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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

PRESTIGE LIMITED PARTNERSHIP  
CONCORD, a California Limited  
Partnership,  
  
Debtor.

Case No. 95-57967-JRG  
Chapter 11

PRESTIGE LIMITED PARTNERSHIP  
CONCORD, a California Limited  
Partnership,  
  
Plaintiff,

Adversary No. 96-5281

vs.

**ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT**

EAST BAY CAR WASH PARTNERS, a  
California Limited  
Partnership,  
  
Defendant.

**I. INTRODUCTION**

The debtor and plaintiff in this adversary proceeding is Prestige Limited Partnership, a California limited partnership. Prestige's General Partner is Mesa Full Service Car Wash Partners, which is an Arizona limited partnership. The General Partners of Mesa are several individuals, one of which is Jerry Brassfield. Jerry Brassfield is also the purported guarantor of

1 the promissory note which is at issue in this case.

2 Before the court is plaintiff's motion for summary judgment  
3 by which plaintiff seeks a determination that defendant has  
4 waived its lien against debtor's real property lease by  
5 attaching and levying upon the unpledged assets of purported  
6 guarantor, Jerry Brassfield. Prestige also requests that the  
7 court find that East Bay does not have a claim in debtor's  
8 estate because it failed to timely file a Proof of Claim.

9 For the reasons hereinafter stated, Prestige's motion for  
10 summary judgment is granted in part.

11 **II. FACTUAL BACKGROUND**

12 The underlying facts are not disputed. In July 1990,  
13 Prestige purchased a car wash business from defendant East Bay.  
14 The purchase price was \$2,850,000, which was paid by (1)  
15 \$500,000 cash; (2) financing through San Jose National Bank in  
16 the amount of \$780,000; and (3) a seller carry-back loan of  
17 approximately \$1,573,000. A ground lease was also assigned to  
18 Prestige as part of the sale. The seller carry-back loan was  
19 evidenced by a promissory note to East Bay (hereafter referred  
20 to as the "1st Note"), and was secured by Prestige's ground  
21 lease, as well as personal property and equipment. The 1st Note  
22 was executed by Prestige's General Partner, Mesa Car Wash  
23 Limited Partnership, as evidenced by the signatures of Mesa's  
24 three individual General Partners, including Jerry Brassfield.  
25 The 1st Note also contained a guaranty provision which provided:  
26 "This Promissory Note, including all of Trustor's obligations to  
27 pay principal and interest are hereby personally guaranteed by  
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1 Jerry G. Brassfield dba J.G. Brassfield Enterprises." Jerry  
2 Brassfield executed the 1st Note in his capacity as General  
3 Partner of Mesa, and also as Guarantor in his individual  
4 capacity and dba "J.G. Brassfield Enterprises."

5 In September 1991, the 1st Note was split into two notes--  
6 (1) an \$800,000 Note (hereafter the "2nd Note"), which contained  
7 the same guaranty language as the 1st Note, and was secured by  
8 the ground lease; and (2) a Note for \$773,000 (hereafter the  
9 "3rd Note"), which was also secured by the ground lease and  
10 contained the same guaranty language as the other notes. The 2nd  
11 Note was subsequently assigned and is not at issue. It is the  
12 3rd Note which is at issue in this case.

13 There is no dispute that the 1st Note was a purchase money  
14 Note;<sup>1</sup> nor is it disputed that the subsequent division of the 1st  
15 Note did not change the character of the 2nd and 3rd Notes as  
16 purchase money notes.<sup>2</sup> Prestige also cites to case law  
17 providing that if a debt is originally a purchase-money debt,  
18 the note evidencing the debt is also a purchase-money debt, even  
19 if it is not the original note. Jackson v. Taylor, 272  
20 Cal.App.2d 1, 76 Cal.Rptr. 891 (1969); Lucky Inv. v. Adams, 183  
21 Cal.App.2d 462, 7 Cal.Rptr. 57 (1960).

22 The 3rd Note became due in October 1993, but the parties  
23 agreed to extend the maturity date to October 1, 1995.  
24 Prestige subsequently attempted to obtain a further extension of  
25 the Note due date but was unsuccessful. In October 1995, East

26 \_\_\_\_\_  
27 <sup>1</sup> East Bay admitted this fact in its Answer.

28 <sup>2</sup> East Bay also admitted this fact in its Answer.

1 Bay commenced an action on the guaranty against Jerry G.  
2 Brassfield, individually and dba J.G. Brassfield Enterprises.  
3 Brassfield raised as an affirmative defense in his answer that  
4 the relief sought by the complaint was a violation of the single  
5 action rule of California Code of Civ. Proc. § 726(a). East Bay  
6 obtained temporary protective orders against Brassfield, and in  
7 March 1996, and April 1996, obtained writs of attachment. East  
8 Bay levied on the writs of attachment in April 1996 and attached  
9 \$74,960.51 of funds held in Brassfield's unpledged bank  
10 accounts.

