

NOT FOR PUBLICATION

APR 09 2013

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-12-1303-TaMoMk
		)		
6	MERUELO MADDUX PROPERTIES,	)	Bk. No.	SV 09-13356-VK
	INC., et al.,	)		
7		)		
	Debtors.	)		
8	_____	)		
		)		
9	BELINDA MERUELO,	)	<b>MEMORANDUM*</b>	
		)		
10	Appellant,	)		
		)		
11	v.	)		
		)		
12	MERUELO MADDUX PROPERTIES,	)		
	INC., et al.,	)		
13		)		
	Appellees.	)		
14	_____	)		

Argued and Submitted On February 21, 2013  
at Pasadena, California

Filed - April 9, 2013

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Victoria Kaufman, Bankruptcy Judge, Presiding

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Appearances: Gregory M. Salvato of Salvato Law Offices on  
behalf of Appellant Belinda Meruelo; Christopher  
E. Prince of Lesnick Prince & Pappas LLP on behalf  
of Evoq Properties, Inc. (formerly known as  
Meruelo Maddux Properties, Inc.) and Merco Group -  
2001-2021 West Mission Boulevard, LLC

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\*This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Before: TAYLOR, MONTALI,\*\* and MARKELL, Bankruptcy Judges.

2 **INTRODUCTION**

3 Belinda Meruelo, individually, as trustee of the Meruelo  
4 Living Trust u/d/t dated November 11, 1988 ("Trust"), and as  
5 representative of the Estate of Homer Meruelo (hereinafter in all  
6 capacities, "Belinda"<sup>1</sup>), filed a proof of claim in the chapter 11  
7 bankruptcy case of Merco Group 2001-2021 West Mission Boulevard,  
8 LLC ("Merco Group"), case no. 09-13403.<sup>2</sup> Merco Group<sup>3</sup> objected  
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10 <sup>\*\*</sup>The Honorable Dennis Montali, Bankruptcy Judge for the  
11 Northern District of California, sitting by designation.

12 <sup>1</sup> An appeal filed by Belinda Meruelo's son Richard Meruelo  
13 was also submitted to this Panel on February 21, 2013 in BAP No.  
14 CC-12-1304. In order to avoid unnecessary confusion, the  
15 appellant here will be referred to as "Belinda." We intend no  
16 disrespect by this informality.

17 <sup>2</sup> We exercised our discretion and independently reviewed  
18 certain imaged documents from the bankruptcy court's electronic  
19 docket. See Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
20 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase  
21 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th  
22 Cir. BAP 2003). In so doing, we determined that on April 7,  
23 2009, the bankruptcy court ordered joint administration of Merco  
24 Group's bankruptcy case with 53 related cases under case no.  
25 09-13356, In re Meruelo Maddux Properties, Inc. ("MMPI") ("Joint  
26 Administration Order"). The Joint Administration Order directed  
27 claimants to file proofs of claim in the case directly related to  
28 their claims and to use the caption and case number for that case  
when so doing. It also, however, directed use of the MMPI case  
number, caption, and docket in connection with all other filings  
in the jointly administered cases. As a result, the MMPI docket  
included more than 3700 entries at the time of our review; this  
significantly impeded our ability to independently identify  
relevant documents.

<sup>3</sup> On June 24, 2011, the bankruptcy court entered an order  
confirming a plan of reorganization. The post-confirmation Merco  
Group filed the motion for disallowance.

1 to the claim and moved for disallowance; the bankruptcy court  
2 granted the disallowance motion. Belinda appeals the bankruptcy  
3 court's order disallowing the claim. We AFFIRM.

4 **FACTS<sup>4</sup>**

5 **Pre-Petition Sale of the Property.**

6 In early 2005, Merco Group, as buyer, entered into a  
7 contract with Meruelo Pomona, LLC, as seller, to purchase  
8 improved real property located in Pomona, California (the  
9 "Property") for \$20,000,000. Belinda and her late husband, Homer  
10 Meruelo, managed and owned the selling entity ("Seller"). Their  
11 son, Richard Meruelo, managed Merco Group.

