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Bank of Nevada v. Petersen, 132 Nev. Adv. Op. 64 (Aug. 12, 2016)

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REAL ESTATE LAW; APPLICATION FOR DEFICIENCY JUDGMENT

Summary

The Court determined that, in the context of a suit by an undersecured creditor on a commercial guaranty, a pre-foreclosure complaint for the deficiency allowed by NRS 40.495(4) satisfies NRS Chapter 40's requirements that an application for deficiency be made within six months after the foreclosure sale.

Background

Respondent Murray Peterson (Peterson) acquired a commercial guaranty agreement with the appellant Bank of Nevada (BON) worth \$2,500,000. The loan was evidenced by two promissory notes (Notes). The first and second deeds of trust for the real property on which Red Card, LLC operated its gas station and convenience store business (Property) secured both Notes. Additionally, both Notes were personally guaranteed by Petersen. Subsequently, Red Card, LLC defaulted on the Notes and Petersen did not satisfy his guaranty. BON brought its action against Petersen on April 12, 2013 before foreclosing on the Property. However, BON did not seek from Petersen the full amount due on the Notes;² instead, BON merely sought damages as stated in the deficiency provision to NRS 40.495(4).

Approximately two months after filing the lawsuit, BON foreclosed on the property on June 18, 2013. BON and Petersen then filed a joint case conference report which identified "the key issue in this case as the fair market value of the Property." During discovery, BON and Petersen submitted a stipulation and order which declared that "[t]he fair market value of the [P]roperty at issue . . . is \$1,990,000."

On January 16, 2014, BON moved for summary judgment because the market value of the Property was no longer in dispute. Because the fair market value of the property could only cover the debt owed on Note A and a small portion of Note B, BON sought a deficiency judgement against Petersen for \$1,109,798.29, plus prejudgment interest, attorney fees, and costs. Petersen then filed a cross-motion for summary judgment and argued that BON did not timely file its motion for summary judgment and "forfeited its right to obtain deficiency judgment by operation of NRS 40.455. . ."³ In response, BON argued its complaint satisfied all applicable requirements regarding timeliness and that no additional pleadings or documents were required. The district court agreed with Petersen and granted summary judgment in his favor and against BON.

¹ By Kristopher Kalkowski.

² BON's complaint paraphrased NRS 40.495(4) and sought: "(a) the amount by which the Indebtedness exceeds the fair market value of the property as of the date of commencement of this action; or (b) if a foreclosure sale is concluded before a judgment is entered, the amount that is the difference between the amount for which the property was actually sold and the Indebtedness; whichever is the lesser amount."

³ NEV. REV. STAT. 40.455; NRS 40.455 requires a foreclosing lender to make an "application" for a deficiency judgment "within 6 months after the date of the foreclosure sale." Here, the foreclosure sale occurred on June 18, 2013, and BON filed its motion for summary judgment on January 16, 2014.

Discussion

NRS 40.430 is Nevada's one-action rule and allows a creditor to take only one action to recover debt and specifically states the "action must be in accordance with provisions of NRS 40.426 to 40.459."⁴ Petersen argued that the district court rightfully granted summary judgment in his favor in accordance with the Court's previous ruling in *Lavi v. Eighth Judicial District Court*.⁵ In *Lavi*, the Court held a complaint seeking full recovery of a defaulted commercial real estate loan is not an "application" for deficiency under NRS 40.455(1).⁶ Instead, a separate "application" for the deficiency was required within 6 months after the date of the foreclosure sale.⁷ In contrast, here the Court ruled that *Lavi* did not apply to the current issue for two reasons: (1) the legislature recently made significant amendments to NRS Chapter 40 which did not apply to the Court's decision in *Lavi*, and (2) the Court's language concerning a pre-foreclosure complaint in *Lavi* was not necessary to the holding and directly offended public policy.

The Nevada legislature substantially amended NRS Chapter 40 in 2011 and again in 2015.⁸ Specifically, the 2011 legislature made two significant amendments to Chapter 40. Namely, it added NRS 40.495(4) which provides, for the first time, "a method that specifies the lender's pre-foreclosure right to a deficiency judgment against its guarantor and how to calculate that judgment."⁹ Additionally, the legislature added NRS 40.4639, which allows the filing of a "civil action" to satisfy NRS 40.455(1)'s "application" requirement for a junior lienholder.¹⁰

In this case, since BON sued Petersen in 2013, the post-2011 amendments to NRS Chapter 40 applied to the matter. Additionally, here BON simply requested the deficiency allowed by NRS 40.495(4). Petersen thus "had fair notice, from the start, that BON sought a deficiency judgment and, given NRS 40.495(4)(b), knew how to calculate what he owed." Thereafter, Petersen indicated notice of the deficiency judgment by filing an answer. Additionally, Petersen's submission of the joint case conference report and stipulation and order indicated the deficiency request was accurate within six months of the foreclosure sale.

Altogether, BON satisfied the "application" requirement in NRS 40.455(1) by filing an initial complaint requesting only a deficiency judgment and then certifying this request through the joint case conference report and stipulation and order within 6 months of the foreclosure sale. The Court even went a step further and stated that "a properly pled complaint for a deficiency" can constitute a sufficient "application" for purposes of NRS 40.455(1). Accordingly, the 2011 amendments to NRS 40.495(4) gave BON the right to pursue a deficiency measured as of the date of the commencement of the action rather than the date BON filed the motion for summary judgment.

⁴ NEV. REV. STAT. 40.430.

⁵ 130 Nev. Adv. Op. 38, 325 P.3d 1265 (Nev. 2014).

⁶ NEV. REV. STAT. 40.455(1).

⁷ *Lavi*, 130 Nev. Adv. Op. 38, 325 P.3d at 1266.

⁸ 2011 Nev. Stat. 1742-1745; *see* 2015 Nev. Stat. 3336-45.

⁹ NEV. REV. STAT. 40.495(4)

¹⁰ NEV. REV. STAT. 40.4639.

The Court also determined that even if BON's complaint could not satisfy NRS 40.455(1), BON brought its claim for deficiency as a junior lienholder under NRS 40.4639. Moreover, unlike NRS 40.455, which requires an "application" for a deficiency judgement, NRS 40.4639 only requires the junior lienholder to file a "civil action." As of now, "a civil action is commenced by filing a complaint with the court."¹¹ Additionally, even though NRS 40.4639 requires a "civil action" be commenced "within 6 months *after* the date of the foreclosure sale," the "after" is not meant to be read literally in the context of NRS 40.4639. Therefore, BON, as a junior lienholder, satisfied the requirements of NRS Chapter 40 by filing its complaint.

Conclusion

The Court held that a properly pled complaint for a deficiency can constitute a sufficient application for purposes of NRS 40.455(1). Additionally, NRS 40.4639 only requires a junior lienholder to commence a civil action in bringing a claim for deficiency, and a civil action need not be commenced literally after the date of the foreclosure sale. Accordingly, the Court reversed the district court's orders and remanded for calculation and entry of summary judgment in favor of Bank of Nevada.

¹¹ NEV. R. CIV. P. 3.