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Danielle Barraza
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Sandpointe Apts. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 87 (Nov. 14, 2013)¹

COMMERCIAL LAW: RETROACTIVE APPLICATION OF NRS 40.459(1)(c)

Summary

The Court determined two issues: (1) whether NRS 40.459(1)(c) is a new statute that impacts vested rights; and (2) whether, pursuant to the language in Assembly Bill 273 (“A.B. 273”) regarding the effective date of NRS 40.459(1)(c), the statute may apply retroactively.

Disposition

NRS 40.459(1)(c) is a new statute that impacts vested rights; therefore, it may not apply retroactively unless such intent was clearly manifested by the Legislature. Language in A.B. 273 indicates the statute may not apply retroactively, and there is no clear or strong evidence supporting application of the statute retroactively. Thus, NRS 40.459(1)(c) only applies prospectively to loans entered into after June 10, 2011.

Factual and Procedural History

In 2007, Silver State Bank issued a loan to Sandpointe Apartments, for the construction of an apartment complex. Silver State Bank held the Note and Deed of Trust, which contained a power of sale provision. In 2008, the Nevada Financial Institutions Division closed Silver State Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as the loan’s receiver. In 2009, Sandpointe defaulted on the loan. The FDIC then sold the loan and the guarantee to Multibank in 2010. Multibank transferred its interest in the loan and the guarantee to its wholly owned subsidiary, CML-NV Sandpointe, a single purpose entity created by Multibank to facilitate and pursue collections on the loan. CML-NV held a trustee’s sale under the deed of trust’s power of sale provision, at which CML-NV purchased the property securing the loan for a credit bid of \$1,440,000. CML-NV subsequently sued Sandpointe for deficiency and breach of guaranty.

In 2011, the Nevada Legislature passed A.B. 273, which limits the amount of a deficiency judgment that a successor in interest can recover. The district court held that A.B. 273 only applies to loans entered into after June 10, 2011, and accordingly granted CML-NV’s request for summary judgment. Sandpointe appealed, arguing that applying AB 273 in this instance would not constitute retroactive operation of the statute, and that even if it would, A.B. 273 allows for retroactive application.

Discussion

Policy underlying A.B. 273 and NRS 40.459(1)(c)

Nevada’s real estate market experienced a downturn with the recent recession, leading to a large secondary market in which various entities, including collection companies, would purchase distressed loans at great discounts. The entities would later foreclose on the collateral

¹ By Danielle Barraza.

and pursue deficiency judgments against the debtors and guarantors based upon the full indebtedness.² This activity led to A.B. 273, which became law following the 2011 legislative session and is codified, in pertinent part, in NRS 40.459. The statute provides that “[i]f a person seeking the judgment acquired the right to obtain the judgment from a person who previously held that right,” then the person seeking the judgment may only recover

the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs[.]³

The intent of A.B. 273 was to prevent a creditor from profiting from a judgment in excess of the amount the creditor originally paid for the right to pursue such a judgment.⁴ This would discourage creditors from purchasing notes or mortgages at deep discounts and encourage creditors to negotiate with borrowers directly..

NRS 40.459(1)(c)’s retroactive effect

Unless it is clear that the drafters intended for a statute to apply retroactively, courts will presume substantive statutes only apply prospectively.⁵ This presumption comes from a policy of fairness, as “individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”⁶ Additionally, the law fosters creativity in endeavors when people are confident about the legal consequences of their actions.⁷

In analyzing whether applying a new statute would constitute retroactive operation, courts consider “fundamental notions of fair notice, reasonable reliance, and settled expectations.”⁸ A statute acts retroactively when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”⁹

NRS 40.459(1)(c) attaches a new disability and would impair vested rights if applied to deficiencies arising after trustee sales that took place before the statute became effective

NRS 40.451(1)(c) does not merely clarify existing law, but it attaches a new disability. NRS 40.459(1)(c) limits the amount of the judgment that a successor in interest may recover in a deficiency judgment action to the amount the successor paid to acquire the interest in the

² See *Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm.*, 76th Leg. (Nev., March 23, 2011).

³ NEV. REV. STAT. § 40.459(1)(c) (2013).

⁴ *Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm.*, 76th Leg. (Nev., March 23, 2011).

⁵ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994).

⁶ *Id.* at 265.

⁷ *Id.* at 265–66.

⁸ *Pub. Emps.’ Benefits Program v. Las Vegas Metro. Police Dep’t (PERP)*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008) (internal quotations omitted).

⁹ *Id.*, at 155, 179 P.3d at 553–54 (citing *INS v. St. Cyr.* 533 U.S. 289, 321).

obligation. In contrast, NRS 40.451 limits only the lien amount to the amount of consideration paid.

