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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

COMMUNITY WEST BANK, Plaintiff, Cross-defendant and Respondent, v. GREGORY B. FRIEDMAN, Defendant, Cross-complainant and Appellant, OLIVE INVESTMENT, LLC, Cross-complainant and Appellant.	B275451 (Santa Barbara County Super. Ct. No.1379965)

APPEAL from a judgment of the Superior Court of Santa Barbara County, Colleen K. Sterne, Judge. Affirmed.

Parker Mills, David Bruce Parker; Abir Cohen Treyzon Salo, Danny Abir, Boris Treyzon; Piesner Law Group, Mark Piesner for Defendant, Appellant and Cross-complainant Gregory B. Friedman and Appellant and Cross-complainant Olive Investment.

Price, Postel & Parma, Shereef Moharram and Susan M. Basham for Plaintiff, Respondent and Cross-defendant Community West Bank.

INTRODUCTION

Respondent Community West Bank (CWB) sued appellant Gregory B. Friedman for breach of contract relating to Friedman's guaranty of a loan for a parcel of commercial real estate. Friedman and his company, borrower Olive Investment, LLC, cross-complained, alleging that CWB induced Olive into taking the loan by falsely promising that CWB would later provide construction funding for the project. CWB moved for summary judgment, and the court granted the motion. Friedman and Olive (collectively, appellants) moved to reopen the case to present additional evidence to undermine CWB's claim for damages. The court denied the motion. Appellants appealed, challenging both rulings.

We affirm. Regarding the motion for summary judgment, CWB met its burden, the trial court did not abuse its discretion in excluding certain evidence, and appellants did not demonstrate a triable issue of fact. Regarding appellants' request to reopen the case, appellants did not demonstrate diligence and the court did not abuse its discretion by denying the motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint and cross-complaint

CWB filed a complaint for breach of contract against Friedman on March 21, 2011. In its sole cause of action for breach of contract, CWB alleged that in August 2007 it loaned Olive $724,000. The loan was secured with deeds of trust for several properties on North Olive Avenue in Ventura, California (the property). The agreement provided for interest payments only; the unpaid balance would be due two years from the date of the agreement. Friedman individually executed a commercial guaranty for the loan.

A change-in-terms agreement required additional collateral of $100,000, and several additional change-in-terms agreements adjusted the due dates for repayment of the loan. The loan repayment became due in September 2010, and Olive breached the terms of the note by failing to repay the loan. CWB alleged the current amount due was $724,000, plus interest accruing at a rate of 11.00 per cent per annum, or $221.22 per day. CWB also alleged that although it had demanded payment from Friedman under the terms of the guaranty, he refused to pay the debt.

Friedman answered the complaint, and filed a cross-complaint. The cross-complaint operative at the time relevant to this appeal is the third amended cross-complaint, which included Olive as a cross-complainant.[1] In that cross-complaint, appellants asserted causes of action for fraud, negligent misrepresentation, fraudulent inducement, conspiracy to defraud, negligence, declaratory relief, cancellation of instruments, and quiet title. Appellants alleged that CWB lured Olive into taking

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[1] The third amended cross-complaint also included additional cross-defendants that are not relevant to this appeal.

out the loan by falsely representing that CWB would provide Olive with an additional loan to develop the property once appellants obtained needed city and county approvals. Appellants alleged they lost significant investments in the property when CWB failed to provide a development loan to them.

The third amended cross-complaint also alleged that CWB and another cross-defendant conspired to purchase the property at a price far below its true value. It alleged that shortly after foreclosure, the property was sold for "$360,000 plus fees and costs – a sum far less than the true and actual value of the property." On information and belief, appellants alleged that shortly after that sale, the new owner sold the property for $895,000. Appellants also alleged CWB was negligent for making Friedman sign the guaranty, because they knew he was the principal of Olive and therefore was "the actual borrower" of the loan.

B. CWB's motion for summary judgment

CWB moved for summary judgment on the sole cause of action for breach of contract in its complaint, as well as the "four remaining causes of action stated in the cross-complaint." Those remaining causes of action were fraud, negligent misrepresentation, fraudulent inducement, and declaratory relief.[2]

CWB asserted the following facts relating to its breach of contract cause of action, which appellants did not dispute except as otherwise noted. Friedman created Olive as a single-member

[2] The record on appeal does not reveal the disposition of the causes of action from the third amended cross-complaint not included here.

LLC for the purposes of developing the property. CWB and Olive executed a business loan agreement and promissory note for a $724,000 loan. CWB and Olive also secured the debt by executing a deed of trust, conveying the property to trustee T.D. Service Company, with CWB as the beneficiary. Friedman, individually, executed a personal guaranty, personally guaranteeing the entire loan debt. The guaranty "waived all rights and defenses that the Guarantor may have because the Borrower's obligation is secured by real property." The guaranty further explained, "If Lender forecloses on any real property collateral pledged by Borrower: (1) the amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. . . . This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because Borrower's obligation is secured by real property."