12 When Seller and Merco Group executed the purchase agreement  
13 ("Purchase Agreement"), a deed of trust securing debt owed by  
14 Seller to PNL Pomona, L.P. ("PNL") encumbered the Property. PNL  
15 also held a written guaranty from Belinda ("Guaranty")  
16 guaranteeing repayment of its loan to Seller.

17 The sale transaction closed over two years later on or about  
18 July 27, 2007. On closing, Merco Group paid the sales price, in  
19 part, by assuming the obligation to repay the PNL loan which had  
20 a then outstanding balance of \$8,763,304.85. The Purchase  
21 Agreement did not require a release of the Guaranty, and Belinda  
22 remained bound by the Guaranty after assumption.

23 **Post-Petition Proceedings.**

24 On or about March 27, 2009, Merco Group and 53 related  
25 entities filed voluntary petitions under chapter 11. The  
26

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27 <sup>4</sup> The record on appeal reflects that the background facts  
28 are not in dispute.

1 Property became an asset of a bankruptcy estate. On  
2 September 24, 2009, Belinda filed the original proof of claim  
3 ("Original Claim"). The Original Claim stated that it was an  
4 indemnification claim and sought payment to the extent Belinda,  
5 in the future, incurred losses associated with Merco Group's  
6 failure to re-pay PNL.

7 Thereafter, PNL sued Belinda in an action seeking recovery  
8 on the Guaranty in Los Angeles Superior Court, PNL Pomona, L.P.  
9 v. Belinda Meruelo, et al., case number KC055493 ("Guaranty  
10 Action").<sup>5</sup> As a result, on December 6, 2011, Belinda filed an  
11 amendment to the Original Claim ("Amended Claim") and asserted a  
12 specific claim for \$3,306,941.05 based on a proposed judgment  
13 dated October 20, 2011 in the Guaranty Action. In the Amended  
14 Claim, Belinda alleged that: (1) as a third party beneficiary to  
15 the Purchase Agreement, she may enforce the Purchase Agreement  
16 against Merco Group pursuant to California Civil Code section  
17 1559 ("CC Section 1559");<sup>6</sup> and (2) she holds rights to  
18 reimbursement and indemnification under California law, including  
19 California Civil Code section 2847 ("CC Section 2847").<sup>7</sup>

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21  
22 <sup>5</sup> It is not disputed that at some point thereafter, PNL  
23 foreclosed non-judicially against the Property.

24 <sup>6</sup> CC Section 1559 provides: "A contract, made expressly  
25 for the benefit of a third person, may be enforced by him at any  
26 time before the parties thereto rescind it."

27 <sup>7</sup> CC Section 2847 provides, in relevant part, that:  
28 "If a surety satisfies the principal obligation, or any part  
thereof, whether with or without legal proceedings, the principal  
is bound to reimburse what he has disbursed, including necessary  
costs and expenses. . . ."

1 On January 23, 2012, Merco Group filed its Motion for Order  
2 Disallowing Claim of [Belinda] ("Motion") and sought disallowance  
3 on two grounds. First, Merco Group argued that section 502(e)<sup>8</sup>  
4 of the Bankruptcy Code<sup>9</sup> bars recovery under the Amended Claim as  
5 Belinda had not yet paid the PNL judgment. Second, Merco Group  
6 asserted that section 580d of the California Code of Civil  
7 Procedure ("CCP Section 580d") barred recovery. Merco Group,  
8 citing Union Bank v. Gradsky, 265 Cal. App. 2d 40, 44-47 (1968),  
9 argued that just as this anti-deficiency statute protects a  
10 borrower from a lender's deficiency claim after a non-judicial  
11 foreclosure, it also protects a borrower from the guarantor's  
12 reimbursement claim.

13 Belinda filed an opposition to the Motion ("Opposition").<sup>10</sup>  
14

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15 <sup>8</sup> Section 502(e) provides, in relevant part, that:

16 [T]he court shall disallow any claim for reimbursement  
17 or contribution of an entity that is liable with the  
18 debtor on or has secured the claim of a creditor to the  
19 extent that (A) such creditor's claim against the  
20 estate is disallowed; (B) such claim for reimbursement  
21 or contribution is contingent as of the time of  
22 allowance or disallowance of such claim for  
23 reimbursement or contribution; or (C) such entity  
24 asserts a right to subrogation under section 509 of  
25 this title.

