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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re MARIANNE M. TOGAMI AND MINORU TOGAMI, dba TOGAMI CONSTRUCTION,  Debtors.	Case No. 5-90-00180-MM  Chapter 11
MARIANNE M. TOGAMI AND MINORU TOGAMI,  Plaintiffs,  vs.  FRESNO APARTMENT HOLDERS and DOES 1-10, inclusive,  Defendants.	Adversary No. 92-5491-MM

**MEMORANDUM OPINION AND ORDER THEREON**

**INTRODUCTION**

This matter is before the Court on the debtors' complaint to determine the extent, validity, and priority of Fresno Apartment Holders' lien pursuant to 11 U.S.C. § 506. The parties stipulated to all facts and submitted the matter on their trial briefs. For the reasons that follow, the Court finds that the anti-deficiency provision of California Code of Civil Procedure § 580b is applicable to the

1 Togamis' loan; therefore, Fresno Apartment Holders is not entitled to pursue a deficiency judgment  
2 against the debtors.

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4 **FACTS**

5 The plaintiffs, Minoru and Marianne Togami, commenced this adversary proceeding after  
6 Fresno Apartment Holders foreclosed on its interest in the real property located at 1544 East Fedora  
7 Avenue, Fresno, California, which is a 93 unit apartment building. The Togamis originally acquired  
8 the Fresno apartment building in 1982 from Joyce Kakinami pursuant to a tax deferred real estate  
9 exchange. The purchase price was \$1,920,000. To finance the purchase, the Togamis assumed  
10 various notes and deeds of trust against the property, including a purchase money promissory note  
11 executed by Kakinami (the "Note"). The Note included an obligation by the maker to refinance the  
12 Note on or before April 1987. The lender, Fresno Investors, a Limited Partnership, also agreed to  
13 subordinate the obligation under the 1982 Note to new financing and to accept a new note in the  
14 principal amount of \$325,000. The Togamis were unable to acquire a new loan by April 1987 and  
15 defaulted on the original purchase money Note.

16 In August 1987, the Togamis were able to refinance the 1982 purchase money Note through a  
17 loan from Imperial Thrift and Loan Association ("Imperial"). Fresno Apartment Investors agreed to  
18 reconvey the deed of trust in exchange for a new secured promissory note. The Togamis executed a  
19 new note to Fresno Apartment Holders in the principal amount of \$350,421, which includes  
20 arrearages that accrued as a result of the default. The new note contains the provision, "This note is  
21 not a purchase money note and there is full recourse to the Maker."

22 The Togamis filed a voluntary chapter 11 petition on January 12, 1990. Imperial, the holder  
23 of the first deed of trust, sought and obtained relief from the automatic stay and conducted a  
24 foreclosure sale on April 24, 1991. No proceeds of the foreclosure sale were available for  
25 distribution to Fresno Apartment Holders, the holder of the third deed of trust. From the time of  
26 acquisition, the Togamis operated the property as an apartment complex and made no modifications  
27 or alterations to the property.

1 DISCUSSION

2 A. Transactions Subject to Anti-Deficiency Protection

3 California Code of Civil Procedure § 580b provides in pertinent part:

4 No deficiency judgment shall lie in any event after a sale of real  
5 property or an estate for years therein for failure of the purchaser to  
6 complete his or her contract of sale, or under a deed of trust, or  
7 mortgage given to the vendor to secure payment of the balance of  
8 the purchase price of that real property or estate for years therein,  
or under a deed of trust or mortgage on a dwelling for not more  
than four families given to a lender to secure repayment of a loan  
which was in fact used to pay all or part of the purchase price of  
that dwelling occupied, entirely or in part, by the purchaser.

9 C.C.P. § 580b precludes purchase money lenders and vendors from obtaining a deficiency  
10 judgment against the borrower after foreclosure. The issue is whether the Togamis have waived  
11 the anti-deficiency protection of C.C.P. § 580b under the 1987 refinance by the language in the  
12 new note, which indicates that the anti-deficiency provision does not apply to the transaction.

