

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Douglas Candee and Lyla Candee, Plaintiffs/Appellees, vs. Keith Candee, Defendant/Appellant.	SUPREME COURT NO. 20170028 Civil No. 45-2015-CV-00710
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ON APPEAL FROM JUDGMENT DATED DECEMBER 5, 2016
STARK COUNTY DISTRICT COURT

BRIEF OF APPELLANT KEITH CANDEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by refusing to apply California's anti-deficiency laws, as agreed upon by the parties, when it granted Plaintiffs Doug and Lyla Candeels' summary judgment motion for a deficiency judgment.
2. Whether the district court erred in granting Doug and Lyla Candeels' summary judgment motion for a deficiency judgment because, under California law, the non-judicial foreclosure of Defendant Keith Candeels' California property bars a deficiency judgment.
3. Assuming North Dakota's anti-deficiency laws applied, whether the district court erred in granting Doug and Lyla's summary judgment motion for a deficiency judgment without considering evidence of the fair value of Keith Candee's foreclosed property in California, as required under North Dakota law.
4. Whether the district court erred in granting summary judgment because a genuine issue of material fact exists regarding the fair market value of Keith Candee's foreclosed property in California.

STATEMENT OF THE CASE

A. Overview

[¶1] Both North Dakota and California law require a court to determine the fair value of property subject to foreclosure before granting the foreclosing party a deficiency judgment. The express purpose of these statutes is to protect the party securing the debt from an excessive deficiency judgment, which often happens when the foreclosing party purchases the property for less than the fair value at a foreclosure sale with a credit bid.

[¶2] Here, Appellant/Defendant Keith Candee secured an obligation to his parents, Appellees/Plaintiffs Douglas Candee and Lyla Candee¹, with two properties, one in California and a second one in North Dakota. Under both states' laws, the district court was required to determine the "fair value" of both properties before it could grant a deficiency judgment on the debt. The district court, however, failed to determine the "fair value" of the first property foreclosed upon when it granted Doug and Lyla's summary judgment motion for a deficiency in a Memorandum Opinion and Order issued on October 26, 2016. (App. 229, ¶ 17.) In fact, the district court refused to even consider Keith's un rebutted evidence of the "fair value" of the property. (App. 229, ¶ 17.) Under North Dakota and California law, this was reversible error.

[¶3] The district court's error resulted in an excessive deficiency judgment (e.g., a multi-million dollar windfall) to Doug and Lyla, who purchased the 20-acre California freeway frontage property worth millions for a mere \$200,000 credit bid at a non-judicial foreclosure sale.

¹ Because the parties share the same last name, they will be referred to herein by their first names to avoid confusion.

[¶4] The district court further erred by not applying California's anti-deficiency laws, which the parties specifically stipulated to in a written agreement. These laws completely bar a deficiency judgment because Doug and Lyla elected to proceed with a non-judicial foreclosure.

B. Course of Proceedings

[¶5] On September 25, 2015, Doug and Lyla filed a Complaint against Keith seeking a deficiency judgment following the foreclosures of Keith's real property in California and North Dakota, both of which secured an obligation to Doug and Lyla under a settlement agreement that resolved an action they filed against Keith in Riverside County, California. (App. 6-14, 20-36.)

[¶6] On June 28, 2016, Doug and Lyla filed a Motion for Summary Judgment arguing that they were entitled to a deficiency judgment pursuant to North Dakota Century Code § 32-19-06.2 after the foreclosure of Keith's property in California (the "California Property"), the primary collateral, and his property in North Dakota (the "North Dakota Property"), the secondary collateral. (Dkt. 32.) On July 28, 2016, Keith filed an opposition to the summary judgment motion arguing that Doug and Lyla were not entitled to a deficiency judgment because a genuine issue of material fact existed as to the fair value of the California Property and a deficiency judgment was barred by California law, which applied pursuant to the terms of the parties' settlement agreement. (Dkt. 38.) In support of his opposition, Keith submitted evidence demonstrating that the fair value of his foreclosed California Property was \$3,250,000 at the time it was foreclosed on, and Doug and Lyla obtained it for a credit bid of only \$200,000. (App. 18, ¶ 4; 37-38; 44-45, ¶¶ 9-10; 49-165.)

[¶7] On October 26, 2016, the district court issued a Memorandum Opinion and Order Granting Motion for Summary Judgment, which disregarded Keith's evidence regarding the fair market value of the California Property and found that Doug and Lyla were entitled to a deficiency judgment in the amount of \$884,508.83. (App. 229-30, ¶¶ 17, 18.) On December 2, 2016, the district court issued its Findings of Fact, Conclusions of Law and Order for Judgment. (App. 231-33.) On December 5, 2016, the district court entered the Deficiency Judgment. (App. 234-35.) Keith filed his Notice of Appeal on January 16, 2017. (App. 237-39.)

STATEMENT OF THE FACTS

[¶8] Keith is the son of Doug and Lyla, who divorced in June 2007. Keith grew up in North Dakota but currently lives in California. (Dkt. 100, ¶ 9.) Keith purchased the California Property in 1998 for approximately \$400,000, and subsequently invested \$1,200,000 in the property to develop it. (Dkt. 100, ¶ 4.) The property was in escrow at an \$8,000,000 purchase price up until January 15, 2010, but the deal fell through. (Dkt. 100, ¶ 9.) This \$8 million purchase price was the basis for the property valuation when Keith agreed to settle his parents' minority interest in the California Property as part of their divorce proceedings. (Dkt. 100, ¶ 9.)

