20170028
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 26, 2017
STATE OF NORTH DAKOTA

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

APPELLEES' BRIEF

Appeal from the Order granting summary judgment
dated December 5, 2016,
District Court of Stark County
Southwest Judicial District
The Honorable Rhonda Ehlis
Civil Case No. 45-2015-CV-00710

Nathan M. Bouray, Lawyer #06311
EBELTOFT . SICKLER . LAWYERS . PLLC
Lawyers for the Appellees
2272 Eighth Street West
Dickinson, North Dakota 58601
Telephone No.: 701.225.5297

TABLE OF CONTENTS

TABLE OF AUTHORITIES

North Dakota Legislative History

ISSUES PRESENTED ON APPEAL

[1] Whether the District Court properly granted summary judgment in favor of Doug Candee and Lyla Candee on a North Dakota mortgage deficiency action against Keith Candee.

[2] Whether Keith Candee is precluded in this appeal from again raising the foreclosure of California collateral and its "fair value" when he presented no supporting valuation evidence in the North Dakota foreclosure action that preceded the deficiency action below and failed to appeal the court's decision and monetary judgment in that foreclosure action.

STATEMENT OF THE FACTS

[3] Appellees Douglas Candee and Lyla Candee (hereinafter "Doug & Lyla) are lifelong North Dakota residents who are both 80 years old this year. Appellee Appendix 1, ¶2. Appellant Keith Candee is their son. Id. Appellant breached a 2013 settlement agreement with his mother, father and sisters (the "Settlement Agreement") entered to resolve claims arising out of Appellant's management and control of family assets. Id. Within weeks after signing the settlement, Appellant refused to make the promised payments, which were expressly allocated to his parents' claims against him for fraud and breach of fiduciary duty in managing the family real estate and their resulting legal expenses. Id. & Appellant App. 20, ¶3. Appellant thereby forced his parents to pursue foreclosure of two pieces of real property collateral under the Settlement Agreement -- one in California and one in North Dakota. Appellee Appendix 1, ¶2. The family completed a non-judicial public auction sale of the California collateral on January 23, 2014, duly published, posted, and noticed to Appellant four months in advance, and attended by Appellant's counsel, at which neither Appellant nor any other party made a bid. Id. This first foreclosure resulted in the family's opening bid of $200,000 delivering them title to a gravel pit with delinquent property taxes and producing no income. Id. The California land had been unsuccessfully marketed by Appellant for

six years while he sued the local municipality for materially damaging the property's value by impairing access. Id. This first foreclosure left the elder Candees with delinquent tax bills and ongoing insurance premiums, no cash flow to pay those expenses, and an unpaid payment promise from their son of $1,859,989. Id.

[4] On April 25, 2014, to realize on the second parcel of collateral, Doug & Lyla commenced a North Dakota foreclosure action against Appellant, in Stark County Case #45-2014-CV-00334, (the "North Dakota Foreclosure Action"). Id., ¶3.

[5] In the North Dakota Foreclosure Action, Appellant first argued the applicability of California anti-deficiency and "fair value" theories that he repeated in the mortgage deficiency action below and attempts to raise yet again in this appeal – but Appellant failed to adduce any supporting valuation evidence in the North Dakota Foreclosure Action and failed to appeal the court's decision therein reducing the debt by the $200,000 bid by Doug & Lyla in the California foreclosure and rejecting Appellant's unsupported California "fair value" arguments for exoneration or a greater debt reduction. Appellant App. 171, ¶7 & 173, ¶10.

[6] The finality of the order in the North Dakota Foreclosure Action confirmed the outstanding debt at $1,859,989.33, plus interest, and directed foreclosure of the North Dakota property, expressly preserving Plaintiff's right to apply for a deficiency judgment. Appellant App. 166-177.

[7] The sheriff's sale foreclosing the North Dakota property was held July 16, 2015, and Doug & Lyla as the sole bidder took title for $975,000. Appellee App. 15, ¶4.

[8] On September 25, 2015, Doug & Lyla filed the underlying action, seeking a deficiency judgment against Keith for the balance owing after the foreclosure of the North Dakota Property (the "Deficiency Action"). Appellant App. 6-14.

[9] In the Deficiency Action, in observance of North Dakota foreclosure law's own "fair value" requirement, the parties stipulated that the fair market value of the North Dakota property was the $975,000 bid by Doug & Lyla at the sheriff's sale. Appellee App. 19, ¶7.

[10] On June 28, 2016, Doug & Lyla filed a Motion for Summary Judgment in the Deficiency Action, arguing that the finality of the order in the North Dakota Foreclosure Action established the debt remaining after the California foreclosure in the amount specified ($1,859,892.33), and that the North Dakota foreclosure and parties' "fair value" stipulation further reduced the debt by $975,000, leaving a balance owing of $884,774.55. Dkt. 32-37.

