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## Mardian v. Greenberg Family Trust, 131 Nev. Adv. Op. 72 (Sep. 24, 2015)

Colton Loretz  
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## PROPERTY: DEFICIENCY JUDGMENTS

### **Summary**

The Court concluded that the promissory note, which had security interest by both a deed of trust of Arizona real property and personal guaranties, was governed by Nevada limitations period because of the Nevada choice-of-law provision within the contract. Consequently, the Court held that the party seeking deficiency judgment was time-barred pursuant to NRS 40.455(1) because the judgment was not sought within six months of the foreclosure sale of the collateral property.

### **Background**

In this case, Joshua Tree, LLC executed a promissory note of \$1,100,000 in favor of Greenberg Family Trust (Greenberg). The note was secured by both a deed of trust of 280 acres of real property located in Arizona and personal guaranties from Susan and Leonard Mardian (Mardians). Joshua Tree, LLC defaulted on the loan, and the guaranties were not upheld. Consequently, Greenberg sought relief by filing a complaint in Nevada and initiating foreclosure sale of the Arizona property. Greenberg initiated a deficiency judgment on the guaranty nine months after the foreclosure sale of the property.

The District Court held that neither Arizona's nor Nevada's limitations period applied because the foreclosure of the property was in Arizona while the proceedings were in Nevada. Thus, it ruled that the action could proceed. At a bench trial, the District Court entered a deficiency totaling \$929,224 in Greenberg's favor (\$1,279,224 owed on the promissory note less \$350,000, which was the fair market value of the property at the time of its sale). The judgment was appealed.

### **Discussion**

#### *Choice-of-law provision*

The Court first addressed the issue of whether the Arizona law should have been applied. The Court agreed with Greenberg in that it would not have been appropriate for the district court to apply the Arizona limitation period for foreclosures to the personal action commenced in Nevada because the guaranties specify that they are governed by Nevada law. The Court concluded that due to the Nevada choice-of-law provision, Nevada's limitations period applied.

#### *Application of NRS 40.455(1)*

The Court considered whether NRS 40.455(1) permits deficiency judgments in Nevada when the property foreclosed upon was in another state.<sup>2</sup> "NRS 40.455(1) is an anti-deficiency

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<sup>1</sup> By Colton Loretz, Junior Staff Member on Nevada Law Journal at William S. Boyd School of Law

<sup>2</sup> NEV. REV. STAT. 40.455(1) ("Except as otherwise provided in subsection 3, 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

statute that derogates from the common law, and this court construes such provisions narrowly, in favor of deficiency judgments.”<sup>3</sup> In *Branch Banking*, the court considered whether NRS 40.455(1) precluded a deficiency judgment arising from a note with a Nevada choice-of-law provision, secured by real property in Texas.<sup>4</sup> Ultimately, the Court found that NRS 40.455(1) did “not . . . preclude deficiency judgments arising from nonjudicial foreclosure sales held in another state.”<sup>5</sup>

In this case, it is unclear whether Greenberg proceeded via a judicial or nonjudicial foreclosure sale, however, the Court concluded that it was an irrelevant distinction. The Court found that NRS 40.455(1) was not a bar to Greenberg seeking a deficiency judgment from the Mardians solely because Greenberg foreclosed on real property in Arizona.

Next, the Court analyzed whether Greenberg needed to apply within 6 months after the date of the foreclosure sale pursuant to NRS 40.455(1). The Court relied on its holdings in two previous cases.<sup>6</sup> In *Walters v. Eighth Judicial District Court*, the Court concluded that a lender was not time-barred from seeking a deficiency judgment because it properly filed for summary judgment within six months of the foreclosure.<sup>7</sup> Furthermore, in *Lavi v. Eighth Judicial District Court*, the lender filed a motion for summary judgment to recover deficiency nearly one year after the foreclosure sale.<sup>8</sup> The Court found when the guarantor waived the one-action rule, the lender “was allowed to bring an action against [the guarantor] prior to completing the foreclosure on the secured property, but that waiver did not terminate the procedural requirements for asserting that separate action” within six months of the foreclosure sale.<sup>9</sup>

In this case, the Court held that the promissory note was governed by Nevada law, so Greenberg was required to make its application pursuant to NRS 40.455(1). However, the Court found that Greenberg failed to comply with NRS 40.455(1); therefore, the district court erred when it denied the Mardians’ motion for summary judgment.

## **Conclusion**

The Court concluded that 1) Nevada law governed the contract because of the choice-of-law provision, and 2) Greenberg failed to comply with the application requirements pursuant to NRS 40.455(1) because it did not apply for a deficiency judgment within six months from the foreclosure sale. Thus, the Court reversed the district court’s judgment in favor of Greenberg and reversed the order denying Mardian’s motion for summary judgment.

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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 trust . . .”).

<sup>3</sup> *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. Adv. Op. 20, 347 P.3d 1038, 1041

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1041.

<sup>6</sup> *Walters v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. 66, 263 P.3d 231 (2011); *Lavi v. Eighth Jud. Dist. Ct.* 130 Nev. Adv. Op. 38, 325 P.3d 1265 (2014).

<sup>7</sup> *Walters*, 263 P.3d at 234.

<sup>8</sup> *Lavi*, 325 P.3d at 1266.

<sup>9</sup> *Id.* at 1267.