The parties agreed several times to extend the original maturity date on the loan, and each time Friedman reaffirmed his guaranty. Olive defaulted on the loan by not paying the principal and interest payment due in September 2010. CWB requested payment from Friedman, but Friedman did not pay. CWB filed its complaint against Friedman alleging breach of contract on the guaranty in March 2011. The trustee held a foreclosure sale on July 15, 2011, and sold the property to CWB for $467,266.86. CWB asserted that Olive's loan account was credited the amount of the sale, plus the liquidation of the remainder of the pledge account ($99,401.14), resulting in an outstanding loan balance of $157,332.00. In his opposition separate statement Friedman disputed this amount, but only because he "has never received a statement" from CWB and

because he "disputes any deficiency due to the fraud of Plaintiff." Friedman did not cite any evidence in support of his statement disputing this fact.

Regarding appellants' causes of action for fraud, misrepresentation, and fraudulent inducement, CWB asserted the following facts. The 2007 loan agreement does not refer to any future loans for any purpose. CWB loan officer Daniel Morelli, who arranged the loan between CWB and Olive, testified that he did not make any representations to Friedman that CWB would provide a construction or development loan. Appellants' loan broker, Kirk Jaffe, testified that he arranged the loan through CWB employee Donald Macaulay, who made no promises of construction funding to appellants. Olive and Friedman did not dispute these facts, but stated that each of them was "[i]rrelevant as not an element of a fraud cause of action."

CWB argued that it was entitled to summary judgment on Olive and Friedman's cross-claims because there was no evidence of any false promise to Friedman or Olive, nor was there evidence that CWB intended to deceive them. CWB also contended that appellants' claims were barred by the statute of frauds, because there was no writing evidencing the allegedly false statements regarding a construction or development loan. CWB argued that because there was insufficient evidence to support appellants' fraud-based claims, summary judgment was also warranted for the declaratory relief cause of action.

C. Appellants' opposition

Appellants opposed the motion. They argued Friedman would not have entered into the loan agreement without CWB's promise of a construction loan, and "[t]his construction loan is

critical to this case because it was this loan that was to be used to pay off the short term loan."

In Friedman's declaration, he said he asked Jaffe to find a bank "that would provide construction financing for the project." Friedman submitted portions of Jaffe's deposition testimony, in which Jaffe testified that he recalled that CWB understood that Olive intended to take out a series of loans: first a "take-out" loan to "complete entitlements" and preliminary planning on the property, then a construction loan to complete construction, then long-term financing once construction was complete. Macaulay at CWB "liked the project" and was "fully aware of what [Jaffe] was planning." Jaffe said it was his usual practice to seek out a single bank to do these successive loans, but he did not recall any specific conversations to that effect with CWB in relation to this project. Jaffe also said that "there were not three sets of legal documents that tied these three pieces of this transaction together with Community West Bank." Jaffe noted that when the initial loan was completed in 2007, "nobody back then had the foresight to see the entire market crashing as it did."

Friedman stated in his declaration that "Dan Morelli and Don Macaulay (representatives of Plaintiff CWB) and I were all fully aware that I could not get a construction loan until I had obtained the City approvals [for developments on the property], but it was understood that my sole goal at that time was to get construction financing. If Plaintiff CWB had not promised that, I would never have done business with them at all." After Friedman received approvals for the project in 2009, he returned to CWB for construction financing, but he was told by a new CWB representative that CWB was no longer making construction loans. Friedman said he signed the change-in-terms extensions

because he thought he would be getting a construction loan. Even after Olive defaulted and CWB filed the breach of contract action against Friedman, Friedman "continued to talk to bank representatives about another loan and continued to provide my financial information that they requested." Friedman discovered CWB had "purchased the property themselves at the foreclosure sale."

Friedman also stated in his declaration that although CWB sought to recover the deficiency from him, there should have been no deficiency because "the property was undervalued at the time of the foreclosure sale." He said CWB "hired someone to do an appraisal on the Olive property which valued it in 2009 at half of what I paid: $720,000." Friedman also stated that "CWB had three (3) different appraisals performed over a period of 7 months and each time the value went lower even though the real estate market began an upswing in 2011." He said none of these appraisals "gave any value to the City approvals that had cost me hundreds of thousands of dollars and should have substantially improved the value of the property. . . . If the property had been properly valued, there would be no deficiency."

