

IN THE SUPREME COURT OF THE STATE OF NEVADA

VACATION VILLAGE, INC., A  
NEVADA CORPORATION; SHANGRI  
LA, LTD., A NEVADA GENERAL  
PARTNERSHIP; TERRIE HEERS  
THOMPSON, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI  
LA, LTD.; TIM S. HEERS,  
INDIVIDUALLY AND AS GENERAL  
PARTNER OF SHANGRI LA, LTD.;  
CATHLEEN HEERS NORCOTT,  
INDIVIDUALLY AND AS GENERAL  
PARTNER OF SHANGRI LA, LTD.;  
GARY R. HEERS, INDIVIDUALLY  
AND AS GENERAL PARTNER OF  
SHANGRI LA, LTD.; AND CHERYL D.  
NOLTE, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI  
LA, LTD.,

Appellants/Cross-Respondents,

vs.

FOOTHILL CAPITAL CORPORATION,  
A CALIFORNIA CORPORATION,  
Respondent/Cross-Appellant.

VACATION VILLAGE, INC., A  
NEVADA CORPORATION; SHANGRI  
LA, LTD., A NEVADA GENERAL  
PARTNERSHIP; TERRIE HEERS  
THOMPSON, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI  
LA, LTD.; TIM S. HEERS,  
INDIVIDUALLY AND AS GENERAL  
PARTNER OF SHANGRI LA, LTD.;  
CATHLEEN HEERS NORCOTT,  
INDIVIDUALLY AND AS GENERAL  
PARTNER OF SHANGRI LA, LTD.;  
GARY R. HEERS, INDIVIDUALLY  
AND AS GENERAL PARTNER OF  
SHANDRI LA, LTD.; AND CHERYL D.  
NOLTE, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI

No. 43185

**FILED**

NOV 19 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

No. 43740

LA, LTD.,  
Appellants,

vs.

FOOTHILL CAPITAL CORPORATION,  
Respondent.

No. 47511

FOOTHILL CAPITAL CORPORATION,  
A CALIFORNIA CORPORATION,  
Appellant,

vs.

VACATION VILLAGE, INC., A  
NEVADA CORPORATION; SHANGRI  
LA, LTD., A NEVADA GENERAL  
PARTNERSHIP; TERRIE HEERS  
THOMPSON, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI  
LA, LTD.; TIM S. HEERS,  
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PARTNER OF SHANGRI LA, LTD.;  
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INDIVIDUALLY AND AS GENERAL  
PARTNER OF SHANGRI LA, LTD.;  
GARY R. HEERS, INDIVIDUALLY  
AND AS GENERAL PARTNER OF  
SHANGRI LA, LTD.; AND CHERYL D.  
NOLTE, INDIVIDUALLY AND AS  
GENERAL PARTNER OF SHANGRI  
LA, LTD.,  
Respondents.

**ORDER AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING WITH INSTRUCTIONS**

These are consolidated appeals and a cross-appeal from a final judgment in a collection action, a district court order dismissing a complaint in a related action, and a district court order denying relief under NRCP 60(b). Eighth Judicial District Court, Clark County; Lee A. Gates and Kathy A. Hardcastle, Judges.

## FACTS

Vacation Village, Inc., is a Nevada corporation that owned a hotel-casino in Las Vegas. Vacation Village's principals are members of the Heers family, five brothers and sisters. The Heers were also equal partners in the Shangri La Limited Partnership, which owned a shopping center in Las Vegas called Sundance Plaza. For convenience, this order refers to Vacation Village, Shangri La, and the Heers collectively as "appellants."

In September 1999, Vacation Village entered into a \$19,000,000 loan agreement with Foothill Capital Corp. The loan called for monthly, interest-only payments, with interest at 14%, and the full balance to be paid in one year, by September 2000. If Vacation Village defaulted on the loan, then a default interest rate of 21% was triggered. The loan was secured by a deed of trust on Vacation Village's hotel-casino, as well as some undeveloped land adjacent to the casino and owned by Vacation Village. All of Vacation Village's personal property and fixtures also served as security for the loan, and Vacation Village assigned its leases and rents to Foothill, as well.

In addition to the security provided by Vacation Village, Foothill obtained guaranties from the individual Heers family members and from Shangri La. Shangri La provided security for its guaranty in the form of a deed of trust on its shopping center and a pledge agreement for all personal property. Shangri La also assigned the leases and rents from the shopping center to Foothill as additional security. The record reflects that Foothill's security interests were properly perfected by recording the deeds of trust with the Clark County Recorder and filing UCC-1 Financing Statements with the Nevada Secretary of State, including fixture filings.

