Case No. _____

IN THE

SUPREME COURT OF CALIFORNIA

BLACK SKY CAPITAL, LLC,

Plaintiff and Appellant,

v.

MICHAEL A. COBB and KATHLEEN S. COBB,

Defendants and Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case No. E064482

From the Superior Court of California, County of San Bernardino
The Hon. Bryan F. Foster, Judge
Case No. CIVDS1416584

PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW

Does Code of Civil Procedure section 580d ("Section 580d") bar a single creditor that owns both the senior and junior liens encumbering the same parcel of real property from seeking a money judgment against the debtor under the sold-out junior lien when that creditor caused its own sold-out junior status. For twenty-five years, *Simon v. Superior Court*, 4 Cal. App. 4th 63 (1992) ("*Simon*") and its progeny have answered that question in the affirmative. The Court of Appeal's published opinion below now not only answers that question in the negative, but it severely criticizes the rationale and holding of the *Simon* line of cases. This Court's guidance is therefore needed to resolve this newly-created split in the districts on this recurring issue of lending law.

II. INTRODUCTION

There is compelling need for this Court to review the issue presented in order to secure uniformity of decision and to resolve a newly-created split in the appellate districts as to the proper application of Section 580d when the same creditor owns both the senior and junior liens encumbering a parcel of real property, and then opts to nonjudicially foreclose on the senior lien, thereby causing its own junior lien to become sold-out. The published decision by the Court of Appeal in this case has pitted the First Appellate District's holding in *Simon v. Superior Court*, 4 Cal. App. 4th 63,

78 (1992) ("section 580d must nonetheless be viewed as controlling where, as here, the senior and junior lenders and lienors are identical and those liens are placed on the same real property") against the Fourth Appellate District, Division Two's[1] severe criticism of *Simon*, where it holds that a sold-out junior lienholder in that same scenario can in fact pursue a money judgment against the debtor ("It makes no difference whether the junior lienholder is the same entity or a different entity as the senior lienholder") (See Opinion at page 14).[2] As a result of the published opinion, the Court of Appeal has created uncertainty among California's borrowers and lenders, such that it is now unclear which rule will apply if a lender owns both the senior and junior lien interests. Creditors and debtors deserve guidance and predictability as to these issues. Petitioners MICHAEL A. COBB and KATHLEEN S. COBB (hereinafter, collectively, "the COBBS" or "Petitioners") therefore respectfully assert that this Court's review is warranted pursuant to Rule 8.500(b)(1),

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[1] As will be discussed more fully below, the Fourth District, Division Three began the current assault on *Simon* and its progeny in 2012, when it stated (in dictum) that *Simon* "ignore[d] the text of section 580d in favor of free-ranging judicial policy making." *Cadlerock Joint Venture, L.P. v. Lobel*, 206 Cal. App. 4th 1531, 1547-48 (2012)(review denied October 10, 2012).

[2] Pursuant to Rule 8.504(b)(4), a copy of the Court of Appeal's published opinion dated June 13, 2017 is attached hereto as Exhibit A.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. BLACK SKY's Unity of Interest in the Underlying Loans

On or about August 18, 2005, the COBBS borrowed the sum of $10,229,250.00 ("first loan") from Citizens Business Bank ("Citizens") evidenced by a promissory note ("senior note") and secured by a deed of trust ("senior deed of trust") encumbering real property located at 10681 Foothill Blvd., Rancho Cucamonga, California 91730 ("Subject Property"). (CT, I, p. 86).[3] On or about September 14, 2007, the COBBS borrowed $1,500,000.00 ("second loan") from Citizens and executed a second promissory note ("junior note"), which was also secured by a deed of trust ("junior deed of trust") encumbering the Subject Property. (CT, I, p. 86). Citizen's Bank thereafter simultaneously assigned both the first loan and the second loan to Plaintiff and Appellant BLACK SKY CAPITAL, LLC ("BLACK SKY"), who maintained a unity of interest in both the senior and junior liens.

Following the borrowers' defaults under both the senior and junior loans, BLACK SKY opted to conduct a nonjudicial foreclosure on the senior deed of trust, acquiring the Subject Property on or about October 28, 2014 for a credit bid of $7,500,000.00. (CT, I, p. 144). This amount was

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[3] All references to the record on appeal shall be to the Clerk's Transcript, volumes 1-3. "CT" shall refer to "Clerk's Transcript," followed by volume number and page number.

substantially less than the indebtedness under both the senior note (CT, I, p. 144) and the junior note (CT, I, p. 179). It was also substantially less than the $8,400,000.00 appraised value of the Subject Property as of August 1, 2013 (CT, III, p. 603). BLACK SKY's decision to move forward with nonjudicial foreclosure (thereby taking title to the Subject Property by way of credit bid) eliminated its own security interest in the Subject Property under the junior deed of trust by operation of law. (CT, I, p. 13).

