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BANK MAY SEEK ATTACHMENT ON UNSECURED GUARANTY EVEN IF PRINCIPAL LOAN IS SECURED

Question: May a Bank who made a construction loan secured by real property seek a right to attach order and writ of attachment against a third party guarantor on its unsecured guaranty security?

Answer: Yes, according to the Fourth District Court Of Appeal, Division Three, in *United Central Bank v. Superior Court* (G042247), decided November 17, 2009.

In this case, a third party guarantor provided three personal guaranties to the Bank as additional credit support for construction loans the plaintiff Bank made to another party. The construction loans-but not the guaranties-were secured by deeds of trust on real property. When the Borrower defaulted, the Bank demanded the guarantor pay the amounts due under its guaranties. The guarantor refused, and the Bank applied to the trial court for a right to attach order and writ of attachment.

The trial court denied the Bank's application, citing section 483.010 of the Code of Civil Procedure for the proposition that "writs of attachment do not pertain to situations where the loan or loans are secured by real property. . . ." The Court of Appeal reversed, holding that the trial court misapplied section 483.010. Although that section does provide that an attachment "may not be issued on a claim which is secured by any interest in real property," the Fourth District noted the trial court "failed to recognize that the 'claim' before it was based on *unsecured* guaranties."

The Court added that, "[c]ase law holds that a writ of attachment may issue on a guaranty, regardless of whether the principal loan is secured, so long as the guarantor has waived the right to require the creditor to proceed first against the security given for the primary obligation." This holding is, of course, unremarkable. Indeed, the trial court's error was so apparent that the Court of Appeal issued a peremptory writ of mandate in the first instance, holding that the Bank's entitlement to the relief it requested "is so obvious that no purpose could be served by plenary consideration of the issue."

Having determined the trial court should have considered the merits of the Bank's application, the Fourth District remanded the matter to the trial court with instruction to conduct a new hearing to consider whether the Bank had, in fact, made a sufficient showing for issuance of the right to attach order.

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