11 Prestige filed its petition for bankruptcy under Chapter 11  
12 of the Bankruptcy Code on December 1, 1995 and listed East Bay  
13 in its schedules as the holder of a disputed secured claim. The  
14 deadline for filing proofs of claim was April 10, 1996. East  
15 Bay filed a Proof of Claim on May 3, 1996.

16 **III. ISSUES PRESENTED**

17 There are three issues before the court. The first issue  
18 is whether Jerry Brassfield, as the general partner of  
19 Prestige's general partner Mesa, is a primary obligor under the  
20 3rd Note, such that the purported "guaranty" added no additional  
21 liability, and Prestige may assert that, by proceeding against  
22 Jerry Brassfield, East Bay has taken its "action" under Calif.  
23 Code of Civ. Proc. § 726(a).

24 If Jerry Brassfield is found to be a primary obligor under  
25 the 3rd Note, the second issue presented is whether East Bay's  
26 attachment and levy of Brassfield's unpledged bank accounts  
27 constitutes an "action" for purposes of California Code of Civ.  
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1 Proc. § 726(a), resulting in a waiver of East Bay's security  
2 interest in Prestige's ground lease.

3 If the court answers the first and second issues in the  
4 affirmative, the third issue presented is whether East Bay has a  
5 claim in Prestige's bankruptcy case. If plaintiff's contention  
6 is correct that, by proceeding against Brassfield, East Bay made  
7 an election of remedies and waived its lien against debtor's  
8 ground lease, East Bay could have only an unsecured claim in the  
9 debtor's case. However, Prestige contends that since East Bay  
10 did not file a timely proof of claim, it does not even have an  
11 unsecured claim.

12 **IV. APPLICABLE LAW ON MOTION FOR SUMMARY JUDGMENT**

13 Plaintiff has moved for summary judgment under Federal Rule  
14 of Civ. Proc. 56, which is made applicable to this adversary  
15 proceeding by Federal Rule of Bankruptcy Procedure 7056.

16 Summary judgment is appropriate where no genuine issue of  
17 material fact exists and a party is entitled to prevail in the  
18 case as a matter of law. Fed.R.Civ.P. 56(c); Bhan v. Nme  
19 Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), cert.  
20 denied, 502 U.S. 994 (1991), citing, Anderson v. Liberty Lobby,  
21 Inc., 477 U.S. 242, 250 (1986).

22 The party requesting summary judgment has the initial  
23 burden to show that there are no genuine issues of material  
24 fact. Bhan v. Nme Hospitals, Inc., 929 F.2d at 1409. The  
25 nonmovant's version of the facts must be accepted and all  
26 inferences from the underlying and undisputed facts are to be  
27 drawn in favor of the nonmovant. Bishop v. Wood, 426 U.S. 341,  
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1 348 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655  
2 (1962).

3 "[The] party seeking summary judgment always bears the  
4 initial responsibility of informing the district court of the  
5 basis for its motion, and identifying those portions of `the  
6 pleadings, depositions, answers to interrogatories, and  
7 admissions on file, together with the affidavits, if any,' which  
8 it believes demonstrate the absence of a genuine issue of  
9 material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323  
10 (1986); quoting Fed. R. Civ. P. 56(c). If the moving party  
11 satisfies this initial burden, the opposing party must go beyond  
12 the pleadings and by affidavit, deposition, answers to  
13 interrogatories, and admissions on file, designate specific  
14 facts showing that there is a genuine issue for trial. Id. at  
15 324.

16 **V. DISCUSSION**

17 **A. Is Jerry Brassfield a Primary Obligor Under the Third**  
18 **Note?**

19 With respect to the first issue, plaintiff contends that  
20 East Bay's action against Brassfield as guarantor constitutes an  
21 action against a primary obligor under the 3rd Note, citing to  
22 cases that hold that general partners are primary obligors  
23 because they are jointly liable for partnership liabilities, and  
24 purported "guarantees" by general partners therefore add no  
25 additional liability. Defendant, on the other hand, cites to a  
26 number of cases that have analyzed whether a guaranty is a  
27 "true" guarantee or a "sham" guaranty, and those courts have  
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1 looked to see if there is an attempt to get around California's  
2 anti-deficiency legislation by creating some sort of "straw man"  
3 set up. The determination of whether Brassfield is a "primary  
4 obligor" is a significant issue, because if he is primary  
5 obligor of the 3rd Note, Prestige may invoke the protection of  
6 California's one-action rule (C.C.P. § 726(a)), and assert that  
7 East Bay has waived its security by bringing an "action" on the  
8 3rd Note against Jerry Brassfield. United California Bank v.  
9 Maltzman, 44 Cal.App.3d 41, 53, 118 Cal.Rptr. 299, 307 (1974);  
10 Westinghouse Credit Corp. v. Barton, 789 F.Supp. 1043, 1045 (D.  
11 C.D.Cal. 1992); and Everts v. Matteson, 21 C.2d 437, 448-450,  
12 132 P.2d 476 (1942). On the other hand, if Brassfield is not a  
13 primary obligor, and he is a "true guarantor," Prestige cannot  
14 avoid East Bay's lien under the one-action rule. See, Security-  
15 First Nat'l Bank of Los Angeles v. Chapman, 31 Cal.App.2d 182,  
16 186, 87 P.2d 724, 726 (1939)(*reh'g denied*); and Westinghouse  
17 Credit Corp. v. Barton, 789 F.Supp. at 1045, citing, Bauman v.  
18 Castle, 15 Cal.App.3d 990, 994, 93 Cal.Rptr. 565 (1971).

