

DIRT Periodic Development for Tuesday, June 10, 2014  
*Lavi v. Eighth Judicial District Court*

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*Lavi v. Eighth Judicial District Court*, 2014 WL 2428749 (Nevada Supreme Court May 29, 2014)

Link to Opinion: <http://law.justia.com/cases/nevada/supreme-court/2014/58968.html>

**SYNOPSIS:** Nevada Supreme Court rules that mortgagee could not recover from commercial guarantor, even though guarantor had waived protection of Nevada's one-action rule - and even though mortgagee had filed suit on the guaranty prior to foreclosing its mortgage! - because mortgagee failed to file a motion for a deficiency judgment within six months after completion of the foreclosure sale.

**FACTS:** Simon Lavi guaranteed a mortgage loan held by BB&T, signing a guaranty agreement under which he waived the protection of Nevada's "one-action" rule, Nev. Rev. Stat. § 40.430(1). [Under Nevada law, guarantors have been held to have the protection of the "one-action" rule under *First Interstate Bank of Nevada v. Shields*, 730 P.2d 429 (1986).] After the mortgagor defaulted, BB&T sued Lavi to recover on the guaranty agreement. While that action was pending, BB&T foreclosed and took title by credit bid at a nonjudicial foreclosure sale.

Nearly one year after the sale, BB&T moved for summary judgment against Lavi on its action on the guaranty. Lavi also moved for summary judgment, asserting that Nev. Rev. Stat. § 40.455 barred BB&T from obtaining a deficiency judgment because it had not filed an application for the judgment within six months after the trustee's sale. The district court granted summary judgment for BB&T, concluding that the statute did not bar BB&T's action because the complaint had sufficiently notified Lavi that of BB&T's intent to seek a deficiency judgment. Lavi then filed a petition for a writ of mandamus or a writ of prohibition in the Nevada Supreme Court, which issued a writ of mandamus compelling the district court to dismiss the guaranty action against Lavi based on § 40.455. A divided Nevada Supreme Court denied BB&T's petition for rehearing.

**DISCUSSION AND HOLDING:** The language of Nev. Rev. Stat. §§ 40.495 and 40.455 is helpful to parse the opinions in this case. Section 40.495(2) permits a guarantor to waive the one-action rule, and provides that after such a waiver, an action to enforce the guarantor's obligation

may be maintained separately and independently from: (a) An action on the debt; (b) The exercise of any power of sale; (c) Any action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby; and (d) Any other proceeding against a mortgagor or grantor of a deed of trust. [Nev. Rev. Stat. § 40.495(2)]

Section 40.495(3) provides that in an action to enforce the guarantor's obligation, the guarantor "may assert any legal or equitable defenses" provided pursuant to various sections of the Nevada statutes, including § 40.455. In turn, § 40.455, a portion of Nevada's anti-deficiency statute, provides a procedural limitation upon deficiency judgments, permitting a deficiency judgment "upon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale...."

Finally, 40.495(4) provides that if the mortgagee brings an action against the guarantor prior to a foreclosure sale, the court must hold a hearing as to the fair market value of the mortgaged property "as of the date of the commencement of the action" and that the court may not render a judgment for more than the lesser of:

- (1) The amount by which the amount of the indebtedness exceeds the fair market value of the property as of the date of the commencement of the action;  
or
- (2) 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 amount of the indebtedness which was secured .... [Nev. Rev. Stat. § 40.495(4)]

BB&T argued that by waiving the one-action rule, Lavi also released BB&T from the obligation to satisfy § 40.455(1)'s six-month procedural requirement. The majority rejected this interpretation as "unreasonable," noting that § 40.495(2) "focuses on maintaining a separate action; nothing in the subsection implies that it also terminates the procedural requirements for that action." The majority also noted that § 40.495(3) permits the guarantor to assert statutory defenses, which it noted was "consistent with both legislative intent" and § 40.495(2), because it "preserves the obligor's rights under the antideficiency statutes and it does not prevent an obligee from maintaining that action separately from a foreclosure action."

