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

COMERICA BANK,

Plaintiff and Appellant,

v.

ALI AMIDY,

Defendant and Appellant.

H040232

(Santa Clara County

Super. Ct. No. 112CV221745)

**I. INTRODUCTION**

Defendant Ali Amidy borrowed \$600,000 from Comerica Bank (Comerica) on a master revolving note that was secured by Comerica's junior deed of trust on Amidy's home in Tiburon. The holder of the senior deed of trust, Bank of America, foreclosed on the Tiburon property, which extinguished Comerica's junior lien. After Amidy defaulted on the now unsecured note, Comerica brought the instant action against Amidy to recover principal, interest, and late fees in the amount of \$723,314.65.

The matter proceeded to a jury trial that concluded in a jury verdict in Amidy's favor. A judgment was entered on June 20, 2013 in which Comerica took nothing. The trial court denied Comerica's motion for judgment notwithstanding the verdict and granted Comerica's motion for new trial. Amidy has appealed from the order granting

the motion for new trial and Comerica has cross-appealed from the order denying the motion for judgment notwithstanding the verdict.

For the reasons discussed below, we determine that Comerica's motion for judgment notwithstanding the verdict should have been granted. We will therefore reverse the judgment and direct the trial court to grant the motion for judgment notwithstanding the verdict. We will dismiss Amidy's appeal of the order granting Comerica's motion for new trial as moot.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. The Complaint***

In April 2012 Comerica filed a complaint against Amidy that included a first cause of action for "money due on master revolving note" and a second cause of action for "common count for money lent."

According to the complaint's allegations, Amidy executed a master revolving note, dated August 31, 2006, in the amount of \$600,000 payable to Comerica. The note provided that Amidy would repay all amounts advanced to him, plus interest. Amidy subsequently executed a series of loan revision extension agreements that changed the note from being payable on demand to having a fixed maturity date.

The note was secured by a deed of trust executed by Amidy and his wife that encumbered their real property in Tiburon. The Comerica deed of trust was junior to a senior deed of trust executed by Amidy and his wife that also encumbered the Tiburon property.

After Amidy defaulted on the obligation secured by the senior deed of trust, a non-judicial foreclosure sale of the Tiburon property was held in January 2012 and a trustee's deed was recorded with "The Bank of New York Mellon and/or The Bank of New York N.A. as buyer." After the trustee's deed was recorded, Comerica's junior lien on the Tiburon property was extinguished.

Amidy failed to make certain monthly interest payments and also failed to pay the entire balance owed on the Comerica note at the maturity date. Comerica demanded full payment of all amounts due under the note, but Amidy failed to pay any amount. Comerica sought payment of the principal sum of \$600,000, plus late charges, interest, and reasonable attorney's fees.

## ***B. Jury Trial and Jury Verdict***

### **1. Trial Evidence**

A jury trial was held in May 2013. The following is a brief summary of the relevant witness testimony and other evidence presented at trial.

Amidy executed a master revolving note for business and commercial loans, dated August 31, 2006, that allowed him to borrow up to \$600,000 from Comerica. Amidy eventually borrowed the entire \$600,000.

The Comerica note was secured by a deed of trust on Amidy's home in Tiburon. The Comerica deed of trust was signed by both Amidy and his wife and was recorded in 2007. It was junior to the first deed of trust on the Amidys' Tiburon property that secured their mortgage loan with CTX Mortgage Company, LLC. The first deed of trust was recorded in 2004. The mortgage loan was later sold to Bank of America.

David Zittlow is a Comerica vice president who works in Comerica's special assets department and is the account officer for Amidy's loan. Zittlow stated that the Comerica note was originally payable on demand, but the parties entered into several loan revision extension agreements that resulted in the note having a fixed maturity date of April 30, 2010. Amidy did not make any payments on the note after May 2010 because he had lost his job.

The Comerica vice president supervising the collection of payment on Amidy's note at that time was Hisashi Takiguchi. Takiguchi sent Amidy a demand letter dated June 9, 2010, that demanded full payment of the amounts owed on the Comerica note.

Amidy also defaulted on his Bank of America mortgage loan. He tried to sell the Tiburon house to pay his loan obligations to Comerica and Bank of America and received an offer of \$1.3 million in January 2012 that was contingent on obtaining a 90 percent loan. However, Bank of America had already initiated foreclosure proceedings and refused to stop the foreclosure sale.