19 Prestige cites to California Corp. Code § 15015,<sup>3</sup> which  
20

21 <sup>3</sup> Cal. Corp. Code § 15015(a) provides:

22 Except as provided in subdivision (b), all partners are liable as follows:

- 23 (1) Jointly and severally for everything chargeable to the partner-ship under Sections 15013 and  
24 15014.
- 25 (2) Jointly for all other debts and obligations of the partnership; but any partner may enter into  
26 a separate obligation to perform a partnership contract.

27 There are no facts before the court to find that § 15015(a)(1) is applicable in this case, because the sections to  
28 which it applies are § 15013 [liability of partnership for wrongs of partner], and § 15014 [liability of partnership for  
partner's misapplication of money or property]. The applicable section in this case is § 15015(a)(2), which provides that  
partners are jointly liable for all debts and obligations of the partnership.

1 provides that a partner is jointly liable for the debts of a  
2 partnership (applicable to Prestige as a California limited  
3 partnership), and Arizona Rev. Stat. § 29-215,<sup>4</sup> which provides  
4 that partners are jointly and severally liable for the debts and  
5 obligations of the partnership (applicable to Mesa as an Arizona  
6 limited partnership). Prestige cites to three cases involving  
7 partnerships which hold that general partners who purport to  
8 guarantee a secured loan on behalf of a partnership take on no  
9 additional liability since they are already jointly liable as  
10 general partners, and therefore a purported guarantee cannot be  
11 enforced as an independent agreement. And, because the partners  
12 are principal obligors of the partnership's debt, the courts  
13 have held that they are protected by California's anti-  
14 deficiency laws. Riddle v. Lushing, 203 Cal.App.2d 831, 21  
15 Cal.Rptr. 902 (1962) (deficiency judgment against  
16 partners/guarantors barred by § 580b); Union Bank v. Dorn, 254  
17 Cal.App.2d 157, 61 Cal.Rptr. 893 (1967) (partners/guarantors  
18 entitled to full protection of § 580d which prohibits deficiency  
19 judgments after foreclosure under a power of sale); and  
20 Westinghouse Credit Corp. v. Barton, 789 F.Supp. 1043 (D.  
21 C.D.Cal. 1992) (partner/guarantor of non-recourse obligation  
22 protected by Code of Civ. Proc. § 580d).<sup>5</sup>

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24 <sup>4</sup> Arizona Rev. Statute § 29-215(A) provides:

25 Except as provided in subsection B of this section, all partners are liable jointly and severally for  
26 everything chargeable to the partnership under §§ 29-213 and 29-214, and for all other debts and  
27 obligations of the partnership, but any partner may enter into a separate obligation to perform a  
28 partnership contract.

<sup>5</sup> Because Jerry Brassfield is not a party in this action, the court makes no ruling as to whether Jerry Brassfield is  
entitled to and/or to what extent he may be covered by California's various anti-deficiency statutes. The court's ruling

1 The facts presented in this case are different from the  
2 cases cited by plaintiff, in that the general partner of  
3 Prestige is another limited partnership, Mesa. Prestige argues  
4 that this does not change the applicability of the "primary  
5 obligor" analysis of the above cases, because Mesa is jointly  
6 liable for Prestige's debts, and Brassfield is jointly and  
7 severally liable for Mesa's debts, including Mesa's liability  
8 for Prestige's debts.