26 <sup>9</sup> Unless otherwise specified, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

<sup>10</sup> The Opposition initially sought a six month continuance  
of the hearing on the Motion on the grounds that the matter was  
not ripe, as Belinda alleged that damages were likely to  
increase. At that time, Belinda alleged out-of-pocket damages in  
(continued...)

1 In substance, Belinda argued that Merco Group's first basis for  
2 disallowance, section 502(e), did not apply, because Merco Group  
3 was not liable with Belinda on the Guaranty. Belinda noted that  
4 the confirmed plan allowed PNL to non-judicially foreclose, that  
5 this foreclosure eradicated PNL's deficiency rights against Merco  
6 Group by operation of California law, and that this left only  
7 Belinda liable to PNL.

8 The Opposition did not address Merco Group's second basis  
9 for disallowance, CCP Section 580d. Instead, Belinda argued that  
10 Merco Group breached the Purchase Agreement when, having agreed  
11 to assume the PNL debt, it failed to satisfy the PNL debt in full  
12 and thereby release Belinda from obligations under the Guaranty.  
13 Belinda alleged that Seller contracted with Merco Group for the  
14 "express purpose of relieving [Belinda's] mortgage debt through  
15 the assumption of the loan by [Merco Group]." Opposition at  
16 54:19-21. Belinda asserted, therefore, that as the third party  
17 beneficiary of the Purchase Agreement, she had the right to  
18 compel Merco Group to perform its obligations under the Purchase  
19 Agreement. Belinda, thus, requested that the bankruptcy court  
20 infer that such contractual obligations included payment of all  
21 the alleged damages incurred, or to be incurred, as a result of  
22 the Guaranty Action and Merco Group's failure to pay PNL in full.

23 \_\_\_\_\_  
24 <sup>10</sup>(...continued)  
25 the amount of \$425,521.05, for attorney's fees incurred in  
26 defense of the Guaranty Action, but the proposed judgment in the  
27 Guaranty Action had not been entered. The bankruptcy court  
28 continued the initial hearing on the Motion, scheduled for  
March 15, 2012, to May 11, 2012, based on the parties'  
stipulation and order thereon. Neither the stipulation nor the  
order thereon, however, mentioned the ripeness argument.

1 The bankruptcy court heard oral argument on the Motion and  
2 Opposition on May 11, 2012. After hearing brief argument, the  
3 bankruptcy court granted the Motion, on the following stated  
4 grounds:

5 The Court doesn't see her as a third-party beneficiary.  
6 They bought the property. The intention wasn't to  
7 relieve her of the debt, it was to acquire the  
8 property. And so the Court's going to - - and for the  
9 other grounds explained in the motion. So the  
10 objection is sustained. Okay.

11 Hr'g Tr. (May 11, 2012) at 3:19-24. The Court entered the order  
12 disallowing the Amended Claim on May 29, 2012 ("Order"). The  
13 Order, prepared by Merco Group's counsel, recites that it is  
14 based on the "Motion, the Opposition to the Motion, the Reply in  
15 support, the arguments presented at the hearing, and the  
16 pleadings and papers on file in this proceeding . . . ." Order,  
17 Dkt. 3768 at 2:6-7. Belinda filed a timely notice of appeal.

#### 18 **JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
20 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.  
21 § 158.

#### 22 **ISSUE**

23 Did the bankruptcy court err in disallowing the Amended  
24 Claim?

#### 25 **STANDARD OF REVIEW**

26 We review the bankruptcy court's legal conclusions de novo  
27 and its findings of fact for clear error. See Allen v. US Bank,  
28 NA (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012). We  
review the bankruptcy court's order disallowing the claim de  
novo. See Continental Ins. Co. v. Thorpe Insulation Co.

1 (In re Thorpe Insulation Co.), 671 F.3d 1011, 1020 (9th Cir.  
2 2012), cert. denied, 133 S. Ct. 119 (2012). See also Varela v.  
3 Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.), 293 B.R.  
4 489, 493 (9th Cir. BAP 2003) (issues related to disallowance are  
5 questions of law reviewed de novo). This case also involves  
6 contract interpretation; again, de novo review is appropriate.  
7 Simpson v. Burkart (In re Simpson), 366 B.R. 64, 70-71 (9th Cir.  
8 BAP 2007).