[¶9] On August 9, 2011, Doug and Lyla filed a Verified Complaint in the Superior Court for the County of Riverside, State of California (Case No. RIC 1113111) against Keith (the "California Action"). (App. 21.) On or around April 23, 2013, Doug and Lyla and Keith executed the Settlement Agreement to resolve the California Action. (App. 20-22.) Paragraph 1 of the Settlement Agreement obligated Keith to pay Doug and Lyla a "Guaranteed Settlement Sum" in the amount of \$2,200,000.00 in accordance with a payment schedule set forth in the Settlement Agreement. (App. 22-23.)

[¶10] Pursuant to paragraph 5 of the Settlement Agreement, Keith's payment obligations were secured by: (1) a deed of trust² encumbering the 20-acre California Property; and (2) a mortgage encumbering the 560-acre North Dakota Property. (App. 25-26.) Paragraph 5 further specified that in the event of default, Doug and Lyla could foreclose on the deed of trust encumbering the California Property first, and if the proceeds were insufficient, then they could foreclose on the mortgage encumbering the North Dakota Property.

[¶11] Paragraph 5 also unequivocally set forth the law the parties agreed would apply here: **"The Parties agree to comply with the California 'one-form-of-action' rule and the California anti-deficiency and fair value statutes in connection with any such foreclosure proceedings to the extent applicable."** (App. 25-26 (emphasis added).)

[¶12] The parties reiterated this choice of law in paragraph 19.1 of the Settlement Agreement, which provides: "This Agreement shall, in all respects, be governed by the laws of the State of California applicable to agreements executed and to be wholly performed within California; provided, however, that for purposes of state tax laws only, North Dakota's tax laws apply to the sums paid hereunder." (App. 31.)

[¶13] After paying \$230,000 to Doug and Lyla, Keith was unable to make the rest of the payments required under the Settlement Agreement due to his ongoing health issues. (Dkt. 100, ¶¶ 5-7.) California law provides two mechanisms to foreclose on property, a

² In California, a "deed of trust" is "a conveyance in trust to secure an indebtedness or charge against the trust estate, the property conveyed, with power of sale vested in the trustee to sell according to the terms of the trust set forth in the instrument." La Arcada Co. v. Bank of America of California, 120 Cal.App.397, 398 (Cal. 1932). A deed of trust is like a mortgage but it includes a power of sale vested in the trustee for a non-judicial foreclosure in the event of a default. California Civil Code § 2934a.

judicial foreclosure or a non-judicial foreclosure. Doug and Lyla chose to proceed with a non-judicial foreclosure of the California Property. (App. 37-38.) At the trustee's sale on January 23, 2014, Doug and Lyla acquired the California Property for a credit bid of \$200,000. (App. 37-38.) The appraised value of the California Property as of this same date, however, was \$3,250,000. (App. 18, ¶ 4; 37-38; 44-45, ¶¶ 9-10; 49-165.) Given that it was a non-judicial foreclosure, there was, of course, no judicial involvement, and thus a court did not determine the fair value of the property.

[¶14] On April 25, 2014, Doug and Lyla commenced an action against Keith in North Dakota seeking to foreclose on the North Dakota Property (the "North Dakota Foreclosure Action"). (Dkt. 1, Candee v. Candee, Case No. 45-2014-CV-00334.) In Doug and Lyla's complaint, they alleged that the outstanding balance remaining after the non-judicial foreclosure of the California Property was \$1,859,774.55, which purportedly represented the amount that Keith owed under the Settlement Agreement after deducting \$200,000 for the credit bid of the California Property. (Dkt. 1, Candee v. Candee, Case No. 45-2014-CV-00334.)

[¶15] On September 25, 2014, Doug and Lyla filed a motion for summary judgment seeking to foreclose on the North Dakota Property. (Dkt. 17, 18, Candee v. Candee, Case No. 45-2014-CV-00334.) On October 27, 2014, Keith filed an opposition to Doug and Lyla's summary judgment motion, arguing, *inter alia*, that Doug and Lyla's summary judgment motion should be denied because: (1) California's anti-deficiency laws applied (pursuant to paragraphs 5 and 19 of the Settlement Agreement) and prohibited a deficiency judgment following the non-judicial foreclose; and (2) the fair value of the

California Property exceeded the amount of the remaining debt. (Dkt. 28, Candee v. Candee, Case No. 45-2014-CV-00334.)

[¶16] On January 27, 2015, the district court issued a Memorandum Opinion and Order Granting Motion for Summary Judgment. (App. 166-78.) In its order, the district court found that the action did not violate *California law* because it was a foreclosure action, not an action for a deficiency judgment.³ (App. 174-75, ¶ 12; 177, ¶ 16.) The district court also stated that Keith’s arguments against a deficiency judgment were “premature because an action for a personal deficiency judgment has not been filed.” (App. 177, ¶ 16.)

[¶17] On July 16, 2015, the North Dakota Property was sold to Doug and Lyla at a foreclosure sale for \$975,000. (Dkt. 36.) Thus, by foreclosing on the California Property, which was appraised at a fair market value of \$3,250,000, and the North Dakota Property, Doug and Lyla obtained property worth \$4,225,000 for only \$1,175,000, a windfall that far exceeds the amount of the secured debt, which was \$2,200,000. (App. 18, ¶ 4; 22; 37-38; 44-45, ¶¶ 9-10; 49-165.)