B. BLACK SKY's Action to Collect Against the COBBS on the Junior Note Following its Decision to Make Itself a Sold-Out Junior Lienholder

Less than one week after the trustee's sale, on November 4, 2014, BLACK SKY initiated the underlying lawsuit seeking to recover money damages under the junior note against the COBBS. Both parties filed cross motions for summary judgment before the trial court, resulting in the trial court's May 8, 2015 order granting the COBBS's motion for summary judgment and denying BLACK SKY's motion for summary judgment. (CT, III, 708-711). The trial court found that the case "boils down to the applicability of the anti-deficiency statutes when the senior and junior lienholders are the same entity" (CT, III, p. 709), and ruled that because "the liens are held by the same creditor, and that creditor forecloses on the senior lien, thus extinguishing its junior lien, the creditor cannot then sue on the junior as note as a sold-out junior lienor." (CT, III, p. 710). The trial court thereafter entered judgment in favor of the COBBS and against

BLACK SKY on September 4, 2015. (CT, III, pp. 719-720). BLACK SKY filed its notice of appeal on September 18, 2015. (CT, III, p. 735).

C. The Court of Appeal Reverses the Trial Court and Attempts to Abrogate the Holding in *Simon*

In its June 13, 2017 published opinion reversing the trial court, the Court of Appeal took an unreasonably narrow reading of Section 580d and virtually ignored the well-settled case law finding that the antideficiency statutes are to be liberally construed. In so doing, the Court of Appeal's published opinion severely criticized the holding of *Simon* and its progeny in order to find that the unity of interest in the senior and junior liens held by BLACK SKY at the time of its nonjudicial foreclosure sale under the senior deed of trust was *irrelevant* for purposes of its Section 580d analysis. (See Opinion at page 14)("It makes *no difference* whether the junior lienholder is the same entity or a different entity as the senior lienholder") (emphasis added). This position directly contradicts the First District's holding in *Simon* (as well as all the holdings from other districts that have applied *Simon*) that when a creditor who owns a unity of interests in both loans **takes action to make itself a sold-out junior lienholder**, it cannot also maintain an action for money damages under the sold-out junior note. See, e.g., (Second Appellate District) *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199, 1207 (2012) (barring recovery by a junior note holder on the balance due on the junior note by a mortgage lender who

made two loans in the form of two notes, each secured by separate deeds of trust encumbering the same real property, and thereafter assigned the junior note and deed of trust to another lender) and *Ostayan v. Serrano Reconveyance Co.*, 77 Cal. App. 4th 1411, 1422 (2000) (finding that a single creditor holding both liens at the time of a nonjudicial foreclosure cannot pursue a deficiency judgment as a sold-out junior lienholder); (Fifth District) *Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540, 550 (1994) (holding that a contract claim on the junior note was barred because of the unity of ownership between the senior and junior liens). This case therefore falls directly within the standards of Rule 8.500(b)(1) and warrants this Court's review.[4]

IV. REASONS FOR GRANTING REVIEW

This Court's review is warranted because the Court of Appeal has set in motion two opposing viewpoints on how a creditor may proceed in attempting to collect on its sold-out junior lien interest. In so doing, it has not only created confusion among creditors and borrowers doing business in this state, but it has also created uncertainty for trial courts who must now decide which rule to apply. See *Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara Cnty.* 57 Cal. 2d 450, 455 (1962) (a court of appeal decision

[4] The COBBS did not file a petition for rehearing at the Court of Appeal, and instead, seeks this Court's review on this matter of statewide concern.

must be followed by all superior courts, regardless of which appellate district rendered the opinion). Petitioners respectfully assert that the Court of Appeal's analysis is deficient in the following respects:

The Court of Appeal's opinion severely limits the applicability of Section 580d, as it espouses an unnecessarily narrow reading of this Court's holding in *Roseleaf Corp. Chierighino*, 59 Cal. 2d 35 (1963) ("*Roseleaf*"). This approach is contrary to this Court's mandate when interpreting the antideficiency statutes to "focus on the substance rather than form of the loan transaction in question." *Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal. 4th 667, 681 (2016). See also *Simon*, supra, at 77-78 ("the elevation of the form of such a contrived procedure over its easily perceived substance would deal a mortal blow to the antideficiency legislation of this state").

The Court of Appeal's published opinion also attempts to abrogate the evolution of antideficiency jurisprudence in this state by severely criticizing *Simon*'s application of Section 580d in instances where the same creditor has a unity of interest in both liens. In so doing, the opinion fails to give any deference to the liberal construction historically afforded to the application of the antideficiency statutes. See *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 258-9 (1997) (citing *Simon* for the proposition that "our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against

deficiency judgments after nonjudicial foreclosure"). For these reasons, the petition for review should be granted.[5]

A. The Court of Appeal Failed to Meaningfully Differentiate a Creditor That Makes Itself a Sold-Out Junior From a Bona Fide Sold-Out Junior at the Whim of a Separate Foreclosing Senior Lienholder

The current published opinion by the Court of Appeal is the latest attack by the Fourth District against the First District's holding in *Simon* (that a creditor who opts to makes itself a sold-out junior lienholder cannot properly be deemed a bona fide sold-out junior lienholder for purposes of Section 580d). Indeed, in *Cadlerock Joint Venture, L.P. v. Lobel*, 206 Cal. App. 4th 1531 (2012)("*Cadlerock*"), the Fourth Appellate District, Division Three, severely criticized the evolution of Section 580d under *Simon*. Since the facts of *Cadlerock* involved a junior lienholder who was deemed *not* to be precluded by Section 580d from seeking a money judgment on a