After Takiguchi left his employment at Comerica, Judith A. Sanchez, a Comerica senior vice president in charge of special assets, became responsible for Amidy's Comerica note. Sanchez had encouraged Amidy to sell the Tiburon property because there was no other apparent source for repayment of his Comerica obligations. However, she was "very skeptical" that the buyer could close on the \$1.3 million offer to buy the Tiburon property, since she did not know of any lender who would provide the 90 percent financing that the buyer required.

Sanchez opted not to foreclose on the Comerica note due to Bank of America's senior lien, which secured an obligation in excess of \$1 million and had to be repaid before Comerica could be repaid. She determined that "in order for Comerica Bank to be repaid in full, [her] estimate was that [the Tiburon] property had to sell for [\$1.7 million]. That property was not going to sell for [\$1.7 million]. [She] had contacted a local realtor. [She] had appraisals done, and it just wasn't going to happen." The \$1.7 million figure was calculated by adding together \$1,051,000 to pay the Bank of America loan, approximately \$100,000 in Comerica's costs to sell the property, and \$600,000 to pay the Comerica note.

Sanchez attended the foreclosure sale of the Tiburon property that was held on January 5, 2012. She did not intend to bid on the property. The only bid was made by an entity representing Bank of America, which made a credit bid of \$1,051,000 to purchase the property. A trustee's deed of sale in the amount of \$1,051,101.53 was recorded on January 13, 2012. To obtain the property for Comerica, Sanchez would have had to bid an amount that was greater than Bank of America's bid.

At the time of trial in 2013, Comerica's records showed that Amidy owed a total of \$723,314.65 on the Comerica note, which included principal, interest and late charges.

## **2. Jury Question and Verdict**

The trial court received a question from the jury during deliberations. Jury Question No. 1 stated, "Is a borrower liable for a debt even if the collateral specified in the note is wiped out? If so, where in the contract is specified [*sic*]?" The court provided the following agreed-upon response: "After the security on the real estate has been lost by the foreclosure sale of the senior lien, the junior lien holder is not barred from suing the debtor directly on the promissory note, which is then considered unsecured by that property. [¶] Accordingly you should look at the terms of the contract to determine whether or not Mr. Amidy is liable."

On May 31, 2013, the jury gave its verdict finding in favor of Amidy. A judgment stating that "Plaintiff takes nothing on its complaint" was entered on June 20, 2013. After entry of judgment, Comerica filed a motion for judgment notwithstanding the verdict and a motion for new trial.

### ***C. Comerica's Posttrial Motions***

In its motion for judgment notwithstanding the verdict, Comerica argued that the evidence showed that it was undisputed that at the time of trial Amidy owed Comerica a total of \$723,314.65 for payment of the principal, interest, and late fees on Comerica's note. Comerica further argued that as the sold-out junior lienholder it had the right to sue on the note as an unsecured creditor and Amidy had not proven a defense to its collection action. In particular, Comerica contended that Amidy could not show either that (1) the agreements pertaining to Comerica's note provided that a foreclosure sale under a senior lien would exonerate Amidy from liability on the note; or (2) Comerica was not entitled to repayment under the Commercial Code.

In its motion for new trial, Comerica argued that the jury verdict was against the law within the meaning of Code of Civil Procedure section 657<sup>1</sup> because there was no evidence to support Amidy's theory that he had no liability on the note if Comerica's deed of trust was extinguished.

Amidy opposed both motions on the grounds that Comerica's sole recourse for payment of the note was to foreclose on the Tiburon property, as stated in the parties' contract; he had not personally guaranteed the loan; and Comerica had failed to mitigate damages by failing to bid at the foreclosure sale.

***D. Trial Court Orders on Posttrial Motions***

The trial court's August 16, 2013 order denied Comerica's motion for judgment notwithstanding the verdict and granted Comerica's motion for new trial. The order did not state the trial court's reasons for denying Comerica's motion for judgment notwithstanding the verdict.

As to the motion for new trial, the order states that the motion is granted "on the ground that there is insufficient evidence to support the jury verdict." Specifically, the trial court found that there was credible evidence that Amidy and Comerica entered into a valid contract for a credit line of \$600,000; that Amidy signed the note promising to pay on demand and was therefore the obligor of the debt; Amidy made some interest payments on the note but no payments on the principal before he stopped paying altogether; and the beneficiary of the senior Bank of America deed of trust had completed a nonjudicial foreclosure sale that made Comerica's junior deed of trust valueless.