Shangri La's pledge agreement and the individual Heers family guaranties contained identical language that set forth a collection sequence to be followed in the event of default, requiring Foothill to collect first from the hotel-casino collateral, then from Sundance Plaza, and only after that security had been exhausted, from the individual Heers family members. Pertinent to these appeals, Foothill's obligation to adhere to the collection sequence was contingent upon none of appellants filing a bankruptcy petition.

Vacation Village obtained a one-month extension, to October 14, 2000, to repay the loan. After Vacation Village failed to timely repay the loan by its extended due date, Foothill commenced aggressive collection proceedings. It filed a complaint against all of the appellants, seeking injunctive relief and the appointment of receivers for Vacation Village and Sundance Plaza, and it recorded a notice of default and election to sell under Vacation Village's deed of trust. Appellants did not oppose Foothill's applications for injunctive relief and receivers, but approximately three weeks after Foothill filed its complaint, Vacation Village filed a Chapter 11 bankruptcy petition. At no time during these three weeks did appellants challenge, in the district court proceedings, Foothill's failure to adhere to the collection sequence provision in the pledge agreement and guaranties.

The bankruptcy automatic stay halted Foothill's action against Vacation Village, but it continued against the remaining appellants. A receiver was appointed for Sundance Plaza, which was later purchased by Foothill's affiliate with a credit bid at the foreclosure sale, and Foothill obtained summary judgment against the Heers individually on their guaranties. In the bankruptcy proceedings, Foothill proposed and obtained confirmation of a reorganization plan under which the hotel

casino and personal property was auctioned off, with the proceeds going to creditors, primarily Foothill. The confirmed plan provided that Foothill was to receive the auction proceeds in satisfaction of its "allowed secured claim." It further noted that Foothill's claim accrued interest at the default contractual rate of 21%, and stated that interest would accrue according to the debt instruments between the parties. At the auction, the hotel casino sold for \$17,800,000.

During the course of post-confirmation proceedings in the bankruptcy court, the court entered a "Plan Implementation Order," which, contrary to the plan and confirmation order, stated that Foothill's acceptance of the auction proceeds satisfied its "filed claim."

Upon the conclusion of the foreclosure proceedings, Foothill moved in the district court action for a deficiency judgment. For the first time, appellants asserted that Foothill's actions violated the collection sequence, and that Foothill was thus not entitled to any deficiency. Also, Vacation Village's answer, filed after the automatic stay terminated upon plan confirmation, included counterclaims based on Foothill's failure to adhere to the collection sequence, and the other appellants sought leave to amend their answers to include counterclaims. Appellants also filed a new action in the business court, raising claims identical to the counterclaims, and yet another action in the bankruptcy court, as an adversary proceeding, asserting the same claims plus three bankruptcy-specific claims.

In deciding Foothill's motion for a deficiency, the district court conducted an evidentiary hearing, following which the district court found that Vacation Village's hotel casino's fair market value was \$19 million, the shopping center's fair market value was \$4.5 million, and that interest should accrue on Foothill's claim at the legal judgment rate, not the

contractual rate or the default contractual rate. Following a motion to alter or amend, the district court concluded that the Plan Implementation Order, together with this court's decision in First Interstate Bank v. Shields,<sup>1</sup> barred any deficiency claim by Foothill. The district court also dismissed Vacation Village's counterclaims and denied the other appellants leave to amend.

Docket No. 43185 is an appeal and cross-appeal from that judgment. Foothill argues that the district court improperly interpreted the Plan Implementation Order, and that on remand, it is entitled to interest at the default contractual rate, not the legal judgment rate. Appellants primarily challenge the district court's dismissal of Vacation Village's counterclaims and the denial of leave to amend, and also assert that, in the event that this court concludes that the Plan Implementation Order does not bar any deficiency, that the district court's finding concerning the hotel casino's fair market value was not supported by the record. Appellants further argue that Foothill is not entitled to a deficiency because it violated the collection sequence provision.

Based on the district court's decision on Vacation Village's counterclaims, the business court dismissed the business court action based on claim preclusion. Docket No. 43740 is an appeal from that order.