Appellants also submitted as evidence some emails referencing construction loans. In a June 2007 email from Morelli to Jaffe discussing the terms of the initial loan, Morelli stated, "We would . . . be interested in the future construction financing." A July 2009 email from Lori Barlow at CWB to Friedman stated, "We are not doing any construction financing right now."

Regarding CWB's cause of action for breach of contract, appellants argued fraud in the inducement, because the contract was "based on the misrepresentations of" CWB. Appellants also

asserted that there was a triable issue of fact as to whether CWB performed under the contract: "Since the initial loan was originally agreed to be paid off by the construction loan that [CWB] was going to provide, [CWB] clearly did not perform all terms."

Appellants also argued that summary judgment should be denied for the fraud-based causes of action in their cross-complaint, because CWB failed to present evidence sufficient to show that it was entitled to a judgment in its favor. Appellants asked that the motion be denied in full.

D. CWB reply and objections

In its reply, CWB argued that "[t]ransitory conversations about the future of property do not provide evidence of any variant of deceit." CWB argued the evidence showed that when arranging the initial loan, Friedman's broker described plans for the property and discussed the eventual need for a construction loan, but at the time Friedman "was nowhere near having a project ready to construct."

CWB also argued that it met its burden required for summary judgment. As a cross-defendant, CWB did not need to negate the allegations in appellants' cross-complaint; instead it needed only to show that appellants could not meet at least one element of each of their causes of action. CWB argued that it met that burden with its motion by showing that appellants did not have evidence of any fraud or misrepresentations. CWB also objected to some of the evidence submitted with appellants' opposition, which we discuss further below.

E. Court ruling

After a hearing, the court adopted its tentative ruling and granted CWB's motion. The court sustained CWB's objections to

certain statements in Friedman's declaration. First, the court sustained CWB's objection to Friedman's statement that an appraiser in 2009 valued the property at half of what Friedman paid for it. The court held, "There is no foundation for or personal knowledge of this statement and it is hearsay." Second, the court sustained CWB's objection to Friedman's statements that the property was undervalued at the time of the foreclosure sale, three appraisals valued the property low despite a real estate upswing, the appraisers failed to value city approvals, and there would be no deficiency had the property been appropriately valued. The court held, "These statements are objectionable for lack of foundation, they are lay opinion, and they are conclusory."

In considering the merits of CWB's breach of contract action, the court noted that Friedman disputed the amount of the deficiency, but the court sustained objections to his evidence about the value of the property. The court also stated that Friedman did not dispute that the guaranty explicitly waived all defenses, and stated that the "amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price." The court added that Friedman had not shown any irregularity with respect to the foreclosure sale. The court stated, "CWB has established a principal loan balance of $157,332 and interest in the amount of $148,375.61, for a total of $305,707.61."

The court said that Friedman's fraud-in-the-inducement defense to CWB's contract claim essentially rested on the same facts as appellants' fraud-based causes of action. The court stated, "[Appellants'] sole basis for fraud is the alleged false promise to provide a construction loan." However, appellants

"have not carried their burden of making a prima facie showing of the existence of a triable issue of fact regarding a representation that [CWB] would make a construction loan." The court also said that the evidence "demonstrates the absence of a triable issue of material fact with respect to knowledge of the falsity of any representation regarding a construction loan." At most, the court said, in 2007 CWB expressed interest in a future construction loan; by 2009, it was no longer providing construction loans. "There is no evidence supporting an inference that representations were knowingly false in 2007."

The court therefore held that CWB met its initial burden of production to show the absence of a triable issue of fact on appellants' fraud-based causes of action, and appellants did not meet their burden to show a triable issue of fact on those causes of action. The court also held that its "ruling on the breach of contract cause of action based on the undisputed facts necessarily disposes of the declaratory relief cause of action."

The court therefore granted summary judgment against Friedman on CWB's complaint, stating that CWB was entitled to $305,707.61 on the complaint, as well as costs and attorney fees. The court also granted summary judgment in favor of CWB on appellants' cross complaint. Judgment was entered several weeks later.

F. Appellants' motion to reopen the case

Appellants[3] moved for a new trial and moved to reopen the case under Code of Civil Procedure section 662,[4] asserting that

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[3] The notice of motion stated that Friedman was moving for a new trial, but the memorandum of points and authorities stated that both Friedman and Olive made the motion.

there had been irregularity in the proceedings, there was newly discovered evidence, the court awarded excessive damages, and insufficiency of the evidence. They argued that the court's calculation of damages was not supported by evidence and it is "unfair for Plaintiff Bank to recover damages based on false and fraudulent valuations of the subject property." They also argued that the guaranty was not valid because "the bank intentionally undervalued the real property that is the basis of the guaranty . . . concealing its true value and hoping that its Guaranty would assist them in their fraud." This resulted in CWB having "unclean hands."