9 **DISCUSSION**

10 The Bankruptcy Code sets forth the grounds for disallowance  
11 of proofs of claim primarily in section 502(b). See Heath v. Am.  
12 Express Travel Related Servs. Co., Inc. (In re Heath), 331 B.R.  
13 424, 426 (9th Cir. BAP 2005). Section 502(b)(1) provides for  
14 disallowance of a claim that "is unenforceable against the debtor  
15 and property of the estate, under any agreement or applicable law  
16 for a reason other than because such claim is contingent or  
17 unmatured." The bankruptcy court's oral ruling articulated only  
18 one specific ground for disallowance; Belinda was not a third  
19 party beneficiary of the Purchase Agreement. Belinda disputes  
20 this conclusion, but she never addresses the bankruptcy court's  
21 general reference to other grounds set forth in the Motion and  
22 the resultant inclusion of CCP Section 580d as a basis for  
23 disallowance. We conclude, first, that the necessary application  
24 of CCP Section 580d is dispositive here. We then also conclude  
25 that the bankruptcy court correctly determined that Belinda was  
26 not a third party beneficiary of the Purchase Agreement entitled



1 to specific performance rights under California law.<sup>11</sup>

2 **CCP Section 580d Requires Disallowance of the Amended Claim.**

3 Merco Group cited CCP Section 580d in its Motion as grounds  
4 for disallowance. It argued that non-judicial foreclosure  
5 extinguished any indirect obligation it otherwise owed to Belinda  
6 on account of the Guaranty. Belinda did not respond directly to  
7 this argument prior to appeal either in writing or at oral  
8 argument.<sup>12</sup> The bankruptcy court, likely as a result, did not  
9 discuss this objection specifically in its oral ruling. But, it  
10 generally references the "other grounds explained in the motion"  
11 as a basis for its disallowance of the claim. Hr'g Tr. (May 11,  
12 2012) at 3:23-24.

13 In her opening brief on appeal, Belinda addresses not CCP  
14 Section 580d, but her Guaranty's Gradsky waiver. In her reply  
15 brief, she responds more directly to Merco Group's CCP Section  
16 580d argument, and states that she found no case authority  
17 providing that CCP Section 580d applies to the claim of a third  
18 party beneficiary. To the extent Belinda retained any right to  
19 dispute the CCP Section 580d basis for disallowance of the  
20 Amended Claim, these arguments fail to justify a reversal. Merco

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21  
22 <sup>11</sup> To the extent that we misread the bankruptcy court's  
23 reference to other grounds as including CCP Section 580d, we note  
24 that we may affirm the bankruptcy court on any grounds supported  
25 by the record. Com-1 Info, Inc. v. Wolkowitz (In re Maximus  
Computers, Inc.), 278 B.R. 189, 194 (9th Cir. BAP 2002).

26 <sup>12</sup> Belinda may not argue the inapplicability of CCP Section  
27 580d for the first time on appeal. Golden v. Chicago Title Ins.  
28 Co. (In re Choo), 237 B.R. 608, 613 (9th Cir. BAP 2002) (issues  
not raised at the trial court will not be considered for the  
first time on appeal).

1 Group argues that even if it "impliedly promised Belinda that it  
2 would pay the underlying debt, CCP Section 580d would still  
3 preclude her claim for reimbursement." Apl'e Brief at 10. We  
4 agree.

5 CCP Section 580d provides, in pertinent part, that:

6 No judgment shall be rendered for any  
7 deficiency upon a note secured by a deed of  
8 trust or mortgage upon real property or an  
9 estate for years therein hereafter executed  
10 in any case in which the real property or  
11 estate for years therein has been sold by the  
12 mortgagee or trustee under power of sale  
13 contained in the mortgage or deed of trust.

14 And it is well settled that CCP Section 580d: "prevents both the  
15 creditor and the guarantor from obtaining any deficiency judgment  
16 against the debtor after nonjudicial sale of the security."

