IN THE SUPREME COURT OF THE STATE OF NEVADA

FOROUZAN, INC.; SAIID FOROUZAN RAD, AN INDIVIDUAL; AND R. PHILLIP NOURAFCHAN, BOTH INDIVIDUALLY AND AS TRUSTEE OF THE R. PHILLIP AND AFAGH NOURAFCHAN FAMILY TRUST,
Appellants,
vs.
BANK OF GEORGE, A NEVADA CORPORATION,
Respondent.

No. 56337

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended district court order granting summary judgment in a contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

FACTUAL BACKGROUND

In May 2008, Beltway View, LLC,[1] entered into a loan agreement and borrowed $5,980,000 from respondent Bank of George (BOG). To secure the loan, Beltway and BOG executed a promissory note, and Beltway used real property in Las Vegas as collateral. To induce BOG to make the loan, appellants Forouzan, Inc.; Saiid Forouzan Rad; and R. Phillip Nourafchan, individually and as trustee of the R. Phillip and Afagh Nourafchan Family Trust (collectively, Forouzan) executed guaranty agreements in which Forouzan waived Nevada's one-action rule and did not include any requirement that BOG foreclose on the collateral before filing an action against Forouzan.

[1]Appellant Forouzan, Inc. (managed by appellant Saiid Forouzan Rad and others); and RPN, LLC (managed by appellant R. Phillip Nourafchan), are the two entities that manage Beltway.

In 2009, BOG appraised the real property collateral and determined that it had an approximate value of $6,840,000, nearly $1,000,000 more than the amount owed under the loan agreement. Approximately ten days later, Beltway defaulted on its loan obligation. As a result, Forouzan and BOG allegedly attempted to negotiate a deal to satisfy the debt. The specific negotiations are not clear from the record, but importantly, BOG expressed to Forouzan that the guaranty agreements allow BOG to "foreclose on the real property collateral and to pursue the guarantors to the loan."

After Forouzan failed to satisfy the debt, BOG filed suit against Forouzan without first pursuing a foreclosure of the collateral. In its complaint, BOG alleged breach of the guaranty agreements, breach of the implied covenant of good faith and fair dealing, and, alternatively, unjust enrichment. Forouzan answered, claiming, among other things, that BOG's actions were statutorily precluded, that BOG misled Forouzan, and that BOG was "equitably estopped" from pursuing an action against Forouzan because BOG failed to mitigate its damages by first foreclosing on the real property collateral, which was worth more than the amount owed under the loan agreement. Forouzan also counterclaimed, alleging breach of the implied covenant of good faith and fair dealing and promissory estoppel based on BOG's alleged representations that it would first foreclose on the collateral, and seeking declaratory relief.

BOG filed a motion for summary judgment on its breach-of-guaranty claim and on Forouzan's counterclaims. Forouzan opposed and countermoved for summary judgment on BOG's claims, partial summary judgment on Forouzan's counterclaims, or additional time to conduct discovery. The district court subsequently ordered summary judgment in

favor of BOG and denied Forouzan's countermotion, finding that Forouzan specifically waived any requirement that BOG foreclose on the collateral first, and that BOG had the option to pursue independent remedies against Forouzan without foreclosing on the collateral. Following the district court's grant of summary judgment, BOG filed a motion for an award of late charges, pre- and post-judgment interest, and attorney fees. The district court granted BOG's motion and subsequently entered an amended judgment to reflect the additional amounts awarded to BOG. This appeal followed.

DISCUSSION

This appeal requires us to consider whether, after a borrower defaults on a loan, a creditor must foreclose on real property collateral securing the loan before pursuing a guarantor who has validly waived Nevada's one-action rule codified in NRS 40.430.[2] This appeal also requires us to interpret several statutes relating to the rights of a creditor and a guarantor after a borrower defaults on a loan.

Statutory interpretation

This court reviews issues of statutory construction de novo. Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. ___, ___, 245 P.3d 1149, 1153 (2010). When interpreting a statute, we first look to its plain language and "[w]hen the language . . . is clear on its face, 'this court will not go beyond [the] statute's plain language.'" J.E. Dunn Nw. v. Corus Constr. Venture, 127 Nev. ___, ___, 249 P.3d 501, 505 (2011) (second alteration in original) (quoting Great Basin Water Network v. State Eng'r,

[2]NRS 40.430 requires creditors to foreclose on and sell the real property collateral securing a debt before pursuing the debtor or a guarantor separately.