The majority thus held that although BB&T had already commenced an action on the guaranty under its waiver of the one-action rule, once it foreclosed on the property, it was still required to satisfy the requirement in § 40.455 for an "application" for a deficiency judgment. Because it did not, the majority held, Lavi was entitled to raise the defense that BB&T had failed to satisfy § 40.455.

BB&T also argued that its complaint should be considered to constitute an “application” for a deficiency judgment within the meaning of § 40.455. The majority rejected this argument, concluding that BB&T’s foreclosure complaint did not satisfy the six-month requirement in § 40.455 “because BB&T filed it before the trustee’s sale” and 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.”

Two judges dissented, noting:

The 6-month period in NRS 40.455 is a statute of limitations, designed to cut off stale post-foreclosure deficiency claims. To exonerate the guarantor, whom the lender sued before the foreclosure sale, because the lender sued before instead of within 6 months after the foreclosure sale, punishes the diligent lender without statutory basis or policy reason. And because such a rule is not apparent from a natural reading of the applicable statutes, and virtually unprecedented nationally, it impedes Nevada’s economic growth and development. Without predictable laws permitting efficient enforcement of commercial guaranties, commercial loans in Nevada will become increasingly expensive and difficult to obtain.

**COMMENT:** The editor thinks the dissent has the better view here. Section 40.495(2) permits the mortgagee to bring an action against a guarantor that has waived the one-action rule, even before scheduling a foreclosure sale. Section 40.495(4) then gives the mortgagee a choice, it can either:

- Pursue that claim to judgment prior to a foreclosure sale, in which case the judgment can be no larger than the difference between the balance of the debt and the fair market value of the mortgaged premises as of the date the action was filed; or
- Pursue that claim to judgment after the foreclosure sale, in which case the mortgagee can recover the actual deficiency, up to (but not over) the difference between the balance of the debt and the fair market value of the mortgaged premises as of the date the action was filed.

Here, BB&T’s complaint to enforce the guaranty sought damages in an undetermined amount “in excess of \$10,000” (as it had to do, because at that time no sale had taken place nor had there been any valuation hearing as required by § 40.495, so no precise amount could have been demanded). At about the same time, BB&T recorded a notice of default and its election to sell the property, giving notice to Lavi. As a result, Lavi certainly understood that BB&T would seek judgment against him for the post-

foreclosure deficiency on the guaranty of the note, and Lavi's answer asserted, as a defense, that "Plaintiff's [BB&T's] recovery, if any, must be offset by the amounts recovered by Plaintiff in the foreclosure proceeding."

Thus, the majority's argument that "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" is simply specious. As the dissent notes, "most people, at least non-lawyers" would think Lavi had received notice of his potential liability. [It is worth noting that the federal district court in Nevada had previously considered and rejected the majority's interpretation of §§ 40.455 and 40.495. *Interim Capital, L.L.C. v. The Herr Law Group, Ltd.*, 2:09-CV-1606-KJD-LRL, 2011 WL 7053806 (D. Nev. 2011).]

The dissent also argued that Lavi's waiver of the one-action rule authorized BB&T to proceed against Lavi "separately and independently" from any foreclosure under § 40.495(2), and that the court's interpretation of §§ 40.455 and 40.495(4) effectively read the "separately and independently" language out of the statute. The majority argued that allowing BB&T to recover would have deprived Lavi of his fair value defenses:

If an obligee seeks a deficiency judgment from a guarantor in an action separate from a foreclosure action, the two actions are undeniably and inextricably connected because the foreclosure sale necessarily impacts the deficiency judgment award. If we disregard this fact, a party could possibly receive an excess recovery.

But as the dissenting judges correctly point out, that is simply wrong. As explained above, if the mortgagee proceeds to judgment prior to foreclosure, the court must value the property as of the date the action commences, and the judgment cannot exceed the balance of the debt less that determined fair market value. If the mortgagee does not proceed to judgment until after the sale, the deficiency is still capped by the difference between the balance of the debt and the lesser of the sale price or the fair market value as of the commencement of the action. Either way, Lavi was protected by a substantive fair value requirement that could not be waived.