

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANCH BANKING AND TRUST
COMPANY, SUCCESSOR-IN-
INTEREST TO COLONIAL BANK BY
ACQUISITION OF ASSETS FROM THE
FDIC AS RECEIVER FOR COLONIAL
BANK, A NORTH CAROLINA
BANKING CORPORATION
ORGANIZED AND IN GOOD
STANDING UNDER THE LAWS OF
THE STATE OF NORTH CAROLINA,
Appellants,
vs.
FRANK NIELSEN, AN INDIVIDUAL;
AND ROBERT H. SCHULMAN, AN
INDIVIDUAL,
Respondents.

No. 60256

FILED

NOV 14 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in a deficiency and guaranty action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Branch Banking and Trust Company (BB&T) brought a deficiency judgment and a breach of guaranty action against respondents Frank Nielsen and Robert Schulman (collectively, Nielsen) to recover the outstanding debt remaining, after a foreclosure sale, on a loan guaranteed by Nielsen. BB&T alleged that Nielsen, as guarantor for a loan made to Ft. Mojave-Aztec, LLC, was liable for almost \$4 million in unpaid principal, interest and fees. However, BB&T did not originate the loan; instead, it acquired the loan, as well as other assets, from the

Federal Deposit Insurance Corporation, which was acting as receiver for Colonial Bank, a failed financial institution.

Following acquisition of the loan, BB&T proceeded with a non-judicial foreclosure. At the foreclosure sale, it obtained ownership of the property by placing a \$1.7 million credit bid. BB&T then filed suit to obtain a judgment for the difference between the outstanding loan amount and the sale price. After the filing of BB&T's suit, the Nevada Legislature approved, and the Governor signed, Assembly Bill 273 on June 10, 2011, which, in pertinent part, added NRS 40.459(1)(c) to the Nevada Revised Statutes—limiting the amount that a successor loan holder is able to recover in a deficiency action to the amount paid for the note. Nielsen brought a motion for summary judgment, alleging that BB&T failed to prove the amount of consideration it paid to acquire the loan, as well as the fair market value of the property at the time of the foreclosure sale. The district court granted Nielsen's motion. This appeal followed.

BB&T asks this court to reverse the district court's summary judgment because it erred as a matter of law in determining that NRS 40.459(1)(c) can be applied to this case.

Standard of review

We review a district court's entry of summary judgment de novo. *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. ___, ___, 284 P.3d 377, 380 (2012); *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there are no genuine issues of material fact and "the moving party is entitled to a judgment as a matter of law." *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (quoting NRCP 56(c)).

NRS 40.459(1)(c) does not apply

BB&T argues that the district court erred in granting Nielsen's motion for summary judgment because NRS 40.459(1)(c) applies prospectively and, therefore, only applies when a loan is transferred on or after the effective date of the statute. Nielsen contends that the deficiency judgment limitations created by NRS 40.459(1)(c) apply prospectively to any case pending in the district court on or after the effective date of the statute.

In a case with similar circumstances, we determined that NRS 40.459(1)(c) applies prospectively. That is to say, the trustee's sale must have occurred on or after June 10, 2011, the effective date of the statute. *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. ___, ___, 2013). Here, because the trustee's sale occurred before the effective date of NRS 40.459(1)(c), the statute does not apply. Consequently, the district court erred in determining that the limitations of NRS 40.459(1)(c) apply to this case.

NRS 40.451 does not limit the amount of the deficiency judgment

BB&T also contends that the district court erred in granting summary judgment pursuant to NRS 40.451. We agree. As we concluded in *Sandpointe Apartments*, 129 Nev. at ___, ___ P.3d at ___, NRS 40.451 does not limit the total amount of the judgment that a successor holder can recover. We therefore,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Douglas, J.
Douglas

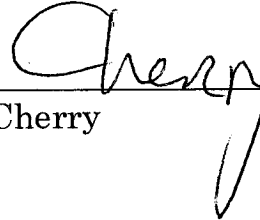
Saitta, J.
Saitta

¹After this case was submitted for decision, BB&T filed a motion to strike all references to Assemblyman Conklin's statement of intent made within John A. Ritter's amicus brief. We deny BB&T's motion as untimely pursuant to NRAP 27(a)(3)(A); in any event, we did not need to consider the statement of intent in reaching our ultimate disposition.

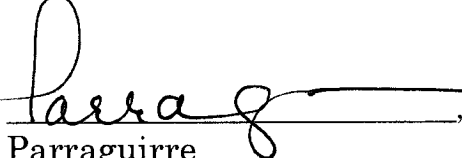
cc: Hon. Elissa F. Cadish, District Judge
Robert F. Saint-Aubin, Settlement Judge
Sylvester & Polednak, Ltd.
Foley & Oakes, PC
Pisanelli Bice, PLLC
Bogatz and Associates
Eighth District Court Clerk

CHERRY, J., with whom PARRAGUIRRE, J. joins dissenting:

I would affirm the district court's order granting respondents' summary judgment for the reasons set forth in my dissent in *Sandpointe Apartments, LLC v. Eighth Judicial District Court*, 129 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. ___, ___, 2013). I therefore dissent.


_____, J.
Cherry

I concur:


_____, J.
Parraguirre