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[5] Since there is no "horizontal stare decisis" within the Courts of Appeal (*Marriage of Shaban*, 88 Cal.4th 398, 409 (2001)), the Court of Appeal was not required to follow *Simon*. However, appellate courts usually give substantial deference to another district's or division's prior decision "without good reason to disagree." *Mega Life & Health Ins. Co. v. Super. Ct. (Closson)*, 172 Cal.4th 1522, 1529 (2009); *see also Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co., LLP*, 98 Cal. 4th 934, 947 (2002) (stating that the appellate decision out of another district "does not, of course, bind this court, and its persuasiveness depends on whether it is consistent with the California Supreme Court decisions which do bind us"). Here, the Fourth District, Division Two has apparently found what it deems to be a good reason to disagree with *Simon* and its progeny. Review should be granted for this reason as well.

sold-out junior lien, the *Cadlerock* court did not need to reach the issue presented by *Simon* ("[i]n the case before us, the junior lienor and senior lienor were *different* entities at the time of the senior trustee's sale") *Id.* (emphasis added). Nonetheless, the *Cadlerock* court, in dictum, went on to call into question the wisdom of the *Simon* line of cases.[6]

Parroting the language and the reasoning from *Cadlerock*, the Court of Appeal below concluded that "*Roseleaf* . . . cannot be read to support the rule created by *Simon*. . . . *Roseleaf*'s holding that section 580d does *not* apply to nonselling junior lienholders cannot be contorted into a rule that section 580d *does* apply to preclude a lienholder from seeking damages under the junior note if it, in its capacity as the senior lienholder, has exercised its right to conduct a private sale of the property rather than seeking a judicial foreclosure." (See Opinion at page 9). The Court of Appeal in its opinion then went on to note that it, like the *Cadlerock* panel

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[6] It is significant to note, however, that the *Cadlerock* court reiterated the underlying purpose of section 580d set forth in *Simon*; namely, preventing a situation where "'the same lender. . .(1) obtain[s] the security without a right of redemption afforded to borrower and (2) obtain[s] a deficiency judgment, [which] would undermine the purpose of section 580d—to place judicial and nonjudicial foreclosure in parity. *Id.* at 1545 (citing *Simon*, at 76).'" Here, BLACK SKY had a choice. By taking the quicker, less costly route of nonjudicial foreclosure, it was able to acquire title to the security quickly and without the investment of new money (by simply bidding a price that was less than the outstanding indebtedness). (CT, I, p. 144). The choice BLACK SKY made blocked the COBBS's right of redemption. But it also should have precluded BLACK SKY from pursuing an action on the second note.

before it, found "conspicuously absent" from *Simon* and cases following it a "close examination of the text of section 580d." (See Opinion at page 9). The Court of Appeal therefore concluded that *Simon* created "an equitable exception to section 580d to expand the statute" (Opinion at page 10) and further criticized *Simon* for justifying its holding "by the fact that the bank was not a bona fide sold-out junior because it was the bank itself, rather than a different lienholder, that made the decision to foreclose on the senior lien." (Opinion at page 10).

However, what is remarkably absent in the Court of Appeal's analysis is any explanation as to *why* the distinction that *Simon* and its progeny made about creditors not being bona fide sold-out juniors when they put themselves in that position by nonjudicially foreclosing on their own senior lien should not apply. Instead, the Court of Appeal answers this question by not answering the question at all, demurring that "Section 580d simply does not, however, by its express terms, encompass a lien that has not been foreclosed." (Opinion at page 11). In so holding, the Court of Appeal takes an unreasonably restrictive approach towards its analysis of the language of Section 580d, as well as this Court's prior holding in *Roseleaf,* and concludes that *Simon* and its progeny are wrong in their approach towards the applicability of Section 580d when a lender causes its own sold-out junior status. This was error which warrants this Court's review.

B. The Court of Appeal Erred by Narrowly Construing Section 580d and *Roseleaf*

It is well-settled that Section 580d prohibits recovery of a deficiency judgment from the borrower after a nonjudicial foreclosure sale.[7] According to Section 580d, 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 if the real property has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust. See *Western Security Bank*, supra, at 237 (precluding a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust secured by real property). In that way, the antideficiency statute is "designed to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies." *Roseleaf*, supra, at 43-44. Unfortunately for the COBBS, this exact

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[7] Since foreclosure may be either judicial or nonjudicial (the former allowing the creditor to seek a deficiency judgment and the debtor to have a statutory right of redemption; the latter eliminating the right of a creditor to seek a deficiency judgment, but also eliminating the borrower's right of redemption), a secured creditor is therefore faced with an election of remedies when seeking to enforce the one action. *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1236 (1995). Here, BLACK SKY elected to proceed with nonjudicial foreclosure in order to seek a quicker, cheaper way to take title to the Subject Property (and to bypass the borrowers' right of redemption.

scenario befell them; a result which the Court of Appeal has now ratified.[8] While the Court of Appeal purports to base its rationale upon a strict reading of *Roseleaf*, in actuality the Court of Appeal fails to take the context of that case into proper perspective.