Similarly, the bankruptcy court dismissed the adversary proceeding based on claim preclusion and, with respect to the bankruptcy-specific claims, on bankruptcy law. But the bankruptcy court also took the opportunity to "correct" the Plan Implementation Order, stating that the Order improperly purported to release Foothill's claim against Vacation

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<sup>1</sup>102 Nev. 616, 730 P.2d 429 (1986).

Village, not only its allowed secured claim, and that the plan and confirmation order clearly provided only for payment of the secured claim. On appeal, the Bankruptcy Appellate Panel affirmed, specifically approving the bankruptcy court's "correction" of the Plan Implementation Order. Based on the bankruptcy court order and the Bankruptcy Appellate Panel order, Foothill moved, in the district court action, to set aside the judgment under NRCP 60(b)(5). Since the appeal in Docket No. 43185 was still pending, thereby depriving the district court of jurisdiction to set aside the judgment while it was on appeal, Foothill asked the district court to certify that it was inclined to grant the motion, which would permit Foothill to seek a remand under Huneycutt v. Huneycutt.<sup>2</sup> The district court denied the Rule 60(b) motion. The appeal in Docket No. 47511 is from that order.

### DISCUSSION

We first consider the effect of the bankruptcy court's order on the state court proceedings. We next determine whether Foothill may be entitled to any deficiency on remand, and we offer the district court guidance concerning the applicable interest rate and the hotel casino's fair market value to aid its decision on remand. Finally, we conclude that the district court did not err in dismissing Vacation Village's counterclaims or denying the remaining appellants leave to amend, and that the business court did not err in dismissing the business court action.

#### Effect of bankruptcy court's Plan Implementation Order

The plan provided for the bankruptcy court's post-confirmation jurisdiction to resolve any disputes and to assist in

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<sup>2</sup>94 Nev. 79, 575 P.2d 585 (1978).

implementing the plan.<sup>3</sup> Consequently, the district court was faced with a difficult question when deciding what effect to give the Plan Implementation Order, which conflicted with the plan, especially when Foothill's counsel approved the Plan Implementation Order's form. We conclude that the district court's interpretation of the order was reasonable and that, based on Shields, the district court properly concluded that Foothill was barred from seeking any deficiency against the guarantors.

But the Plan Implementation Order's pertinent language was later corrected by the bankruptcy court, and the BAP approved the bankruptcy court's correction. NRCP 60(b)(5) provides that a district court may grant relief from a judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated." Notably, the six-month time limit for motions under NRCP 60(b)(1) and (2) does not apply to motions under paragraph (5). Also, while the district court was divested of jurisdiction to grant the motion in light of the pending appeal in Docket No. 43185, it could have entered a Huneycutt order<sup>4</sup> expressing its inclination to grant relief, and the matter could have been remanded to the district court with no prejudice to appellants. We conclude that the district court abused its discretion in denying Foothill's NRCP 60(b)(5) motion.<sup>5</sup>

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<sup>3</sup>See also 11 U.S.C. § 1127(b) (2000) (permitting post-confirmation modification of a reorganization plan).

<sup>4</sup>Huneycutt, 94 Nev. 79, 575 P.2d 585.

<sup>5</sup>See Deal v. Baines, 110 Nev. 509, 874 P.2d 775 (1994) (stating that decisions under NRCP 60(b) are reviewed for abuse of discretion).



### Collection sequence provision

By filing an action against all of the appellants, Foothill clearly violated the collection sequence provision, since by these actions Foothill was “attempt[ing] to recover repayment” by “seeking recourse” against the shopping center and the guarantors personally. But less than a month after Foothill filed its complaint, Vacation Village filed a bankruptcy petition. Since Foothill’s obligation to adhere to the collection sequence was dependent upon none of the obligors filing a bankruptcy petition, Foothill was thus released from the collection sequence. The record indicates that appellants failed to oppose the motion for a receiver and did not in any way assert the collection clause as a defense to Foothill’s actions during the weeks between the complaint’s filing and Vacation Village’s bankruptcy petition. Under these circumstances, we conclude that appellants waived application of the collection sequence.<sup>6</sup> Accordingly, the collection sequence does not bar Foothill’s efforts to obtain a deficiency.

### Factors impacting determination of deficiency on remand

Since under our decision today, Foothill may be entitled to a deficiency, we offer the following guidance to the district court to aid its determination of what deficiency may be proper.