[11] After oral argument was held on September 19, 2016, the Court scheduled supplemental papers to be filed by the parties and thereafter entered Summary Judgment in favor of Doug & Lyla on October 26, 2016. Appellant App. 217, [2-12]. The Court's Memorandum Opinion concluded that Keith Candee had waived any argument as to California "fair value" procedures by failing to appeal the decision in the prior North Dakota Foreclosure Action. Appellant App. 229, ¶17. Further, the District Court stated that in its final order in the North Dakota Foreclosure Action, the prior court had "concluded that North Dakota law applied to the foreclosure of North Dakota real property, not California law, as the Appellant contended,." and that finding had also gone unchallenged by appeal. Appellant App. 227, ¶13.

[12] In addition to identifying the California "fair value" and anti-deficiency arguments that Appellant had failed to preserve by neglecting to appeal the foreclosure judgment, the Court below

adopted as persuasive the analysis of Ninth Circuit and Arizona Supreme Court cases in holding that California anti-deficiency law was without extra-territorial effect.[1] Id.

[13] Appellant filed his Notice of Appeal on January 16, 2017. Dkt. 128.

ARGUMENT

[14] Appellant Keith Candee has filed a timely appeal from the Order of the Stark County District Court, Southwestern Judicial District, granting the Motion for Summary Judgment filed by Appellees, Douglas Candee and Lyla Candee, and awarding them a mortgage deficiency judgment.

I. THE DISTRICT COURT CORRECTLY REFUSED TO APPLY CALIFORNIA'S "FAIR VALUE" PROCEDURE AND ANTI-DEFICIENCY LAW TO THE NORTH DAKOTA DEFICIENCY CASE.

[15] Keith argues that the District Court erred when it refused to apply California foreclosure law to the North Dakota deficiency case. Keith argues throughout that the purported fair market value of the California land and its 2014 non-judicial foreclosure in California must bar a North Dakota deficiency judgment following a North Dakota judicial foreclosure by his parents as North Dakota residents. Keith misconstrues both the agreement of the parties and the limits of California procedural law to effect proceedings in this state.

---

[1] Keith attempts to manufacture an issue for appeal out of the District Court's reference to two cases cited in Doug & Lyla's 4-page Reply below, filed in response to Keith's 56-page Supplemental Affidavit and attachments. No issue is thereby presented because (i) a Reply is not barred from citing authority (ii) the two cases cited address an issue both parties brief in their motion papers and argued at hearing – the limited extra-territorial effect of CA foreclosure law – and do not "raise entirely new issues" (Appellant Brief ¶30 at fn 4); and (iii) Keith presents no authority for the notation that a court's citation of published opinion can "deprive [a party] of his due process rights" or otherwise constitute reversible error (Appellant Brief. ¶30), even assuming for argument that Doug & Lyla's citation of those cases was untimely.

A. In the Parties' Settlement Agreement, California Foreclosure Law Expressly Governs Only "To The Extent Applicable"; That Is, Only As To California Proceedings.

1. The Settlement Agreement applies California procedural law to foreclosure and a potential deficiency action in California.

[16] The Settlement Agreement at Paragraph 5 provides in specific detail that:

> In the event of any uncured default by Defendants under this Agreement, Plaintiffs agree that the Deed of Trust on the [California land] will be foreclosed upon ***first***, as the primary security, and the Real Estate Mortgage on the North Dakota Property will be foreclosed upon, as the secondary security, ***only if the proceeds from the foreclosure of the [California land] are insufficient to satisfy the amounts due under this Agreement.*** Appellant App. 25, ¶5. (emphasis added)

It is in this context of addressing the agreed foreclosure of the California land as the first step of enforcement that the next sentence of Paragraph 5 goes on to provide that "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." Appellant App. 26, ¶5. In agreeing to this provision, Keith's parents agreed to limit their rights and remedies upon default such that (i) they could not pursue payment from Keith until after they exhausted the real property security by foreclosing both the California land and the North Dakota land; (ii) they were required to foreclose the California land first and the North Dakota land second; and (iii) by force of California procedural law, they could not pursue a deficiency judgment ***in California*** unless they foreclosed judicially pursuant to California's procedural requirements of California Civil Procedure §726.

[17] After Keith's breach of the Settlement Agreement, Doug & Lyla scrupulously respected the above limitations in enforcing their rights, bringing first the California land and then the North Dakota land to public foreclosure auctions as agreed, and abstaining from commencement of a deficiency action ***in a California court***.