[¶18] As if that windfall were not enough, on September 25, 2015, Doug and Lyla filed the underlying action seeking a deficiency judgment in the amount of \$889,626.55 (the “Deficiency Action”). (App. 7, ¶ 7.) Doug and Lyla filed a summary judgment motion on June 28, 2016 arguing that they were entitled to a deficiency based on the difference between the fair market value of the North Dakota Property, which the parties stipulated was \$975,000, and the remaining amount purportedly owed by Keith, which Doug and

³ In the later deficiency action, the court flip-flopped and misapplied North Dakota law instead of California law.

Lyla alleged was \$1,859,989.33. (Dkt. 34, pg. 1-2.) However, the \$1,859,989.33 sum alleged by Doug and Lyla applied the \$200,000 amount of the credit bid for the California Property instead of the fair value of the property, which had to be determined before Doug and Lyla could be entitled to a deficiency judgment. (Dkt. 34, pg. 1-2.)

[¶19] Keith filed an opposition to Doug and Lyla's summary judgment motion on July 28, 2016, arguing that: (1) California's anti-deficiency and fair value statutes applied pursuant to paragraphs 5 and 19 of the Settlement Agreement; (2) California law barred a deficiency judgment after the non-judicial foreclosure of the California Property; (3) California law barred a deficiency judgment because Doug and Lyla failed to apply for a fair value hearing within the requisite three months (or at all); and (4) a genuine issue of material fact exists as to the fair value of the California Property, and the fair value exceeded Doug and Lyla's \$200,000 credit bid. (Dkt. 38, pg. 2-10.)

[¶20] On August 15, 2016, Doug and Lyla filed a reply arguing for the first time in either the foreclosure or deficiency action that California anti-deficiency statutes were "procedural" and did not apply to an action seeking a deficiency judgment in North Dakota. (Dkt. 83, pg. 6, 8-9.) In fact, in the North Dakota foreclosure action, Doug and Lyla admitted that California law applied, and the district court applied California law. (App. 174, ¶ 12; 177, ¶ 16.)

[¶21] On September 19, 2016, the district court held a hearing on Doug and Lyla's summary judgment motion. (App. 179-221.) At the hearing, the district court gave Keith permission to submit a supplemental affidavit responding to the factual assertions made in Doug and Lyla's affidavit filed with their reply. (App. 188-93, 216-17.) On

September 22, 2016, Keith submitted his supplemental affidavit, as he had been given permission to do by the district court. (Dkt. 100.)

[¶22] On October 4, 2016, Doug and Lyla filed a reply to Keith's supplemental affidavit. (Dkt. 108.) Rather than simply focusing on the factual assertions made in Keith's supplemental affidavit, Doug and Lyla raised new legal arguments in their supplemental reply, including citing an Arizona case for the first time that purportedly stood for the proposition that California anti-deficiency statutes do not have extra-territorial effect. (Dkt. 108, 109, 110, 111.) Because Doug and Lyla cited this case for the first time in a supplemental reply after oral argument at the summary judgment hearing, Keith never had the opportunity to respond to Doug and Lyla's argument or to be heard regarding the fact that the case cited by Doug and Lyla had been expressly rejected by subsequent Arizona Supreme Court decisions.

[¶23] On October 26, 2016, the district court issued its Memorandum Opinion and Order Granting Motion for Summary Judgment. (App. 222-30.) In its order, the district court relied on the Arizona case and concluded that: (1) North Dakota law, not California law, applied to the question of whether Doug and Lyla were entitled to a deficiency; (2) Doug and Lyla were entitled to a deficiency in the amount of \$884,508.33; and (3) Keith's dispute regarding the fair value of the California Property should have been raised by appealing the judgment in the North Dakota Foreclosure Action. (App. 227-29.) Keith timely appealed the district court's decision on January 16, 2017. (App. 237-39.)

LAW AND ARGUMENT

I. ARGUMENT: THE DISTRICT COURT ERRED IN GRANTING DOUG AND LYLA’S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

[¶24] “Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law.” Zuger v. State, 2004 ND 16, ¶ 7, 673 N.W.2d 615. “The standard of review for summary judgments is well-established. . . . ‘Whether summary judgment was properly granted is a question of law which we review de novo on the entire record.’” Dahl v. Messmer, 2006 ND 166, ¶ 8, 719 N.W.2d 341, quoting Zuger, 2004 ND at ¶ 7, 673 N.W.2d at 619.

B. The District Court Erred by Refusing to Apply California’s Anti-Deficiency Laws as the Parties had Expressly Agreed, which Prohibited Doug and Lyla from Recovering a Deficiency Judgment.

1. North Dakota law required the district court to honor the parties’ choice of law.

[¶25] In this case, the parties agreed in paragraph 19.1 that California law would govern the Settlement Agreement “in all respects” (with the exception of North Dakota tax laws). (App. 31.) This intent was reiterated in paragraph 5 where the parties agreed “to comply with... **the California anti-deficiency and fair value statutes in connection with any such foreclosure proceedings**, to the extent applicable.” (App. 25-26.) North Dakota law required the district court to follow the parties’ choice of law (since this was not a tax law issue), and the district court’s failure to do so was reversible error. If the district

court had followed California law as it was required to do under the Settlement Agreement, Doug and Lyla would be prohibited from recovering a deficiency judgment.