Appellants asserted that valuing CWB's damages using the sale price of the property at the foreclosure sale was unfair, because CWB was the only bidder at the sale, and therefore "the figure of $467.266.86 was a value unilaterally assigned by the Bank." As a result, CWB "failed to meet its burden to make a prima facie case on the element of damages." Appellants argued that CWB "engaged in fraud by deliberately devaluing the property while suppressing evidence of its true value." By doing

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[4] Section 662 states that in ruling on a motion for new trial, "the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered." All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

so, CWB "intentionally concealed or suppressed the [true value of the property] with the intent to defraud the guarantor."

Appellants contended that the property was worth much more than what CWB paid for it. Appellants submitted a November 2010 appraisal valuing the property at $483,000, a January 2011 appraisal valuing the property at $520,000, and an August 2011 appraisal valuing the property at $430,000. Appellants contended these were CWB-controlled appraisals intended to "substantiate an artificially reduced value" for the property. Appellants also submitted letters from 2014 by an expert witness stating that the 2010 and 2011 appraisals were not reliable. In addition, appellants submitted a report dated July 29, 2014, which opined that in July 2011, the property had been worth $1.2 million.

Appellants also argued that in their opposition to CWB's motion for summary judgment, they were "under no obligation to present evidence of the Bank's fraud tainting the foreclosure sale where the Bank failed to state sufficient facts establishing its damages." Because CWB did not provide evidence of the value of the property other than its own statement about the price CWB paid at the foreclosure sale, CWB received excessive damages.

G. CWB's opposition

CWB opposed the motion to reopen the case, arguing in part that none of the evidence appellants presented constituted newly discovered evidence. Because all the evidence appellants presented with their motion for new trial was available at the time of the motion for summary judgment, appellants were essentially inappropriately asking the court to reopen the case without good cause.

In addition, CWB argued that appellants' motion did not properly show that the court awarded excessive damages or was "against the law," because motions on those grounds must be based on the evidence that was before the court at trial. Because appellants' motion relied on evidence that was not before the court when the motion was heard, the motion should not be granted on either of these bases. In support of this argument, CWB submitted a declaration with evidence demonstrating that the various pieces of evidence appellants relied upon in their motion were available to them before the summary judgment proceedings.

H. Court ruling on motion to reopen the case

At the hearing on the motion to reopen the case, the court heard argument from counsel, took the motion under submission, and issued a written ruling denying appellants' motion. The court stated that in appellants' reply, which is not in the record on appeal, "they say that they are not challenging the calculation of damages at all. [Reply 3:28-4:1] They contend that the damages were arrived at through fraud consisting of CWB concealing the true value of the property at the time of the foreclosure sale." The court said that appellants did not assert such a theory when opposing summary judgment, where they "relied on a theory that CWB defrauded them at the outset by promising [it] would provide a construction loan without any intention of doing so." The court held that appellants were not barred from asserting a new legal theory in a motion for new trial, but said that "the new theory must be supported by evidence in the record."

However, appellants "do not rely on the record before the court 'at trial' (trial in this instance being the motion for

summary judgment proceedings)." The various appraisals and communications about the appraisals were not before the court in the summary judgment proceedings. The court concluded, "The grounds for the motion for new trial are not supported by evidence in the record at trial as required by CCP §§ 658 and 660. The court denies the motion for new trial."

The court also considered whether it should vacate the judgment and reopen the case under section 662. An application to reopen a case to present additional evidence must be supported by an affidavit justifying the failure to offer the evidence earlier. Here, the court found, "Friedman and Olive do not suggest that any of this information was unavailable at the time of trial." In addition, CWB's declaration demonstrated that most of the evidence appellants relied upon for their motion for new trial was available before they filed their opposition to CWB's motion for summary judgment. The court concluded, "Friedman and Olive had every opportunity to fully oppose the motion for summary judgment and they did so. All of the evidence they now seek to introduce into the record was available to them well before they opposed the motion. CCP § 662 is not a vehicle for a 'do over.' The court denies the alternative relief of vacating the judgment and reopening the case."

Following a motion by CWB, the court awarded CWB $17,364.53 in costs and $511,639.00 in attorney fees against Friedman.

Appellants timely appealed.

DISCUSSION

A. Summary judgment

1. *Standard of review*

A trial court properly grants a motion for summary judgment where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) ""We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.)

2. *CWB met its burden on summary judgment*

Appellants contend that CWB failed to meet its initial burden as the moving party under section 437c because it did not show a lack of a triable issue of fact as to the amount of the damages. "[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 851.) "[A] plaintiff bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto. (Code Civ. Proc., § 437c, subd. (o)(1).) A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. (*Id*., § 437c, subd. (o)(2).)" (*Id.* at p. 850.) Appellants challenge whether CWB met its burden as plaintiff to prove the amount of

its damages suffered from Friedman's failure to pay the balance of the loan.

