

## Scholarly Commons @ UNLV Boyd Law

---

Nevada Supreme Court Summaries

Law Journals

---

5-29-2014

### Summary of Lavi v. Eighth Judicial District Court, 130 Nev. Adv. Op. 38

Danielle Barraza  
*Nevada Law Journal*

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Banking and Finance Law Commons](#), [Commercial Law Commons](#), [Consumer Protection Law Commons](#), and the [Contracts Commons](#)

---

#### Recommended Citation

Barraza, Danielle, "Summary of Lavi v. Eighth Judicial District Court, 130 Nev. Adv. Op. 38" (2014). *Nevada Supreme Court Summaries*. 781.

<https://scholars.law.unlv.edu/nvscs/781>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

PROPERTY: DEFICIENCY JUDGMENTS

**Summary**

The Court determined whether waiver of the “one-action rule” of NRS 40.430 terminates the procedural requirements for bringing a deficiency judgment action within six months of foreclosure under NRS 40.455.

**Disposition**

Waiver of the one-action rule allows the obligee to bring an action against the obligor prior to completing foreclosure on the property, but it does not terminate other procedural requirements, including the obligation to file for a deficiency judgment within six months after the foreclosure sale.

**Factual and Procedural History**

Petitioner Simon Lavi personally guaranteed a commercial real estate loan purchased by BB&T. When the borrowers defaulted on the loan, BB&T filed a complaint seeking full recovery of the loan’s balance from Lavi and other guarantors. While the case was pending, BB&T foreclosed on the property and took ownership through a credit bid at a trustee’s sale. The property was worth less than what the borrowers still owed under the loan.

Almost one year later, BB&T moved for summary judgment regarding Lavi’s breach of the loan guaranty. Lavi claimed that NRS 40.455 prevented BB&T from obtaining a judgment for the deficiency on the loan balance arising after the trustee’s sale. This is because NRS 40.455 requires a party to file for a deficiency judgment within six months after the trustee’s sale.<sup>2</sup> In granting BB&T’s motion for summary judgment, district court determined that BB&T notifying Lavi that it intended to seek a deficiency judgment was enough to satisfy the statute.

Lavi then sought a writ of mandamus or a writ of prohibition, asserting that BB&T was barred from recovering a deficiency judgment because it did not apply for it within six months after the trustee’s sale. The Court agreed and issued the writ of mandamus, leading to the dismissal of the guaranty action. BB&T petitioned the Court for rehearing.

**Discussion**

The Court’s based its order granting the writ of mandamus, concluding that under NRS 40.455 and *Walters v. Eighth Judicial District Court*<sup>3</sup>, a party seeking a deficiency judgment must request the judgment within six months after selling the property at a trustee’s sale, regardless of any waiver of the one-action rule. Thus, Lavi was allowed to assert BB&T’s

---

<sup>1</sup> By Danielle Barraza.

<sup>2</sup> NEV. REV. STAT. § 40.455(1).

<sup>3</sup> *Walters v. Eighth Judicial District Court*, 127 Nev. \_\_\_, 263 P.3d 231 (2011).

failure to timely apply for a deficiency judgment as a defense to the breach of guaranty action.<sup>4</sup> *Walters* involved a similar situation, where a lender sold the real property securing the loan at a trustee's sale, and failed to apply for a deficiency judgment within six months after the trustee's sale entitled a guarantor, who waived the one-action rule.<sup>5</sup> In that case, the Court held that the lender's motion for summary judgment sufficed as an application for a default judgment because it was written and set forth the particular grounds for relief within six months of the trustee's sale.<sup>6</sup>

Generally, "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate."<sup>7</sup> This statute requires an obligee to foreclose before attempting to recover from the loan's guarantor. If the guarantor waives the NRS 40.430 "one-action" protections, the obligee may maintain an action to recover from the guarantor before completing the foreclosure process.<sup>8</sup> However, waiving the one-action rule does not also free an obligee from complying with NRS 40.455's requirement to request a deficiency judgment within six months of foreclosure, as these procedural requirements cannot be terminated through waiver.

Also, if an obligee seeks a deficiency judgment from a guarantor in an action separate from a foreclosure action, the two actions are clearly connected, as the foreclosure sale necessarily impacts the deficiency judgment.<sup>9</sup> Allowing the defense to a deficiency action preserves the obligor's rights under the antideficiency statutes and it does not stop an obligee from maintaining that action separately from a foreclosure action. Moreover, this notion is aligned with NRS 40.495's 2011 amendment adding subsection 4, which does not deny applicability of the deficiency judgment defense or the six-month deadline; instead, it governs the amount due from the guarantor regardless of whether the property has been foreclosed.<sup>10</sup>

Thus, Lavi waiving the one-rule action allowed BB&T to bring an action against him prior to the foreclosure of the property, but it did not terminate the procedural requirements for asserting that separate action. Once the property was foreclosed and a deficiency judgment was sought, BB&T still had to satisfy NRS 40.455. Therefore, Lavi was able to raise his defense to BB&T's attempt to recover from a deficiency judgment. The Court distinguished this case from *Walters*, noting in *Walters* the summary judgment motion was filed within six months after the foreclosure sale, whereas here, BB&T filed the complaint before the trustee's sale and delayed the motion for summary judgment for one year. Accordingly, the Court denied BB&T's petition for rehearing.<sup>11</sup>

---

<sup>4</sup> NRS 40.495(3) provides the legal or equitable defenses available to guarantors if obliges foreclose or otherwise enforce mortgages or liens.

<sup>5</sup> *Walters*, \_\_\_, 263 P.3d at 232-33.

<sup>6</sup> *Id.* at \_\_\_, 263 P.3d at 234.

<sup>7</sup> NEV. REV. STAT. § 40.430(1).

<sup>8</sup> See NEV. REV. STAT. § 40.495(2).

<sup>9</sup> Disregarding this fact could possibly lead a party to receive an excess recovery. See *Carillo v. Valley Bank of Nev.*, 103 Nev. 157, 159, 734 P.2d 724, 725 (1987).

<sup>10</sup> See 2011 Nev. Stat., ch. 311 § 5.5, at 1743-44.

<sup>11</sup> In a lengthy dissent, Justice Pickering contended that Lavi waiving the one-action rule actually did entitle BB&T to proceed to judgment against Lavi separately and independently from the foreclosure action. Justice Pickering also reasoned that NRS 40.455 is merely a statute of limitations, and exonerating the guarantor when the lender sued before the foreclosure sale only punished the diligent lender. Also, new NRS 40.495(4) should have been considered, as it applies to suits against guarantors who have given waivers, and confirms that NRS 40.455 and NRS 40.459 do not apply because they are inconsistent with NRS 40.495(4) and do not require an "application" beyond the pre-foreclosure complaint against the guarantor.

## **Conclusion**

A right to deficiency judgment does not vest until the property is sold. Therefore, a complaint filed before the foreclosure sale cannot sufficiently put an obligor on notice that the deed of trust beneficiary intends to seek further recovery from the obligor.