IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRY H. SHULL, AN INDIVIDUAL; STEVEN R. ROSENBERG, AN INDIVIDUAL; HHS HOMES, INC., A CALIFORNIA CORPORATION; SSR HOMES, INC., A CALIFORNIA CORPORATION; AND BRAWLEY CA 122, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellants,
vs.
VESTIN REALTY MORTGAGE I, INC., A MARYLAND CORPORATION; VESTIN REALTY MORTGAGE II, INC., A MARYLAND CORPORATION; AND VESTIN FUND III, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 53250

FILED

FEB 03 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order in a real property action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Brawley CA 122 and respondents Vestin Realty Mortgage I, Vestin Realty Mortgage II, and Vestin Fund III (collectively, Vestin) executed an agreement in which Vestin agreed to loan Brawley $2,270,000 to purchase real property in California (Loan Agreement). The Loan Agreement was evidenced by a promissory note secured by a deed of trust on the real property in California and guaranteed by appellants Harry H. Shull, Steven R. Rosenberg, HHS Homes, and SSR Homes (collectively, Shull) through a guaranty agreement. Brawley was the trustor of the deed of trust, but not a guarantor.

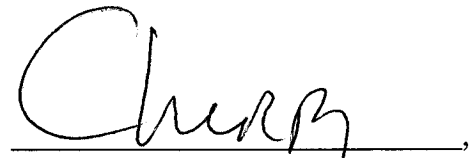
Brawley subsequently defaulted on the loan and Vestin foreclosed on the real property securing the loan by initiating a nonjudicial trustee's sale in California. The real property was purchased by Vestin for $1,000,000. Vestin then sought a deficiency judgment in Nevada, pursuant to NRS 40.455, on the difference between the underlying indebtedness ($2,270,000) and the fair market value of the real property on the date of the foreclosure ($1,340,000). The district court granted Vestin a deficiency judgment, under NRS 40.455, against both Brawley and Shull. Brawley and Shull now appeal the district court's judgment.

We review "a district court's grant of summary judgment de novo." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); see, e.g., Citibank Nevada v. Wood, 104 Nev. 93, 93-95, 753 P.2d 341, 341-42 (1988) (applying summary judgment standard to deficiency action). Summary judgment is appropriate when the pleadings and other evidence establish that "no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Wood, 121 Nev. at 792, 121 P.3d at 1029 (alteration in original) (quoting NRCP 56(c)).

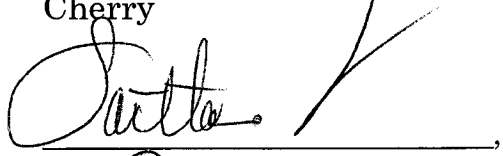
Because Vestin foreclosed on the real property securing the loan by conducting a nonjudicial trustee's sale in California, under California Civil Code section 2924, we conclude that the district court improperly applied Nevada law, specifically NRS 40.455, as the procedural mechanism to award Vestin a deficiency judgment against Brawley. Likewise, we conclude that the district court erroneously granted Vestin a summary judgment against Shull, the guarantors. A deficiency judgment may only be awarded against the makers of the promissory note which is secured by the deed of trust. A breach of guaranty cause of action is

governed by contract law and is subject to contractual defenses. E.g., Tri-Pacific Commercial Brokerage v. Boreta, 113 Nev. 203, 205-06, 931 P.2d 726, 728-29 (1997). Consequently, the summary judgment awarded against Brawley and Shull was improper.[1] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Cherry



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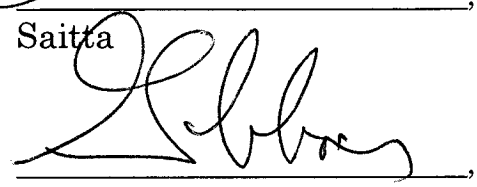

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Leonard I. Gang, Settlement Judge
Coleman Law Associates
Craig D. Burr
Solomon Dwiggins & Freer
Eighth District Court Clerk

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[1]We decline to address the parties' argument with respect to the award of attorney fees and costs on appeal, as that contention "should be addressed, in the first instance, by the district court with its greater fact-finding capabilities, subject to our review." Musso v. Binick, 104 Nev. 613, 615, 764 P.2d 477, 478 (1988).