In its motion, separate statement of facts, and evidence presented with the motion, CWB said that Olive defaulted by failing to pay the loan when it was due on September 15, 2010. The principal balance on the loan was $724,000.00. CWB sent a notice of default, but neither Olive nor Friedman paid the loan. The trustee held a foreclosure sale and sold the property to CWB. CWB credited Olive's loan account in the amount of the trustee's sale, $467,226.86. CWB also liquidated Olive's pledge account for $99,401.14. The resulting principal balance was $157,332.00, "the remaining deficiency in the principal balance guaranteed by Mr. Friedman." These statements were supported by the declaration of Michael Will, vice president of CWB, and accompanying evidence.

Friedman argues this evidence was insufficient to establish CWB's damages because "CWB nowhere in its moving papers provided any evidence justifying the value it unilaterally selected for the Property in fixing its standing bid [at the trustee's sale] as being the fair market value. CWB thereby failed to meet its burden of production to show the existence of a deficiency and consequently failed to make a prima facie case on the element of damages."

Friedman has not pointed to any legal authority requiring a breach of contract plaintiff, in order to meet its initial burden in a motion for summary judgment, to not only provide evidence of damages, but also to "justify" the measure of damages. With its motion, CWB presented evidence that it was damaged by Olive's default and Friedman's failure to pay the remaining balance. Friedman's disagreement about the fairness of the price CWB

paid at the foreclosure sale is, in essence, an argument that there was a triable issue of fact as to the *amount* of the damages, which Friedman could address in his opposition. This argument does not render CWB's motion insufficient to meet its initial burden on summary judgment under section 437c.

3. *The trial court properly excluded Friedman's statements about a deficiency*

The trial court sustained some of CWB's objections to appellants' evidence submitted in opposition to the motion for summary judgment. On appeal, appellants argue the trial court erred in excluding portions of Friedman's declaration regarding the value of the property. We review the trial court's rulings on evidentiary objections by applying the abuse of discretion standard.[5] (*Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335; *Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 449.)

Paragraph 9 of Friedman's declaration stated, in part, "On November 10, 2009, Plaintiff CWB gave me another extension on the loan only this time they required that I put up $100,000 as additional collateral. Plaintiff had hired someone to do an

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[5] Appellants point out that the standard of review for evidentiary objections on summary judgment is unsettled, and encourage us to review the court's evidentiary rulings de novo. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 ["[W]e need not decide generally whether a trial court's ruling on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo"].) We follow the weight of authority and apply the abuse-of-discretion standard. (See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 8.168, p. 8-146.)

appraisal on the Olive property which valued it in 2009 at half of what I paid: $720,000. I complied and put up an additional $100,000, again based on the representations that the bank would eventually come through with a construction loan." CWB objected to each sentence of this paragraph. The court sustained the objection to the second sentence regarding the 2009 appraisal, stating, "Friedman says that plaintiff hired an appraiser who valued the property in 2009 at half of what he paid for it. There is no foundation for or personal knowledge of this statement and it is hearsay."

Friedman argues that the court's ruling was improper because this statement "should have been admitted as relevant for a non-hearsay purpose." Friedman does not address the court's rulings that the statement lacked foundation and lacked any indication of Friedman's personal knowledge. "[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) "'Personal knowledge' means a present recollection of an impression derived from the exercise of the witness' own senses." (Evid. Code, § 702, Law Revision Com. comment.) Friedman's statement about the 2009 appraisal is about what CWB did and what the appraiser found. The statement says nothing of how Friedman learned the information. As a result, the court's rulings on foundation and personal knowledge grounds were not an abuse of discretion. Friedman does not challenge these rulings on appeal, and therefore the statement was appropriately excluded.

Even if foundation did not bar admissibility, Friedman's hearsay arguments do not lead to the conclusion that the court abused its discretion. Hearsay is an out-of-court statement

offered for its truth. (Evid. Code, § 1200, subd. (a).) Friedman argues the statement should have been admitted for the non-hearsay purpose of demonstrating the effect on the listener, because it was "the reason given by the Bank's officers to Friedman for requiring him to put up $100,000 additional collateral in order to obtain another loan extension." (See *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591 [statements offered to explain a person's conduct are not hearsay].) However, the declaration does not support this argument. This paragraph in Friedman's declaration said the bank required additional collateral, and Friedman paid it. The excluded statement says nothing about a statement from CWB to Friedman or what effect that statement had; it simply says that the property was appraised at a specific value. The excluded sentence does not qualify as non-hearsay offered to show the effect on the listener.