In *Roseleaf*, this Court held that prohibitions of section 580d did not extend to a junior lienholder whose security interest in property was extinguished by a trustee's sale under a senior lien. *Id.* at 43. As such, a sold-out junior lienholder "whose security has been rendered valueless by a senior sale" may recover on its promissory note since "there is no reason to compel a junior lienor to go through foreclosure and sale when there is nothing left to sell." *Id.* at 39. In so holding, this Court in *Roseleaf* showed particular concern that a junior lienholder might "end up with nothing" and noted that "the junior's right to recover should not be controlled by *the whim of the senior*." *Id.* at 44 (emphasis added). Although the Court of

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[8] In a carefully choreographed sequence of events aimed at prejudicing the debtors in this case, BLACK SKY made the strategic decision to nonjudicially foreclose under the senior lien (thereby taking title to the Subject Property by virtue of a credit bid that was substantially less than the value of the Subject Property) which simultaneously left the COBBS without any right of redemption. BLACK SKY immediately thereafter pursued a money judgment against the COBBS under the sold-out junior note, which Appellant procured knowing that it was substantially unsecured. (CT, I, p. 179). This creditor strategy of initiating simultaneous recoveries against the debtors by nonjudicially foreclosing on a senior lien, underbidding the Subject Property at the trustee's sale, and then seeking a money judgment on the sold-out junior note, is exactly what the antideficiency statutes were designed to protect against.

Appeal pays lip service to this oft cited language from *Roseleaf* pertaining to a sold-out junior creditor being at the "whim of the senior" (See Opinion at p. 6), it fails to take into consideration that *Roseleaf* did not intend to apply to a situation where a single creditor owns two loans secured the same real property; but rather, where there was a *different* senior lienholder. That is the only explanation that justifies this Court's concern in *Roseleaf* of not putting the junior lienholder at the whim of the senior lienholder.

So while the fundamental tenets of *Roseleaf* remain good law (i.e. a sold-out junior may bring an action on the note without running afoul of section 580d), subsequent decisions have analyzed the proper application of section 580d under different factual contexts; most notably, when the foreclosing senior lienholder is the *same entity* as the junior lienholder. For that reason, in *Simon,* the First District held that "where a creditor makes two successive loans secured by separate deeds of trust on the same real property and forecloses under its senior deed of trust's power of sale, thereby eliminating the security for its junior deed of trust, section 580d . . . bars recovery . . . on the obligation the junior deed of trust secured." *Id.* at 66. See also *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199, 1207 (2012). As such, while lending practices may have changed since *Roseleaf* (i.e. the common usage of first and second liens owned by the same creditor that encumber the same parcel of real property), the fundamental principles that arise from the application of the antideficiency

rules remain wholly consistent between the disparate factual backgrounds surrounding *Roseleaf* and *Simon*.[9] The Court of Appeal's opinion to the contrary is based upon an unnecessarily narrow interpretation of Section 580d and *Roseleaf*, which warrants this Court's review.

C. The Court of Appeal Failed to Honor the Liberal Construction Historically Applied to the Antideficiency Statutes

The Court of Appeal's unreasonably restrictive approach to the interpretation of *Roseleaf* and the applicability of Section 580d has led it away from the path this Court has consistently forged with respect to the antideficiency statutes (i.e. the liberality of construction to be afforded to them). See *Western Security*, supra, at 258-9. See also *Coker*, supra at 676 ("our cases assigning to section 580b this *broad construction* have consistently looked to the purposes of the statute and to the substance rather than the form of loan transactions in deciding the statute's applicability") (emphasis added). That is to say, rather than interpreting Section 580d through this more inclusive lens, the Court of Appeal instead focuses on the legislature's singular use of the phrase "a deed of trust" as justification for its highly limiting position that section 580d only applies to a "single deed

[9] Indeed, the *Simon* court's ruling even assumed that "legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured" yet still found that "section 580d must nonetheless be viewed as controlling" based upon the unity of the creditor and the real property serving as security. *Simon* at 77.

of trust." (See Opinion at page 14). In so doing, the Court of Appeal goes on to hold that Section 580d "does not apply to a junior deed of trust secured by the same property so as to the bar the junior lienholder from suing on the now-unsecured debt." (See Opinion at page 14).

The Court of Appeal's holding in this regard seemingly has the effect of going "back to the future," as it takes the very specific factual circumstance of *Roseleaf* (involving separate senior and junior lienholders), as well as the singular use of deed of trust from the strict reading of Section 580d, to abrogate the 25-year evolution of Section 580d under *Simon* and its progeny, which have all liberally construed the antideficiency statutes. By doing so, the Court of Appeal has created an air of uncertainty in California's lending landscape which makes it almost impossible for lenders and borrowers to know which rule will apply if the lender owns both the senior and junior lien interests (not to mention which rule the trial courts will apply in any given case). For example, in the First, Second and Fifth Districts, the *Simon* rule precludes that lender from making itself into a sold-out junior lienholder and then pursuing the debtor for a money judgment on the sold-out junior. In the Fourth District (divisions two and three at least), that same result would not hold true. Creditors and debtors deserve guidance and predictability as to these issues. As such, this petition for review should be granted.