126 Nev. ___, ___, 234 P.3d 912, 918 (2010)). When examining a statute's meaning, this court "'will interpret a rule or statute in harmony with other rules and statutes,'" Albios v. Horizon Communities, Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (quoting Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993)). We will "consider[ ] the statute's multiple legislative provisions as a whole . . . [and will] not render any part of a statute meaningless." Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007); see also SNMARK, 126 Nev. at ___, 245 P.3d at 1153 ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Because we conclude that the statutes relevant to this case are clear, we do not look beyond their plain language.

Forouzan is not entitled to the protections provided by Nevada's fair-value defenses and Nevada's one-action rule

On appeal, Forouzan maintains that, consistent with Nevada's one-action rule, NRS 40.430, and fair-value defenses, NRS 40.451-.463, BOG should have foreclosed on the real property collateral to determine whether any deficiency was due from Forouzan before bringing an action against Forouzan. We disagree.

Forouzan admitted in its opposition to BOG's motion for summary judgment that it waived Nevada's one-action rule when it executed the guaranty agreements. However, Forouzan argued that Nevada's fair-value defenses require BOG to foreclose on the collateral before seeking relief from the guarantors and that BOG must now take the property in satisfaction of the debt rather than pursue the guarantors. During the district court's summary judgment hearing on the matter, Forouzan again conceded that guarantors could waive Nevada's one-action rule and that Forouzan had waived the one-action rule pursuant to the

guaranty agreements. Because Forouzan waived the one-action rule, BOG was not required to foreclose on the collateral before pursuing Forouzan, and BOG elected to not foreclose. The fair-value defenses only apply when a creditor elects to foreclose; as such, they are not applicable to this case.

Forouzan waived the one-action rule

Pursuant to Nevada's one-action rule, a creditor is required to foreclose on real property collateral before bringing an action to enforce a promissory note or guaranty agreement.[3] See McDonald v. D.P. Alexander, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005). However, Forouzan conceded below that it waived Nevada's one-action rule when it executed the guaranty agreements, which contained a waiver of

> any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after

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[3]Specifically, NRS 40.430(1) states that:

> [e]xcept in cases where a person proceeds under subsection 2 of NRS 40.495 or subsection 1 of NRS 40.512, . . . there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive. In that action, the judgment must be rendered for the amount found due the plaintiff, and the court, by its decree or judgment, may direct a sale of the encumbered property, or such part thereof as is necessary, and apply the proceeds of the sale as provided in NRS 40.462.

> Lender's commencement or completion of any foreclosure action.

Nevada law permits guarantors to waive the one-action rule. See NRS 40.495(2)[4] ("[A] guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, may waive the provisions of NRS 40.430."); see also NRS 40.430(1) (explaining that the one-action rule applies "[e]xcept in cases where a person proceeds under subsection 2 of NRS 40.495" (emphasis added)). Thus, we conclude that Forouzan validly waived the one-action rule.

Entitlement to the fair-value defenses is affected by a waiver of the one-action rule

Forouzan maintains on appeal that, notwithstanding its waiver of the one-action rule, it did not and could not waive the statutory protections provided by the fair-value defenses because NRS 40.453 prohibits waiver of "any right secured to the person by the laws of this state" in documents relating to the sale of real property. Therefore, Forouzan contends that BOG was required to foreclose on and sell the collateral before it could pursue any remedies against Forouzan. We disagree. Because Forouzan waived the one-action rule, BOG was not required to first foreclose, and it elected not to do so. Thus, the fair-value

[4]The Legislature amended NRS 40.495 in 2011. See 2011 Nev. Stat., ch. 311, § 5.5, at 1743-45. Although the language of NRS 40.495(2) remained unchanged, any amendment would not apply here because the amendments went into effect in June 2011 and BOG commenced its action in July 2009.

defenses, which only apply when a creditor elects to foreclose, do not apply to this case.[5]

Nevada's fair-value defenses, which apply equally to debtors and guarantors, provide protections for debtors and guarantors upon foreclosure by setting forth guidelines for and limiting the amount of deficiency judgments. See, e.g., NRS 40.457 (requiring an appraisal to determine the fair market value of the collateral before the court awards a deficiency judgment); NRS 40.459 (limiting the amount of deficiency judgments). While the fair-value defenses cannot themselves be waived, see NRS 40.453(1), they are directly affected by the waiver provisions set forth in NRS 40.495. Specifically, NRS 40.453, which addresses waiver, states that "[e]xcept as otherwise provided in NRS 40.495[,] [i]t is . . . against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or the grantor of a deed of trust or a guarantor . . . waives any right secured to the person by the laws of this state," and "[a] court shall not enforce any such provision. (Emphasis added.) Thus, we turn our attention to NRS 40.495.

