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APPLICATION OF CALIFORNIA CODE OF CIVIL
PROCEDURE SECTION 580d TO A GUARANTY
SECURED BY REAL PROPERTY

Steven J. Lurie*

INTRODUCTION

A creditor¹ holding a note secured by a deed of trust and a guaranty which is not secured by real property has rights against the trustor, the trustor's security, and the guarantor.² The extent of the guarantor's liability when the trustor defaults on such a note is well settled by California case law or well discussed by secondary authority.³ A creditor holding a guaranty secured by real property also has rights against the guarantor's security. In this situation, an important issue remains unresolved. Specifically, does a creditor who forecloses non-judicially on a deed of trust⁴ executed to secure a guaranty have the right to obtain a deficiency judgment against the guarantor, or does California Civil Procedure Code section 580d,⁵ which prohibits a beneficiary from obtaining a deficiency judgment following a non-judicial foreclosure sale, protect the guarantor from a deficiency judgment following such a sale?

Courts should apply section 580d to a guaranty secured by real property.

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1. The words "creditor," "beneficiary," and "mortgagee" are used synonymously in this article. The words "trustor" and "debtor," as well as the words "deed of trust" and "mortgage," are also used synonymously in this article.

2. A secured creditor's rights are limited in California by interrelated antideficiency and foreclosure statutes. *See, e.g.*, CAL. CIV. PROC. CODE § 726(a) (Deering 1983) (allowing only one action and one form of action for enforcement of any right secured by a mortgage or deed or trust); CAL. CIV. PROC. CODE §§ 726(b) and 580a (Deering 1982 & Supp. 1991) (limiting any deficiency judgment to the amount by which the outstanding debt exceeds the fair value of security sold); CAL. CIV. PROC. CODE § 580b (precluding any deficiency judgment when loan is "purchase money" within meaning of statute); CAL. CIV. PROC. CODE § 580d (Deering Supp. 1991) (precluding any deficiency judgment following a nonjudicial sale).

3. *See, e.g.*, R. BERNHARDT, CALIFORNIA MORTGAGE AND DEED OF TRUST PRACTICE, §§ 8.10-18, at 404-13 (Cal. Cont. Educ. Bar ed. 1990); D. AUGUSTINE & S. ZARROW, CALIFORNIA REAL ESTATE LAW PRACTICE, §§ 122.70-.75 (1987); and J. HETLAND, SECURED REAL ESTATE TRANSACTIONS, §§ 9.35-46, at 221-34 (Cal. Cont. Educ. Bar ed. 1974).

4. Technically, the creditor forecloses the trustor's equity of redemption in the secured real property. *See* R. MAXWELL, S. RIESENFELD, J. HETLAND & W. WARREN, CALIFORNIA CASES ON SECURITY TRANSACTIONS IN LAND 2 (3d ed. 1984). In practice, however, it is often said that the creditor forecloses the security. *See, e.g.*, Walker v. Community Bank, 10 Cal. 3d 729, 734, 518 P.2d 329, 332, 111 Cal. Rptr. 897, 900 (1974) (debtor may invoke sanction aspect of California Code of Civil procedure section 726 when creditor does "not foreclose on the security."). This latter colloquial use will sometimes be used in this article.

5. All subsequent statutory references are to the California Code of Civil Procedure unless otherwise indicated.

It is possible to construe section 580d as permitting a creditor to obtain a deficiency judgment against a guarantor following a trustee's sale of the guarantor's security since section 580d expressly provides deficiency protection only to a debtor who executes a "note" secured by a deed of trust. However, section 580d's exclusion of certain types of bonds suggests the word "note" as used in section 580d should not be narrowly construed. Additionally, and most importantly, providing section 580d protection to guarantors who secure their guaranties with a deed of trust is consistent with section 580d's purpose.

I. SECTION 580d's EXPRESS LANGUAGE

It is possible that a court would permit a creditor to obtain a deficiency judgment against a guarantor following a trustee's sale of the guarantor's real property security since section 580d expressly provides deficiency protection following a trustee's sale only to a debtor who executes a "note" secured by a deed of trust. Specifically, section 580d provides that:

No judgment shall be rendered for any deficiency upon a *note* secured by a deed of trust or mortgage upon real property . . . in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.⁶

Moreover, although no California court has directly addressed whether the word "note" in section 580d includes a guaranty, two cases suggest that the word "note" is to be narrowly construed and thus does not include a guaranty.