V. CONCLUSION

The Court of Appeal's decision in this case sets back the evolution of antideficiency jurisprudence by unreasonably limiting the scope of Section 580d and by taking an unnecessarily narrow reading of this Court's holding in *Roseleaf*. The published opinion below also creates a conflict in the appellate districts as to whether or not a unity of ownership in a senior and junior lien interest will lead to a sold-out junior lienholder's ability to recover a money judgment being barred by Section 580d. This Court's guidance on the applicability of Section 580d; one upon which this Court has not meaningfully opined in several decades since *Roseleaf*, is therefore needed to bring clarity to this issue and to resolve this conflict. As this petition falls squarely within Rule 8.500(b)(1), Petitioners respectfully request that this Court grant review to resolve this recurring issue of state-wide importance.

Dated: 7/20/17

SCHIFFER & BUUS, APC

By: _____
Eric M. Schiffer
Attorneys for Petitioners
MICHAEL A. COBB and
KATHLEEN S. COBB

DECLARATION OF ERIC SCHIFFER REGARDING WORD COUNT

I, ERIC SCHIFFER, hereby declare:

1. I have personal knowledge of all facts stated in this Declaration and, if called as a witness, I am competent to testify about them upon my personal knowledge.

2. I am an attorney duly licensed to practice law before the Courts of California and am a partner in the law firm of Schiffer & Buus, APC, counsel of record for Petitioners Michael A. Cobb and Kathleen S. Cobb. This declaration is offered in compliance with California Rules of Court, Rule 14(c), requiring counsel for the Petitioner to certify the word count of this petition for review.

3. I certify that there are 4877 words in the document entitled Petition for Review. Pursuant to California Rules of Court, Rule 14(c), I relied on the word count function of the word processing program utilized by our office, Microsoft Word, to provide the total number of words in this Petition for Review.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of July, 2017 at Costa Mesa, California.

Eric M. Schiffer

PROOF OF SERVICE

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 3070 Bristol Street, Suite 530, Costa Mesa, California 92626.

On the date entered below, I served the attached PETITION FOR REVIEW by placing a true copy thereof in an envelope addressed to the persons named below on the service list at the addresses shown, sealing and depositing that envelope and sending it in the manner described.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct on this 20th day of July, 2017 in Costa Mesa, California.

Patricia L. Starr

Patricia L. Starr

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EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BLACK SKY CAPITAL, LLC, Plaintiff and Appellant, v. MICHAEL A. COBB et al., Defendants and Respondents.	E064482 (Super.Ct.No. CIVDS1416584) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Reversed.

Law Offices of Ronald Richards & Associates, Ronald N. Richards; Law Offices of Geoffrey Long and Geoffrey S. Long for Plaintiff and Appellant.

Levitt Law, Scott L. Levitt; Lex Opus, Eric M. Schiffer; Schiffer | Buus and Eric M. Schiffer for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Black Sky Capital, LLC, (Black Sky) appeals a summary judgment entered in favor of defendants and respondents Michael A. Cobb and Kathleen S. Cobb (the Cobbs).[1]

On or about August 18, 2005, the Cobbs borrowed $10,229,250 from Citizens Business Bank. The note was secured by a deed of trust on a parcel of commercial real property in Rancho Cucamonga. On or about September 13, 2007, the Cobbs obtained a second loan from Citizens Business Bank, in the amount of $1,500,000, which was secured by a second deed of trust on the same property. Black Sky purchased both notes from Citizens Business Bank for an undisclosed sum. After the Cobbs defaulted on the senior loan, Black Sky opted to conduct a trustee's sale under the senior deed of trust. It acquired the property on or about October 28, 2014 for $7,500,000. On November 4, 2014, after the Cobbs defaulted on the junior loan, Black Sky filed the suit which is the subject of this appeal, seeking to recover the amount still owed on the junior note.

The Cobbs moved for summary judgment. Relying on *Simon v. Superior Court* (1992) 4 Cal.App.4th 63 (*Simon*), they argued that Code of Civil Procedure section 580d[2] prohibits a party holding both a senior and a junior lien on real property from both conducting a trustee's sale after default on the senior note and obtaining a monetary

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[1] Black Sky's motion for summary adjudication of issues was denied. It does not assert any error with respect to that ruling.

[2] All further statutory citations refer to the Code of Civil Procedure. We discuss section 580d below.

judgment for the balance owing on the note secured by the junior lien. They contended that the monetary judgment would be a deficiency judgment, which is prohibited by section 580d.

The trial court granted the Cobbs' motion and entered judgment for them. Black Sky appealed.

On appeal, Black Sky contends that *Simon, supra*, 4 Cal.App.4th 63, and the cases following it have erroneously expanded section 580d, based on an incorrect reading of *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35 (*Roseleaf*). It contends that section 580d, by its express terms, does not apply to the present circumstances. It contends that it is a "sold-out junior" lienholder within the meaning of *Roseleaf*, and that it has the right to seek a judgment for the balance owed on the junior note.

We agree that neither the rule enunciated in *Simon* nor section 580d applies under the circumstances of this case. Accordingly, we will reverse the judgment.

LEGAL ANALYSIS

BLACK SKY'S CLAIM FOR ANY BALANCE DUE ON THE SECOND LOAN IS NOT BARRED BY SECTION 580d OR BY SECTION 726

Standard of Review

The relevant facts, stated above, are undisputed. Accordingly, we review de novo the trial court's ruling on the motion for summary judgment. (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1539 (*Cadlerock*).)