[¶26] Under North Dakota law, courts must enforce a contractual choice of law provision. For example, in Snortland v. Lawson, this Court ruled that the trial court properly honored the parties' choice of Minnesota law to govern a lease. Snortland v. Larson, 364 N.W.2d 67, 68-69 (N.D. 1985). In fact, the Court noted that there was no need to engage in the "significant contacts" rule that is applied in tort cases, and instead simply applied the law chosen by the parties. Id. The Court also cited with approval the Restatement (Second) of Conflict of Laws § 187(1), which provides "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."

[¶27] Other North Dakota decisions are in accord. See, e.g., Sellie v. North Dakota Ins. Guaranty Ass'n, 494 N.W.2d 151, 155-56 (N.D. 1992) ("[Plaintiff] was free to stipulate that Minnesota law would apply."); American Hardware Mut. Ins. Co. v. Dairyland Ins. Co., 304 N.W.2d 687, 689, fn.1 (N.D. 1981) ("Parties may stipulate as to choice of law."). Federal courts are also in accord. See, e.g., Macquarie Bank Ltd. v. Knickel, 793 F.3d 926, 933 (8th Cir. 2015) (recognizing that choice of law provisions relating to credit agreement would be honored under North Dakota law); Chapman v. Hiland Partners GP Holdings, LLC, No. 1:13-CV-052, 2015 WL 12591722, at *3 (D.N.D. Apr. 23, 2015) (holding that the parties agreement to apply Oklahoma law to a North Dakota action would be enforced). The district court committed reversible error when it disregarded North Dakota law, which required the district court to honor the parties' contractual

choice of California law, and instead applied North Dakota substantive law to the question of whether Doug and Lyla were entitled to a deficiency judgment.

2. The district court erred in relying on the “choice of law” analysis in an Arizona case that was later rejected by Arizona Supreme Court decisions.

[¶28] Here, the district court failed to follow any of the law cited above, or any North Dakota choice of law rules, when it refused to honor the parties’ choice of law. Instead, the court concluded that the parties’ choice of California law did not apply because it erroneously held that California anti-deficiency statutes are procedural, not substantive.

[¶29] In concluding that California anti-deficiency statutes confer a procedural right that does not apply extra-territorially, the district court primarily relied on an Arizona case, Martin v. Midgett, 413 P.2d 754 (Ariz. 1966), which it cited and quoted at length in its Memorandum Order on page 7, paragraph 14. (App. 227-28, ¶¶ 13-15.) The district court should not have relied on Martin v. Midgett because: (1) it’s an Arizona case that is not in accord with North Dakota’s choice of law rules, (2) Doug and Lyla sandbagged Keith by citing the case for the first time in a supplemental reply to an affidavit, which deprived Keith of the opportunity to address the case in his briefing or at oral argument; and (3) the analysis stated in Martin was expressly rejected by subsequent Arizona Supreme Court decisions, including Catchpole v. Narramore, 428 P.2d 105, 107-08 (Ariz. 1967), which rejected the Martin holding one year later. (Dkt. 108, 111.)

[¶30] The North Dakota Rules of Court and Rules of Civil Procedure do not allow for a party moving for summary judgment to submit a supplemental reply after the hearing on the summary judgment motion. N.D.R.Ct. 3.2(a)(2); N.D.R.Civ.P. 56(c). Contrary to these rules, Doug and Lyla submitted a supplemental reply after oral argument that raised

new legal arguments and cited to cases that were not referenced in their opening brief or reply. (Dkt. 108.) At the hearing on the summary judgment motion, the district court gave Doug and Lyla permission to file a response to the factual issues asserted in Keith's supplemental affidavit, which responded to the factual issues that were raised for the first time in Doug and Lyla's reply. (App. 188-93, 216-17.) The district court did not give Doug and Lyla permission to file a supplemental reply that raised new legal arguments and citations to which Keith did not have the opportunity to respond. (Dkt. 108.) This was unjust and deprived Keith of his due process rights.⁴

[¶31] The district court's error in allowing Doug and Lyla to submit their supplemental reply was not harmless because the district court relied on the Martin case cited in Doug and Lyla's supplemental reply in granting Doug and Lyla's summary judgment motion. (App. App. 227-28, ¶¶ 13-15; Dkt. 108.)

[¶32] Additionally, the district court erred because the "rule" stated in Martin was expressly rejected by the Arizona Supreme Court just one year later. On page 7 of its Memorandum Opinion, the district court quoted and expressly relied on the Martin court's holding that "the California statute relating to foreclosure has been uniformly held to be procedural not affecting a substantive right of contract. . . . We agree that the provisions of California Code of Civil Procedure [sections] 580b and 729 are procedural only and do not bar plaintiff from recovery in this action filed in the Superior Court of the State of Arizona." Martin, 413 P.2d at 757. However, one year later, in Catchpole v.

⁴ "A true reply should be addressed to the arguments and positions advanced in the papers responding to the initial motion . . . Most courts will not allow a reply brief to raise entirely new issues. . . . If allowed, the court should provide the opposing party an adequate opportunity to respond to the new arguments." Aspen Publishers, Motion Practice, § 3:08.

Narramore, 428 P.2d 105, 107-08 (Ariz. 1967), the Arizona Supreme Court expressly rejected Martin⁵, stating, “We are not of the view that [section] 580b is procedural.” The Catchpole court went on to state,

While superficially § 580b is directed to the seller’s remedy, it affects a substantive right—that of the seller to recoup the balance due on the purchase price of real property. That statute does not simply govern applicable procedures; it obliterates the debtor’s liability. Arizona is bound by the interpretation given by the California courts to California laws. Id.