Before concluding that the Plan Implementation Order barred any deficiency, the district court found in its original deficiency order that

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<sup>6</sup>See Hudson v. Horseshoe Club Operating Co., 112 Nev. 446, 457, 916 P.2d 786, 792 (1996) (holding that the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished); McKeeman v. General American Life Ins., 111 Nev. 1042, 1048, 899 P.2d 1124, 1128 (1995) (same).

the hotel casino's fair market value was \$19 million. Appellants contend that this figure is not supported by substantial evidence.

The district court's determination of fair market value is a question of fact, reviewed for whether it is supported by substantial evidence.<sup>7</sup> Substantial evidence is defined as evidence that a reasonable person would find adequate to support a conclusion.<sup>8</sup>

The district court did not include any written findings in its order, and it did not make any oral findings when it announced its decision on the properties' fair market value, which occurred at a hearing on a different motion. We note that the evidence in the record, particularly given the district court's lack of findings, could easily sustain a fair market value of more than \$19 million. Initially, the appraisals in the record for dates close to the auction date indicate a higher fair market value. First, Gary Kent's appraisal of the land and its fixtures, sold as-is, yielded a fair market value of \$33,265,000. Next, Harold O'Brien reached a fair market value of \$50,000,000 for the hotel casino as an ongoing business. Finally, Kevin Bemel's appraisal of the land only resulted in a market value of \$26,200,000. Bemel further noted that the land's liquidation value, after less than six months of marketing, was \$20,000,000. All of these appraisals estimate the property's value, even Bemel's liquidation value, at higher than \$19 million. Also, testimony at the evidentiary hearing and information in the written appraisals indicated that twelve to eighteen months was a reasonable time frame for

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<sup>7</sup>See Halfon v. Title Ins. & Trust Co., 97 Nev. 421, 634 P.2d 660 (1981).

<sup>8</sup>McClanahan v. Raley's, Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001).

marketing this type of property, and that even six months was viewed as a distressed or liquidation sale; thus, evidence was introduced that the actual sale price after only four months of marketing did not reflect the fair market value. Finally, while the bankruptcy court denied Vacation Village's motion to continue the November 2001 auction, based on the events of September 11, 2001, and due to the decline in tourism and the resulting negative impact on the Las Vegas market, the district court could properly consider the auction's timing in light of these events in determining how close a connection the actual sale price bore to fair market value. Accordingly, the district court should reconsider its fair market value determination and make specific findings regarding this determination on remand.

Additionally, for reasons that are unclear, in its original deficiency order, the district court held that Foothill was entitled to interest only at the legal judgment rate. The loan documents provide for an interest rate of 14%, which is increased to 21% upon default. Nevada permits contracting parties to agree on any interest rate, and thus these rates are permissible.<sup>9</sup> In addition, the loan matured by its terms before Foothill filed its complaint; thus, the default rate of interest was properly triggered. Finally, nothing in NRS Chapter 40 permits the district court to reduce the contractual interest rate in the context of a deficiency action to the legal judgment rate, as was done by the district court here before it determined that the Plan Implementation Order barred any deficiency. Under Nevada law, then, the contractual default rate properly applies.

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<sup>9</sup>See NRS 99.050.

Vacation Village's bankruptcy proceedings could have affected the rate to be charged;<sup>10</sup> however, in this case, the confirmed plan twice referenced Foothill's contractual default rate, and provided that Foothill's claim was to accrue interest according to the parties' debt instruments.<sup>11</sup> Accordingly, Foothill is entitled to interest at its contractual default rate.

Counterclaims and business court action

The original answers of Shangri La and the Heers did not include any counterclaims. After Vacation Village's reorganization plan was confirmed, thus terminating the automatic stay,<sup>12</sup> Vacation Village filed an answer and counterclaim, and Shangri La and the Heers moved for leave to amend their answers to include counterclaims. The district court denied the motions for leave to amend, and it later granted summary judgment to Foothill on Vacation Village's counterclaims, without discussion. Appellants challenge these rulings.

The counterclaims allege that Foothill intentionally sought multiple recoveries and a windfall by pursuing the guarantors and

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<sup>10</sup>See 11 U.S.C. § 502(b)(2) (2000) (permitting the bankruptcy court to disallow a claim for interest that was unmaturing as of the petition date); 11 U.S.C. § 506(b) (2000) (allowing post-petition interest on secured claims to the extent that they are oversecured); 11 U.S.C. § 1123 (2000) (providing that a reorganization plan may change the interest rate); Matter of Terry Ltd. Partnership, 27 F.3d 241 (7th Cir. 1994) (applying a presumption for the contract rate, subject to rebuttal based on equitable considerations).