Friedman also argues that the statement was "a non-hearsay admission by an agent made within the scope of his or her employment." Such a statement is allowed by Evidence Code section 1222, which states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The declaration does not allow for such a finding, because it does not say who made any statement about the appraisal, when it was made, or in what context it was made. As appellants acknowledge, a determination of admissibility under this rule "requires an

examination of the nature of the employee's usual and customary authority, the nature of the statement in relation to that authority, and the particular relevance or purpose of the statement." (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570.) No such showings were made here.

Moreover, despite arguing that the statement is not hearsay, appellants seek to rely on it for the truth of the matter asserted. Appellants argue that exclusion of the statement "was prejudicial as it showed (1) Friedman's reliance on CWB's statements regarding the Property's value and/or (2) that the Property was appraised by the Bank in 2009 at $720,000." Use of the statement for the second purpose—the truth of the matter asserted in the statement—would place it squarely in the realm of hearsay, and thus render it inadmissible. The court did not abuse its discretion in excluding the second sentence in paragraph 10 of Friedman's declaration.

CWB also objected to portions of paragraph 15 of Friedman's declaration. Paragraph 15 states, "Since that time, I have been pursued personally for the deficiency between the sale price at foreclosure of $459,000 and the amount of the loan. There should not be any deficiency, however, as the property was undervalued at the time of the foreclosure sale. Plaintiff CWB had three (3) different appraisals performed over a period of 7 months and each time the value went lower even though the real estate market began an upswing in 2011. Not one of the multiple appraisals done between November 2010 and July 2011 gave any value to the City approvals that had cost me hundreds of thousands of dollars and should have substantially improved the value of the property. Even the subsequent buyers of the Olive

property put it on the market right after they closed escrow in Jan [*sic*] 2012 for $895,000. If the property had been properly valued, there would be no deficiency."

Appellants did not provide CWB's objections in their appellants' appendix. Although most of CWB's objections are in the respondent's appendix, the page relating to paragraph 15 is missing. It is therefore unclear which specific portions of paragraph 15 CWB objected to, and on what basis those objections were made. The court's order sustaining the objections to paragraph 15 states, "Friedman says the property was undervalued at the time of the foreclosure sale; plaintiff had three appraisals performed over a seven-month period and each time the value went lower even though the real estate market began an upswing in 2011; City approvals should have substantially improved this property; and, if the property had been properly valued there would have been no deficiency. These statements are objectionable for lack of foundation, they are lay opinion, and they are conclusory. Sustained." The parties seem to agree about the gist of the statements excluded, and therefore we consider appellants' arguments based on the declaration itself and the trial court's representation of the evidence excluded.

Appellants argue that the trial court abused its discretion "in excluding Friedman's testimony regarding the value of the Property, property that he owned and was extensively involved in developing for commercial uses for many years, on the ground that it constituted lay opinion." Appellants cite Evidence Code section 813, which states that the "value of property may be shown only by the opinions of . . . [t]he owner or the spouse of the owner of the property or property interest being valued" or "[a]n officer, regular employee, or partner designated by a corporation,

partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest." (Evid. Code, § 813, subd. (a)(2) and (3).)

CWB argues that the statements were properly excluded because Friedman "opined merely that the property was undervalued at the time of the trustee's sale, without any suggestion of actual value or any explanation of the basis of his opinion." CWB also asserts that Friedman's "improper legal conclusion that there should be no deficiency, stated twice in Paragraph 15 and stricken by the Trial Court, is without factual foundation."

We agree with CWB that the language in paragraph 15 was properly excluded. Friedman said the property was "undervalued" at the trustee's sale, but he did not offer any statements about the value of the property. Although he said the approvals "should have substantially improved the value of the property," he did not provide an opinion about the value of those approvals or state how the property would be affected. Friedman stated that there would be no deficiency if the property were properly valued, but he did not provide any opinion about the actual value of the property.

Moreover, Friedman did not provide any factual basis for his statements. A lay opinion about the value of property must be "based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property." (Evid. Code, § 814.) In other words, "a property owner is bound by the same rules of admissibility as any other

witness regarding the value of real property." (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 950-951.) In his declaration, Friedman did not provide any factual basis for determining the value of the property at the time of the trustee's sale. He did not discuss how the property had appreciated or depreciated since Olive purchased it, the value of the City-approved permits, the value of comparable properties in the area (see Evid. Code, § 816), or any other supporting facts that might support his opinions.

Appellants contend that Friedman properly relied on a subsequent listing price of $895,000 for the property in January 2012 "in arriving at and supporting his opinion that the Property was worth substantially more than CWB's valuation." A listing price for property is "not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable." (Evid. Code, § 822, subd. (b).) Appellants have not pointed to any other legal authority allowing a listing price to provide a basis for an opinion about the value of real property.