The court concluded, “The California statute, being substantive, must be given full faith and credit under the Federal Constitution, § 1, Art. IV.” Id. at 108.

[¶33] The Catchpole decision was subsequently followed by the Arizona Supreme Court in Cardon v. Cotton Lane Holdings, Inc., 841 P.2d 198, 204 (Ariz. 1992), where the court stated, “this court has previously determined that if a California anti-deficiency statute is applicable, it bars the recovery of a deficiency judgment in an Arizona court.” The court in Cardon also reiterated the rule that the manner in which a trustee’s sale is conducted is a procedural matter that is governed by the law of the *situs* (Arizona), but a “deficiency judgment, on the other hand, is a matter of substantive law” that is governed by the law specified in the note (California). Id. at 201.

[¶34] Both California and North Dakota law are consistent with the rule stated in Catchpole and Cardon that the issue of whether a creditor is entitled to a deficiency judgment is governed by the parties’ contractual choice-of-law provision. In California, a court enforced a choice-of-law provision adopting Texas law in a promissory note and

⁵ The court noted that the “rule” stated in Martin “was *dicta* insofar as it had application to s 580b. No question was presented within the limited issues of Martin v. Midgett which required a determination of the nature of s 580b as being substantive or procedural, and the language used should have been confined to s 726 of the California Code of Civil Procedure.” Catchpole, 428 P.2d at 107.

concluded that pursuant to Texas law, the creditors were entitled to a deficiency judgment after a foreclosure even though under California law, a deficiency judgment would be barred. Guardian Savings & Loan Ass'n v. MD Associates, 64 Cal.App.4th 309, 315-23 (Cal. 1998).

[¶35] In North Dakota, this Court has stated that when parties stipulate as to choice of law, North Dakota's procedural rules remain in effect and the parties' choice of law governs resolution of substantive issues. American Hardware Mut. Ins. Co. v. Dairyland Ins. Co., 304 N.W.2d 687, 689, fn. 1 (N.D. 1981). As referenced in paragraph 29 above, North Dakota follows the Restatement (Second) of Conflict of Laws, and Comment e to Section 229 of the Restatement provides that local procedural law may apply to "questions involving the foreclosure," but for "a deficiency remaining after foreclosure," a court should apply the substantive law that governed the debt. Here, the parties expressly selected California law to govern the debt and any deficiency. (App. 25-26, ¶ 5; 31, ¶ 19.1.)

[¶36] In summary, even assuming that the district court could disregard North Dakota law, which required the district court to honor the parties' choice of law, the court's reliance on Martin to conclude that California anti-deficiency statutes are procedural and do not have extra-territorial effect was error because Martin is bad law. As held by the Arizona Supreme Court in Catchpole and Cardon, and as supported by both California and North Dakota law, California's anti-deficiency statutes confer a **substantive** right that must be applied to the question of whether a party is entitled to a deficiency

judgment after the foreclosure of real property.⁶

3. California law barred any deficiency after the non-judicial foreclosure of the California property because there was never a fair value determination.

[¶37] The district court analyzed the parties' rights under California law in the North Dakota Foreclosure Action, then changed course and refused to apply California law in the later deficiency action. (App. 174-75, ¶ 12; 177, ¶ 16; 227-28, ¶¶ 13-15.) In the former, Keith argued at summary judgment that California's anti-deficiency and fair value laws applied pursuant to the parties' choice of law provision, and in the district court's memorandum opinion and order in the North Dakota Foreclosure Action, the district court noted that Doug and Lyla also "admit that California law applies." (App. 174, ¶ 12.)

[¶38] The district court agreed with both parties and applied California law, finding that under California law, Doug and Lyla were permitted to foreclose on secondary collateral (the North Dakota Property) without first having to determine the fair value of the primary collateral (the California Property). (App. 174, ¶ 12; 177, ¶ 16.) Specifically, the district court stated, "This Court is persuaded that this action does not violate California law because it is not an action for a deficiency judgment, but instead a foreclosure action

⁶ In its order granting Plaintiffs' summary judgment motion, the district court also relied on a Ninth Circuit case cited in Plaintiffs' supplemental reply. Hersch and Co. v. C and W Manhattan Associates, 700 F.2d 476 (9th Cir. 1982). The trial court relied on footnote 3 in Hersch, which stated that California's "one form of action rule" (California Code of Civil Procedure section 726) "is limited in its effect to property located in California." However, the district court ignored footnote 2, which expressly states, "the application of 580b is not limited to judgments derived from property located in California." Therefore, the Hersch case reiterates the holdings in Catchpole and Cardon that California anti-deficiency statutes, including California Code of Civil Procedure §§ 580b and 580d, apply extra-territorially.

authorized under the express terms of the settlement agreement between the parties. This Court further agrees and finds that [Keith's] argument against a personal deficiency judgment is premature because an action for a personal deficiency judgment has not been filed." (App. 177, ¶ 16.) In other words, the court found that the North Dakota Foreclosure action did not violate California law, and Keith's arguments regarding California's fair value limitations were premature and would not apply until a later deficiency action.

