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State appellate ruling could help lenders in foreclosures

By James Getz

In a ruling that could change real property law, a state appellate court has ruled that lenders who use a trustee's sale to foreclose on a defaulted superior loan now have the power to also recoup a second mortgage on the same property.

"This is definitely a sea change case," said Ronald Richards of the Law Offices of Ronald Richards & Associates, who represented winning appellant Black Sky Capital.

Under previous law, when a lender used a trustee's sale to foreclose on a property whose owner had defaulted on a senior loan, and the sale of the property did not cover the loan, the lender could not sue to recover any junior loan as well. *Simon v. Superior Court* (1992), 4 Cal.App.4th 63.

With the 4th District Court of Appeal's decision on Tuesday, a lender who made a senior and junior loan at different times on the same property can now sue for the amount owed on the junior loan. *Black Sky Capital LLC v. Cobb et al.*, 2017 DJDAR 5644.

"The effect is, I think, lenders could be more comfortable in making second loans some time after making a first loan without fear that they're going to lose their rights on the second loan if they close on the first loan non-judicially," said Howard Madris of the Law Office of Howard N. Madris P.C. who is not involved in the case. "That could possibly encourage more follow-up lending."

But Karl Geier, a shareholder in Miller Starr Regalia and editor of the California Real Estate, 4th treatise, said borrowers now may be wary.

"Under the Simon case, if a lender who held the first and second foreclosed on the first, the second became uncollectable. Under the Black Sky decision, the second becomes an unsecured note that's fully collectible."

In *Black Sky*, Michael and Kathleen Cobb borrowed \$10.2 million from Citizens Business Bank in 2005 and \$1.5 million two years later. *Black Sky* purchased both loans. After the Cobbs defaulted on the senior loan, *Black Sky* held a trustee's sale that netted only \$7.5 million. The Cobbs then defaulted on the junior loan.

The trial court ruled *Simon* applied and *Black Sky* could not sue for the \$1.5 million.

Thursday, June 15, 2017

SPECIAL REPORT

Top Plaintiffs



Weekly Appellate Report Podcast

This week the state high court debates Prop 66, passed narrowly in November and designed to quicken California's criminal executions; Professor Elisabeth Semel (UC Berkeley Law) and LA Deputy District Attorney Michele Hanisee (President, LA Assn of DDAs) offer opposing views on the legal and policy considerations that surround a swifter death penalty



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Criminal

OC sheriff's lieutenant testifies he said nothing about others' false testimony

A public defender trying to get the death penalty dismissed against a mass murderer continued Wednesday to try to show that sheriff's officials cannot be trusted.

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Criminal case raises civil pro se loophole issue

A slippery fraudster who for years has narrowly escaped serious criminal penalties may finally have run out of luck, according to federal authorities.

Litigation

California AG seeks to intervene in suit challenging for-profit college rules

Arguing that the Trump administration is failing to protect students at for-profit colleges, state Attorney General Xavier Becerra has joined a motion to intervene in a lawsuit challenging

Eric M. Schiffer of Schiffer Buus APC, who represented the Cobbs, said the 4th District's decision puts it at odds with Simon and a later decision in the 2nd District that developed from a key case, *Roseleaf Corp. v. Chierighino* (1963), 59 Cal.2d.35. "I think there's a very good chance we'll file a petition for review with the California Supreme Court," he said.

"They're saying it doesn't matter if the same lender has the first and second [loans], and that's contrary to way law has evolved," Schiffer said, characterizing Simon as an evolution of *Roseleaf*.

Geier called Schiffer's view "a fair statement," saying case law had developed an underlying policy of protecting the debtor against a lender's claim that might be more than the value of the property. Like Schiffer, he sees a district split.

Richards and Madris see no split, saying courts applied Simon too broadly — to any two loans by the same lender.

"Black Sky Capital is better reasoned and exploits numerous deficiencies with Simon, including the fact that a senior's foreclosure simply has nothing to do with the junior lien," Richards said.

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Obama administration rules that Education Secretary Betsy DeVos plans to alter.

Obituaries

Longtime Alameda County jurist remembered for bow ties, integrity

Retired Alameda County Superior Court Judge Steven A. Brick, whose career included much-praised stints as an attorney, judge, and mediator, died over the weekend due to a heart-related issue while working out on a stationary bike at the gym. He was 70.

Labor/Employment

Victoria's Secret settlement leaves key question unanswered

While a \$12 million settlement for plaintiffs in a lawsuit against Victoria's Secret LLC resolved the case, the lack of a judicial ruling on whether the employee's "on-call" shifts definitively qualify for compensation as "reporting time" left similar lawsuits in murky waters.

Firm Watch

European litigation finance and insurance broker to open LA office

A London-based litigation finance broker will open a Los Angeles office this summer, pegging its success on the hope that the U.S. market will show interest in its litigation insurance offerings.

U.S. Court of Appeals for the 9th Circuit

9th Circuit rules for state in First Amendment challenge to alcohol sale law

California laws that prohibit alcohol manufacturers and wholesalers from exerting influence over retail stores are lawful regulations of commercial speech under the First Amendment, the 9th U.S. Circuit Court of Appeals ruled Wednesday.

California Courts of Appeal

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In a ruling that could change real property law, a state appellate court has ruled that lenders who use a trustee's sale to foreclose on a defaulted superior loan now have the power to also recoup a second mortgage on the same property.

Discipline

CJP investigates Napa County judge for petty theft

The CJP claims Superior Court Judge Michael S. Williams nabbed a few card holders at a judicial event.

Administrative/Regulatory

Show me the money!

What the Trump administration's budget reveals to employers. By **C. Matthew Schulz and Cynthia L. Jackson**

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Internal controls at private corporations

Increasingly, private corporations are facing levels of governmental scrutiny that historically only have been seen by public corporations. Don't wait until preparing for an IPO to have the proper internal controls in place. By **Richard S. Horvath Jr.**

Steps to ensure a successful workplace investigation

The ensuing workplace investigation into alleged employee misconduct can make or break an employer's ability to implement and uphold disciplinary action against the errant employee. By **Erin I. Kunze**

Judicial Profile

Ann Q. Ameal
Superior Court Judge
Stanislaus County (Modesto)

State Bar & Bar Associations

State Bar planning to get arrest alerts for current and future attorneys

The agency's board had previously directed staff to enter a contract that would apply to lawyers licensed after it is signed, not the more than 185,000 active bar members.