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### Summary of First Financial Bank v. Lane, 130 Nev. Adv. Op. 96

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*First Financial Bank v. Lane*, 130 Nev. Adv. Op. 96 (Dec. 24, 2014)<sup>1</sup>

## PROPERTY: RECOVERY RIGHTS OF SUCCESSOR LIENHOLDER

### **Summary**

The Court determined whether the definition of “indebtedness,” found in NRS 40.451, in conjunction with NRS 40.459, limits the amount a successor lienholder can recover in a deficiency judgment.

### **Disposition**

NRS 40.451 does not set a consideration-based limit which a successor lienholder can recover in a deficiency judgment action to the amount of consideration paid by the lienholder to obtain the note and deed of trust.

### **Factual and Procedural History**

Respondents Gordon and Carol Lane took out a three million dollar loan for the purchase of a commercial real estate property. Respondent John Serpa executed a personal guarantee on the Lane’s loan. The Lanes subsequently defaulted on the loan, and Serpa did not fulfill the obligations of his personal guarantee.

Before the original lender foreclosed on the property, the Federal Deposit Insurance Corporation was appointed the loan’s receiver, and it assigned the interest to appellant First National Bank, N.A. (hereinafter FFB) for \$2,256,879.90.<sup>2</sup> FFB foreclosed and sold the property at auction, to itself, for \$1,890,000.00. The property’s fair market value at the time of auction was \$2,300,000.00.

After selling the property, FFB brought a deficiency judgment and breach of guarantee against respondents. The district court entered final judgment for respondents “under NRS 40.451 because the fair market value of the subject property [\$2,300,000.00] exceeds the consideration [FFB] paid [the FDIC] to acquire a lien on the property [\$2,256,879].” FFB appealed.

### **Discussion**

The district court decided this case based on its interpretation of NRS 40.451. NRS 40.451 delineates the categories of debt that may be collected under a deficiency judgment, defining an obligor’s indebtedness subject to collection:

[First Sentence:] As used in [the deficiency judgment statutes] "indebtedness" means the principal balance of the obligation secured by a mortgage or other lien on real property, together with all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by

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

<sup>2</sup> \$2,256,879.90 represented 75% of the then-due balance on the loan of \$3,009,166.66.

the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment. [Limitation:] Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.

The first sentence of NRS 40.451 represents five categories of obligation, that together, constitute an obligor's "indebtedness" enforceable by a deficiency judgment following foreclosure.

At issue is the effect of NRS 40.451's second, limiting sentence on each of the five categories of debt described in the first sentence: "[s]uch amount constituting a lien is limited to the amount of the consideration paid by the lienholder."<sup>3</sup>

#### A.

Respondents first asserted that the limiting sentence applies to each of the five categories, instead of just the final, fifth category delineated in NRS 40.451. The Court disagreed, finding that the opening phrase "[s]uch amount" suggests that the limiting sentence only "applies to the last antecedent,"<sup>4</sup> meaning the limitation is only effectual against the fifth category, or "all other amounts secured by the mortgage or other lien,"<sup>5</sup> rather than each of the five categories. In addition, the Court examined the statute's legislative history and found that in its original, 1969 version, the term "lien" only appeared in the fifth category. The term was added to the first category in 1989 to accomplish a grammatical correction to existing law, not to alter or reinterpret the original legislative intent behind the statute.

The Court found the meaning and application of NRS 40.451's limitation to be plain, and the intended result to be uncomplicated. The limiting sentence affects the fifth category of indebtedness only, and it limits the measure of deficiency recovery to the actual amount of consideration exchanged between a lender and borrower to create said lien.

#### B.

Next, respondents relied on the 2011 enactment of NRS 40.459(1)(c). NRS 40.459(1)(c) directs that where a person seeking a deficiency judgment "acquired the right to obtain the judgment from a person who previously held that right,"<sup>6</sup> the judgment may not exceed "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 of the amount for which the property was actually sold."<sup>7</sup> Respondents argued that the phrase "consideration paid" could also refer to the consideration paid by a third-party secondary purchaser to obtain assignment of the debt, thereby limiting an element of that successor-in-interest's indebtedness to the amount paid to acquire the assignment of debt.<sup>8</sup>

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<sup>3</sup> Nev. Rev. Stat. § 40.451.

<sup>4</sup> See *Sims' Lessee v. Irvine*, 3 U.S. 425, 444 n.2 (1799); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 146 (2012).

<sup>5</sup> Nev. Rev. Stat. § 40.451.

<sup>6</sup> Nev. Rev. Stat. § 40.459(1)(c).

<sup>7</sup> *Id.*

<sup>8</sup> See *Sandpointe Apartments v. Eighth Judicial Dist. Court*, 129 Nev. 313 P.3d 849, 854-56 (2013).

The Court disagreed for three reasons. First, NRS 40.451's text does not mention successors-in-interest. Further, each category of indebtedness describes an obligation owed by a borrower to a lender; consideration paid by a successor for the assignment of the original obligation is irrelevant. Finally, the Court found that to read NRS 40.451 to include successors-in-interest would be to abrogate the common law of most states, something it was not willing to do with clear legislative instruction to do so.

Second, because NRS 40.459(1)(c) limits the value of the lien to the consideration given from a successor-in-interest to the mortgagee, the Court found that respondents' interpretation of NRS 40.451 would make NRS 40.459(1)(c) ineffectual where assignment of rights is at issue. Additionally, where an assignment is not at issue, NRS 40.451's limitation would have no effect because, as respondents interpret the phrase, "consideration paid" by the lienholder would also be the "principle balance" of the loan.<sup>9</sup>

Third, and most importantly, the legislative history regarding NRS 40.451 confirmed the Court's findings. Throughout the many hearings to which the Legislature subjected then A.B. 493 (Nev. 1969), successors-in-interest to the note and deed of trust were not mentioned, nor any intent that would alter the common law regarding assignors and assignees. The Court found that these concerns would have played a central role in the limitation crafted by the Legislature if it had intended it to apply, and thereby found respondents' interpretation to be definitively incorrect.

## **Conclusion**

NRS 40.451 does not set an assignor-assignee, consideration-based limit on FFB's recovery against respondents. The limitation only applies to the fifth category of indebtedness, "all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment," and limits the amount recoverable under that category to the consideration extended by the lender to the borrower.

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<sup>9</sup> See also *Interim Capital*, 2011 WL 7047062 \*8 (noting that the "[d]efendants cannot account how their interpretation would apply to a primary lender").