Section 580d Does Not Apply to a Junior Lien After Nonjudicial Foreclosure on a Senior Lien

In California, "there is only 'one form of action' for the recovery of any debt or the enforcement of any right secured by a mortgage or deed of trust. That action is foreclosure, which may be either judicial or nonjudicial." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236 (*Rothwell*).) Section 726 provides that in a judicial foreclosure, if the property is sold for less than the amount of the outstanding indebtedness, "the creditor may seek a deficiency judgment, or the difference between the amount of the indebtedness and the fair market value of the property, as determined by a court, at the time of the sale. [Citation.]" (*Rothwell*, at p. 1236.) In contrast, section 580d "precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure [or trustee's sale] under a power of sale in a deed of trust . . . on real property."[3] (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 237.)

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[3] In pertinent part, section 580d provides:

"(a) 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.

"(b) The fact that no deficiency shall be owed or collected under the circumstances set forth in subdivision (a) does not affect the liability that a guarantor, pledgor, or other surety might otherwise have with respect to the deficiency, or that might otherwise be satisfied in whole or in part from other collateral pledged to secure the obligation that is the subject of the deficiency."

In *Roseleaf, supra,* 59 Cal.2d 35, the California Supreme Court addressed the question whether section 580d applies to a so-called "sold-out junior" lienholder when the senior lienholder elects to conduct a trustee's sale after default on the senior loan. (*Roseleaf,* at pp. 39, 41-44.) The court held that section 580d refers solely to the "instrument securing the note sued upon." (*Roseleaf,* at p. 43.) It held that the plain language of section 580d does not "extend to a junior lienor whose security has been sold out in a senior sale." (*Roseleaf,* at p. 43.) Accordingly, when two separate loans are secured by separate deeds of trust on the same real property, section 580d does not prevent the junior lienholder from enforcing the junior debt obligation when the senior lienholder conducts a trustee's sale and thus extinguishes the junior lienholder's security interest. (*Roseleaf,* at pp. 43-44.)

The court also explained the rationale for its holding based on the legislative purpose underlying section 580d:

"The purpose of section 580d is apparent from the fact that it applies if the property is sold under a power of sale, but not if the property is foreclosed and sold by judicial action. Before the section was enacted in 1939 (Stats. 1939, ch. 586, p. 1991), it was to the creditor's advantage to exercise a power of sale rather than to foreclose by judicial action. His right to a deficiency judgment after either was the same (Code Civ. Proc., §§ 580a, 726), but judicial foreclosure was subject to the debtor's statutory right of redemption (Code Civ. Proc., § 725a), whereas the debtor had no right to redeem from a sale under the power. [Citations.] It seems clear . . . that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be

accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case the debtor is protected.'

"The purpose of achieving a parity of remedies would not be served by applying section 580d against a nonselling junior lienor. Even without the section the junior has fewer rights after a senior private sale than after a senior judicial sale. He may redeem from a senior judicial sale [citation], or he may obtain a deficiency judgment. [Citations.] After a senior private sale, the junior has no right to redeem. This disparity of rights would be aggravated were he also denied a right to a deficiency judgment by section 580d. There is no purpose in denying the junior his single remedy after a senior private sale while leaving him with two alternative remedies after a senior judicial sale. *The junior's right to recover should not be controlled by the whim of the senior, and there is no reason to extend the language of section 580d to reach that result.*" (*Roseleaf, supra*, 59 Cal.2d at pp. 43-44, italics added.)

In *Simon, supra*, 4 Cal.App.4th 63, the court held that section 580d *does* preclude a deficiency judgment when the same lender is both the senior lienholder and the junior lienholder. (*Simon*, at p. 77.) The court reasoned as follows:

"The Supreme Court in *Roseleaf* found [that] the purpose of section 580d is 'to put judicial enforcement on a parity with private enforcement. . . . The junior's right to recover should not be controlled by the whim of the senior [as to whether to hold a private sale or seek judicial foreclosure] . . . .' (*Roseleaf Corp. v. Chierighino, supra,* 59 Cal.2d at pp. 43-44, italics [omitted].) [¶] Neither will a parity of creditor's remedies be served if [the bank] here is permitted to make successive loans secured by a senior and junior deed of trust on the same property; utilize its power of sale to foreclose the senior lien, thereby eliminating the Simons' right to redeem; and having so terminated that right of redemption, obtain a deficiency judgment against the Simons on the junior obligation whose security Bank, thus, made the choice to eliminate.

"Unlike a true third party sold-out junior, [the bank's] right to recover as a junior lienor which is also the purchasing senior lienor is obviously not controlled by the 'whim of the senior.' We will not sanction the creation of multiple trust deeds on the same property, securing loans represented by successive promissory notes from the same debtor, as a means of circumventing the provisions of section 580d. The elevation of the form of such a contrived procedure over its easily perceived substance would deal a mortal blow to the antideficiency legislation of this state. Assuming, arguendo, legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured, section 580d must nonetheless be viewed as controlling where, as here, the senior and junior lenders and lienors are identical and those liens are placed on the same real property. Otherwise, creditors would be free to structure their loans to a single debtor, and the security therefor, so as to obtain on default the secured property on a trustee's

sale under a senior deed of trust; thereby eliminate the debtor's right of redemption thereto; and thereafter effect an excessive recovery by obtaining a deficiency judgment against that debtor on an obligation secured by a junior lien the creditor chose to eliminate. [Citation.]" (*Simon, supra*, 4 Cal.App.4th at pp. 77-78.)