13 In general, a purchase money loan acquires its character at the time the loan is made and  
14 retains its character absent subsequent waiver. Brown v. Jensen, 41 Cal. 2d 193, 197, 259 P.2d  
15 425 (1953), cert. denied, 347 U.S. 905 (1954). A purchase money loan retains its character  
16 notwithstanding subsequent assignment of the mortgage and note. Ziegler v. Barnes, 200 Cal.  
17 App. 3d 224, 231 fn. 6, 246 Cal. Rptr. 69 (Cal. Ct. App. 1988).

18 The anti-deficiency provision of § 580b applies only to standard transactions. The  
19 traditional standard purchase money transaction involves the purchase of property where the  
20 buyer gives the seller a promissory note for the balance of the purchase price secured by a deed of  
21 trust on the property. The second standard purchase money transaction involves the purchase of  
22 property where the buyer gives a third-party lender a promissory note for the balance of the  
23 purchase price secured by a deed of trust on the property, which is an owner-occupied residential  
24 property containing four or fewer units.

25 It is undisputed that the Togamis assumed the Kakinami Note, which is a purchase money  
26 note, in connection with their acquisition of the apartment building. A subsequent assignee of a  
27 purchase money note is subject to the protections of the anti-deficiency provisions of § 580b.  
28 Ziegler v. Barnes, 200 Cal. App. 3d at 231. On that basis, the court concludes that the

1 transaction in question is a standard transaction to which the anti-deficiency provisions of § 580b  
2 would normally apply.

3  
4 **B. Policy Underlying § 580b**

5 California historically has had a strong public policy against deficiency judgments. The  
6 policy objective of the anti-deficiency legislation is to place the risk of inadequate security on the  
7 lender, who is in the best position to know its true value and to discourage a seller or lender from  
8 overvaluing the collateral above its fair market value. Roseleaf v. Chierighino, 59 Cal. 2d 35, 42,  
9 27 Cal. Rptr. 873 (1963). The Roseleaf court articulated the policy objectives as follows:

10 Section 580b places the risk of inadequate security on the purchase  
11 money mortgagee. A vendor is thus discouraged from overvaluing  
12 the security. Precarious land promotion schemes are discouraged,  
13 for the security value of the land gives purchasers a clue as to its  
14 true market value. (Citations omitted). If inadequacy of the  
15 security results, not from overvaluing, but from a decline in  
16 property values during a general or local depression, section 580b  
17 prevents the aggravation of the downturn that would result if  
18 defaulting purchasers were burdened with large personal liability.  
19 Section 580b thus serves as a stabilizing factor in land sales.

20 Id. By enacting the anti-deficiency legislation, the California Legislature sought to prevent a  
21 secured creditor from selling the property at a foreclosure sale for less than its fair market value  
22 and then recovering a personal judgment from the borrower for the difference between the sales  
23 proceeds and the balance of the unpaid debt. Id.

24 Because of its strong public policy objective, the anti-deficiency protection cannot be  
25 altered or waived at the time the purchase money obligation is created or renewed. Palm v.  
26 Schilling, 199 Cal. App. 3d 63, 69, 244 Cal. Rptr. 600 (Cal. Ct. App. 1988). A seller's lien  
27 remains subject to the anti-deficiency protection even when it is subordinated to a subsequent  
28 refinance loan. Thompson v. Allert, 233 Cal. App. 3d 1462, 1466-67, 285 Cal. Rptr. 367 (Cal.  
Ct. App. 1991). After the lender has received the secured note, the lender can alter or modify its  
terms, extend or renew the terms of the note, or substitute other or additional security for the  
note. As long as the obligation is secured by the same property and remains substantially the  
same as when it was originally created, the purchase money limitations continue to protect the

1 borrower. Jackson v. Taylor, 272 Cal. App. 2d 1, 5, 76 Cal. Rptr. 891 (Cal. Ct. App. 1969).

2 A transaction which does not serve the public policy objectives of the anti-deficiency  
3 statute is non-standard, and the anti-deficiency provisions generally do not apply to the non-  
4 standard transaction. Spangler v. Memel, 7 Cal. 3d 603, 612, 102 Cal. Rptr. 807 (1972); Union  
5 v. Anderson, 232 Cal. App. 3d 941, 946, 283 Cal. Rptr. 823 (Cal. Ct. App. 1991). However,  
6 even in transactions that vary from the standard, the anti-deficiency statute applies if the factual  
7 circumstances come within the purposes of the statute. Roseleaf, 59 Cal. 2d at 41.