9 East Bay contends that a factual question is presented as  
10 to whether Brassfield is a true guarantor or a primary obligor  
11 in guarantor's guise, and that the court must look at the  
12 purpose and effect of the agreements to determine whether there  
13 is an attempt to recover a deficiency in violation of § 580d.  
14 East Bay takes the position that in order to find the guaranty  
15 unenforceable, the court must find that Brassfield is the "alter  
16 ego" or "mere instru-mentality" of Prestige. In making this  
17 argument, East Bay relies on several cases in which courts have  
18 looked at factors to determine whether a guaranty is a true  
19 guaranty, or whether it is a "sham" guaranty devised to get  
20 around California's anti-deficiency statutes. The cases cited  
21 to are Paradise Land & Cattle v. McWilliams Enters., Inc., 959  
22 F.2d 1463 (9th Cir. 1992); Valinda Builders, Inc. v. Bissner,  
23 230 Cal.App.2d 106, 40 Cal.Rptr. 735 (1964); River Bank America  
24 v. Diller, 38 Cal.App.4th 1400, 45 Cal.Rptr.2d 790 (1995)(*reh'g*  
25 *denied*); and Yunker v. Manor, 255 Cal.App.2d 431, 63 Cal.Rptr.

26 \_\_\_\_\_  
27 is limited to whether Brassfield is a primary obligor under the 3rd Note, and whether the judicial proceeding against  
28 Brassfield constitutes an "action" under Calif. Code of Civ. Proc. § 726(a), such that East Bay has made an election of  
remedies that results in a waiver of its security in the Prestige bankruptcy case.

1 197 (1967).

2 The court finds the cases cited by East Bay to be  
3 distinguishable from the facts presented in this case because  
4 those cases do not involve an individual's guarantee of a  
5 partnership debt, but instead address the question of whether a  
6 corporation or individual is really the "alter ego" of the  
7 other, such that the guarantor is really the true borrower. The  
8 court does not believe an "alter ego" type analysis is necessary  
9 here because partners are by law jointly liable for a  
10 partnership's debts and obligations. See, Riddle v. Lushing,  
11 203 Cal.App.2d 831, 21 Cal.Rptr. 902 (1962); Union Bank v. Dorn,  
12 254 Cal.App.2d 157, 61 Cal.Rptr. 893 (1967); and Westinghouse  
13 Credit Corp. v. Barton, 789 F.Supp. 1043 (1992).

14 Looking to the cases cited by defendant, the River Bank  
15 case is cited for the proposition that to determine whether  
16 individuals as purported guarantors are primary obligors, such  
17 that their guarantees are considered ineffective, courts look to  
18 the purpose and effect of the agreements to determine whether  
19 they are attempts to recover deficiencies in violation of §  
20 580d. However, the court in that case pointed out that had the  
21 individual purported guarantors in that case been the general  
22 partners of the subject partnership (rather than a corporation  
23 that they fully owned and controlled), "there is no question  
24 [the] guaranty would have been a sham . . . [because] in those  
25 circumstances, the [individuals] would have been treated as  
26 primary obligors and would be entitled to the unwaivable  
27 protection of Code of Civil Procedure section 580d, which

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1 prohibits a deficiency judgment after nonjudicial foreclosure  
2 under a power of sale." River Bank America, 38 Cal.App. 4th  
3 1400, 1422, 45 Cal.Rptr.2d 790, 802. Thus, the Court in River  
4 Bank recognized that in the case of individual partnership  
5 guarantees, it is unnecessary to look to the purpose and effect  
6 of the guarantee because as a matter of law, partners are  
7 jointly liable for the partnership's obligations, and they are  
8 therefore primary obligors.

9 The court finds the other cases cited by defendant to be  
10 similarly distinguishable from this case, in that they do not  
11 involve the straightforward legal question of whether a partner  
12 is primarily obligated on a partnership obligation. Instead,  
13 the cases involve "alter ego," and "straw man" analyses in which  
14 the courts have had to determine if an individual or corporate  
15 guarantor was the "mere instrumentality" of the borrower. For  
16 example, in Yunker, the court held that there was a triable  
17 issue as to whether an individual guarantor was truly a  
18 guarantor, in light of the fact that the individual contended  
19 that he formed the borrower corporation at the solicitation of  
20 the lender, and he was told that his signature as guarantor was  
21 merely for use as collateral and the note would remain one for  
22 purchase money. Yunker, 255 Cal.App.2d 431, 438, 63 Cal.Rtr.  
23 197, 202 (1967). Similarly, in Valinda Builders, two  
24 individuals entered into a contract of sale for the purchase of  
25 undeveloped real property. The contract provided that the  
26 individuals guaranteed performance. The individuals formed a  
27 corporation that was funded by \$200 paid-in-capital, and the  
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1 corporation took title to the property and executed a note and  
2 deed of trust in favor of the seller (although the formation of  
3 the corporation was not required under the contract of sale).  
4 The Court held that there was no evidence that the corporation  
5 was anything other than an instrumentality used by the  
6 individuals or that defendants were ever removed from their  
7 status and obligations of purchasers. The court thus held that  
8 the individuals were entitled to the protections of § 580b of  
9 the Code of Civil Procedure, and the seller could not look  
10 beyond the land for payment of the purchase price.