Simon justified its rule by holding that "[t]he antideficiency statutes are to be 'liberally construed to effectuate the specific legislative purpose behind them. . . . The courts have exhibited a very hospitable attitude toward the legislative policy underlying the anti-deficiency legislation and have given it a broad and liberal construction that often goes beyond the narrow bounds of the statutory language. [Citation.] And the legislative purpose against deficiency judgments may not be subverted.' [Citation.] 'The objective sought to be achieved by a statute as well as the evil to be prevented is of prime consequence in its interpretation.' [Citations.]" (*Simon, supra*, 4 Cal.App.4th at p. 78.)

Black Sky contends that *Simon, supra*, 4 Cal.App.4th 63, is in error and is not supported by the analysis in *Roseleaf, supra*, 59 Cal.2d 35, which, as we have discussed above, specifically found that section 580d does *not* apply to a junior lienholder after the senior lienholder has exercised its power of sale, based both on the statutory language and on the underlying purpose of the statute. Black Sky relies on *Cadlerock, supra*, 206 Cal.App.4th 1531 in support of its position, and asserts that in *Cadlerock*, the court held that *Simon* is in error because it violates the plain meaning of section 580d and extends *Roseleaf* beyond its holding.

Cadlerock does address this contention, albeit in dictum.[4] There, the court observed that, as held in *Roseleaf*, the unambiguous language of section 580d applies only to a lien that is nonjudicially foreclosed and that it simply does not apply to a junior lienholder unless the junior lienholder elects to exercise its power of sale under its deed of trust. The court pointed out that although in *Roseleaf* the Supreme Court did engage in an analysis of the policies underlying the antideficiency statutes, it "did not ignore the text of section 580d in favor of free-ranging judicial policy making," as it felt the court did in *Simon*. (*Cadlerock*, *supra*, 206 Cal.App.4th at pp. 1547-1548.)

We concur with *Cadlerock* that *Roseleaf*, *supra*, 59 Cal.2d 35, cannot be read to support the rule created by *Simon*, *supra*, 4 Cal.App.4th 63. *Roseleaf*'s holding that section 580d does *not* apply to nonselling junior lienholders cannot be contorted into a rule that section 580d somehow *does* apply to preclude a lienholder from seeking damages under the junior note if it, in its capacity as the senior lienholder, has exercised its right to conduct a private sale of the property rather than seeking a judicial foreclosure. As the court in *Cadlerock* notes, "[c]onspicuously absent" from *Simon* and cases following it "is a close examination of the text of section 580d." (*Cadlerock*, *supra*, 206 Cal.App.4th at p. 1548.) *Cadlerock* examines the rationale *Simon* gives for its rule and concludes that it simply is not supported by the text of section 580d or by

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[4] "Having decided the case before us, we could end our opinion here. But our review of the relevant case law on this topic compels us to make several additional observations on the subject of the interpretation of section 580d." (*Cadlerock*, *supra*, 206 Cal.App.4th at p. 1547.) "[O]bservations" unnecessary to the holding of a case are, by definition, dictum. (See *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 339-340.)

Roseleaf. *Roseleaf*, it notes, did not create an equitable exception to section 580d for sold-out junior lienholders. Rather, it is *Simon* that created an equitable exception to section 580d to expand the statute to preclude what it deems a deficiency judgment in favor of a junior lienholder which has exercised its power of sale under a senior lien on the same property. (*Cadlerock*, at p. 1549.)

The *Simon* decision appears to have been motivated by the court's concern that the bank in that case, by issuing nearly simultaneous loans secured by the same property, was attempting to circumvent the antideficiency statutes. *Simon* based its extension of section 580d on its concern that allowing such a "contrived procedure" would "deal a mortal blow" to the antideficiency statutes. (*Simon*, *supra*, 4 Cal.App.4th at p. 78.) This concern, in our view, led it to prohibit the bank from obtaining a judgment on the junior loan by means of creating, out of whole cloth, an equitable rule. (See *Cadlerock*, *supra*, 206 Cal.App.4th at pp. 1547-1549.) In any event, even if that result might arguably be justified under the circumstances present in *Simon*, it is not justified in this case. In this case, the second loan was issued two years after the first, and the default did not occur until seven years later. There is nothing in the record that supports the conclusion that the second loan was in any way an attempt to circumvent the antideficiency statutes in the event of default on the first loan.

The court in *Simon* also justified its holding by the fact that the bank was not a bona fide sold-out junior because it was the bank itself, rather than a different lienholder, that made the decision to foreclose on the senior lien. The bank could have chosen judicial foreclosure to preserve its right to seek a deficiency judgment, and its options

were therefore not limited by the whim of another creditor. (*Simon, supra*, 4 Cal.App.4th at p. 77 [bank can be classified as a sold-out junior lienor only because it "literally 'sold-out' itself by foreclosing on its senior lien, and no third party's foreclosure or purchase affected the security of its junior lien"].) Section 580d simply does not, however, by its express terms, encompass a lien that has not been foreclosed. (*Roseleaf, supra*, 59 Cal.2d at p. 43.) This suggested to the court in *Cadlerock* that *Simon* might have conflated section 580d with the "one form of action rule" set out in section 726.[5] (*Cadlerock, supra*, 206 Cal.App.4th at p. 1549.)