Moreover, Friedman provided no foundation that could lead to the conclusion that the listing price of the property six months after the trustee's sale accurately reflected the value of the property. Friedman did not say, for example, that the property remained unchanged between the time of the trustee's sale and the new listing, or that the market had not changed in that time period, or that the listing price reflected an appropriate value for the property. Indeed, although the listing price from January 2012 was included in the 2016 declaration, no sales price for the property was included. The listing price alone was insufficient to

support Friedman's assertion that the property was undervalued at the trustee's sale.

Appellants argue that Friedman's opinions should have been admissible because they were relevant. For example, appellants assert that Friedman's opinions about the real estate market "upswing" should have been admissible because "the trend of sales prices of neighboring properties can illuminate the appreciation of the subject property." (*City of Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 485.) They also argue that Friedman's opinions about the City approvals for the property were admissible because a property's "highest and best use" is relevant to determining a property's value. However, the court did not exclude these opinions in the basis that they were irrelevant. Instead, the court found that these opinions lacked foundation, were conclusory, and were lay opinion. That these opinions could have been relevant had they been appropriately supported does not suggest that the court abused its discretion in deeming them inadmissible.

Appellants have not demonstrated that the court abused its discretion in excluding portions of Friedman's declaration.

4. *Triable issue of fact on damages*

Appellants also contend that there was a triable issue of fact "concerning whether the Bank suffered any damage." Appellants assert arguments on this point, some of which CWB contends have been forfeited. We consider each of appellants' arguments below.

First, appellants argue that Friedman demonstrated a triable issue of material fact because "[h]e states in his Declaration that there would have been no deficiency if the property had been properly valued, and a deficiency occurred only

because the Property was undervalued by CWB at the time of the foreclosure sale, and, as can be inferred from Friedman's Declaration, the Bank's undervaluation was deliberate and intentional." Other than the excluded statements in Friedman's declaration, appellants did not argue to the trial court that there was a triable issue of fact as to CWB's damages.

As discussed above, the trial court did not err by excluding these statements. In our de novo review of a summary judgment, we consider "all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334.) Because the trial court sustained objections to Friedman's statements about the value of the property, and we have found that the court did not err by doing so, those statements cannot support a finding that there was a triable issue of fact as to CWB's damages.

Appellants make a variety of additional arguments regarding CWB's damages. For example, appellants contend that the waiver in the guaranty "is applicable only where the collateral is sold to a third party bona fide purchaser for value at the foreclosure sale," and California antideficiency laws bar CWB's recovery. Appellants also assert that the "duty of good faith and fair dealing was not waived by Friedman in the Guaranty," "CWB is barred by unclean hands," and this Court should find that Friedman is entitled to equitable remedies.

Appellants did not make these arguments below. In its separate statement, CWB said the guaranty "waived all rights and defenses that the Guarantor may have because the Borrower's obligation is secured by real property." The guaranty further explained, "If Lender forecloses on any real property

collateral pledged by Borrower: (1) the amount of Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price. . . . This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because Borrower's obligation is secured by real property." In response, appellants wrote, "Undisputed but irrelevant as Friedman was induced to sign the document based on representations of Plaintiff that they would provide a construction loan."

CWB's statement of undisputed material facts also stated that the property was sold at a trustee's sale for $467,266.86, and appellants did not dispute this fact.[6] CWB said that the remaining deficiency owed under Friedman's guaranty was $157,332.00. Appellants disputed this fact, saying that "[d]efendant disputes any deficiency due to the fraud of Plaintiff." No evidence is cited in this portion of appellants' separate statement.

On appeal following summary judgment, "we are not obliged to consider arguments or theories, including assertions as to deficiencies in [the moving party's] evidence, that were not advanced by plaintiffs in the trial court. . . . 'Specifically, in reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal.' (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d

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[6] On appeal, appellants make clear that they are not challenging the validity of the foreclosure sale.

1271, 1281, [241 Cal.Rptr. 466].)" (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.) In addition, "'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.'" (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

In the trial court, appellants opposed CWB's motion on the basis that they were misled into completing the loan because CWB promised to provide Olive construction funding in the future. Other than the brief statements in Friedman's declaration that were excluded, appellants did not argue or present evidence supporting the position that CWB was not an appropriate purchaser of the property, that antideficiency laws barred CWB's recovery, or that Friedman was entitled to assert equitable remedies despite the express waivers in the guaranty. Because appellants did not assert these arguments below, they have been forfeited. (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 ["arguments raised for the first time on appeal are generally deemed forfeited"].)