### 8 9 C. Exceptions To Anti-Deficiency Protection

10 Under certain circumstances, the anti-deficiency protection of § 580b can be waived. For  
11 example, the seller's voluntary subordination of the purchase money deed of trust to a subsequent  
12 lien to secure a construction loan for commercial development constitutes an effective waiver of  
13 the anti-deficiency protection. Spangler v. Memel, 7 Cal. 3d at 614. The reason the buyer  
14 becomes personally liable is that the risk of deterioration of the property's value shifts because the  
15 use of the property has changed. The substitution of collateral may also provide the basis for the  
16 waiver of the anti-deficiency statute. Goodyear v. Mack, 159 Cal. App. 3d 654, 658, 205 Cal.  
17 Rptr. 702 (Cal. Ct. App. 1984). Although some courts have held that a material and substantial  
18 modification to the terms of a purchase money note may also constitute a waiver of the protection  
19 of § 580b, Russell v. Roberts, 39 Cal. App. 3d 390, 114 Cal. Rptr. 305 (Cal. Ct. App. 1974), the  
20 majority position is that subsequent events do not alter the effect of § 580b. Brown v. Jensen, 41  
21 Cal. 2d 193, 259 P.2d 425; Paramount Savings & Loan Ass'n v. Barber, 263 Cal. App. 2d 166, 69  
22 Cal. Rptr. 390; Roger Bernhardt, California Mortgage and Deed of Trust Practice § 4.24 (2d ed.  
23 1990 & Supp. 1992).

24 Fresno Apartment Holders argues that Russell v. Roberts, 39 Cal. App. 3d 390, which  
25 holds that Cal. Civ. Code § 2953<sup>1</sup> does not prevent the waiver of the anti-deficiency provision of

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27 <sup>1</sup> Any express agreement made or entered into by a borrower at the time of or in connection  
28 with the making of or renewing of any loan secured by a deed of trust, mortgage or other

(continued...)

1 C.C.P. § 580b in connection with the making or renewing of a purchase money loan, is controlling  
2 and that a subsequent waiver of the anti-deficiency protection of C.C.P. § 580b may constitute  
3 consideration for the renewal of a purchase money loan. However, since Russell v. Roberts,  
4 another California appellate court has clarified that the protection against a deficiency cannot be  
5 waived, stating that Cal. Civ. Code 2953's prohibition against waivers of privileges is consistent  
6 with § 580b. Palm v. Schilling, 199 Cal. App. 3d 63. The court finds that Russell v. Roberts is an  
7 aberration from those cases that hold that a subsequent waiver of the anti-deficiency protection is  
8 contrary to the public policy objectives underlying § 580b. Thompson v. Allert, 233 Cal. App. 3d  
9 1462; Palm v. Schilling, 199 Cal. App. 3d 63. To hold otherwise would be against the weight of  
10 the authority and would be contrary to the policies underlying the anti-deficiency statute.

11  
12 **CONCLUSION**

13 Based upon the foregoing reasons, the Court concludes that the debtors cannot waive the  
14 anti-deficiency provision of C.C.P. § 580b, and the subsequent refinance of the 1982 purchase  
15 money note did not operate as such a waiver. Accordingly, judgment is granted for the debtors,  
16 and the note to Fresno Apartment Holders remains subject to the California anti-deficiency  
17 provisions in C.C.P. § 580b.

18 Good cause appearing, it is SO ORDERED.

19 Dated:

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UNITED STATES BANKRUPTCY JUDGE

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25 (...continued)

26 nstrument creating a lien on real property, whereby the borrower agrees to waive the rights, or  
27 privileges conferred upon him by sections 2924, 2924(b), 2924(c) of the Civil Code or by sections  
28 580(a) or 726 of the Code of Civil Procedure, shall be void and of no effect . . . . Cal. Civ. Code  
§ 2953.