17 Union Bank v. Gradsky, 265 Cal. App. 2d at 41. And as the  
18 Gradsky court further noted:

19 The Legislature clearly intended to protect  
20 the debtor from personal liability following  
21 a nonjudicial sale of the security. No  
22 liability, direct or indirect, should be  
23 imposed upon the debtor following a  
24 nonjudicial sale of the security. To permit  
25 a guarantor to recover reimbursement from the  
26 debtor would permit circumvention of the  
27 legislative purpose in enacting [CCP Section  
28 580d].

Id. at 46.

Thus, when PNL foreclosed, CCP Section 580d extinguished all  
PNL's claims against Merco Group. And concurrently,  
CCP Section 580d also barred any Guaranty-based claim by Belinda  
against Merco Group based on California laws such as CC Section  
2847.

The Guaranty contains extensive waivers of defenses by the

1 guarantor, Belinda, and includes a "Gradsky waiver" wherein  
2 Belinda acknowledged the impact of a non-judicial foreclosure on  
3 any rights to recovery against the borrower and agreed to be  
4 bound by her guarantee notwithstanding. Belinda asserts that she  
5 never waived her right to reimbursement from Merco Group under  
6 California law, despite the Gradsky and other suretyship waivers  
7 contained in the Guaranty. Without citation to legal authority,  
8 she argues that any waivers of reimbursement claims under the  
9 Guaranty were extinguished as a result of the provision in Merco  
10 Group's confirmed plan that allowed PNL to proceed to  
11 non-judicial foreclosure in full satisfaction of its claim.  
12 Belinda misses the point. The Guaranty's waivers are intended to  
13 protect PNL from an argument that a non-judicial foreclosure  
14 exonerates the Guaranty, precisely because foreclosure negatively  
15 impacts Belinda's rights against Merco Group. Belinda did not  
16 simply waive the right to assert suretyship defenses against PNL  
17 in the Guaranty; in addition, she acknowledged that a non-  
18 judicial foreclosure terminated all such rights. Again, non-  
19 judicial foreclosure did not revitalize Belinda's rights to  
20 recovery from PNL - it extinguished them. And as a result, the  
21 bankruptcy court correctly disallowed the Amended Claim.

22 **The Bankruptcy Court Did Not Err In Disallowing The Claim**  
23 **Notwithstanding Alleged Third Party Beneficiary Rights.**

24 Perhaps in recognition of the impact of CCP Section 580d on  
25 her ability to recover against Merco Group after a non-judicial  
26 foreclosure, Belinda also asserted rights to recovery as a third  
27 party beneficiary of the Purchase Agreement. CC Section 1559  
28 permits a third party beneficiary to enforce a contract "made

1 expressly" for its benefit. A court finds such express benefit  
2 where the contracting parties must have intended to benefit the  
3 third party and where such intent appears in the express terms of  
4 the contract. Bancomer, S.A. v. Superior Court, 44 Cal. App. 4th  
5 1450, 1458 (1996) (citation omitted). Ascertaining the parties'  
6 intent is a question of contract interpretation. Hess v. Ford  
7 Motor Co., 27 Cal. 4th 516, 524 (2002). A third party bears the  
8 burden of proving that the contractual performance it seeks was  
9 actually promised. Garcia v. Truck Ins. Exchange, 36 Cal. 3d  
10 426, 436 (1984).

11 Belinda argues on appeal that testimony and declarations  
12 establish that the parties to the Purchase Agreement intended her  
13 to benefit by Merco Group's assumption of the PNL debt and by  
14 having all obligations on the debt to PNL released. But, she  
15 cites to no part of the record on appeal for any such testimony  
16 or declaratory evidence. The Panel's review of the appellate  
17 record and its limited review of the extensive bankruptcy court  
18 docket also failed to uncover any such evidence. Thus, the Panel  
19 must conclude that the bankruptcy court necessarily based its  
20 ruling on its review and interpretation of the only evidence  
21 properly before it, the Purchase Agreement itself and the  
22 relevant closing statements.<sup>13</sup>

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23  
24 <sup>13</sup> In her Opening Brief, Belinda states, without citation,  
25 that "the parties' testimony, including that of Richard Meruelo"  
26 established that the intent of the parties to the Purchase  
27 Agreement was to purchase the Property and to relieve Belinda of  
28 her "obligation on the Property otherwise owing to PNL." Apl't  
Opening Brief at 12. The record on appeal, however, contained no  
such testimony. At oral argument, Belinda acknowledged the

(continued...)