2. **Appellant wrongly argues that California's "fair value" procedure as to the California collateral limits the availability of foreclosure and deficiency in North Dakota, misstating both the agreement of the parties and applicable law.**

[18] Keith argues that the parties agreed to apply California fair value procedures of CCP §726 to the California collateral in order to limit foreclosure and deficiency proceedings in North Dakota. Appellant Brief, ¶25. But Keith thereby ignores the plain language of the Settlement Agreement, which expressly states the parties' agreement that the relevant test as to the value of the California property and the amount of the remaining debt subject to enforcement in North Dakota is a measurement of "*if the proceeds from the foreclosure of the [California land] are insufficient to satisfy the amounts due under this Agreement.*" Thus by agreement, the remaining debt enforceable in North Dakota is determined by the shortfall from the California foreclosure -- not by Keith's affidavits, by appraisal experts, or by a separate California valuation procedure. Nor does this result offend equity. Keith is not a borrower and the Settlement Agreement is not a mortgage note. In the Settlement Agreement, Keith structured a promise to pay his restitution obligations to his parents in installments and to secure his promise, bargained for mortgages on California and North Dakota properties that he was intimately familiar with, including circumscribed enforcement procedures for the impaired California property, followed by the North Dakota property. Appellant App 23, ¶2. There is every indication from the absence of any bidding at the California foreclosure, including the decision by Keith not to bid, as well as the prior impairment of the California property as argued in Keith's own action against the City of Murrieta, California, that Doug & Lyla's sole bid of $200,000 was indeed a fair value for the California land at the date of foreclosure-- and no windfall to them. Finally, it is the parties' express agreement that supplies the shortfall calculation relevant to foreclosure in North Dakota -- and no

separate evidentiary hearing on value was required in California unless Appellees attempted to pursue a deficiency judgment in a California court. No such California proceeding has been filed.

[19] Instead, Appellees' prosecution of foreclosure in North Dakota gave full and proper effect to North Dakota's fair value procedures under N.D.C.C. section 32-19-06.2. Keith voluntarily stipulated that the fair value of the North Dakota property at foreclosure was $975,000, and the deficiency action proceeded from that valuation. Keith has had the full protection of the Settlement Agreement and of North Dakota procedural law. Keith has nothing to complain of procedurally and should not be allowed to continue to evade his promises to pay his aged parents what he owes them.

[20] Finally, assuming for argument only that California Civil Procedure §726 were to be applied to the *entire* Settlement Agreement, §726 would have required Doug & Lyla (i) to foreclose on all real property collateral first ("security first") before pursuing a personal judgment, and (ii) not to seek a personal judgment against Keith except by judicial foreclosure and deficiency action – as they have done in North Dakota courts – in order to protect Keith from multiple lawsuits on the underlying obligation ("one action"). Keith has thereby received the benefit of Cal Code Civ Proc §726 statutory protections he argues for throughout the course of this litigation.

3. Keith's related argument to apply California Civil Procedure Sections 726 "one-action" law and Civil Procedure Section 580d to this North Dakota proceeding must also fail.

a. Keith's Brief intentionally misstates the key Ninth Circuit decision limiting the effect of California Civil Procedure section 726.

[21] Keith offers a lengthy recital of California cases describing the policy objectives and procedural requirements of California Code of Civil Procedure 726, but Keith fails to present any authority as to why California procedural law should trump North Dakota statutes in this North Dakota deficiency action by North Dakota residents based on foreclosure of a North Dakota form

of mortgage recorded against North Dakota agricultural land. The instant action is not a California deficiency proceeding, which Appellees have never pursued in California courts.

[22] Significantly, Cal Code Civ Proc §726 has been held to be a California procedural statute without extra-territorial effect on deficiency actions in other states. In Hersch & Co. v. C & W Manhattan Assoc., 700 F.2d 476 (9th Cir. 1982), the Ninth Circuit analyzed the scope of California anti-deficiency law in protecting a California obligor against judgment on sale contracts and promissory notes with California choice of law provisions that were given to a seller to secure the purchase of New Mexico and Iowa real property. When the buyer defaulted, the seller sued in California district court to collect on the notes. Like Keith in this case, the Hersch buyer defended under Cal Code Civ Proc §726 -- claiming that the seller could only enforce the obligation through a California judicial foreclosure and deficiency action. Unlike Keith, the Hersch defendant could and did also claim a buyer-protection defense under California Code of Civil Procedure ***§580b***.[2] This distinction is key in parsing the limits of California anti-deficiency law. The Ninth Circuit recognized that California's section 580b protection of a buyer against a deficiency judgment on a seller-financing obligation provided a valid defense because "the application of Sec. 580b is not limited to judgments derived from property located in California." Hersch at footnote 2.

[23] In stark contrast, the Ninth Circuit in Hersch rejected the section 726 defense that Keith raises here -- stating that "Sec. 726, which requires one form of action to recover any debt or

[2] Section 580b in the form cited by the Ninth Circuit provided, in pertinent part: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale." Cal. Civ. Proc. Code Sec. 580b (West 1976) (emphasis added). Subsequent amendment of the statute has not altered this core provision.

enforcement of any right secured by a mortgage or trust deed....is limited in its effect to property located in California." Hersch at footnote 3 (citing Felton v. West, 102 Cal 266, 36 P. 676 (1894)).