Although the trial court did not rule that the verdict was against the law, the order also states that the court determined that Comerica, as a sold-out junior lienholder, was

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

not barred by section 580 from obtaining a deficiency judgment on a non-purchase money note that was secured by a deed of trust, citing *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 39 (*Roseleaf*). The court rejected Amidy's contention that Comerica had failed to mitigate damages by not bidding at the foreclosure sale. The court also rejected Amidy's contention that he was not personally liable on the note because he had not signed a personal guarantee, finding that Amidy had signed the most recent loan extension agreement as the borrower.

Amidy subsequently filed a timely notice of appeal from the August 16, 2013 order.

### **III. DISCUSSION**

On appeal, Amidy contends that the trial court erred in granting Comerica's motion for new trial. Comerica cross-appeals, contending that the trial court erred in denying its motion for judgment notwithstanding the verdict.<sup>2</sup> We will begin our analysis by addressing the merits of the trial court's order denying Comerica's motion for judgment notwithstanding the verdict, since we find that issue to be dispositive.

#### ***A. Motion for Judgment Notwithstanding the Verdict***

##### **1. Legal Principles**

A motion for judgment notwithstanding the verdict is governed by section 629. Subdivision (a) of section 629 provides in part: "The court, before the expiration of its power to rule on a motion for a new trial, . . . on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding

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<sup>2</sup> "An appeal may be taken from an order denying a motion for [judgment notwithstanding the verdict] even where the trial court has granted, or denied, a new trial motion. (Code of Civ. Proc. §§ 629, [subd. (d),] 904.1, subd. (a)(4); [citation].)" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324.)

the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.”

Thus, the power of a trial judge “to grant a judgment notwithstanding the verdict is identical to his [or her] power to grant a directed verdict. [Citations.] The trial judge cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] ‘A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.’ [Citation.]” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 (*Hauter*)).

## **2. Standard of Review**

“As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury’s conclusion. [Citations.]” (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 (*Sweatman*)). “If the motion presents a legal question based on undisputed facts, however, we review the ruling de novo. [Citation.]” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1043-1044; *Sweatman, supra*, at p. 68.)

Accordingly, where the appellate court’s review of the record “discloses no evidence nor any reasonable inference therefrom which supports the jury’s verdict” and instead “leads to a contrary conclusion—that plaintiffs should recover as a matter of law under each cause of action,” the motion for judgment notwithstanding the verdict should be granted. (*Hauter, supra*, 14 Cal.3d at p. 111.)

### **3. The Parties' Contentions**

In its cross-appeal, Comerica argues that the trial court erred in denying its motion for judgment notwithstanding the verdict because (1) the undisputed evidence showed that Comerica was the holder of the \$600,000 note that Amidy had signed and therefore Comerica entitled to enforce the note; (2) Amidy did not contest Comerica's computation of the amount owed on the note; (3) Amidy failed to show that Comerica's claim was barred under the antideficiency statutes, sections 580b and 580d, since it was undisputed that Comerica was a sold-out junior lienholder entitled to seek recovery directly from the debtor; and (4) there was no evidence to support Amidy's mitigation of damages defense, since Comerica would have had to make an unreasonable expenditure of a bid over \$1 million to acquire the Tiburon property.

We understand Amidy to argue that the trial court properly denied the motion for judgment notwithstanding the verdict because Comerica's sole recourse on the note was the Tiburon property. Amidy states in his opening brief: "There was no dispute in the case that defendant Ali Amidy owed Comerica Bank interest on the principal borrowed and would also be obliged to repay the principal WHENEVER the Bank were to demand repayment; rather, the contention by Mr. Amidy was that the parties (including the Bank) had agreed that the sole recourse (for recovery of funds) was [the] house in Tiburon." Amidy asserts in his reply brief that "there was evidence—lots of evidence—that supported [his] position that the contract, properly interpreted, provides recourse only to the Tiburon property—even if that property were lost in a foreclosure by the mortgage holder in the first position."

Regarding mitigation of damages, Amidy states in his opening brief that the general rule with regard to a claim for breach of contract is that the non-breaching party to the contract "must take reasonable steps to mitigate damages when a contract has been breached." He asserts that Comerica failed to mitigate damages because Comerica failed to bid at the foreclosure sale on the Tiburon property.