1 Belinda argues that the Purchase Agreement, augmented by the  
2 closing statements, provides that: "[Merco Group] assumed the  
3 entire liability for the indebtedness with the objective of  
4 eliminating Meruelo's liability." Apl't Opening Brief at 12.  
5 Our review reveals major flaws in Belinda's position.

6 The Purchase Agreement was a contract between Seller and  
7 Merco Group for the sale and purchase of the Property. On its  
8 face, it contemplated that Merco Group would obtain new financing  
9 for its acquisition of the Property. Paragraph 5, "Financing  
10 Contingency," allows Merco Group until the closing date to  
11 satisfy itself as to its ability to obtain financing. The  
12 Purchase Agreement, in contrast, never referenced PNL, the  
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14 <sup>13</sup>(...continued)

15 absence of such testimony in her designation of the record, and,  
16 further, never specified where on the docket such alleged  
17 testimony resides. The Panel conducted some appropriate docket  
18 review. But, it was not required to cull an unidentified piece  
19 of evidence from an undesignated and unidentified document; and  
20 this is particularly true given the fact that the docket here  
21 exceeds 3,700 entries. To the extent that this evidence exists,  
22 it is buried in the docket and must remain interred.

23 In particular, the Panel reviewed the docket and found no  
24 other hearing held on this matter (the first hearing was  
25 continued in advance on the parties' stipulation), including no  
26 evidentiary hearing. The transcript of the hearing contains no  
27 party testimony, only the short argument by counsel for Belinda  
28 and the bankruptcy court's terse ruling.

29 Thus, the record before us establishes that the only  
30 evidence submitted by Belinda to the bankruptcy court directly in  
31 support of her third party beneficiary claim is attached to the  
32 Amended Claim: a copy of the Purchase Agreement and the Seller's  
33 and Buyer's closing statements. Belinda's argument that the  
34 bankruptcy court also should have considered parol evidence,  
35 thus, must refer to the closing statements, which follow the copy  
36 of the Purchase Agreement attached to the Amended Claim; she  
37 discussed and provided nothing else.

1 existing PNL debt amount or loan terms, nor the Guaranty.  
2 Similarly, the due diligence documents listed in the incorporated  
3 exhibits to the Purchase Agreement do not include any documents  
4 associated with the existing PNL loan. Nor does the Purchase  
5 Agreement contain any mention of notice to, or request for  
6 consent to loan assumption from, PNL. Finally, Exhibit "C" to  
7 the Purchase Agreement, the "Standard Provisions", contains an  
8 integration clause and the requirement that all amendments be in  
9 writing. The only reference to existing financing, by logical  
10 inference, is the line item in the closing statements:  
11 "Assumption" and the amount credited toward the \$20,000,000  
12 purchase price: \$8,763,304.85.

13 Obviously, Merco Group's acquisition of new financing and  
14 related retirement of the existing PNL debt on close of escrow  
15 would have satisfied Belinda's obligations to PNL. As Belinda  
16 alleges, however, and as the closing statements evidence, Merco  
17 Group, instead, took the Property subject to the existing PNL  
18 debt. The Purchase Agreement contained no provisions addressing  
19 Belinda's obligations to PNL under the Guaranty and no expressed  
20 intent to benefit Belinda directly. And the closing statements  
21 are similarly silent as to Belinda and the Guaranty. And there  
22 is no other evidence before us on appeal. On this record, there  
23 is no evidence of express intent to benefit Belinda directly and  
24 in her capacity as a guarantor. We, thus, determine that the  
25 bankruptcy court correctly found that Belinda did not meet her  
26 burden of proving third party beneficiary status in relation to  
27 the Purchase Agreement and for CC Section 1559 purposes.

28 But even if extra-contractual evidence of intent existed,

1 beneficiary status of the type that allows specific performance  
2 under CC Section 1559 does not exist here, because the Purchase  
3 Agreement itself is silent on this point. CC Section 1559 allows  
4 certain third party beneficiaries to compel specific enforcement  
5 of a contract between other parties. It does not provide  
6 enforcement rights to all third parties who derive some  
7 incidental benefit from a contract. The statute provides real  
8 party in interest status only for a narrow category of third  
9 party beneficiaries.