[24] Because the Ninth Circuit flatly rejected the Cal Code Civ Proc §726 defense upon which Keith relies in this case, Keith intentionally conflates the Ninth Circuit's succinct review of very different California statutes by misrepresenting that "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." Appellant Brief ¶ 36 & n. 6. Keith's statement attempts multiple mischief. It claims Ninth Circuit support for application of Cal Code Civ Proc §580d when that statute is nowhere mentioned in the case. Keith's brief also asserts that in Hersch the Ninth Circuit "reiterates the holdings" of two Arizona cases that the Ninth Circuit decision in fact never mentions. Appellant Brief ¶ 36 & n. 6.

[25] Importantly, in Hersch, the Ninth Circuit was never presented with the predicate fact of a non-judicial foreclosure and therefore never considered or referenced Cal Code Civ Proc §*580d* -- California's post-sale deficiency bar upon which Keith would like to rely. Instead Hersch and the California authorities it examines focus solely on the legitimate purpose of California's section 580b in protecting a buyer against a deficiency judgment on a seller-financing obligation. The California Supreme Court has at length explained the purposes of Cal Code Civ Proc §580b, declaring that placing the risk of inadequate security for the debt carried by the seller discourages seller schemes to overprice the land and also stabilizes property values. Roseleaf Corp. v. Chierighino, 378 P.2d 97 (Cal. 1963).

[26] Thus both the plain language of Section 580b and the California Supreme Court's pronouncement of its purposes have absolutely no application to Keith and his payment obligations under the Settlement Agreement. Doug & Lyla are not sellers who overvalued their real property

security -- they are victims of their son's misappropriations who have for years been attempting to collect the settlement he promised to pay but has waged a litigation war of attrition to avoid paying.

[27] As examined above, Keith has baldly misrepresented to this Court that the Ninth Circuit in Hersch recognized the extra-territorial effect of California's Cal Code Civ Proc §580d post-foreclosure deficiency bar and has further misrepresented that the Ninth Circuit therefore validated two questionable Arizona cases upon which Keith wishes to rely. The Ninth Circuit in Hersch never mentions either Cal Code Civ Proc §580d or any Arizona cases. Instead the Ninth Circuit in Hersch expressly cites and then cuts the ground from under Keith's section 726 argument -- leaving Keith to search for support for his remaining anti-deficiency argument, which must rise or fall on the applicability of Cal Code Civ Proc §580d.

b. Keith's argument to apply California Civil Procedure §580d as a post-foreclosure deficiency bar is flawed because the plain language of that Borrower-protection statute only applies to a *Note* and not to the settlement at issue here.

[28] Even if California procedural law were to be (improperly) applied to a North Dakota mortgage deficiency proceeding, the plain language of Cal Code Civ Proc §580d would not bar a deficiency when -- as in this case -- the underlying obligation is not a negotiable instrument, but is instead a settlement agreement with payments allocated to the resolution of tort claims and the victims' legal expenses. This result follows from the plain language of Cal Code Civ Proc §580d, which makes express reference to a "note" and does not apply to any and all obligations that can be secured by real property. Specifically, Cal Code Civ Proc §580d provides, in pertinent part, as follows:

> 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.

California Code of Civil Procedure Section 580d(a) (effective January 1, 2014) (emphasis added).

[29] Precisely this analysis of Cal Code Civ Proc §580d was applied by the California appellate court in Willys of Marin Company v. Pierce, 296 P.2d 25, 140 Cal. App.2d 826, 831 (Cal. App. 1st Dist. 1956)("Section 3266 of the Civil Code defines "note" as meaning a "negotiable promissory note".... In 1940, when section 580d was enacted,[3] the limited term "note" was used. It seems obvious that section 580d does not apply to obligations other than promissory notes.")

c. Keith's Brief mistakenly cites foreign state decisions on California buyer-protections under California section 580b as validating an anti-deficiency defense under section 580d.

[30] In Martin v. Midgett, 413 P.2d 754 (AZ. 1966)(*en banc*), cited by the District Court in this case, two California residents had executed a purchase and sale contract and a seller-financing deed of trust encumbering the subject California real property. When the buyer defaulted, the seller foreclosed non-judicially under the power of sale in the California deed of trust. The seller's prevailing foreclosure auction bid was less than the amount secured by the California deed of trust, and seller then filed suit in Arizona on account of the unpaid balance due from the buyer. Buyer defended under California CCP Sections 726 and 580b. The Arizona Supreme Court, en banc, reversed the trial court's ruling for the defense and ordered a new trial, stating that "the provisions of California Code of Civil Procedure §§ 580b and 729 (sic) are procedural only and do not bar

[3] As California case law and commentary establishes, Section 580d was enacted in 1940 with the "Note" language in place. Tellingly, the amendment of Section 580d through the years, including in 2014, made no change to that core language. Had the California Legislature wished 580d to apply more broadly than just to promissory notes, it could have re-worded the state during amendment. It did not.

plaintiff from recovery in this action filed in the Superior Court of the State of Arizona." Martin, 413 P.2d at 757.

