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Young Lawyers

BY GUEST COLUMNIST COURTNEY RADOW, ESQ.

Deficiency Judgements in Nevada – What’s the Status?

Many young lawyers, especially in the current financial climate, will in one way or another be involved in actions stemming from failed real estate (and real estate financing) transactions. One of the most common scenarios will be in the context of a deficiency action – a case brought after a borrower has taken out a loan for the purchase of real property and has defaulted on that loan, leading to foreclosure and a subsequent sale of the subject property. NRS 40, Actions and Proceedings in Particular Cases, and in particular, NRS 40.451 through NRS 40.463, govern foreclosure sales and deficiency judgments. A deficiency judgment, of course, arises when the amount of the underlying note exceeds the greater of the foreclosure sales price or the fair market value of the property.

During the 76th Legislative Session, the Nevada Assembly introduced AB 273, which subsequently passed with little to no fanfare. AB 273 amends NRS 40.459 affecting the amount of money that could be recovered in a deficiency action. In particular, Section 5 of AB 273 amended NRS 40.459 to add sections (1)(c) and (2). One of the main points of contention regarding sections (1)(c) and (2) is whether or not they were contemplated to be applied “retroactively,” and what exactly a retroactive application would mean. In other words: Do the amendments apply only to loans taken out after the June 10, 2011 enactment of AB 273? Do they apply only to actions wherein a complaint was filed after June 10, 2011? Or do they apply to any deficiency action wherein the deficiency judgment is entered after June 10, 2011? The answer to these questions will have very real implications for lenders, note purchasers and borrowers in the state of Nevada. While many have postulated about the potential answer to these questions, the problem came to the forefront on October 11, 2011 when, coincidentally, two separate cases in two separate departments were met with two divergent answers.

In one case, *Branch Banking and Trust Co. v. Robert Schulman, et al.*, (Case No. A-09-602382-C), the Honorable Elissa Cadish found that Sections 1(c) and (2) of NRS 40.459 were indeed intended to apply in a manner that some consider to be “retroactive.” Specifically, the plaintiff in that case was found to have “acquired the right to obtain the [deficiency] judgment” when it purchased the underlying loan in 2009, but was subject to the June 11, 2011 amendments reflected in Section 5 of AB 273. As a result of that decision, a related case, *Branch Banking and Trust Co. v. Frank Nielsen, et al.*, (Case No. A-09-601456-C), was appealed to the Nevada Supreme Court, after the Honorable Douglas Smith denied a motion for summary judgment sought in favor of the defendants based on NRS 40.459. While that decision, and subsequent appeal, was not based on the “retroactive” application of AB 273, it is one of the issues noted.

Also on October 11, 2011, the Honorable Elizabeth Gonzalez issued a ruling in *CML-NE Sandpointe, LLC et al. v. Sandpointe Apartments, LLC, et al.*, (Case No. A-11-644055-C) wherein the court held that the amendments to NRS 40.459 were not intended to be applied “retroactively.”¹ In that case, the deficiency action was originated on June 24, 2011, almost two weeks after the amendments were enacted, but held that NRS 40.459(1)(c) should not be applied. The court held that where a loan or foreclosure sale originated prior to June 11, 2011, the amendments to NRS 40.459 are not applicable. This decision appears to be in line with the view that applying NRS 40.459 (1)(c) and (2) to loans generated prior to June 11, 2011 would adversely affect the right to contract (based on a purchaser’s fear that if the law changes they may be limited in their ability to collect on their bargained-for debt). The defendants have subsequently appealed the court’s decision, arguing that a finding of

retroactivity would only apply where the statute in question imposed “new legal consequences on events completed before its enactment” and 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.” Under the defendants’ view, the amendments did not affect any substantive rights, but instead touched only on the calculation of a remedy (the total amount of the deficiency which a plaintiff may be entitled to).² As such, they have argued that NRS 40.459 (1)(c) and (2) should have been applied in their case.

Whatever the outcome of these divergent opinions, a decision by the Nevada Supreme Court will help clarify the expectations of plaintiffs bringing suit under NRS 40.459, as well as of the attorneys involved in deficiency actions statewide. Despite any decision that may be forthcoming it is important for young lawyers to stay abreast of this important issue and any action that may be taken by the courts and the Nevada Legislature in the near future³. ■

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- 1 This is the characterization set forth by the defendants in their appeal.
 - 2 A purchaser’s interest in a loan is not affected by the amendments set forth in AB 273, save and except the interests of those purchasers pursuing a deficiency under NRS 40.459.
 - 3 Earlier this year, Assembly Majority Leader Marcus Conklin released a Statement of Intent in an effort to clarify the intent behind AB 273. This article was drafted prior to the release of that statement and does not reflect its clarifications.

COURTNEY RADOW is an associate with the law firm of Gordon Silver and has been in practice for almost two years, focusing mostly on business litigation. She is licensed in the state of Nevada and the District of Nevada, and will soon be licensed in the state of Arizona. Radow graduated, cum laude, from the University of Arizona, James E. Rogers College of Law.