Moreover, appellants' contentions are not well-taken. "California has an elaborate and interrelated set of foreclosure and antideficiency statutes relating to the enforcement of obligations secured by interests in real property." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.) However, "[t]he antideficiency statutes' protections generally do not extend to guarantors." (*LSREF2 Clover Property 4, LLC v. Festival Retail Fund 1, LP* (2016) 3 Cal.App.5th 1067, 1075 (*LSREF2*).) Thus, "[l]enders may pursue deficiency judgments against guarantors." (*CADC/RADC Venture 2011-1 LLC v.*

Bradley (2015) 235 Cal.App.4th 775, 780.) Appellants acknowledge that "California law uniformly holds guarantors do not have rights under" the antideficiency statutes, but assert that the statute should be applied here nonetheless. We decline to extend antideficiency protections to Friedman as a guarantor, where the statutory scheme and case law do not support such an assertion.[7]

In addition, appellants did not dispute below that the guaranty stated that obligation on the loan "may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price." Appellants also did not dispute that Friedman as the guarantor waived "any rights and defenses Guarantor may have because Borrower's obligation is secured by real property." "Civil Code section 2856 provides that any guarantor or other surety, including a guarantor of a note secured by real property, may waive rights and defenses that would otherwise be available to the guarantor." (*California Bank & Trust v. DelPonti* (2014) 232 Cal.App.4th 162, 166.)[8] Appellants may not argue on appeal that

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[7] *LSREF2* and *Bradley* state that a lender may not obtain a deficiency judgment on a guaranty that is shown to be a sham, meaning that the guarantor is actually the principal obligor, which occurs when "(1) the guarantor personally executes underlying loan agreements or a deed of trust or (2) the guarantor is, in reality, the principal obligor under a different name by operation of trust or corporate law or some other applicable legal principle." (*Bradley, supra*, 235 Cal.App.4th at pp. 786-787; *LSREF2, supra*, 3 Cal.App.5th at p. 1075. Appellants have not contended here that the guaranty was a sham.

[8] Appellants assert that waivers in guaranties such as the one at issue here "are limited to those legal or statutory defenses

the trial court erred by failing to find a triable issue on those undisputed facts.

B. Appellants' motion to reopen the case

Appellants assert that the trial court erred in denying their motion to reopen the case under section 662 so they could present additional evidence.[9] Section 662 authorizes a court to "reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered." (§ 662.)

"Trial courts have broad discretion in deciding whether to reopen evidence." (*Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 1052.) We therefore review the denial of appellants' new trial motion for an abuse of discretion. "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) "[D]enial of a motion to reopen will be upheld if the moving party fails to show diligence or that he had been misled by the other party." (*Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 428.)

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particularly set forth in the guaranty agreement and do not constitute a waiver of all equitable defenses." (*DelPonti, supra,* 4) 232 Cal.App.4th at p. 168.) But appellants did not assert or prove any equitable defenses below, and we will not consider them on appeal in the first instance. (See *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 54 [the party asserting equitable defenses has the burden to prove them].)

[9] Appellants did not challenge the court's order regarding their request for a new trial.

Appellants argue that the trial court abused its discretion because the additional evidence it sought to present demonstrated that "CWB acted fraudulently, has unclean hands and breached its implied contractual obligation of good faith and fair dealing regarding the Property's valuation, just to obtain a deficiency judgment against the Guarantor, Friedman." As the trial court noted, appellants did not assert that the additional evidence they sought to present was unavailable to them before they filed their opposition to CWB's motion for summary judgment. Appellants have offered no explanation as to why the evidence they presented with their section 662 motion was not presented with their opposition to the motion for summary judgment. "[A] trial court may properly refuse to reopen a case for introduction of further testimony, or other additional evidence, where there has not been a sufficient showing of any excuse for not having produced the evidence at trial [citation], or where there is no showing of diligence." (*In re Estate of Horman* (1968) 265 Cal.App.2d 796, 807.)

Appellants argue that the court misunderstood the section 662 standard because in its order denying the motion, the court cited *In re Brady's Estate* (1950) 95 Cal.App.2d 511 and *Westerholm v. 20th Century Ins. Co.* (1976) 58 Cal.App.3d 628. Both of these cases involved requests to reopen evidence, but neither involved a post-judgment motion decided under section 662. Appellants contend that "[t]he court below, by applying the wrong legal standard of *Brady* and *Westerholm*, failed to understand the broad, liberal scope of its discretion under CCP § 662."

The record does not support appellants' argument. In its written ruling, the court quoted and cited section 662. It noted

appellants' lack of diligence, and stated that section 662 "is not a vehicle for a do over." The court also stated that courts are reluctant to reopen a final judgment, making clear that the court understood the status of the case before it. In short, there is no indication that the court failed to understand the limits of its discretion under section 662.

Appellants have not demonstrated that the trial court abused its discretion in denying the motion to reopen the evidence under section 662.

DISPOSITION

The judgment is affirmed. Respondent Community West Bank is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.