[31] Keith argues that the Arizona Supreme Court in Catchpole v. Narramore 428 P.2d 105, 107-108 (Ariz. 1967) "expressly rejected" the Martin case and assigns reversible error to the District Court's reliance, in part, on Martin in ruling that California anti-deficiency statutes are procedural and so do not bar this North Dakota deficiency action. Appellant Brief, ¶ 32. But the District Court made no error in citing to Martin because the relevant part of the Martin holding was left intact by Catchpole. In assigning error, Keith ignores the essential distinction made by the Arizona Supreme Court in both Martin and Catchpole: In those cases, only the seller-financing anti-deficiency protection of Cal Code Civ Proc §580b was held to be substantive law and given defensive effect in collection actions filed outside of California. That is why the Arizona Supreme Court in Catchpole harmonized to its earlier Martin decision by announcing that "the language used [in Martin] should have been confined to §726 of the California Code of Civil Procedure." Catchpole, 428 P.2d at 107.

[32] Keith does not argue that the secured debt at issue in this case is seller-financing debt and does not argue that Cal Code Civ Proc §580b affords any defense whatsoever to the deficiency judgment under appeal. Accordingly, Catchpole offers Keith no defense to the deficiency

judgment,[4] and the District Court's inclusion of Martin among persuasive authority supporting its grant of summary judgment was no error.[5]

[33] Moreover, Doug & Lyla's right to adjudicate this deficiency in a North Dakota action is fully consistent with the principle that even in California, the anti-deficiency statutes do not exonerate the underlying obligation; they merely raise a procedural bar to accessing California courts to pursue a deficiency judgment. Romo v. Stewart Title of California, 35 Cal. App. 4th 1609, 1615 (Cal. App. 1st Dist. June 23, 1995).

[34] In sum, Keith's argument to apply California foreclosure procedures to limit this North Dakota mortgage foreclosure and deficiency action cannot prevail. Keith bargained for and received both contractual and California procedural protections as to California actions, but having pledged North Dakota real property for his obligations, Keith cannot evade North Dakota's foreclosure laws permitting a judicial action, valuation by Keith's voluntary stipulation, and a resulting deficiency judgment.

[35] Persuasive authority has held that in a foreign state foreclosure and deficiency action as presented in this case, Cal Code Civ Proc §726 is a procedural statute and its rules for "one action"/"security first"/"fair value" are not applicable outside of California. The post-foreclosure

---

[4] Even as to Section 580b, the Catchpole case has been limited in its applicability by federal debt collection cases, noting that Catchpole interpreted °580b as eliminating the debtor's liability, but not the debt itself. Johnson v. Wells Fargo Home Mortgage, Inc., 2013 U.S. Dist LEXIS 185345 (C.D. Cal. Sept. 13, 2013). Thus the argument that §580b erases the debt, and bars creditors from seeking payment in any manner, must fail as a matter of law. Herrera v. LCS Fin. Servs. Corp., 2009 U.S. Dist. LEXIS 81850 (N.D. Cal. Sept 9, 2009).

[5] Appellant offers no authority for the proposition that it can ever constitute reversible error for a District Court to cite as persuasive a foreign state decision that was later limited, if the District Court's ruling is, or can be, otherwise supported. That appellate question is not presented here, however, because as discussed above, the relevant holding of the Martin case as cited by the District Court was left intact by the Arizona Supreme Court.

deficiency bar of Cal Code Civ Proc §580d has been held similarly procedural and limited to California enforcement actions; however, that issue is not presented here because the plain language of Cal Code Civ Proc §580d limits its application to a promissory note secured by real property -- and the secured debt at issue here is not a loan evidenced by a negotiable instrument, but rather payment obligations in settlement of tort claims and related legal expenses.

4. No legitimate conflicts of law question is presented by the instant case.

[36] Although not clearly stated, Keith appears to argue that the District Court was required to apply California's "fair value" procedure under Cal Code Civ Proc §726 to the North Dakota deficiency action because a comment in the Restatement (Second) of Conflict of Laws directs, in effect, that North Dakota's laws should govern foreclosure procedures in North Dakota, but Cal Code Civ Proc §726 should govern the resulting deficiency in the North Dakota enforcement action. Keith also asserts without citation to authority that North Dakota follows the Restatement in this matter. Appellant Brief ¶35.