<sup>11</sup>See In re Sugarhouse Realty, Inc., 192 B.R. 355 (stating that a Chapter 11 reorganization plan is generally regarded as a contract, and rules of contractual interpretation apply); In re DiBerto, 171 B.R. 461 (same).

<sup>12</sup>11 U.S.C. § 1141 (2000); 11 U.S.C. § 362(c) (2000).

Shangri La and by seeking a deficiency judgment. They further allege that Foothill's conduct violated the one-action rule, the anti-deficiency statutes, and the collection sequence provision in the loan documents. Based on these allegations, the counterclaims are for breach of contract, breach of the duty of good faith and fair dealing, abuse of process, and misrepresentation. The damages alleged consist of everything Foothill received over and above the auction proceeds from Vacation Village's bankruptcy, plus unspecified damages relating to the loss of the hotel-casino and the shopping center, punitive damages, costs and attorney fees.

Nevada's one-action rule is set forth in NRS 40.430, and provides generally that there may be but one action to recover a debt secured by real property. The statute describes specific methods of recovery that are not "actions" for the rule's purposes, such as a non-judicial sale under a deed of trust. NRS 40.495, however, provides that, with certain exceptions not applicable here, the one-action rule may be waived. Here, the pledge agreement and the guaranties contain conspicuous waivers of the one-action rule in the paragraphs immediately preceding the collection sequence clause. As noted above, the collection sequence clause was a special exception to the one-action rule waiver provisions, so long as no obligor had filed a bankruptcy petition or otherwise sought to restrict Foothill's remedies. Thus, even if Foothill's conduct consisted of more than one "action," appellants had validly waived the rule, and Vacation Village's bankruptcy petition voided the waivers' special exception—the collection sequence clause. Accordingly, no cause of action was properly based on this conduct.

Second, the anti-deficiency statutes are designed to prevent a windfall to the creditor if a foreclosure sale price is less than the property's fair market value. Here, while the district court improperly reduced the

interest rate and may not have accurately determined the hotel-casino's fair market value, it recognized that Foothill was entitled only to the amount owing after deducting the fair market value, thus denying Foothill any windfall. Therefore, appellants' claims on this ground lacked merit as a matter of law, and summary judgment was properly granted.

Finally, as discussed above, the collection sequence provision became inoperative when Vacation Village filed for bankruptcy. During the month before that, appellants failed to assert the provision as a defense to any of Foothill's actions, thereby demonstrating an intent to waive the provision. Accordingly, no cause of action based on the collection sequence provision could succeed.

Under these circumstances, then, the district court did not err in granting summary judgment on Vacation Village's counterclaim.<sup>13</sup> In addition, the district court did not abuse its discretion in refusing to allow Shangri La and the Heers to amend their answer to assert futile counterclaims.<sup>14</sup>

The business court complaint was essentially identical to the counterclaims filed and sought to be filed in the district court case. Accordingly, the business court did not err in dismissing the complaint on the grounds of issue and claim preclusion.<sup>15</sup>

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<sup>13</sup>See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

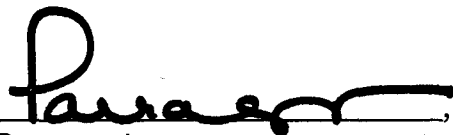
<sup>14</sup>See Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 110 P.3d 59 (2005) (stating that the district court's decision whether to permit amendment to add counterclaims is reviewed for a gross abuse of discretion).

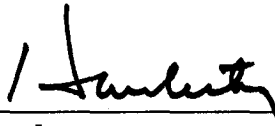
<sup>15</sup>See Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 963 P.2d 465 (1998).

CONCLUSION

We affirm the business court's order dismissing appellants' complaint in Docket No. 43740. In the district court action forming the basis for Docket Nos. 43185 and 47511, we reverse the district court's order denying Foothill's NRCP 60(b)(5) motion and we remand this matter with instructions that the district court grant the motion and conduct further proceedings in accordance with this order.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Kathy A. Hardcastle, District Judge  
Hon. Lee A. Gates, District Judge  
Lansford W. Levitt, Settlement Judge  
Buchalter Nemer  
Gordon & Silver, Ltd.  
John Peter Lee Ltd.  
Eighth District Court Clerk