We therefore will not address it on appeal. (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1594, fn. 7 ["When an argument is not asserted below in opposition to a motion for summary judgment, it is deemed waived and will not be considered for the first time on appeal to reverse an order granting summary judgment"]; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488 [same]; cf. *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592.)

Appellants do not deny that the guaranties they signed contained "unconditional and irrevocable" waivers of all rights and defenses they might have had under the antideficiency laws, including "any rights and defenses based on Code of Civil Procedure sections 580a, 580b, 580d, or 726 of the Code of Civil Procedure." (See, e.g., Code Civ. Proc. § 580d.⁹) These waivers were expressed in "clear, unequivocal" language (*Gramercy Inv. Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 912) consistent with Civil Code section 2856,¹⁰ and each guaranty was acknowledged to be "a separate and independent contract" with the lender.

⁹ Code of Civil Procedure section 580d states, in pertinent part: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

¹⁰ Civil Code section 2856 recognizes the effectiveness of a guarantor's waiver and suggests acceptable language to express that intention. The statute provides, in relevant part: "(a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following: [¶] (1) The guarantor or other surety's rights of subrogation, reimbursement,

indemnification, and contribution and any other rights and defenses that are or may become available to the guarantor or other surety by reason of Sections 2787 to 2855, inclusive. [¶] (2) Any rights or defenses the guarantor or other surety may have in respect of his or her obligations as a guarantor or other surety by reason of any election of remedies by the creditor. [¶] (3) Any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon, directly or indirectly, the application of Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal's note or other obligation. [¶] (b) A contractual provision that expresses an intent to waive any or all of the rights and defenses described in subdivision (a) shall be effective to waive these rights and defenses without regard to the inclusion of any particular language or phrases in the contract to waive any rights and defenses or any references to statutory provisions or judicial decisions. [¶] (c) Without limiting any rights of the creditor or any guarantor or other surety to use any other language to express an intent to waive any or all of the rights and defenses described in paragraphs (2) and (3) of subdivision (a), the following provisions in a contract shall effectively waive all rights and defenses described in paragraphs (2) and (3) of subdivision (a): The guarantor waives all rights and defenses that the guarantor may have because the debtor's debt is secured by real property. This means, among other things: [¶] (1) The creditor may collect from the guarantor without first foreclosing on any real or personal property collateral pledged by the debtor. [¶] (2) If the creditor forecloses on any real property collateral pledged by the debtor: [¶] (A) The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. [¶] (B) The creditor may collect from the guarantor even if the creditor, by foreclosing on the real property collateral, has destroyed any right the guarantor may have to collect from the debtor. [¶] This is an unconditional and irrevocable waiver of any rights and defenses the guarantor may have because the debtor's debt is secured by real property. These rights and defenses include, but are not limited to, any rights or defenses based upon Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure. [¶] (d) Without limiting any rights of the creditor or any guarantor or other surety to use any other language to express an intent to waive all rights and defenses of the surety by reason of any election of remedies by the creditor, the following provision shall be effective to waive all rights and defenses the guarantor or other surety may have in respect of his or her obligations as a surety by reason of an election of remedies by the creditor: [¶] The guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of Section 580d of the Code of Civil Procedure or otherwise."

Appellants do contend, however, as they did below, that they should be considered the "true obligors" on the promissory note and on that basis were entitled to the antideficiency protections provided in Code of Civil Procedure section 580d. They cite *River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, which allowed a "sham guaranty" defense to overcome a bank's summary judgment motion against the defendant guarantors. In *River Bank*, the court upheld the lower court's determination that a triable issue of fact on the "sham guaranty" defense precluded summary adjudication for the bank. The defendant guarantors supplied evidence that the lender had structured the loan transaction so as to circumvent the protections provided in the antideficiency statutes.

If there were evidence of such an attempt by EWB to subvert the antideficiency laws, we would agree with them that summary judgment was improper. It was appellants' burden to produce such evidence, however. (*Wachovia Bank v. Lifetime Industries, Inc.*, *supra*, 145 Cal.App.4th at p. 1049 [defendant opposing summary judgment has burden of producing evidence of facts material to defense]; *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411 [plaintiff moving for summary judgment does not have the initial burden to disprove defendant's affirmative defenses].) Appellants produced no evidence, direct or indirect, that EWB had structured the loan to Sorrento in order to preserve its ability to seek a deficiency judgment in the event of foreclosure. Unlike the entity under scrutiny in *River Bank*, a shell corporation which the bank insisted be designated as general partner, Sorrento had existed for at least four years when it procured the business loan from EWB in 2008. During those four years it had functioned not only as borrower but as lessor for the businesses on the property.¹¹ And there was no evidence that EWB, like the *River*

¹¹ Appellants' claim that Sorrento was "a brand new entity" at the time of the 2008 loan is belied by the fact that the original purchase of the property was in 2004, with Sorrento as title holder.

Bank plaintiff, had relied entirely on the financial statements of appellants rather than inquiring about Sorrento's financial health. Indeed, in Teri Nguyen's application for the \$4.5 million loan, she listed the property's value as \$8 million. Thus, the collateral for Sorrento's loan was worth far more than the amount it intended to borrow. As First Century points out, this figure was "high enough that the bank . . . would not need to create a sham guaranty protecting the \$4 million loan." Moreover, as appellants pointed out in their argument below, the Plaza had "more than enough income" to support the monthly payments.

In summary, appellants failed to create a triable issue of fact on any of the issues raised in their opposing papers. Their additional defense that First Century violated the covenant of good faith and fair dealing is unavailing. Not only is it a theory that was not raised in the summary judgment proceedings below,¹² but it is premised on the inflation of the reinstatement demand and the refusal to accept appellants' tender, factual assertions that we have already rejected as unaccompanied by admissible evidence.

¹² The theory of breach of the covenant of good faith and fair dealing was stated in Sorrento's cross-complaint against First Century and EWB, but it did not appear in appellants' papers in opposition to First Century's summary judgment motion.

Disposition

The judgment is affirmed.

ELIA, Acting P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MÁRQUEZ, J.