11 Lastly, in Paradise, a corporate guarantor argued that §  
12 580b should apply because the guaranty was a "sham" because it  
13 was the true purchaser-debtor, and not the individuals, who  
14 executed the note and deed of trust. The Court noted that the  
15 "sham" guaranty cases, including Yunker, Valinda, and Riddle,  
16 had at least two facts in common--the guarantor was an  
17 individual, and the purchaser-debtor in each case was a "dummy"  
18 controlled by the guarantor. The Court found that the "sham"  
19 guaranty cases were not applicable in Paradise because, unlike  
20 the cases cited, the guarantor in Paradise was a corporation,  
21 and one of the purposes of § 580b "concerns the harmful effect  
22 of unlimited personal liability in times of economic downturn,"  
23 and the "concern is not as strong where the guarantor is a  
24 corporation whose owners are protected by the central feature of  
25 corporations: limited liability." Paradise Land and Cattle  
26 Co., 959 F.2d at 1467. The Court also found that the  
27 corporation was not a "dummy," as was the case in the "sham"  
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1 guaranty cases cited, because the corporation was a "long-  
2 standing corporation of substantial assets." Id.

3 As previously stated, the court does not believe that it is  
4 necessary to determine if Brassfield is an "alter ego" or "straw  
5 man" for Prestige. The court believes the correct inquiry is  
6 strictly a legal one--that is, given the express statutory  
7 authority in California that provides partners are jointly  
8 liable for partnership debts, and the express statutory  
9 authority in Arizona that provides that partners are jointly and  
10 severally liable for the partnership debts, the court must  
11 determine if Brassfield, as a general partner of Prestige's  
12 general partner, is a primary obligor under the 3rd Note, such  
13 that the purported guaranty added no additional liability.

14 In attempting to determine who would be primarily liable  
15 under the 3rd Note, the court posed the following question at  
16 the hearing: Assuming that the Note was unsecured and there was  
17 no guarantee, if East Bay had brought an action to enforce the  
18 3rd Note, would it not in fact include as parties not only  
19 Prestige, but also Mesa, and Mesa's general partners, including  
20 Jerry Brassfield? Counsel for East Bay agreed that all of these  
21 persons would be named. East Bay takes the position, however,  
22 that Brassfield is at best only "secondarily" liable, because  
23 his assets are reached only if Prestige is unable to pay its  
24 debts, and Mesa is unable to pay Prestige's debts. While the  
25 court understands the logic behind East Bay's argument that  
26 Brassfield is "twice removed" from liability under the 3rd Note,  
27 in reviewing the applicable law the court concludes that

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1 Brassfield is primarily obligated on the 3rd Note without the  
2 guaranty.

3 In California, "A partnership in the eyes of the law is not  
4 a legal entity even though it may be sued under the firm name,  
5 by reason of the provisions of section 388 of the Code of Civil  
6 Procedure [now CCP § 369.5<sup>6</sup>]." Riddle v. Lushing, 203 Cal.App.2d  
7 831, 836, 21 Cal.Rptr. 902, 904 (1962), citing, In Rudnick v.  
8 Delfino, 140 Cal.App.2d 260, 266, 294 P.2d 983 (1956). And,  
9 unlike a corporation and its shareholders, partners are  
10 statutorily jointly liable for partnership debts. Cal. Corp.  
11 Code § 15015. Under the law in Arizona, general partners are  
12 jointly and severally liable for partnership debts, and thus, a  
13 partner may be sued severally and his assets reached even though  
14 the partnership assets are not exhausted and the other partners  
15 are not sued and their assets applied to the debt. See,  
16 Catalina Mortgage Co., Inc., 166 Ariz. 71, 75, 800 P.2d 574, 578  
17 (1990); and, Arizona statutes §§ 29-215 and 44-141.<sup>7</sup>

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19 <sup>6</sup> Calif. Code of Civ. Proc. § 369.5 provides:

20 (a) A partnership or other unincorporated association, whether organized for profit or not, may sue  
21 and be sued in the name it has assumed or by which it is known.

22 (b) A member of the partnership or other unincorporated association may be joined as a party in an  
23 action against the unincorporated association. If service of process is made on the member as an  
24 individual, whether or not the member is also served as a person upon whom service is made on behalf  
of the unincorporated association, a judgment against the member based on the member's personal  
liability may be obtained in the action, whether the liability is joint, joint and several, or several.

25 <sup>7</sup> Arizona Rev. Statute § 44-141(A) provides:

26 All parties to a joint obligation, including negotiable paper and partnership debts, shall be severally  
27 liable also for the full amount of such obligations. An action may be brought against such parties  
jointly or separately, joining one or more, and judgment may be given in each such action without  
28 barring an action against any party to the obligation not included in the judgment, and without  
releasing any party against whom the action was not brought.