The court in *Cadlerock* did not explain how the one form of action rule might be used to achieve the same result as the rule stated in *Simon*. It suggested that "[a]rguably, a creditor that owns both the senior and junior lien might be deemed to have rendered the junior lien valueless by its own actions when it conducts a nonjudicial foreclosure on the senior lien." (*Cadlerock, supra*, 206 Cal.App.4th at p. 1549.) It did not resolve the issue, however, because that resolution was unnecessary to its decision. (*Ibid.*) We asked the parties for supplemental briefing on this point.

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[5] Section 726, subdivision (a), provides, in pertinent part: "(a) There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff . . . ."

"'As judicially construed, section 726 is both a "security-first" and "one-action" rule: It compels the secured creditor, in a single action, to exhaust his security judicially before he may obtain a monetary "deficiency" judgment against the debtor.' [Citations.] In other words, '[a] secured creditor can bring only one lawsuit to enforce its security interest and collect its debt.' [Citation.]" (*National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1232, fn. and italics omitted.) An exception to the one form of action rule applies when the value of the security has been lost through no fault of the creditor. Under that circumstance, the creditor may bring a personal action on the debt rather than foreclosing. (*Hibernia S. & L. Soc. v. Thornton* (1895) 109 Cal. 427, 429.) However, "when the mortgagee, *by his own act or neglect*, deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action upon the note." (*Ibid.*, italics added.)

Having reviewed the parties' submissions, we are not persuaded that the one form of action rule or the *Hibernia* exception applies in this case. Section 726 expressly applies to judicial foreclosures; it does not apply if a nonjudicial foreclosure is pursued. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 736 ["[A] private sale under the power contained in the trust deed is not a *judicial* foreclosure within section 726"].) This is consistent with the definition of "action." Section 22 provides that an action is "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Because there is no court involvement in a nonjudicial foreclosure, section 726 does not apply. (*Birman v. Loeb* (1998) 64

Cal.App.4th 502, 508-509; see *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) Nor do we see any justification for applying any analogy to this rule, as suggested in *Cadlerock*, because to do so would be to insert a provision into either section 726 or section 580d that is not included in the unambiguous language of either statute. Courts are not authorized to insert provisions that are not contained in a statute, nor are they authorized to rewrite a statute to conform to an assumed intention that does not appear from the unambiguous language of the statute. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002.) Accordingly, we decline to do so in this case.

Another fallacy underlying the *Simon* rule, in our view, is that the court viewed the judgment sought on the junior note as a deficiency judgment. (*Simon*, *supra*, 4 Cal.App.4th at pp. 77-78.) The term "deficiency judgment" is not, as far as we have discovered, defined by statute. The California Supreme Court has long defined it as "'a personal judgment against a debtor for recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale.' [Citation.]" (*Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 407; see *Hatch v. Security-First Nat. Bank* (1942) 19 Cal.2d 254, 261; see *Rothwell*, *supra*, 10 Cal.4th at p. 1236.) Any debt owed on the junior note in this case has no relationship to the debt owed on the senior note, and by no contortion of the above definition can the unpaid balance on that note be deemed a deficiency with respect to the senior note, within the meaning of section 580d.

The unambiguous language in section 580d also supports this conclusion. Section 580d precludes recovery "for a deficiency on *a* note secured by *a* deed of trust . . . 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." (Italics added.) By using the singular throughout the statute, the Legislature unambiguously indicated that section 580d applies to a single deed of trust; it does not apply to multiple deeds of trust, even if they are secured by the same property. The singular language of section 580d was the reason that the court in *Roseleaf* held that section 580d expressly applies only to the particular deed of trust that has been foreclosed upon and does not apply to a junior deed of trust secured by the same property so as to bar the junior lienholder from suing on the now-unsecured debt. (*Roseleaf, supra*, 59 Cal.2d at p. 43.) For the same reason, we hold that it does not apply to preclude Black Sky from suing for the balance due on the junior note in this case. It makes no difference whether the junior lienholder is the same entity or a different entity as the senior lienholder.

For all of the foregoing reasons, we conclude that the trial court erred in applying *Simon, supra*, 4 Cal.App.4th 63, to the facts of this case and that Black Sky's suit to enforce the debt on the junior note is not barred by section 580d or by section 726. Accordingly, we will reverse the judgment and remand the cause for further proceedings in the trial court.[6]

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[6] In light of our ruling that sections 580d and 726 do not apply in this case, we need not address Black Sky's contention that the Cobbs waived all defenses, including those afforded by sections 580d and 726, in the forbearance agreements they entered into before finally defaulting on both notes.

DISPOSITION

The judgment is reversed, and the cause is remanded to the trial court for further proceedings. Costs on appeal are awarded to plaintiff Black Sky Capital, LLC.

CERTIFIED FOR PUBLICATION

McKINSTER
Acting P. J.

We concur:

MILLER
J.

FIELDS
J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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