Further, the Court notes that “even if NRS 40.459(1)(c) had not changed the law as to deficiency judgment against borrowers, it clearly changed the law as to judgments against guarantors following a sale, pursuant to a judicial foreclosure or a trustee’s sale.” Pre-2011 guarantors of a note received no protection with any consideration-amount limit in the factors used to determine indebtedness. NRS 40.459(1)(c) created a new limitation on the amount recoverable against guarantors. Thus, when a guarantor sells its right to obtain a judgment, and the successor decides to judicially foreclose or conduct a trustee’s sale, the guarantor is given the same protections as borrowers. Therefore, “NRS 40.459(1)(c) is not simply a clarification of existing law, but is rather a new limitation on the amount that may be recovered in a deficiency judgment.”

The right to a deficiency judgment is a vested right

The right to deficiency vests upon sale of the secured property. The trustee’s sale date is used to determine both the fair market value and the trustee’s sale price of the property securing the loan, which determines the deficiency amount.¹⁰ Additionally, the right to receive proceeds from a foreclosure sale vests at the time of the foreclosure sale, and so it follows that the right to a judgment for the amount not received in a foreclosure sale vests on the trustee’s sale date.¹¹ The trustee’s sale commences the six-month limitations period for pursuing a deficiency judgment.¹² Thus, “applying NRS 40.459(1)(c) to deficiencies arising from sales that took place before that provision was enacted would affect vested rights.”

Application of NRS 40.459(1)(c) in this case would have a retroactive effect

The Court relied on *Holloway v. Barrett*, a similar case in which a statute limited the amount of a deficiency judgment to the difference between the total amount owed on the loan and the fair market value of the property securing the loan.¹³ In that case, the Court specifically did not consider applying the limitation to loans executed prior to the effective date of the statute even if the foreclosure sales occurred after the statute’s effective date.¹⁴ Based on that case, the Court concluded that statutes affecting deficiency judgments operate prospectively when the trustee’s sale occurs after enactment, and retroactively when the trustee’s sale occurs before enactment. Therefore, applying NRS 40.459(1)(c) here, where the trustee’s sale occurred before the statute’s enactment would require the Court to apply the statute retroactively.

NRS 40.459(1)(c) may only apply prospectively

The presumption against retroactive legislation is strong and the Nevada Supreme Court has historically disapproved of retroactive statutes, labeling them “odious and tyrannical.”¹⁵

¹⁰ See NEV. REV. STAT. § 40.459(1) (2013).

¹¹ NEV. REV. STAT. § 40.462(1) (2013).

¹² NEV. REV. STAT. § 40.455(1) (2013).

¹³ *Holloway v. Barrett*, 87 Nev. 385, 387 n.1, 487 P.2d 501, 502 (1971).

¹⁴ *Id.* at 386-88, 487 P.2d at 502-03.

¹⁵ *Milliken v. Sloat*, 1 Nev. 573, 577 (1865).

Thus, unless the Legislature clearly manifests an intent to apply a statute retroactively, a statute will only apply prospectively.

The Legislature did not clearly manifest an intent to apply NRS 40.459(1)(c) retroactively

The Legislature did not expressly indicate that NRS 40.459(1)(c) should operate retroactively, only providing that it “become[s] effective upon passage and approval.”¹⁶ This language falls well short of the express indication required. Additionally, the language was not ambiguous, making it unnecessary to seek out other legislative materials to determine intent. Even if the statute’s effective date language were ambiguous, the Legislature would still not have clearly manifested an intent to apply the statute retroactively.

Nothing in NRS 40.459(1)(c) clearly, strongly, and imperatively shows that the Legislature’s intent can only be implemented by applying the statute retroactively

Although NRS 40.459(1)(c) would have a broader impact if courts applied it retroactively, that fact alone is not enough to rebut the presumption against retroactivity.¹⁷ Applying the statute prospectively still enables it to reach a large portion of the secondary market for distressed loans. Additionally, legislative comments made during the committee hearings for A.B. 273 indicate that the Legislature did not intend the provisions to apply retroactively.¹⁸ Therefore, the presumption against retroactivity was not rebutted.

Conclusion

NRS 40.459(1)(c) cannot apply retroactively because it is a new statute that impacts vested rights, and intent for the statute to apply retroactively was not clearly manifested by the Legislature. There was also no clear or strong evidence supporting applying the statute retroactively. Therefore, because the trustee’s sale occurred before the statute’s effective date, NRS 40.459(1)(c)’s limitations cannot apply here. The Court denied Sandpointe’s petition for extraordinary relief.

¹⁶ 2011 Nev. Stat., ch. 311, § 7, at 1748.

¹⁷ See Landgraf, 511 U.S. at 285–286.

¹⁸ See *Hearing on A.B. 273 Before the Senate Judiciary Comm.*, 76th Leg. 2-3 (Nev., May 3, 2011); *Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm.*, 76th Leg. 12-13 (Nev., March 28, 2011); *Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm.*, 76th Leg., at 7 (Nev., March 23, 2011).