1 Applying this law to the present case, the court finds the  
2 following result: As a California limited partnership, the  
3 general partner of Prestige is jointly liable for the debts of  
4 the partner-ship. Cal. Corp. Code § 15015. Thus, there can be  
5 no dispute that Mesa is jointly liable for the debts of  
6 Prestige, which includes the obligation to East Bay. Mesa's  
7 general partners, in turn, are jointly and severally liable for  
8 Mesa's debts, and under the law in Arizona, Brassfield could be  
9 sued on one of Mesa's debts or obligations even though the  
10 partnership and/or other partners' assets had not yet been  
11 applied to the debt. Since the obligation to East Bay is one  
12 that Mesa is jointly liable for, Brassfield is, by application  
13 of Arizona's partnership law, jointly and severally liable for  
14 that obligation. Brassfield is therefore not "secondarily"  
15 liable for the obligation to East Bay, he is primarily obligated  
16 for the debt. Under the Riddle, Union Bank and Westinghouse  
17 cases, the purported guaranty by Jerry Brassfield therefore  
18 added no additional liability, and Prestige can therefore assert  
19 that East Bay has taken its "action" under the one-action rule  
20 by proceeding against Brassfield on the 3rd Note.

21 Before reaching the second issue, the court addresses a  
22 final argument by East Bay that it would not have carried back a  
23 promissory note for \$1.6 million if it believed Brassfield's  
24 guarantee was unenforceable. The court does not believe the  
25 argument is relevant to the strictly legal question of whether  
26 Brassfield is primarily obligated on the 3rd Note. A similar  
27 argument was also made in Riddle v. Lushing, but the intention  
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1 of the parties did not affect the Court's ruling that  
2 California's anti-deficiency statutes were applicable once the  
3 Court concluded that the purported guarantor was a partner of  
4 the partnership. 203 Cal.App.2d 831, 21 Cal.Rptr. 902. While  
5 this court finds that Jerry Brassfield is a primary obligor  
6 under the 3rd Note, the ruling in no way precludes any action  
7 East Bay may elect to take against Brassfield for his alleged  
8 fraudulent representations or inducements in providing the  
9 guarantee to obtain the loan.

B. Did East Bay's Attachment  
of Jerry Brassfield's  
Unpledged Assets  
Constitute an "Action" for  
purposes of Calif. Code of  
Civ. Proc. § 726(a)?

12 Having concluded that Jerry Brassfield is a primary obligor  
13 under the 3rd Note, the court next addresses the second issue,  
14 which is whether East Bay's attachment of and levy upon Jerry  
15 Brassfield's personal assets constitutes an "action" under  
16 Calif. Code of Civ. Proc. § 726(a), such that East Bay has  
17 forfeited its security interest in the debtor's lease.

18 California Code of Civ. Proc. § 726(a) provides in relevant  
19 part:

20 There can be but one form of action for the recovery of  
21 any debt or the enforcement of any right secured by  
22 mortgage upon real property or an estate for years  
23 therein, which action shall be in accordance with the  
24 provisions of this chapter.

25 California Code of Civ. Proc. § 726(a).

26 Section 726 embodies more than the "one-action" rule. It  
27 is part of a statutory scheme which requires a secured creditor  
28 to proceed against its security before enforcing the underlying  
debt. Security Pacific National Bank v. Wozab, 51 Cal.3d 991,

1 999 275 Cal.Rptr. 201, 205 (1990). Where a secured creditor  
2 sues on the obligation and seeks a personal money judgment  
3 against the debtor without seeking therein foreclosure of such  
4 mortgage or deed of trust, he makes an election of remedies,  
5 electing the single remedy of a personal action, and thereby  
6 waives his right to foreclose on the security or to sell the  
7 security under a power of sale. Walker v. Community Bank, 10  
8 Cal.3d. 729, 733, 111 Cal.Rptr. 897, 899 (1974).

9 The issue presented in this case is whether East Bay's  
10 attachment and levy upon Brassfield's unpledged bank accounts  
11 constitutes an "action" for purposes of § 726(a). East Bay  
12 contends that in issuing the Writs of Attachment, the State  
13 Court "necessarily determined that Brassfield was not a primary  
14 obligor on East Bay's note from Prestige." East Bay  
15 acknowledges that there is no final judgment in the State Court,  
16 and so there can be no res judicata affect, but argues that this  
17 court should be persuaded by the State Court's issuance of the  
18 Writs. Prestige requests that the argument be rejected by  
19 reason of Calif. Code of Civ. Proc. § 484.100, which provides  
20 with respect to attachments:

21 The court's determinations under this chapter shall  
22 have no effect on the determination of any issues in  
23 the action other than issues relevant to proceedings  
24 under this chapter nor shall they affect the rights of  
25 the plaintiff or defendant in any other action arising  
out of the same claim of the plaintiff or defendant.  
The court's determinations under this chapter shall not  
be given in evidence nor referred to at the trial of  
any such action.