#### 4. Analysis

In this case, Comerica sought recovery from Amidy by way of two causes of action, a first cause of action for “money due on master revolving note” and a second cause of action for “common count for money lent.” The two causes of action are essentially identical and seek the same damages.<sup>3</sup>

“A cause of action for nonpayment on a promissory note is one for breach of contract. [Citation].” (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1112.) To prevail, Comerica therefore had to prove the following elements: (1) the existence of a contract (the promissory note) including Amidy’s promise to pay on the note; (2) performance by Comerica; (3) breach of Amidy’s promise to pay; and (4) Comerica suffered damages from the breach. (See, e.g., *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489.) Our review of the trial record shows that Comerica established all four elements of its cause of action for money due on the master revolving note (the promissory note) based on undisputed evidence, as follows.

The trial evidence showed that it was undisputed that the parties had entered into a series of agreements, including the August 31, 2006 master revolving note in the amount of \$600,000 and several loan extension agreements, whereby Amidy promised to pay the \$600,000 principal and interest by the maturity date of April 30, 2010. The parties agreed that the master revolving note was secured by a deed of trust on Amidy’s real property in Tiburon that was junior to a senior deed of trust held by Bank of America, the mortgage lender on the Tiburon property.

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<sup>3</sup> “To prevail on a common count for money had and received, the plaintiff must prove that the defendant is indebted to the plaintiff for money the defendant received for the use and benefit of the plaintiff. [Citations.]” (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 230.)

Further, it was undisputed that Comerica had performed under the parties' agreements because Amidy had borrowed the entire \$600,000 available under the master revolving note. Amidy admitted that he had not paid any of the principal or all of the interest due under the parties' agreements by the maturity date. He did not dispute Comerica's calculation of its damages: that Comerica was owed a total of \$723,314.65 on the master revolving note, which included principal, interest and late charges.

On appeal, Amidy argues that he proved a defense to Comerica's claim based on his interpretation of the parties' agreements. According to Amidy, the parties' agreements provided that Comerica's only recourse for his breach of his promise to pay on the master revolving note was its security interest in the Tiburon property. Amidy contends that since Comerica's security interest was extinguished by Bank of America's foreclosure on its senior deed of trust, he has no personal obligation on the note.

We find that the trial record "discloses no evidence nor any reasonable inference therefrom" that supports Amidy's contract interpretation. (*Hauter, supra*, 14 Cal.3d at p. 111.) Amidy has not referenced any terms in the parties' agreements to support his contention that Comerica's only recourse for Amidy's failure to pay the principal and interest owed under the master revolving note was its security interest in the Tiburon property. Although Amidy contends in his reply brief that "there was evidence—lots of evidence—that supported [his] position that the contract, properly interpreted, provides recourse only to the Tiburon property," he has not provided record citations to any evidence that supports his contention. In a footnote in his opening brief, Amidy states that "Mr. Takicuchi [*sic*] admitted that sometimes a Comerica Bank will enter into a loan with recourse limited to security provided . . . ." Amidy did not present any evidence showing that Comerica's representatives either understood or had agreed that Comerica's recourse on Amidy's master revolving note was limited to the security interest provided by Comerica's junior deed of trust on the Tiburon property.

Moreover, Amidy's contract interpretation is not supported by the silence in the parties' agreements regarding Amidy's personal obligation on the master revolving note in the event that Comerica's security interest in the Tiburon property is extinguished. As Comerica points out, it is well established that "[a]s a general rule, 'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.'" [Citation.]" (*Swenson v. File* (1970) 3 Cal.3d 389, 393; see also *Doe v. Harris* (2013) 57 Cal.4th 64, 69-70; *Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 135.)

Here, the laws incorporated into the parties' revolving master note, deed of trust, and lease extension agreements include the laws regarding deficiency judgments. " "A 'deficiency judgment' is a personal judgment against a debtor for a recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale." ' [Citations.] Under the one form of action rule, section 726, subdivision (a), 'a secured creditor is generally required to pursue its security, not the underlying obligation.' [Citation.]" (*Thoryk v. San Diego Gas & Electric Co.* (2014) 225 Cal.App.4th 386, 398.)

The statutes providing limits on deficiency judgments also include sections 580b and 580d. "When sellers of real estate accept a deed of trust from the purchasers to secure the purchase price, . . . section 580b prohibits the sellers from obtaining a deficiency judgment in the event the purchasers default." (*Enloe v. Kelso* (2013) 217 Cal.App.4th 877, 879, fn. omitted.) Section 580b does not apply in the present case, since there was no evidence that the funds loaned to Amidy under Comerica's master revolving note were used as real estate purchase money.