The first such case is *Willys of Marin Company v. Pierce*.⁷ In *Willys*, the defendant-lessee executed a deed of trust encumbering the lessee's separate real property to secure the lessee's performance of its obligations under the lease. After the lessee breached the lease by failing to pay rent, the lessor caused the real property security to be sold under the power of sale provision contained in the deed of trust. The sale was for the purpose of satisfying rent that was due up until the time of sale. When the lessee again failed to pay rent, the lessor sued. The Court of Appeal rejected the lessee's claim that the lessor was seeking a deficiency judgment which was barred by section 580d. Rather, the court held that section 580d did not apply to the lessor's action since the lessor was seeking to recover a deficiency after foreclosing a deed of trust securing a *lease* rather than a *note*: "It seems obvious that section 580d does not apply to obligations other than promissory

6. CAL. CIV. PROC. CODE § 580d (Deering Supp. 1991) (emphasis added).

7. 140 Cal. App. 2d 826, 296 P.2d 25 (1956)

notes.”⁸

In *Passanisi v. Merit McBride Realtors, Inc.*,⁹ the court also construed the word “note” narrowly. In *Passanisi*, the plaintiff-trustors brought an action to enjoin a trustee’s sale. At trial, the defendant-beneficiary prevailed and obtained a judgment for attorneys’ fees pursuant to an attorneys’ fees provision in the deed of trust. After the trustors elected not to appeal from the judgment, the trustee’s sale took place. The trustors claimed, *inter alia*, that under section 580d the sale of the property rendered the prior award for attorneys’ fees unenforceable. The court held that the judgment was enforceable, reasoning, *inter alia*,¹⁰ that by its express terms, section 580d applied to notes and not to actions for attorneys’ fees.¹¹

If the word “note” in section 580d is indeed to be narrowly construed, as *Willys* and *Passanisi* suggest, a guarantor who secures his or her guaranty with real property would not have section 580d protection since a guaranty is not a note.¹²

II. LEGISLATIVE INTENT

The conclusion reached in *Willys* and *Passanisi* has some justification. Indeed, the legislative history of sections 580d and 580a in part suggests that

8. *Id.* at 831, 296 P.2d at 28.

9. 190 Cal. App. 3d 1496, 236 Cal. Rptr. 59 (1987).

10. The court also considered the policy behind section 580d. *See infra* Section III.

11. *Passanisi*, 190 Cal. App. 3d at 1509, 236 Cal. Rptr. at 67. *Indusco Management Corp. v. Robertson*, 40 Cal. App. 3d 456, 114 Cal. Rptr. 47 (1974), the only reported case in which a creditor had a trustee’s sale of a guarantor’s real property security, does not address the issue of whether a guarantor who secures his or her guaranty with real property has section 580d protection. In *Indusco*, the debtor secured a note with a second deed of trust on a leasehold estate in real property. The guarantor purchased the leasehold estate from the original debtor, and guaranteed, but did not assume, the original note. The guarantor did, however, *secure the note* with a deed of trust on his home. *The guarantor’s deed of trust did not secure the guaranty.* After the debtor defaulted on its payments, the senior lienholder foreclosed the debtor’s equity of redemption in the leasehold estate. The sold-out junior lienholder then had a trustee’s sale of the guarantor’s home. After the sale, the junior lienholder sought to recover a deficiency against the guarantor. The court held that the junior lienholder was estopped from collecting a deficiency against the guarantor because the junior lienholder destroyed the subrogation rights of the guarantor against the original debtor:

Since the Home Trust Deed secured the [original note] by its express terms (*and not the Guaranty* executed by [the guarantor]), the conduct of the Trustee’s Sale by [the creditor] under the Home Trust Deed operated to preclude any recovery of a deficiency judgment against [the original debtor on the original note] under [section 580d].

Id. at 459 (emphasis added).