26 Calif. Code of Civ. Proc. § 484.100.

27 Pursuant to Calif. Code of Civ. Proc. § 484.100, the State  
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1 Court's determinations in issuing the Writs of Attachment are to  
2 have no effect on this court's determination of the issues  
3 before it, and therefore the court will not consider such  
4 evidence.

5 In support of its position that East Bay's attachment of  
6 Brassfield's bank accounts constitutes an "action" under  
7 California Code of Civ. Proc. § 726(a), plaintiff cites to Shin  
8 v. Superior Court, 26 Cal.App.4th 542, 31 Cal.Rptr.2d 587  
9 (1994)(*reh'g denied*). In Shin, the lender was secured by real  
10 property located in California. Before foreclosing on its  
11 security in California, the lender obtained a prejudgment  
12 attachment of one of the co-borrowers' unpledged real property  
13 located in Korea. The Court held that the prejudgment  
14 attachment violated the security first principle of Calif. Code  
15 of Civ. Proc. § 726(a).

16 East Bay acknowledges that a creditor who recovers a  
17 personal money judgment against a debtor without first  
18 foreclosing its security results in a loss of its liens on the  
19 property not foreclosed, but it contends that absent an actual  
20 judgment being obtained, there is no violation of Calif. Code of  
21 Civ. Proc. § 726(a) since the action may be dismissed before  
22 judgment. Defendant asks that the court look to two cases which  
23 Shin expressly declined to follow. The two cases are In re  
24 Tidrick, 105 B.R. 584 (Bankr.C.D. Cal. 1989) and In re Madigan,  
25 122 B.R. 103 (9th Cir. BAP 1991). Both cases held that an  
26 actual judgment is necessary before § 726 bars further recovery,  
27 based on the holding in another case, Brice v. Walker, 50  
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1 Cal.App.49, 194 P. 721 (1920). In Brice v. Walker, the creditor  
2 brought an action for a personal judgment against the borrower  
3 before foreclosing on its security interest in an automobile.  
4 The borrower gave the automobile to his daughter, and the bank  
5 asserted a right to take possession of the automobile as  
6 collateral for its loan. The daughter, who had possession of  
7 the automobile, argued that the bank had made an election of  
8 remedies by seeking a personal judgment. The Court disagreed,  
9 citing to two cases involving conditional sales contracts in  
10 which the courts held there was no election of remedies absent a  
11 judgment.

12 The Court in Shin found that the reliance by Tidrick and  
13 Madigan on Brice v. Walker was misplaced, stating:

14 In Brice v. Walker, the court analyzed instances  
15 involving conditional sales contracts in which the  
16 seller had the right to bring an action for the  
17 purchase money or retake possession of the property but  
18 not both. "In George J. Birkel Co. v. Nast, 20  
19 Cal.App. 651 [129 P. 945] . . . , the court said: 'The  
20 legal effect of such an election was immediately upon  
21 the filing of the complaint, to transfer and vest in  
22 defendant title.' . . . [Furthermore,] [i]n Geo.  
23 Birkel Co. v. Nast, supra, the plaintiff was seeking to  
24 hold by attachment the property which by conditional  
25 sale contract had been delivered to the defendant. In  
26 none of these cases was it necessary to determine that  
27 the commencement of an action . . . without any  
28 judicial action by the court, and without any special  
proceeding by attachment or otherwise against the  
defendant's property, constituted an irrevocable  
election of the prior remedy." (Brice v. Walker,  
supra, 50 Cal.App. at pp. 52-53, 194 P. 721.) Thus,  
Brice v. Walker is distinguishable not only on its  
facts, but in accordance with its own analysis that a  
"special proceeding by attachment or otherwise against  
the defendant's property" calls for a different result.  
Accordingly, [Respondent's] reliance on In re Tidrick,  
supra, 105 B.R. 584, and In re Madigan, supra, 122 B.R.  
103, is misplaced.

Shin v. Superior Court, 26 Cal.App.4th 542, 550-51, 31

1 Cal.Rptr.2d 587, 593-94 (1994).

2 The court agrees with Shin that Brice v. Walker is distin-  
3 guishable, and the court finds that Madigan and Tidrick are also  
4 distinguishable from the facts presented in this case in that  
5 neither case involved a prejudgment attachment. In Madigan, the  
6 lender filed an action for a money judgment against a guarantor  
7 and took the guarantor's default. However, no default judgment  
8 was ever entered. The Court held that there was no violation of  
9 Calif. Code of Civ. Proc. § 726 because no judgment had been  
10 entered and the creditor could have filed an amended complaint  
11 seeking foreclosure, and not obtained a default judgment. In re  
12 Madigan, 122 B.R. at 106. Notably, in response to the debtor's  
13 citation to cases in which courts have held that the offset of a  
14 bank account is an election of remedies, the Court stated:  
15 "This situation is distinguishable from the case before the BAP.  
16 In the case of offsets, although there was no judicial action,  
17 the mortgagee actually partially collected on the secured  
18 obligation, through a self-help remedy available at law. Thus a  
19 legal remedy was actually exercised. [The creditor in Madigan],  
20 on the other hand, while closing in on exercise of a legal  
21 remedy, did not complete the process." Id. at 106.