[¶39] In the district court's ruling in the Deficiency Action that is the subject of this appeal, the district court based its ruling on two inaccurate conclusions. First, it concluded that "... in the foreclosure action related to this case, the court concluded that North Dakota law applied to the foreclosure of North Dakota property, not California law, as the Keith contended." (App. 229, ¶ 17.) However, as set forth in detail above and in the court's order granting summary judgment in the foreclosure action, both parties admitted that California law applied and the court did in fact apply California law. (App. 174, ¶ 12; 177, ¶ 16.) Furthermore, the court analyzed only California law and determined that the foreclosure of the North Dakota Property did not violate California's anti-deficiency and fair value laws. (App. 174, ¶ 12; 177, ¶ 16.)

[¶40] Second, the district court concluded that the fair market value of the California real property was irrelevant because "the issue has been decided by the court in the North Dakota foreclosure action." (App. 229, ¶ 17.) But it is undisputed there was never a fair value determined for the California property in the foreclosure action, or at any time. In fact, the gist of Keith's argument on summary judgment in the foreclosure action was that the California property was foreclosed upon non-judicially at a trustee's sale for a credit

bid, which does not and could not include a judicial fair value determination. (Dkt. 28, Candee v. Candee, Case No. 45-2014-CV-00334.)

[¶41] Under California law, a creditor with a trust deed must elect to either proceed with (1) a judicial foreclosure, or (2) a non-judicial foreclosure, which is also called a “trustee’s sale” based on the trustee’s “power of sale.” Alliance Mortgage Co. v. Rothwell, 900 P.2d 601, 606 (Cal. 1995). The process and consequences for these two remedies differ significantly:

[¶42] Under California law, in a judicial foreclosure:

- a. The debtor has a statutory “right of redemption” to repurchase the property after the judicial foreclosure sale by payment of the sales price plus interest;
- b. The court is required to conduct a fair value hearing;
- c. A judicial foreclosure is more time consuming and expensive than a non-judicial foreclosure; and
- d. After the foreclosure sale, the lienholder *may* sue for a deficiency judgment. Vlahovich v. Cruz, 213 Cal.App.3d 317, 321 (Cal. 1989); California Code Civ. Proc. § 580d; Karl E. Geier, 5 Miller and Starr, California Real Estate § 13:155 (4th ed. 2016).

[¶43] Under California law, in a non-judicial foreclosure:

- a. The debtor has no statutory right of redemption;
- b. The court does not conduct a fair value hearing because there is no judicial action;
- c. A trustee sale is faster and less expensive than a judicial foreclosure; and
- d. After the trustee’s sale, in most instances the lienholder may *not* sue for a deficiency judgment. The only exception requires the foreclosing party to file a complaint within 3 months requesting a fair value determination by the court. Vlahovich, 213 Cal.App.3d at 321; Geier, supra, §13:155.

[¶44] As stated above, a party who elects a non-judicial foreclosure in most instances may not sue for a deficiency judgment. That is because when a party forecloses for a deficiency based on a note, California Code of Civil Procedure Section 580d completely

bars a deficiency judgment. Section 580d specifically provides “no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property . . . 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.”

[¶45] Even for any payment obligation other than a note, Section 580a bars any deficiency unless a party obtains a fair market value determination within three months of the non-judicial foreclosure sale. Specifically, 580a applies “[w]henever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property”, and requires the foreclosing party to file a complaint and obtain a fair market value determination, which “must be brought within three months of the time of sale under the deed of trust or mortgage.” California Code of Civil Procedure § 580a; Coppola v. Superior Court, 211 Cal. App. 3d 848, 863 (Cal. 1989). Thus, Section 580a “eliminates the possibility of [a plaintiff] being entitled to a deficiency judgment without regard to the fair market value of the property at the time of the foreclosure sale.” Bank of Hemet v. United States, 643 F.2d 661, 669 (9th Cir. 1981).

[¶46] The rule is clear—under California law a party who elects to foreclose non-judicially on *one* property securing a debt without obtaining a fair value determination may never seek a deficiency judgment. And the rule also applies where *two* properties secure the same debt. Specifically, once a party forecloses non-judicially on one property securing a debt, that party may foreclose on another property securing that same debt, but “cannot recover a personal judgment against the trustor either before or after he has

enforced the additional security.” Dreyfuss v. Union Bank of California, 24 Cal. 4th 400, 408 (Cal. 2000), citing 4 Miller and Starr, California Real Estate § 9:156 (3d ed. 2000).

[¶47] Here, Doug and Lyla foreclosed non-judicially on the California property securing the debt without obtaining a fair value determination within three months or otherwise, and thus under California law, they were completely prohibited from seeking a deficiency judgment before or after foreclosing on the North Dakota Property. This failure to apply California law was reversible error.

[¶48] Moreover, there is nothing unfair or unjust about this result because the parties expressly agreed that California anti-deficiency laws applied, and because Doug and Lyla *elected* to proceed with the simpler and more efficient trustee sale for the California Property, which deprived Keith of a fair value hearing or a right of redemption post sale, but also prevented Doug and Lyla from recovering a deficiency. (App. 25-26, ¶ 5.) And, as set forth below, this is completely consistent with North Dakota law, which also requires a fair value hearing before a court may grant any deficiency judgment.

**C. The District Court Erred Because even if North Dakota Law Applied,
Doug and Lyla could not have Obtained a Deficiency Judgment.**

[¶49] Unlike California, North Dakota law only provides for judicial foreclosures, not non-judicial foreclosures. N.D.C.C. § 32-19-01 (“The plaintiff shall bring an action in district court for the foreclosure of a mortgage upon real property.”).