In contrast, when a creditor seeks to recover from a guarantor who secures his or her guaranty with real property following a trustee’s sale of such security, the issue of destroying the guarantor’s subrogation rights against the debtor does not arise.

12. *See, e.g., Union Bank v. Gradsky*, 265 Cal. App. 2d 40, 44, 71 Cal. Rptr. 64, 67 (1968) (“An action by the Bank against [the guarantor] before any resort to the security is neither an action on ‘a note’ nor is it an action to recover a ‘deficiency.’ The action is on the guarantee, not on the note.”).

the legislature may have intended that the word “note” be narrowly construed. When the legislature enacted section 580a seven years before enacting section 580d, the legislature used the broad term “obligation.”¹³ In contrast, when the legislature enacted section 580d, it limited section 580d’s application to a “note.”¹⁴ However, if the legislature truly intended that section 580d apply only to a note, there would not appear to be a reason for the legislature to have enacted the exceptions to section 580d contained in the second paragraph of the statute. That paragraph provides as follows:

This section does not apply to any deed of trust . . . given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or which is made by a public utility subject to the Public Utilities Act (Part 1 (commencing with Section 201) of Division 1 of the Public Utilities Code).¹⁵

The bonds referred to in section 580d include not only bonds to raise capital,¹⁶ but also bonds to *guaranty* performance.¹⁷ If the legislature intended to exclude guaranties from section 580d’s scope by using the word “note,” it is unlikely that it would have specifically excluded a guaranty in the second paragraph. Indeed, rather than explaining the scope of the word “note,” this exclusion of certain types of guaranties implies inclusion of other guaranties.¹⁸

Also supporting the conclusion that the legislature intended to provide section 580d protection to guarantors who secure their guaranties with real property is the fact that providing guarantors with such protection is consistent with section 580d’s purpose of putting “judicial enforcement on a parity with private enforcement . . . without denying the creditor his

13. Section 580a provides: “Whenever a money judgment is sought for the balance due upon an *obligation* for the payment of which a deed of trust . . . was given as security, following the exercise of the power of sale in such deed of trust . . .” such money judgment shall, assuming that the procedural aspects of section 580a are followed, be reduced by the amount that the fair value of the real property security exceeds the amount for which such security was sold. CAL. CIV. PROC. CODE § 580a (Deering Supp. 1991) (emphasis added).

14. *See Willys*, 140 Cal. App. 2d at 831, 296 P.2d at 28.

15. *See* J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS, § 6.15 (Cal. Cont. Educ. Bar ed. 1970) (“If all forms of indebtedness other than notes are excluded in any event, there would seem to be little purpose for the legislature’s specific exclusion of a particular form of bond.”); J. Hetland, *Deficiency Judgment Limitations in California—A New Judicial Approach*, 51 CALIF. L. REV. 1, 32-37 (1963).

16. *E.g.*, CAL. PUB. UTIL. CODE § 70225 (Deering 1964) (Marin County transit district); CAL. PUB. UTIL. CODE § 13201 (Deering 1951) (municipal utility districts).

17. *E.g.*, CAL. PUB. UTIL. CODE § 6010 (Deering 1951).

18. *See, e.g.*, *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 881 n.4, 710 P.2d 309, 314 n.4, 221 Cal. Rptr. 509, 514 n.4 (1985) (“Under the familiar maxim of *expressio unius est exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded.”).

election of remedies.”¹⁹ Only a judicial foreclosure is subject to the defendant’s right of redemption.²⁰ This “right to redeem . . . has the effect of making the security satisfy a realistic share of the debt.”²¹ Similarly, a deficiency bar following a trustee’s sale, while not discouraging underbidding, makes underbidding irrelevant since it prevents a creditor from profiting from an underbid.

The purpose of achieving a parity of remedies is served well by giving section 580d protection to guarantors who secure their guaranties with real property. If the creditor forecloses judicially, the guarantor has a right to redeem under section 729.010.²² On the other hand, if the creditor forecloses non-judicially, the guarantor has no right of redemption since there would be no “decree of foreclosure” under section 729.010. The guarantor must therefore have section 580d protection to ensure that the security satisfies a realistic share of the debt, and thus put non-judicial foreclosure on par with judicial foreclosure. Of course, this same purpose could be achieved by giving the guarantor a right of redemption following a trustee’s sale, but such a rule would deny the creditor an election of remedies.