[37] The result Keith urges in his conflicts of law argument contradicts the Hersch and Catchpole decisions cited by Keith, for those cases both conclude that Cal Code Civ Proc §726 should not be given effect outside of California.

[38] Moreover, Keith's argument begs the question by assuming that a conflicts issue is presented merely because both California and North Dakota properties were foreclosed and both States provide for "fair value" procedures as a feature of a deficiency determination. No conflict is presented where each State's fair value procedures are applied to a deficiency determination in an action filed in that State -- and that is indeed the factual setting presented here. Doug & Lyla have not filed any deficiency action in California and in the instant deficiency action, have fully

observed North Dakota's fair value procedures throughout, including joining with Keith in a stipulation of value as to the North Dakota collateral. Appellee App. 18-19.

[39] Further, when confronting a genuine conflicts of law question, this Court has not mechanically applied a Restatement analysis, but has instead followed a two-pronged analysis, beginning with identification of all relevant significant contacts to the competing jurisdictions and continuing through a nuanced, weighted application of Dean Leflar's choice-influencing factors. Daley v. American States Preferred Ins., 587 N.W.2d 159 (N.D. 1998). As summarized in ¶38 above, however, no genuine conflicts question is presented by this case and therefore, the foregoing analysis need not be undertaken here. Should this Court direct supplemental briefing of a conflicts analysis, Appellees stand ready to comply and to demonstrate that North Dakota statutes alone should govern enforcement steps as to North Dakota collateral and a subsequent deficiency action filed in this state.

B. A fair value determination of the value of the California property was not necessary prior to the entry of the deficiency judgment by the District Court.

[40] The District Court was not required to conduct a fair value hearing, as described in California law. In the stated terms of the Settlement Agreement, California fair value procedures are not "applicable" to a North Dakota foreclosure and resulting deficiency when pursued through actions in a North Dakota court applying local valuation and deficiency procedures.

[41] The rules governing deficiency judgments for agricultural lands in North Dakota are clear. Under N.D.C.C. §32-19-06.2, after a complaint to foreclose upon agricultural land of more than forty acres that also gives notice of intent to pursue a deficiency action, the separate deficiency action must be brought within ninety days of the sheriff's sale. Id. In the current case, there is no question that Doug and Lyla complied with the requirements of the statute by providing the proper notice in the Complaint, and bringing the action within the allotted timeframe. Nowhere in the

statute is there a requirement for the Court in the deficiency action to consider other forms of collateral existing between the parties as Keith demands.

[42] Keith cites Schiele v. First Nat. Bank of Linton, 404 N.W.2d 479 (N.D. 1987) for the proposition that the District Court was required to value the California property before entering the deficiency judgment. The Schiele case did not involve a request for a deficiency judgment, nor was it an appeal from an action in which a deficiency judgment had been entered, as presented by the current case. In the Schiele case, a married couple took a loan from the Plaintiff bank, and as collateral, gave the bank a mortgage on their North Dakota home, and as secondary collateral, gave the bank a security assignment of their interest as mortgagees, and the corresponding right to receive the payments, on a farm mortgage from their son and his wife. The bank first foreclosed on the elder Schieles' home in an action that did not ask for a deficiency judgment and at auction, took title by a credit bid lower than the bank's appraised value of the home. The bank resisted the elder Schieles post-judgment motion for return to them of the assigned mortgage on their children's farm and the trial court agreed with the bank. A separate action followed.

[43] This Court ruled that the District Court hearing the foreclosure case should have considered valuation evidence of the elder Schieles' home before allowing the bank to enforce against their children's farm. The alignment of the parties, the procedural posture of the case, and the underlying policy considerations in Schiele are all utterly different from those presented herein. First, this is not a case involving enforcement of an institutional mortgage loan, but rather the pursuit of tort settlement payments owed to elderly parents. Second, Doug & Lyla complied with the negotiated Settlement Agreement requiring California foreclosure first, and thereafter have duly foreclosed in North Dakota and applied for a deficiency judgment based upon a North Dakota fair value stipulation. Finally, unlike in Schiele, this Court is not asked to weigh the remedies of

an institutional lender's adhesion documents as against the interests of elderly parents who have lost their home to the bank's foreclosure and are struggling to protect their children's farm from the bank's further enforcement; herein, the equities are reversed. As noted in the Memorandum Opinion from the North Dakota Foreclosure Action, Keith failed to provide any evidence of the valuation of the California property in resisting Summary Judgment and failed to take an appeal therefrom. Appellant App. 171, ¶7; Appellant App. 175, ¶14. In short, Schiele provides no support for Keith's resistance to the District Court's award of a deficiency to his parents in this case.

