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COURT CLARIFIES WHEN WRIT OF ATTACHMENT MAY BE ISSUED AGAINST GUARANTOR ON A SECURED DEBT

By Darryl J. Horowitz

With credit tightening, banks often look to business owners to guarantee loans, even when the loan may be secured by real estate. This article will discuss a recent case in which the court confirmed that a writ of attachment may be granted against a guarantor even where the underlying loan was secured by real property.

Generally, where a loan is secured by real estate, the “one form of action rule” requires the creditor to foreclose on the real property. (Code of Civil Procedure § 580(a).) There are further restrictions on the ability of a borrower to recover. For example, a lender may not recover a deficiency where the loan proceeds were used to purchase the real property or the property was foreclosed non-judicially; that is, under the power of sale clause in a deed of trust. (Code of Civil Procedure §§ 580(b) and 580(d).) A deficiency is only available where obtained by court order for a non-purchase money loan and where there is inadequate equity in the property. (Code of Civil Procedure § 580(a).)

Realizing that property values have decreased, banks will often request a personal guaranty of corporate officers and/or shareholders in order to secure either the payment of a deficiency judgment or, alternatively, where there is a possibility of a deficiency and the lender wishes to avoid the anti-deficiency rules of Code of Civil Procedure § 580(d).

Knowing the limitations in the anti-deficiency laws, logic would dictate that a guaranty may be worthless if offered where the loan is otherwise secured by real property. That is not, however, the case. In such instances, a guarantor may be liable for such a deficiency. Specifically, guarantors can waive the benefits of the anti-deficiency laws. (See Civil Code § 2856.) Thus, while the borrower may be protected from deficiency judgment liability, the guarantor will not necessarily receive the same protections. (See *Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927, 932.)

Normally, a guarantor who is asked to pay the principal’s obligation becomes subrogated to the same rights against the debtor that the original lender had. In other words, the guarantor effectively “steps into the shoes” of the lender and can obtain no greater rights than the lender had. The lender is thus prevented from pursuing the guarantor for a deficiency when it elects a remedy that destroys the guarantor’s subrogation rights ***unless the guarantor has effectively waived this estoppel***, known as a “Gradsky” waiver. (See *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40; *Cathay Bank v. Lee* (1993) 14 Cal.App.4th 1533, 1535, fn. 3; *Trust One Mortg. Corp. v. Invest America Mortg. Corp.* (2005) 135 Cal.App.4th 1302, 1311-1312.)

Most guaranties contain Gradsky waivers in the personal guaranties. Doing so allows the lender to recover against the guarantors even

though a non-judicial foreclosure has been obtained and the underlying borrower is absolved. But what if the guarantor refuses while the real property security is being foreclosed and the lender knows there will be a deficiency? How can the guaranty be enforced?

Generally, one remedy would be to obtain a pre-judgment writ of attachment, which is a request that the court issue a writ to allow the lender to levy on the non-exempt assets of the guarantor. Such a writ is permitted where the debt arises from a contract, more than \$500 is sought, the obligation is unsecured, and the underlying loan was not for personal, family, or household purposes. (Code of Civil Procedure § 583.010.) Because real estate loans are secured by real property, however, an issue arises as to whether or not a writ of attachment is available. The question was recently answered in *United Central Bank v. The Superior Court of Orange County (Chang)* (2009) DJDAR 16141 with a yes.

In *United Central Bank v. Superior Court*, United Central Bank made three construction loans which were guaranteed by Chang. The borrower defaulted and, despite demands, neither the borrower nor guarantor made payment. The bank then sued Chang for breach of guaranty and applied for a writ of attachment. The trial court rejected the application on the grounds that because the underlying obligation was secured, a writ was not available.

The bank sought a writ of mandate to reverse the trial court, and a writ was issued. In doing so, the court held that the guaranty was unsecured and must be considered a separate

and independent obligation from that of the underlying loan. The court further noted that case law holds that a writ of attachment may issue on a guaranty regardless of whether the principal loan is secured or unsecured, ***provided the guarantor has waived the right to require the creditor to proceed first against the security.*** Because the guarantor, Chang, had waived such a right, the trial court erred in finding that a writ was not available. The writ was thus issued for the trial court to determine if the other conditions for the issuance of a writ of attachment existed.

For lenders, this is an important reminder to be sure that all guaranties contain the Gradsky waiver. It is also a reminder for borrowers to be aware of such waivers when you sign the guaranties. Many guarantors are unaware that they could ultimately be liable after a foreclosure, believing that foreclosure is the only remedy available to the lender.

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