III. RESOLUTION OF CONFLICT BETWEEN SECTION 580d’S EXPRESS LANGUAGE AND FULFILLING SECTION 580d’S PURPOSE

The express language of section 580d does not support giving a guarantor deficiency protection following a trustee’s sale of the guarantor’s security, while the purpose of section 580d supports giving the guarantor such protection. In such a situation, the statute should be interpreted to fulfill its purpose. For example, in *Freedland v. Greco*,²³ the debtor executed two notes, one secured by a chattel mortgage and one secured by a second trust deed on real property. The two notes represented a single obligation. The court determined that the creditor could not obtain a deficiency after exhausting the real property security at a trustee’s sale simply because the creditor had two notes. The court reasoned that, although section 580d might not literally apply to the unsecured note, to permit the creditor to obtain a deficiency would defeat section 580d’s purpose:

Taking into consideration the policies and purposes of the act, the applicable rule of statutory construction is that the purpose sought

19. *Roseleaf Corp. v Chierighino*, 59 Cal. 2d 35, 43, 378 P.2d 97, 102, 27 Cal. Rptr. 873, 878 (1963).

20. CAL. CIV. PROC. CODE § 729.010(a) (Deering 1982) (“If the decree of foreclosure of a mortgage or deed of trust on real property pursuant to Section 726 determines that a deficiency judgment may be ordered against the defendant, the real property . . . shall be sold subject to the right of redemption.”).

21. *Roseleaf*, 59 Cal. 2d at 43, 378 P.2d at 102, 27 Cal. Rptr. at 878.

22. CAL. CIV. PROC. CODE § 729.010 (Deering 1982).

23. 45 Cal. 2d 462 n.8, 289 P.2d 463 n.8 (1955).

to be achieved and evils to be eliminated have an important place in ascertaining the legislative intent. . . . Statutes should be interpreted to promote rather than defeat the legislative purpose and policy.²⁴

Here, the court continued, “[i]t is unreasonable to say the Legislature intended that section 580d could be circumvented by such a manifestly evasive device.”²⁵

As in *Freedland*, the court in *Bank of Italy National Trust & Savings Assn. v. Bentley*,²⁶ similarly interpreted a statute to promote its purpose. By its literal language, section 726 applies only to “mortgages.” The California Supreme Court held, however, that section 726 also applies to deeds of trust. The court reasoned that such a result would fulfill the purpose of section 726 since a deed of trust serves the same economic function as a mortgage.²⁷

CONCLUSION

A guarantor who secures his or her guaranty with a deed of trust is in a position analogous to a debtor who secures his or her note with a deed of trust. Giving such a guarantor the same rights as such a debtor furthers the purpose of section 580d. Section 580d therefore should apply to a guaranty secured by real property. Accordingly, courts should not permit a creditor who forecloses nonjudicially on a deed of trust executed to secure a guaranty to obtain a deficiency judgment against the guarantor.

24. *Id.* at 467, 289 P.2d at 466.

25. *Id.*

26. 217 Cal. 644, 20 P.2d 940 (1933).

27. *Id.* at 657-58, 20 P.2d at 943. See also *Roseleaf* 59 Cal. 2d at 43-44, 378 P.2d at 102, 27 Cal. Rptr. at 878 (section 580d does not prevent sold-out junior from obtaining a judgment on note because, *inter alia*, such a prevention would not serve section 580d's purpose); *Cornelison v. Kombluth*, 15 Cal. 3d 590, 542 P.2d 981, 125 Cal. Rptr. 557 (1975) (section 580d does not bar an action for bad faith waste following a trustee's sale but does bar action when waste results from the depressed condition of the general real estate market since such rules fulfill section 580d's purpose); *Passanisi* 190 Cal. App. 3d at 1508, 236 Cal. Rptr. at 66 (although the express language of section 580d applies only to actions upon a note, “in determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery”).