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## Summary of Branch Banking & Trust v. Windhaven & Tollway, LLC, 131 Nev. Adv. Op. 20 (Apr. 30, 2015)

Joseph Meissner  
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## PROPERTY: DEFICIENCY JUDGMENTS

### **Summary**

The Court determined the proper interpretation of NRS 40.455(1), and applied it in a claim for a deficiency judgment following an out-of-state nonjudicial foreclosure. NRS 40.455(1) “does not require an out-of-state trustee’s sale to comply with NRS 107.080, nor does it preclude a deficiency judgment in Nevada when a nonjudicial foreclosure sale is conducted pursuant to the laws of another state.”<sup>2</sup>

### **Factual and Procedural History**

Respondent Windhaven & Tollway, LLC (Windhaven) borrowed nearly \$17,000,000 from appellant Branch Banking & Trust’s (Branch Banking) predecessor-in-interest.<sup>3</sup> The loan was secured by various assets, including real property located in Texas; the remaining respondents to this action executed a guaranty agreement to pay any remaining debt in the event of a default by Windhaven. The parties agreed that Nevada law would govern the note.

Windhaven and the guarantors defaulted on the note, and Branch Banking sold the Texas property at a nonjudicial foreclosure sale under Texas law. After the sale of property, the total indebtedness remaining on the note was over \$2,500,000. Branch Banking sought a deficiency judgment against Windhaven for breach of guaranty and breach of implied covenant of good faith and fair dealing.

Windhaven moved for summary judgement, arguing that Branch Banking’s deficiency action was precluded by NRS 40.455(1), which requires that all nonjudicial trustee’s sales must be conducted pursuant to NRS 107.080. The district court granted summary judgment for Windhaven, holding that Branch Banking’s nonjudicial foreclosure in Texas did not comply with the terms of NRS 107.080. Branch Banking appealed.

### **Discussion**

The issue decided in this case centered on the correct interpretation of NRS 40.455(1). The district court held that NRS 40.455(1) prohibits deficiency judgments following a nonjudicial foreclosure where the foreclosure does not accord with the provisions of NRS 107.080.

NRS 40.455(1) provides, in pertinent part, that

upon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee’s sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of

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<sup>1</sup> By Joseph Meissner.

<sup>2</sup> *Branch Banking & Trust v. Windhaven & Tollway, LLC*, 131 Nev. Adv. Op. 20 (Apr. 30, 2015).

<sup>3</sup> The predecessor-in-interest, Colonial Bank, was not a party to this appeal.

trust if it appears from the sheriff's return of the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.<sup>4</sup>

Windhaven argued that under NRS 107.080, "foreclosure sale" refers only to a judicial foreclosure, not a *nonjudicial* foreclosure, as conducted by Branch Banking. The Court agreed with Windham's statutory construction, finding that "foreclosure sale" specifically paired to "judgment creditor" by the statute's deliberate use of the word "respectively." But the Court did not agree that the statute limits deficiency judgements to those held in accordance with NRS 107.080.

The Court found that NRS 40.455(1)'s statutory scheme allows a party to bring an action to recover a deficiency from a nonjudicial foreclosure in another state. Specifically, Nevada's one-action rule creates an exception "[t]o enforce a mortgage or other lien upon any real or personal collateral located outside the State [of Nevada] which does not, except as required under the laws of that jurisdiction, result in a personal judgment against the debtor."<sup>5</sup>

Common law allows a lienholder to seek deficiency judgments against liable entities.<sup>6</sup> The Court did not want to interfere with this right, finding that the NRS 40.455(1) did not contain such an express limiting clause. Furthermore, finding that the statute was designed to create fairness for debtors and creditors,<sup>7</sup> the Court held that to deny creditors deficiency judgments after out-of-state property had been nonjudicially foreclosed would undermine the purpose of the statute.

### *Dissent*

Justice Gibbons was joined by Justices Cherry and Saitta in a dissenting opinion. The dissent agreed with the district court's interpretation of NRS 40.455(1). It felt that a "trustee's sale held pursuant to NRS 107.080"—meant exactly that. Before Branch Banking could obtain a deficiency judgment from a trustee's sale pursuant to Nevada law, it would have to satisfy the requirements of NRS 107.080. Because Branch Banking did not fulfill those requirements, the dissent felt its deficiency claim should have failed as a matter of law.

### **Conclusion**

Because NRS 40.455 does not prohibit deficiency judgment actions in Nevada when the nonjudicial foreclosure in another state did not comply with NRS 107.080, the Court held that the district court erred in precluding Branch Banking from pursuing a deficiency judgment against Windhaven. The Court reversed and remanded the district court's judgment for further proceedings consistent with its opinion.

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<sup>4</sup> NEV. REV. STAT. § 40.455(1).

<sup>5</sup> *Id.* at §40.430(6)(c).

<sup>6</sup> RESTATEMENT (THIRD) OF TORTS § 8.4 (1997).

<sup>7</sup> *See First Interstate Bank of Nevada v. Shields*, 102 Nev. 616, 618, 730 P.2d 429, 431 (1986).