NRS 40.495(2) permits a guarantor to waive the protections of the one-action rule codified in NRS 40.430. Significantly,

> [i]f a guarantor . . . waives the provisions of NRS 40.430, an action for the enforcement of that person's obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon real property may be maintained separately and independently from . . . [a]ny action to foreclose or otherwise enforce a

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[5]We also note that none of the fair-value defenses expressly require a creditor to foreclose on real property collateral before bringing an action against a guarantor.

> mortgage or lien and the indebtedness or obligations secured thereby.

NRS 40.495(2)(c) (emphasis added). In other words, when a guarantor waives Nevada's one-action rule, a creditor may pursue the guarantor without first foreclosing on the real property collateral. This is precisely what BOG elected to do in this instance.

The language in NRS 40.495(2)(c) is important to this appeal because if a creditor proceeds pursuant to NRS 40.495(2)(c), a guarantor is not entitled to the fair-value defenses. Specifically, pursuant to NRS 40.495(3), a guarantor is only entitled to the protections of the fair-value defenses "[i]f the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby." (Emphasis added.)[6] Here, because BOG, pursuant to NRS 40.495(2)(c), brought an action against Forouzan "separately and independently from . . . [a]ny action to foreclose," we conclude that Forouzan cannot raise any of the fair-value defenses.[7] Were we to

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[6]The statutory provisions of NRS 40.451-.463 are entitled "Foreclosure Sales and Deficiency Judgments," further supporting our conclusion that they are only available if a creditor elects to foreclose. See Nevada Power Co. v. Haggerty, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999) (explaining that a statute's title can reflect legislative intent).

[7]BOG obtained an appraisal of the real property collateral that valued the property at nearly $1,000,000 more than the amount owed under the loan agreement. In its reply brief, Forouzan comments on the fact that BOG does not address this appraisal. Although not entirely clear, it appears that Forouzan is reiterating its argument that, as a matter of policy, when a creditor can fully recover its debt by foreclosing on the collateral, it must do so. As we have concluded in this order, the statutory scheme does not require creditors to foreclose first—they may independently pursue guarantors who waive the one-action rule. Although it may be beneficial to a creditor to foreclose, the statutes

determine that creditors may not pursue a guarantor separately from foreclosing on the collateral, the waiver provision in NRS 40.495(2) would be superfluous and meaningless because a guarantor could never waive the one-action rule. NRS 40.495(3) would also be superfluous because it would be unnecessary to specify the guarantor's rights in the event of foreclosure if the creditor has no choice but to foreclose.

BOG will not obtain double recovery

Forouzan also argues that BOG's actions allow BOG to obtain a double recovery. However, because NRS 40.475 (allowing a guarantor who fully satisfies the debt to enforce any remedy the creditor has against the debtor and assigning the creditor's rights in the security to the guarantor) and NRS 40.485 (giving a guarantor who partially satisfies a debt an interest in the proceeds of the indebtedness) prohibit such a result unless Forouzan waives those protections pursuant to NRS 40.495(1), we conclude that Forouzan's argument lacks merit.[8] We now turn our

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provide creditors with a choice of remedies upon default. Therefore, we conclude that the value of the appraisal is irrelevant to this appeal.

[8]We recently recognized that "[t]here may . . . be potential of double recovery when a guarantor waives the one-action rule pursuant to NRS 40.495(2)." Walters v. Dist. Ct., 127 Nev. ___, ___, 263 P.3d 231, 235 (2011). However, consistent with our holding today, unless the guarantor also waives the protections provided by NRS 40.475 or NRS 40.485, there can be no double recovery. Here, there is no evidence that Forouzan waived these protections. Forouzan does argue that the policy grounds for placing the guarantor in the shoes of the creditor upon full payment or allowing the guarantor a right to a later judgment upon partial payment are unsound. We conclude that this argument is without merit.

In a related argument, Forouzan contends that it is unfair for BOG to retain the collateral indefinitely because, assuming BOG only partially recovered against Forouzan, BOG could theoretically never foreclose and Forouzan would never recover its interest in any proceeds from a

attention to whether the district court properly denied Forouzan's countermotion for summary judgment and granted summary judgment in favor of BOG.

Summary judgment

In granting summary judgment in favor of BOG, the district court concluded that "no genuine issue of material fact remains," and that Forouzan cannot "show that each of [its] Counterclaims do[es] not fail as a matter of law." "This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); see also J.E. Dunn Nw. v. Corus Constr. Venture, 127 Nev. ___, ___, 249 P.3d 501, 505 (2011).

"Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate 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 729, 121 P.3d at 1029 (alteration in original) (quoting NRCP 56(c)). In reviewing a motion for summary judgment, this court considers "the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to the nonmoving party." Id. To rebut a motion for summary judgment, the nonmoving party must present some specific facts to demonstrate that a

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foreclosure sale. Forouzan maintains that the collateral's market value continues to decrease and thereby "BOG is being rewarded for its inactions" because the potential deficiency against Forouzan continues to increase as the collateral's value decreases. Again, we conclude that these policy arguments are meritless because the statutes plainly permit BOG to elect not to foreclose. We note that Forouzan could have fulfilled the terms of the guaranty agreements and then initiated foreclosure and sale of the collateral before the collateral's value diminished.

genuine issue of material fact exists. Id. at 731, 121 P.3d at 1030-31. Importantly, those facts must be "probative on the operative facts that are significant to the outcome under the controlling law," id. at 730, 121 P.2d at 1030, and not a mere allusion to "'irrelevant or unnecessary'" facts. Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "General allegations supported with conclusory statements fail to create issues of fact." Rodriguez v. Primadonna Company, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009).

Forouzan does not state the specific counterclaims on which the district court improperly granted summary judgment, although it appears that Forouzan focuses on its counterclaims for breach of the implied covenant of good faith and fair dealing and promissory estoppel.[9] This court has previously recognized that "all contracts impose upon the parties an implied covenant of good faith and fair dealing." Nelson v. Heer, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007). This implied covenant "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." Id. For promissory estoppel to exist,

> "(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped."

Pink v. Busch, 100 Nev. 684, 689, 691 P.2d 456, 459 (1984) (quoting Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996,

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[9]Forouzan also counterclaimed for declaratory relief, claiming that BOG was required to first foreclose on the collateral before initiating a separate action against Forouzan.

998-99 (1982)). We conclude that Forouzan failed to present genuine issues of material fact on either of these claims.

Forouzan argues that genuine issues of material fact remain regarding whether BOG made misleading statements that it would foreclose on the collateral first and whether Forouzan detrimentally relied on BOG's representations. In its opening and reply briefs, Forouzan refers to limited evidence in the record to support its contention that summary judgment was inappropriate. First, Forouzan refers to an e-mail from BOG, which states, in pertinent part:

> The loan documents that were executed for the Beltway View LLC transaction allow the bank to both foreclose on the real property collateral and to pursue the guarantors to the loan. You had mentioned the possibility of a deed in lieu on the property and we would like to know what additional asset or collateral you could provide to cover a potential deficiency on the liquidation sale of the existing collateral? If there is no deficiency, the asset/collateral would of course be immediately released.

Second, Forouzan cites to testimony from Saiid Forouzan Rad that, based on the aforementioned e-mail, "BOG misled us to believe that it would not sue directly on our guarantees, but would first foreclose on the property to determine whether any deficiency was due under the subject note."

It is clear from the e-mail that BOG retained the option to pursue Forouzan regardless of foreclosure. BOG's reference in the e-mail to a deficiency seems to be in response to Forouzan's apparent inquiry about providing a deed in lieu of foreclosure, and BOG merely indicates that Forouzan, as guarantor, would not be responsible if BOG foreclosed and the sale generated enough money to cover Forouzan's indebtedness. In light of the statutory provisions that permitted Forouzan to waive the

one-action rule thereby allowing BOG to proceed against Forouzan without first foreclosing on the collateral, we determine that these general allegations do not create a genuine issue of material fact as to whether BOG breached the covenant of good faith and fair dealing. See Rodriguez, 125 Nev. at 584, 216 P.3d at 798. Additionally, we determine that neither the e-mail nor the testimony from Saiid Forouzan Rad establish genuine issues of material fact regarding the promissory estoppel claim because Forouzan presented no evidence of detrimental reliance on any alleged assertions made by BOG. Such detrimental reliance is an essential element of a promissory estoppel claim. See Busch, 100 Nev. at 689, 691 P.2d at 459. Viewing the evidence in a light most favorable to Forouzan, we conclude that no genuine issues of material fact remain, and the district court properly denied Forouzan's countermotion and granted summary judgment in favor of BOG.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Saitta

_____, J.
Douglas

_____, J.
Hardesty

cc: Hon. Timothy C. Williams, District Judge
Robert F. Saint-Aubin, Settlement Judge
Santoro, Driggs, Walch, Kearney, Holley & Thompson/Las Vegas
Fennemore Craig, P.C./Las Vegas
Eighth District Court Clerk