10 In order for a court to find third party beneficiary  
11 standing under CC Section 1559, the third party must be more than  
12 a party who derives some benefit from the contract; instead, it  
13 must be expressly clear from the face of the contract that the  
14 party is an intended beneficiary.<sup>14</sup> Expressly, for purposes of  
15 CC Section 1559 means: ". . . in an express manner; in direct or  
16 unmistakable terms; explicitly; definitely; directly."

17 R.J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 135 (1963).

18 Here, the Purchase Agreement never mentions Belinda, and the  
19 bankruptcy court did not err in finding that there was no express  
20 intention to contract for her benefit. Put another way, the  
21 bankruptcy court correctly found that the express intent of the  
22 Purchase Agreement was to benefit the Seller through the sale and  
23 not to benefit Belinda through an assumption. The bankruptcy  
24 court, thus, correctly determined that CC Section 1559 does not

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25  
26 <sup>14</sup> A classic example of a contract allowing third party  
27 beneficiary enforcement under CC Section 1559 is a will. The  
28 heirs, who are expressly named therein, may bring an action  
requiring specific performance. Sonnicksen v. Sonnicksen,  
45 Cal. App. 2d 46, 53 (1941).

1 allow her to specifically enforce the Purchase Agreement.

2 Cases cited by Belinda do not require a different result.  
3 R.J. Cardinal Co. involved an oral contract wherein the  
4 defendants allegedly expressly promised to pay a debt owed to the  
5 plaintiff-third party creditor. 218 Cal. App. 2d at 133. Here,  
6 there is no evidence or even argument that the contract at issue  
7 included a direct obligation to pay Belinda or to make payment on  
8 her behalf. And, in any event, the appellate court in  
9 R.J. Cardinal Co. reversed based on the exclusion of evidence  
10 relevant to the alleged lack of consideration for the alleged  
11 third party contract. Id. at 137. The facts are clearly  
12 distinguishable, and the case fails to advance Belinda's  
13 position.

14 Ralph C. Sutro Co. v. Paramount Plastering, Inc., 216 Cal.  
15 App. 2d 433 (1963) involved a construction loan agreement.  
16 Belinda cites Sutro for the proposition that in determining third  
17 party beneficiary status a contract: "should be read in light of  
18 the circumstances under which it was entered." Apl't Opening  
19 Brief at 11. This Panel agrees, but does not find this  
20 unremarkable assertion helpful to Belinda here. The Sutro Co.  
21 court determined that it was clear that the construction loan  
22 agreement at issue was made for the benefit of not only the  
23 borrower, but also for the benefit of the laborers and  
24 materialmen who completed the construction, as it expressly  
25 conditioned loan advances on a showing that the laborers and  
26 materialmen were paid. Id. at 437. Again, the contract at issue  
27 in Sutro Co. expressly named the third party plaintiffs - at  
28 least by class; and this was sufficient. Id. Here, again, the



1 Purchase Agreement is silent.

2 Finally, Schauer v. Mandarin Gems of Cal., Inc., 125 Cal.  
3 App. 4th 949 (2005), involved an action by an ex-wife to recover  
4 for breach of a warranty in the contract between her ex-husband  
5 and a jeweler that arose in connection with the ex-husband's  
6 purchase of her engagement ring. The Schauer court echoed the  
7 definition of "expressly" used by the R.J. Cardinal Co. court,  
8 and added the requirement that the intent to create third party  
9 beneficiary status must be expressly manifested by the  
10 contracting parties. Id. at 957-58. The Schauer court then  
11 concluded that the promisor (in that case the jeweler) must have  
12 understood that a third party beneficiary with specific  
13 enforcement rights was intended and had no difficulty finding  
14 that a seller of engagement rings would understand that the buyer  
15 intended to gift the ring to his bride-to-be. Id. at 958. Here,  
16 there is no such logical leap that can or should be made to  
17 overcome the lack of a direct reference to Belinda or the  
18 Guaranty in the Purchase Agreement itself. Clearly, the Seller  
19 intended to benefit itself and to directly enjoy the benefits of  
20 the sale of the Property. Belinda's benefit, if any in relation  
21 to her status as Guarantor, was at best incidental. And the  
22 bankruptcy court correctly determined that this was not enough  
23 for CC Section 1559 purposes.

