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Badger v. Eighth Jud. Dist. Ct.

F. Shane Jackson
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CIVIL PROCEDURE: RELATION BACK: PROPERTY LAW

Summary

The Court considered a petition for a writ of mandamus challenging a district court order denying a motion for summary judgment and a motion to dismiss. Petitioner Darrin D. Badger (“Petitioner”) sought summary judgment in a breach of guaranty action against him and dismissal of a complaint of a deficiency judgment against him in connection with a foreclosure. After the court denied Petitioner’s motions, he filed the instant petition. The Court granted the petition, holding that a party may not use the relation back provision of NRCPC 15(c) to circumvent the requirement in NRS 40.455(1) that an application for a deficiency judgment must be filed within six months of a foreclosure sale.

Background

Omni Family Limited Partnership (“Omni”) became the real party in interest to a mortgage issued to Southwest Desert Equities, LLC (“the borrower”). Petitioner personally guaranteed the mortgage. The borrower defaulted, and Petitioner allegedly breached his guaranty. Omni filed a breach of guaranty action against Petitioner (“guaranty action”), and while that action was pending, foreclosed on the property. Pursuant to NRS 40.455(1), Omni had six months from the date of foreclosure to apply for deficiency judgments against either or both the borrower and Petitioner. Omni filed a second, timely complaint (“borrower action”) applying for a deficiency judgment against the borrower, but not Petitioner. Subsequently, the parties signed a stipulation and order consolidating the guaranty action with the borrower action.

Petitioner moved for summary judgment in the guaranty action on grounds that Omni failed to apply for a deficiency judgment against him within the NRS 40.455(1) deadline. Omni then amended its borrower action complaint by naming Petitioner as an additional defendant, relating the amended complaint back to the initial complaint pursuant to NRCPC 15(c). Petitioner moved to dismiss the amended complaint, but the district court denied both Petitioner’s motion for summary judgment and his motion to dismiss. The court held that the relation back of the amended complaint cured Omni’s failure to timely apply for a deficiency judgment against Petitioner. Petitioner then filed for a writ of mandamus seeking to reverse the district court’s ruling.

Discussion

The district court erred in permitting the Amended Borrower Complaint to relate back to the timely Borrower Complaint under NRCPC 15(c) to satisfy the six-month deadline by NRS 40.455(1)

Every obligation that is secured by property through a mortgage or a deed of trust is subject to Nevada’s antideficiency statutes,² and the Legislature has shown a strong inclination

¹ By F. Shane Jackson.

² *First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 620–21, 730 P.2d 429, 432 (1986).

towards protecting the rights of obligors under those statutes.³ Accordingly, those statutes are intended to protect guarantors as well as borrowers.⁴ Consistent with those goals, NRS 40.455(1) requires that parties apply for deficiency judgments within six months after the date of a foreclosure sale,⁵ and Nevada courts strictly apply that deadline.⁶

Under NRCP 15(c), an amended complaint relates back to the date of the initial complaint if the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence set forth in the initial complaint.⁷ An amended complaint adding a defendant after the statute of limitations has run will only relate back to the initial complaint if the defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been prejudicially misled by the amendment.⁸

Here, the Court held that relation back pursuant to NRCP 15(c) cannot be used to save an untimely application for a deficiency judgment. Allowing creditors to circumvent the rigid statutory deadline would be inconsistent with the Legislature's goal of protecting guarantors and borrowers as outlined in *Shields* and would fail to provide guarantors with adequate notice of a deficiency claim as required by *Lavi*. Since the six-month deadline of NRS 40.455(1) is not subject to relation back, Omni's arguments that Petitioner had actual notice of the action and knew that he was the proper party need not be considered. The district court erred in allowing Omni's amended complaint to relate back to the initial complaint so as to satisfy the requirements of NRS 40.455(1).

The timely Borrower Complaint does not constitute a valid application for a deficiency judgment against the unnamed Guarantor

Alternatively, Omni argued that its timely complaint against the borrower constituted a valid application for a deficiency judgment against Petitioner because the complaint mentioned Petitioner and otherwise met the definition of "application" that the Court applied in *Walters*. The *Walters* Court defined an "application" under NRS 40.455(1) in accordance with the definition stated in NRCP 7(b)(1).⁹ Here, the Court held that Omni's initial complaint did not constitute an application for a deficiency judgment against Petitioner because it did not name Petitioner as a defendant and therefore did not state with particularity any causes of action against him.

The subsequent consolidation of the Guaranty Action and the Borrower Action pursuant to NRCP 42(a) did not merge the two actions to satisfy NRS 40.455(1)

Omni also argued that the consolidation of the guaranty action against Petitioner with the action against the borrower merged the actions in a way that satisfied the requirements of NRS

³ *Lavi v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1268 (2014).

⁴ *Shields*, 102 Nev. at 621, 730 P.2d at 432.

⁵ NEV. REV. STAT. § 40.455(1) (2015).

⁶ *See, e.g., Lavi*, 130 Nev. Adv. Op. 38, 325 P.3d at 1268 (holding that a timely application must be made in order to seek a deficiency judgment); *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 728, 263 P.3d 231, 234 (2011) ("Under the clear and unambiguous language of NRS 40.455(1), an application must be made within six months."); *See also Lavi*, 130 Nev. Adv. Op. 38, 325 P.3d at 1269 (holding that a complaint filed before a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim).

⁷ NEV. R. CIV. P. 15(c).

⁸ *Costello v. Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634 (2011).

⁹ *See* NEV. R. CIV. P. 7(b)(1) ("An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."); *Walters*, 127 Nev. at 728, 263 P.3d at 234.

40.455(1). The Court declined to consider this argument because the actions were consolidated nearly two months after the deadline for filing an application for a deficiency judgment against Petitioner, so even if merging the actions would somehow satisfy NRS 40.455(1), Omni still failed to apply for a deficiency judgment against Petitioner within the six-month deadline.

The Guarantor did not waive his rights to object under NRS 40.455(1)

Finally, Omni argued that Petitioner contractually waived the NRS 40.455(1) time requirements under the terms of the loan guaranty. However, in accordance with NRS 40.453,¹⁰ the Court declined to uphold the waiver as a matter of public policy. Accordingly, the Court granted the petition for a writ of mandamus and instructed the district court to grant Petitioner's motion for summary judgment and motion to dismiss.

Conclusion

A party may not use the relation back provision of NRC 15(c) to circumvent the requirement in NRS 40.455(1) that an application for a deficiency judgment must be filed within six months of a foreclosure sale. Additionally, a party applying for a deficiency judgment against another party must name that other party as a defendant in the complaint constituting the application. Finally, the courts will not enforce provisions in contracts for the sale of real property whereby a guarantor waives any rights secured to him by state law.

¹⁰ NEV. REV. STAT. § 40.453 (2015) (providing that courts will not enforce a provision related to the sale of real property whereby a guarantor waives any right secured to him by the laws of the state).