22 Defendant attempts to distinguish the facts presented in  
23 Shin on the grounds that there has been only one lawsuit filed  
24 in this case, and not two lawsuits as was the case in Shin, and  
25 argues that the fact that the property attached was located in a  
26 different country than the security is a distinguishing factor.  
27 The court disagrees. In determining whether there has been an  
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1 "action" for purposes of Calif. Code of Civ. Proc. § 726(a), the  
2 court looks to the statutory definition of an "action," which is  
3 found at Calif. Code of Civ. Procedure § 22. That section  
4 provides:

5 An action is an ordinary proceeding in a court of  
6 justice by which one party prosecutes another for the  
7 declaration, enforcement, or protection of a right, the  
redress or prevention of a wrong, or the punishment of  
a public offense.

8 Calif. Code of Civ. Procedure § 22. And see, Security Pacific  
9 Nat'l Bank v. Wozab, 51 Cal.3d 991, 998, 800 P.2d 557, 560, 275  
10 Cal.Rptr. 201, 204 (1990)(whether there has been an "action"  
11 under § 726(a) is answered by C.C.P. § 22).

12 The court in Shin reasoned that if an involuntary "banker's  
13 lien" without the aid of judicial authority constitutes an  
14 election of remedies triggering forfeiture of the creditor's  
15 security interest [see Security Pacific National Bank v. Wozab,  
16 51 Cal.3d 991, 275 Cal.Rptr. 201], than the initiation of an  
17 independent judicial proceeding to attach a debtor's unpledged  
18 assets should have the same effect. Shin, at 26 Cal.App.4th  
19 542, 548, 31 Cal.Rptr. 587, 591. The Court stated, "The fact  
20 that the exercise of a 'banker's lien' resulted in the immediate  
21 loss of the debtor's cash deposits but [creditor] has had Shin's  
22 property under attachment for more than two years is not a  
23 significant difference. The extent of appropriation is only a  
24 matter of degree and, by restricting Shin's use of his unpledged  
25 assets, his ability to protect and defend his interests is  
26 impaired." Id. The same reasoning is applicable here. East  
27 Bay initiated a judicial proceeding to enforce the purported  
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1 guaranty of Jerry Brassfield. While the proceeding could have  
2 been dismissed prior to any prosecution of the action, that did  
3 not occur. Instead, East Bay obtained the Writs of Attachment  
4 and levied upon Brassfield's bank accounts. Under the holding  
5 in Shin, this constitutes an action. As already noted, the 9th  
6 Circuit Bankruptcy Appellate Panel in Madigan similarly  
7 recognized in dicta that the exercise of a legal remedy, such as  
8 an offset, in which the mortgagee actually partially collects on  
9 the secured obligation constitutes an action. Madigan, 122 B.R.  
10 103, 106. Pursuant to the statutory definition of an "action,"  
11 and the holding in Shin, the court finds that East Bay's  
12 attachment and levy upon Brassfield's bank accounts constitutes  
13 an "action" for purposes of § 726(a). The result of having  
14 taken an "action" in California is a waiver of East Bay's  
15 security interest in the debtor's ground lease. Walker v.  
16 Community Bank, 10 Cal.3d. 729, 733, 111 Cal.Rptr. 897, 899  
17 (1974), Shin v. Superior Court, 26 Cal.App.4th 542, 31  
18 Cal.Rptr.2d 587.

19 C. Does East Bay Have a "Claim" in Debtor's Bankruptcy  
20 Estate?

21 Having found that East Bay has taken an "action" for  
22 purposes of Calif. Code of Civ. Proc. § 726(a), resulting in the  
23 loss of its security interest, the third issue presented by  
24 Prestige is whether East Bay has an unsecured claim in the  
25 debtor's bankruptcy estate. However, no objection to any claim  
26 of East Bay was raised in Prestige's complaint. Therefore, the  
27 court does not believe any issues regarding East Bay's potential  
28 claim are properly before it at this time, and thus, the court

1 does not consider this issue.

2 **VI. CONCLUSION**

3       Based on the foregoing, the summary judgment of Prestige is  
4 granted in part. The statements in this order shall constitute  
5 the court's findings of fact and conclusions of law pursuant to  
6 Federal Rule of Bankruptcy Procedure 7052.

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8 DATED: \_\_\_\_\_

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JAMES R. GRUBE  
UNITED STATES BANKRUPTCY JUDGE

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