24 Finally, we note that the specific performance that Belinda  
25 desires - payment in full of the PNL loan - is not expressly  
26 required by the Purchase Agreement. Nothing in the Purchase  
27 Agreement or closing statements can reasonably be interpreted to  
28 require that the debt, once assumed, be paid off in full by Merco

1 Group as would be necessary to relieve Belinda of obligations  
2 under the Guaranty. Debt assumption is not the same as a promise  
3 to pay in full. Nothing contained in the Purchase Agreement  
4 would prevent Merco Group from subsequently selling the Property,  
5 as had the Seller, subject to the existing financing with PNL and  
6 without release of Belinda's obligations under the Guaranty.<sup>15</sup>

7 The bankruptcy court specifically disapproved Belinda's  
8 third-party-beneficiary theory, finding that the "intention  
9 wasn't to relieve [Belinda] of the debt, it was to acquire the  
10 property." Hr'g Tr. (May 11, 2012) at 3:21-22. The record  
11 before the bankruptcy court was sufficient for it to properly  
12 make this determination, as a matter of law and fact. Here, the  
13 contract at issue does not expressly state any intention to  
14 benefit Belinda. And, as noted above, there is no parol evidence  
15 available to the Panel to establish that this was the parties'  
16 intention. Even if it was, however, the argument would fail  
17 given contractual silence on this point. Parol evidence may be  
18 appropriate to determine the parties' intent, but CC Section 1559  
19 requires that the contract be unambiguous on this point on its  
20 face. Here, silence leads inescapably to a determination of  
21 facial ambiguity on this point. And here, the reliance on  
22 CC Section 1559 appears to be nothing other than a less than  
23 subtle attempt to recover a deficiency from the borrower where  
24 such recovery is absolutely barred by CCP Section 580(d).

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25  
26 <sup>15</sup> Belinda did not retain any rights limiting Merco Group's  
27 ability to reassign, and in the Guaranty she generally agreed  
28 that PNL could allow such assumption without exonerating the  
Guaranty.

1 Therefore, the bankruptcy court properly disallowed Belinda's  
2 claim to the extent based on this theory.

3 And having concluded that CCP Section 580d bars Belinda's  
4 claim against Merco Group, in any event, and finding no error in  
5 the bankruptcy court's conclusion that Belinda's claim based on  
6 alleged third party beneficiary standing also fails, we need not  
7 address Belinda's's remaining arguments on appeal.<sup>16</sup>

### 8 CONCLUSION

9 For all of the reasons set forth above, we hold that the  
10 bankruptcy court did not err when it disallowed Belinda's Amended  
11 Claim, and we AFFIRM.

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15 <sup>16</sup> Belinda argues that the bankruptcy court should have  
16 analyzed the allegedly paid attorneys' fees claims separately  
17 from the as yet unpaid indemnification claim amount. Any such  
18 error would be harmless in light of this disposition, and we  
19 generally ignore harmless error. See Van Zandt v. Mbunda (In re  
Mbunda), 484 B.R. 344, 2012 Bankr. LEXIS 5940 \*20 (9th Cir. BAP  
20 2012)(citing Litton Loan Serv'g, LP v. Garvida (In re Garvida),  
347 B.R. 697, 704 (9th Cir. BAP 2006)).

21 In addition, Belinda dedicated a substantial part of her  
22 opening brief on appeal in response to Merco Group's argument,  
23 raised for the first time on reply before the bankruptcy court,  
24 that it should not be required to pay claims relating to work by  
25 Belinda's attorney due to a conflict of interest. Appellee Merco  
26 Group did the same. Merco Group also alleged that the bankruptcy  
27 court made findings on this issue, and it cited to multiple pages  
28 of the transcript of the hearing that was held on May 11, 2012,  
in support. This discussion, however, actually occurred in  
connection with another claim objection, which is the subject of  
a separate appeal heard by this Panel, in CC-12-1304. At oral  
argument, the parties confirmed that such citations were the  
result of confusion. The argument adds nothing to our analysis  
and conclusions here.