[¶50] Pursuant to North Dakota Century Code § 32-19-06.2, on which Doug and Lyla relied in their complaint and summary judgment motion seeking a deficiency judgment,

[A] deficiency judgment may be entered, but may not be in excess of the amount by which the sum adjudged to be due and the costs of the action exceed the fair market value of the mortgaged premises. There is not a presumption that the premises sold for the fair market value. **The court may not render a deficiency judgment unless the fair market value as determined by the**

court is less than the sum adjudged to be due and costs of the action.
(Emphasis added.)

[¶51] The term “fair market value” as used in N.D.C.C. § 32-19-06.2 “means the most probable price that real property can be sold for in the open market by a willing seller to a willing buyer, neither acting under compulsion and both exercising reasonable judgment.”

[¶52] Thus, similar to California, N.D.C.C. § 32-19-06.2 absolutely prohibits a deficiency judgment absent a fair market value determination by the court. Of course the rule still applies if a single debt or obligation is secured by multiple properties—the court must determine the fair value of *each* property before granting a deficiency. Schiele v. First Nat. Bank of Linton, 404 N.W.2d 479, 485 (N.D. 1987) (holding that the fair value of the first item of real estate must be determined before any remaining debt is enforced against a second item of real estate); United Bank of Bismarck v. Glatt, 420 N.W.2d 743, 745–46 (N.D. 1988) (same as to real and personal property collateral).

[¶53] North Dakota’s anti-deficiency statutes, including N.D.C.C. § 32-19-6.2, “allow a deficiency judgment under *very limited circumstances* and then only for the amount by which the sum adjudged to be due exceeds the fair value of the foreclosed premises as determined by a jury.” Schiele v. First Nat. Bank of Linton, 404 N.W.2d 479, 484 (N.D. 1987).

[¶54] Similar to California’s policy against deficiency judgments, this Court has stated that “deficiency judgments are one of the *least* favored creatures of the law, and we have often recognized the legislature’s avowed public policy *against* deficiency judgments in real estate litigation.” First State Bank of New Rockford v. Anderson, 452 N.W.2d 90, 92 (N.D. 1990) (emphasis in original). The court in Anderson went on to state, “Our

statutes governing foreclosure proceedings are generally viewed as debtor-protection legislation, and we have consistently construed provisions affecting the mortgagor's right of redemption and protection against deficiency judgments strictly in favor of mortgagors." Id.

[¶55] Here it cannot reasonably be disputed that the district court rendered a deficiency judgment without determining the fair market value of the California Property, which completely violated N.D.C.C. § 32-19-06.2, as well as the holdings in Schiele and Bismarck. This constitutes reversible error.

[¶56] It is anticipated that Doug and Lyla will argue that they purchased the California Property for "fair value" with their credit bid, as they argued at the summary judgment hearing. (App 184-86.) But under North Dakota law, a party cannot obtain a deficiency judgment absent a fair value determination by a court. There is no exception, and in fact, in an action for a deficiency judgment, "[t]here is not a presumption that the premises sold for the fair market value." N.D.C.C § 32-19-06.2. This is particularly true where the mortgagee purchases the property with a credit bid at a foreclosure sale. Schiele, 404 N.W.2d at 485 (the fair value determination is required, even though the mortgagor could possibly redeem the property at the credit bid price).

[¶57] Doug and Lyla may also argue that the district court determined the fair value of the California Property during the North Dakota Foreclosure Action. The district court in the deficiency action erroneously stated in its Memorandum Opinion, ". . . any dispute as to the fair market value of the California real property is irrelevant. The issue has been decided by the court in the North Dakota foreclosure action." (App. 229, ¶ 17.)

[¶58] In fact, the district court in the North Dakota Foreclosure Action never determined the fair market value of the California Property in the foreclosure action. To the contrary, the district court expressly stated that Keith's arguments regarding the fair market value of the California Property were "premature because an action for a deficiency judgment has not been filed." (App. 177, ¶ 16.) As set forth in the Memorandum Opinion in the foreclosure action, the court simply accepted the credit bid amount paid at the foreclosure of the California Property to calculate the amount due on the debt for purposes of foreclosing on the North Dakota Property. (App. 176, ¶ 15.) Thus, this Court should reject any argument that the district court determined the fair value of California Property in the foreclosure action.

[¶59] In summary, the district court committed reversible error by failing to determine the fair market value of the California Property before granting the deficiency judgment as required under N.D.C.C. § 32-19-6.2.

D. The District Court Erred in Granting Summary Judgment Because a Genuine Issue of Material Fact Exists Regarding the Fair Value of Keith's Foreclosed Property in California.

[¶60] Underpinning each of the above grounds for granting this appeal is the district court's failure to determine the fair value or fair market value of the California Property as required under either California or North Dakota law. The district court had the opportunity to consider Keith's un rebutted evidence of fair value, but disregarded it and granted Doug and Lyla's summary judgment motion. (App. 229, ¶ 17.) Thus, there remains an unresolved issue of material fact regarding that value.