Section 580d is also inapplicable. “Section 580d<sup>4</sup> ‘precludes a judgment for any loan balance left unpaid after the lender’s nonjudicial foreclosure under a power of sale in a deed of trust . . . on real property.’ [Citation.]” (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1536 (*Cadlerock*)). However, the California Supreme Court in the landmark case of *Roseleaf, supra*, 59 Cal.2d 35 ruled that neither the one form of action rule set forth in section 726 nor the antideficiency provisions of section 580d apply to “a sold-out junior lienor.” (*Roseleaf, supra*, at pp. 39, 43-44.) “The term ‘sold-out junior lienor’ refers to the situation in which a senior lienholder forecloses on its lien, eliminating the junior lienor’s security interest. ‘A senior foreclosure sale conveys the property free of all junior liens.’ ” (*Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 611-612 (*Bank of America*)).

Under *Roseleaf*, the antideficiency statutes do not bar a sold-out junior lienor from suing the debtor directly on a junior promissory note that is unsecured due to the senior lienor’s nonjudicial foreclosure sale extinguishing the junior lien. (*Cadlerock, supra*, 206 Cal.App.4th at pp. 1543-1544; *Bank of America, supra*, 51 Cal.App.4th at pp. 611-613; *National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1234-1235.) In other words, as stated in *Cadlerock*, “[b]ecause section 580d is inapplicable, a sold-out junior lienor may pursue its only available remedy of suing directly on the debtor’s breach of a now unsecured junior promissory note. [Citations.]” (*Cadlerock, supra*, at p. 1543.) *Amidy* has provided no authority for the proposition that silence in a loan agreement regarding a sold-out junior lienor’s rights under *Roseleaf* negates this rule. Therefore,

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<sup>4</sup> Section 580d, subdivision (a) provides: “Except as provided in subdivision (b), no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property or an estate for years therein 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.”

since it was undisputed that Comerica was a sold-out junior lienor due to Bank of America's foreclosure on the Tiburon property, as a matter of law Comerica was entitled to bring the present action against Amidy to recover the amounts due on the now unsecured master revolving note.

We also find that the trial record "discloses no evidence nor any reasonable inference therefrom" that supports Amidy's alternate defense that Comerica failed to mitigate damages. (*Hauter, supra*, 14 Cal.3d at p. 111.)

"A party injured by a breach of contract is required to do everything reasonably possible to negate his [or her] own loss and thus reduce the damages for which the other party has become liable. [Citation.] The plaintiff cannot recover for harm he [or she] could have foreseen and avoided by such reasonable efforts and without undue expense. [Citation.]" (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 460 (*Brandon & Tibbs*.) The defendant has the burden of proving a defense based on the plaintiff's failure to mitigate damages. (*Ibid.*; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044.)

Here, the record reflects that Amidy failed to meet his burden to prove that Comerica failed to mitigate its damages. Comerica's representative Sanchez testified that she decided not to bid on the Tiburon property at Bank of America's foreclosure sale because Comerica would have had to expend \$1.7 million in order to recover the \$600,000 principal owed by Amidy. Sanchez also testified that she had consulted real estate appraisers and was informed that the Tiburon property would not sell for \$1.7 million. Amidy presented no evidence that contradicted Sanchez's testimony that Comerica could not reasonably mitigate its damages or otherwise showed that Comerica could have reduced its damages "by such reasonable efforts and without undue expense." (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 460.)

For these reasons, we determine that the trial record "discloses no evidence nor any reasonable inference therefrom which supports the jury's verdict" in Amidy's favor.

(*Hauter, supra*, 14 Cal.3d at p. 111.) We further determine the trial record leads to a contrary conclusion: that Comerica should recover as a matter of law under each cause of action. Accordingly, we conclude that the motion for judgment notwithstanding the verdict should be granted and we will direct the trial court to enter judgment in Comerica's favor. (See *ibid.*)

**B. Motion for New Trial**

Since we have concluded that the trial court should have granted Comerica's motion for judgment notwithstanding the verdict, and in light of our direction to the trial court to enter judgment in Comerica's favor, we determine that Amidy's appeal of the order granting Comerica's motion for new trial is moot. (See *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1326.) We will therefore dismiss Amidy's appeal and direct the trial court to vacate its order granting Comerica's motion for new trial.

**IV. DISPOSITION**

The judgment is reversed and the matter is remanded to the trial court with directions to grant Comerica Bank's motion for judgment notwithstanding the verdict, to vacate its granting Comerica's motion for new trial, and to enter a new judgment in favor of Comerica in the amount of \$723,314.65. Ali Amidy's appeal of the order granting Comerica's motion for new trial is dismissed as moot. Costs on appeal are awarded to Comerica.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.