[44] Keith also cites the case of United Bank of Bismarck v. Glatt, 420 N.W.2d 743 (N.D. 1988) for the proposition that N.D.C.C. §32-19-06.2 required the District Court to consider the fair market value of the California real property prior to entering a deficiency judgment. Appellant Brief ¶55. The problem with this argument is that the United case was decided in 1988, prior to the existence of N.D.C.C. §32-19-06.2, and the United case ruling was an interpretation of N.D.C.C. §32-19.1-07, which was repealed in 2005, and does not apply to this case. 2005 N.D. Sess. Laws ch. 302, §30.

[45] The Schiele and United cases were decided under a significantly different statutory scheme. In the current case, the Court granted Doug and Lyla Judgment, relying on N.D.C.C. §32-19-06.2, which governs deficiency judgments on agricultural land. This statute wasn't in effect at the time of the Schiele case, and didn't come in to effect until 2005. 2005 N.D. Sess. Laws ch. 302, §8. Under current law, a deficiency judgment may not be obtained following the foreclosure of residential property with four or fewer units of up to forty acres, containing a residence, occupied by the owner as a homestead. N.D.C.C. §32-19-03. This protection of homeowners against deficiency judgments was not in effect at the time of the Schiele case, and was added to

the Century Code in the same bill discussed above, that added the section on deficiencies for agricultural land. 2005 N.D. Sess. Laws ch. 302, §4.

[46] Keith also cites a series of cases discussing the limited circumstances under which deficiency judgments should be granted, and that the State's foreclosure and deficiency statutes are generally construed as "debtor protection legislation" Appellant Brief, ¶54. The cases he cited were all decided prior to the legislature's overhaul of the foreclosure statutes under 2005 N.D. Sess. Laws ch. 302, §4, which reflected an overall policy to protect homeowners against a deficiency following foreclosure of owner occupied residential real property. The situation presented here is vastly different, where the debt owed did not involve a homeowner, but rather a breached settlement agreement, with a collateralized payment plan in settlement of claims for fraud and breach of fiduciary duty.

[47] If Keith wanted to protest the absence of any fair value determination as to the California property, he necessarily needed to have disputed the amount of the Judgment in the North Dakota Foreclosure Action. He had the full and fair opportunity to do so, and chose to refrain from doing so. He is now is attempting to relitigate and reargue the amount of the Judgment that was entered in the North Dakota Foreclosure Case and press an improper collateral attack on the earlier judgment. There is no question that Doug & Lyla complied with applicable North Dakota law, and brought the deficiency action within the required time, stipulated to the fair value that Keith proposed, which was their opening and prevailing bid at the foreclosure auction, and otherwise complied with North Dakota law governing deficiency judgments.

[48] Keith seems to argue that the Judgment entered in the foreclosure case didn't have effect, and that the Court hearing the deficiency case should have disregarded the Judgment amount and started from scratch to determine the amount of the deficiency. However, the Judgment amount

was binding on both parties, and if the North Dakota property had sold for well in excess of the Judgment amount, Keith would have been entitled to the surplus under N.D.C.C. §32-19-10. Keith has failed to show why the District Court allegedly erred in applying the plain meaning of the N.D.C.C. §32-19-06.2, by entering a personal judgment against him for the deficiency amount.

C. The District Court properly applied North Dakota law.

[49] The pertinent statute to this case is N.D.C.C. §32-19-6.2, which is entitled "Deficiency judgments on agricultural land." As described above, this statute specifically refers to and applies to agricultural land, and requires a deficiency judgment to be pursued within 90 days after the sheriff's sale, referring to a specific sale date. There is no reference in the statute to any property other than the agricultural land referenced in the statute or to any sales other than the one preceding the deficiency action. There is no reference to consideration of any prior foreclosure proceedings between the parties, or other forms of security that may relate to the parties. There is no direction in the statute to review and consider the relative value of any other properties previously foreclosed upon.

[50] N.D.C.C. §32-19-6.2 very clearly describes the process for pursuing a deficiency judgment in a lawsuit following a foreclosure case. It allows a deficiency judgment in the amount "by which the sum adjudged to be due [in the preceding foreclosure action] and the costs of the action [the preceding foreclosure action] exceed the fair market value of the mortgaged premises [from the preceding foreclosure action]. Id.

[51] Keith claims that the District Court in the current action should have considered the value of the California property because of a portion of the Memorandum Opinion from the North Dakota Foreclosure Action, that as dicta, referred to discussion of a deficiency as "premature because an action for a deficiency judgment has not been filed." This statement by the Court is

more logically read as pointing out that until the second foreclosure was held in North Dakota, it would not be known whether the obligation would be fully satisfied by that sale. Moreover, the Court in the Foreclosure Action did credit Keith for the California property in the amount of $200,000, in computing the foreclosure Judgment amount. Appellant App. 166-177.