[¶61] Keith included in his summary judgment filings competent and un rebutted evidence of the fair value of the California Property through the Affidavit and the

detailed appraisal report of Nobel Tucker, a Certified General Real Estate Appraiser with 29 years of experience. (App. 43-45, ¶¶ 2-3, 9-10; 49-165.) Mr. Tucker had extensive experience with the California Property, having assessed the value of the property for lending purposes in 2004 at \$6,700,000, and again in December 2010 (in the midst of California's real estate downturn) at \$2,050,000 to \$2,400,000. (App. 44, ¶¶ 5-8.) Finally, for purposes of this litigation and summary judgment motion, Mr. Tucker prepared a Restricted Appraisal Report that valued the property as of January 23, 2014 at \$3,250,000. (App. 44, ¶ 9.) The district court erroneously refused to consider this evidence. (App. 229, ¶ 17.)

[¶62] In addition, Keith is the owner and manager of Hancock Properties, LLC, which owned the California Property at the time of the trustee's sale. (App. 20, 37-38.) As such, under both California and North Dakota law he was entitled to opine about the value of the property. Heggen v. Heggen, 452 N.W.2d 96, 99 (N.D. 1990). Cal. Evid. Code § 813; People v. La Macchia, 41 Cal.2d 738, 746 (Cal. 1953). Keith submitted an affidavit in the summary judgment proceedings, and opined that the value of the California Property exceeded \$2,000,000. (App. 18, ¶ 5.) The district court also refused to consider this evidence. (App. 229, ¶ 17.)

[¶63] Moreover, Keith presented evidence that on or around October 29, 2015, Doug and Lyla listed the California Property for sale for \$6,435,000, and on or around July 24, 2016, Doug and Lyla listed the California Property for \$4,200,000 and the property was in escrow. (App. 18, ¶¶ 6-7; 39-42.) This indicates that Doug and Lyla's own opinion regarding the value of the California Property far exceeds the amount of their \$200,000

credit bid. California Evidence Code § 822; Hull v .Sheehan, 108 Cal.App.2d 804, 805 (Cal. 1952).

[¶64] Doug and Lyla offered no admissible evidence of the fair value of the California Property, and instead argued at the hearing that the credit bid amount they paid at the trustee's sale was fair value. (App. 184-86.) However, the amount of the credit bid cannot be considered fair value under either California or North Dakota law. In California, the "price at a foreclosure is not deemed the equivalent of the property's fair market value." Alliance Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1236 (Cal. 1995); see also California Code of Civil Procedure § 580a. In North Dakota , this Court has explicitly stated that in determining fair value, "a mortgagee's bid at a foreclosure sale cannot be relied upon." Schiele, 404 N.W.2d at 485; see also N.D.C.C § 32-19-06.2.

[¶65] In summary, the district court erred by not considering Keith's un rebutted evidence of fair value, and because there is a genuine issue of material fact regarding that value.

CONCLUSION

[¶66] The district court erred by awarding Doug and Lyla a deficiency judgment in the amount of \$884,508.83 after the non-judicial foreclosure of the California Property and the judicial foreclosure of the North Dakota Property. Regardless of whether a deficiency judgment is barred entirely by California Code of Civil Procedure § 580d, or whether a fair value determination was required under California Code of Civil Procedure § 580a or North Dakota Century Code § 32-19-06.2, the district court erred in awarding a deficiency judgment to Doug and Lyla.

[¶67] Under both California and North Dakota law, the fair value of the California Property should have been determined prior to awarding a deficiency judgment. Thus,

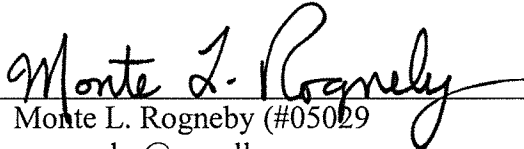
the district court erred in disregarding Keith's evidence of the fair market value of the California Property and concluding that there were no genuine issues of material fact precluding summary judgment in favor of Doug and Lyla.

[¶68] Moreover, pursuant to the express terms of the parties' Settlement Agreement, the district court erred by failing to apply California law. Under California law, a deficiency judgment is barred after the non-judicial foreclosure of property, or, at the very least, a deficiency judgment cannot be awarded unless a fair value determination had been made in an action filed within three months of the sale and the amount of the indebtedness exceeds the fair market value of the foreclosed property. Remarkably, Doug and Lyla argued at the hearing on their summary judgment motion that the procedures agreed to by the parties in the Settlement Agreement were followed because Doug and Lyla "procedurally accepted and observed the bar to any deficiency action in California." (App. 185.) This fallacious argument ignores the fact that Doug and Lyla then proceeded to bring a deficiency action in North Dakota after foreclosing on the North Dakota Property. That the deficiency action was brought in North Dakota rather than California does not change the fact that a deficiency judgment is barred entirely by California anti-deficiency statutes, which apply pursuant to the express terms of the parties' Settlement Agreement.

[¶69] Therefore, Keith respectfully requests that this Court reverse the district court's summary judgment ruling granting Doug and Lyla a deficiency judgment and either (1) enter judgment in favor of Keith, or (2) remand the action to the district court for a determination of the fair market value of the California Property.

Respectfully submitted May 19, 2017.

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Douglas Candee and Lyla Candee, Plaintiffs/Appellees, vs. Keith Candee, Defendant/Appellant.	SUPREME COURT NO. 20170028 Civil No. 45-2015-CV-710
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KAYLA TEEPLE
Notary Public
State of North Dakota
My Commission Expires December 7, 2017

Douglas Candee and Lyla Candee, Plaintiffs/Appellees, vs. Keith Candee, Defendant/Appellant.	SUPREME COURT NO. 20170028 Civil No. 45-2015-CV-710
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Chelsey Ternes

Notary Public