[52] The District Court in the current action properly refused to consider the value of the California property, beyond the amount of the credit bid factored into the earlier Judgment, correctly noting "...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." Appellant App. 229, ¶17. Keith characterizes this excerpt from the Memorandum Opinion as "erroneous", but it is an accurate assessment of the North Dakota Foreclosure Judgment. When the Court in the North Dakota Foreclosure Action entered Judgment for that specific amount, taking into account the final sale amount in the California Trustee's Sale, it factored in the value of the California property. After that time, the Court in the Deficiency action was limited by the Judgment that had been entered in the North Dakota Foreclosure Action, and as the Court said, additional evidence of valuation was irrelevant. As the Court noted in its Memorandum Opinion "If the Appellant [Keith] disputed the fair market value of the California real property, it should have appealed the court's decision entering judgment against him." Id.

D. There is no genuine issue of material fact as to the value of the California property because it was considered in the foreclosure action, which was not appealed or challenged by Keith.

[53] The value of the California Property was not a material issue in the deficiency case because the Court in the North Dakota Foreclosure Action had determined the amount owing, and entered Judgment. The duty of a court applying N.D.C.C. §32-19-6.2 is to take the amount of the judgment

entered in the preceding foreclosure case, and determine if it exceeds the value of the property foreclosed upon, and if so, enter the deficiency judgment in that amount. The only issue properly before the District Court in the present action was the value of the North Dakota Property foreclosed upon, as that was the only factor not previously ruled upon. As the Court noted, "...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... "If the Appellant [Keith] disputed the fair market value of the California real property, it should have appealed the court's decision entering judgment against him." Appellant App. 229, ¶17. When the parties stipulated to the value of the North Dakota Property, the only issue left before the District Court was to apply the amount of the Judgment in the foreclosure case against the stipulated value of the property, and enter judgment against Keith in the amount of the difference.

E. Keith has enjoyed the benefit of contractual protections under the Settlement Agreement and also the protection of the North Dakota fair value statute.

[54] As presented above, Keith has had the full benefit of his carefully bargained-for contractual protections under the Settlement Agreement, despite his near immediate breach of its payment provisions. His parents have been compelled to first bid on and take title to a gravel pit in California with impaired access, reducing their right to payment accordingly, and then bid in again on North Dakota agricultural land with a stipulated value far less than they are owed. Keith Candee has also effectively blocked his parents from pursuing a deficiency action in California.

[55] In addition, Keith has had the full benefit of North Dakota statutes as to judicial foreclosure and fair value limitations on the deficiency resulting from the North Dakota foreclosure, including by joining in a stipulation establishing the value of the North Dakota collateral.

CONCLUSION

[56] The District Court's Order should be affirmed. The Court properly refused to consider outside valuation evidence where Judgment had already been entered in a separate proceeding. The Court properly applied North Dakota law to the North Dakota deficiency action before it, following the North Dakota foreclosure action, concerning North Dakota real property.

[57] The decision of the District Court to award Doug & Lyla Summary Judgment should be affirmed.

Dated this 26th day of June 2017.

Ebeltoft . Sickler . Lawyers . PLLC
Lawyers for the Appellees
2272 Eighth Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
nbouray@ndlaw.com

By: _____
Nathan M. Bouray, Lawyer #06311

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-710

ON APPEAL FROM JUDGMENT
STATE OF NORTH DAKOTA
STARK COUNTY

AFFIDAVIT OF ELECRONIC SERVICE

STATE OF NORTH DAKOTA)
)
COUNTY OF STARK)

Karen Walton, being first duly sworn, deposes and states that she is of legal age and not a party to the above-entitled matter. Affidavit states that on June 26, 2017, **APPELLEES' BRIEF and APPELLEES' APPENDIX** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

Monte L. Rogneby
Vogel Law Firm
mrogneby@vogellaw.com

Dated this 26th day of June, 2017.

Karen Walton

Subscribed and sworn to before me this 26th day of June, 2017.

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

Peggy L. Schiwal, Notary Public

20170028
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 28, 2017
STATE OF NORTH DAKOTA

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-710

ON APPEAL FROM JUDGMENT
STATE OF NORTH DAKOTA
STARK COUNTY

AFFIDAVIT OF ELECRONIC SERVICE

STATE OF NORTH DAKOTA)
)
COUNTY OF STARK)

Karen Walton, being first duly sworn, deposes and states that she is of legal age and not a party to the above-entitled matter. Affidavit states that on June 28, 2017, **APPELLEES' BRIEF** (with corrected footnote formatting) was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

Monte L. Rogneby
Vogel Law Firm
mrogneby@vogellaw.com

Dated this 28th day of June, 2017.

Karen Walton

Subscribed and sworn to before me this 28th day of June, 2017.

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

Peggy L. Schiwal, Notary Public