IN THE SUPREME COURT OF THE STATE OF NEVADA

JORDAN D. MILLER, INDIVIDUALLY; AND AMY L. MILLER, INDIVIDUALLY,
Appellants,
vs.
ASSURITY LIFE INSURANCE COMPANY, A NEBRASKA CORPORATION,
Respondent.

No. 61409

FILED

FEB 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment after trial in a deficiency action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Respondent Assurity Life Insurance Company loaned Boulder-LV, LLC, $2,750,000 to purchase a commercial building (the property), as evidenced by a promissory note secured by a deed of trust. Boulder's owners, Jordan and Amy Miller, provided personal guaranties of the loan to Assurity. Boulder defaulted and Assurity filed a complaint against the Millers for breach of guaranty. While that breach of guaranty action was pending, Assurity foreclosed on the property. Assurity asserts that it purchased the property through a $2,444,239 credit bid at the trustee's sale.

A month later, the district court held a bench trial for Assurity's breach of guaranty action. During the trial, confusion arose over whether Assurity was required to file an application to seek a deficiency judgment and request a fair market value hearing. Assurity contended that a breach of guaranty action does not require compliance

with anti-deficiency provisions. The Millers argued that the trustee's sale triggered their anti-deficiency defenses, thus requiring Assurity to institute a deficiency hearing. At the bench trial, Assurity presented evidence regarding the credit bid that it had approved leading up to the trustee's sale. Assurity offered an uncertified copy of the trustee's deed to establish the amount for which the property actually sold. Additionally, Assurity offered the testimony of its real estate and mortgage lending senior vice president, Steven Hill, who testified as to how Assurity arrived at its credit bid leading up to the trustee's sale. Mr. Hill was not proffered as an expert to testify as to the property's fair market value.

The Millers objected to Mr. Hill's testimony as it related to establishing the fair market value of the property. The district court overruled the Millers' objection on the grounds that it believed that Mr. Hill did not testify as to the fair market value of the property, but rather only testified as to how Assurity arrived at its credit bid for its breach of guaranty claim. At the conclusion of Mr. Hill's testimony, the Millers moved to strike the testimony, again arguing that it improperly purported to establish the property's fair market value. The court denied the motion to strike, stating "I do not believe that this witness tried to testify as to fair market value . . . . [T]he court does not recognize any testimony in the record at this time as to fair market value of the property."

After Mr. Hill's testimony, both parties argued regarding whether NRS Chapter 40's anti-deficiency protections applied given that Assurity had already foreclosed on the property. The district court deferred its decision and ordered post-trial briefing on the issue. The district court then concluded that Assurity had satisfied all aspects of

Nevada's deficiency judgment laws and ordered a judgment to be entered against the Millers in the amount of $513,645. The Millers now appeal.

Standard of review

"'We review a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse.'" *Frei ex rel. Frei v. Goodsell*, 129 Nev. ___, ___, 305 P.3d 70, 73 (2013) (quoting *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008)). Similarly, we review a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). When reviewing questions of law, including issues of statutory interpretation, we apply de novo review. *State, Dep't of Motor Vehicles v. Taylor-Caldwell*, 126 Nev. ___, ___, 229 P.3d 471, 472 (2010). When a statute's plain meaning is clear on its face, this court does not go any further to determine its meaning. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

Burden of Proof

Courts across the United States are split regarding which party has the burden of proof in the context of establishing a deficiency judgment. *See Lost Mountain Dev. Co. v. King*, No. M2004-02663-COA-R3CV, 2006 WL 3740791, at *9 (Tenn. Ct. App. Dec. 19, 2006) ("[W]e think the use of the sales price as the presumptive fair value, with the debtor having the burden of raising its inadequacy and overcoming the presumption by proof is . . . sound."); *cf. Am. Nat'l Bank v. Perma-Tile Roof Co.*, 246 Cal. Rptr. 381, 384-85 (Ct. App. 1988) ("The secured party who conducts a sale of collateral must allege and prove compliance with [notice

requirements] to recover a deficiency judgment . . . . To obtain a deficiency judgment against the guarantors/debtors, the bank clearly bears the burden to plead and/or to prove compliance [with the applicable statutes]."); *Textron Fin. Corp. v. Trailiner Corp.*, 965 S.W.2d 426, 429 (Mo. Ct. App. 1998); *Nat'l Bank of N. Am. v. Sys. Home Improvement, Inc.*, 419 N.Y.S.2d 606, 609 (App. Div. 1979) ("[T]he initial burden is upon the plaintiff to establish, prima facie, the fair market value of the property as of the date of the auction sale.").

As the Supreme Court of Texas noted in the context of a UCC collateral sale:

> The division of authority throughout the country on the issue now before us demonstrates this. There is simply no clear answer to whether a creditor should be required to plead and prove that collateral has been disposed of in a commercially reasonable manner as an element of a claim for the amount due on the debt, or whether a debtor should be required to allege and show that collateral has not been so disposed of as a defense to the creditor's demand for payment.

Greathouse v. Charter Nat'l Bank-Sw., 851 S.W.2d 173, 176 (Tex. 1992). Ultimately, the Texas court concluded that once the debtor raises the issue as a defense, then the burden of proof rests with the creditor. *Id.* at 177. The Texas court reasoned that "[e]vidence on the issue will ordinarily be more readily available to the creditor, who takes the collateral and arranges for its disposition, than to the debtor, who ordinarily plays no role in the disposition and is absent when it occurs." *Id.* at 176. "Furthermore, the creditor controls the disposition of the collateral, and the debtor often has little or no say in how it is done. Accordingly, the creditor bears greater responsibility to demonstrate that the disposition met the requirements of law." *Id.*; *see also Textron Fin. Corp.*, 965 S.W.2d

at 429 ("[P]ractical considerations favor this view since the secured party directs the transactions that dispose of the collateral . . . . [T]he facts proving compliance with notice requirements are peculiarly available to such creditor.").

We are persuaded that Assurity had the burden of proof to prove every element of a deficiency, including the actual sale price at the trustee's sale and the fair market value of the property at the time of the trustee's sale. *See* NRS 40.457, NRS 40.459(1); *see also First Interstate Bank of Nevada v. Shields*, 102 Nev. 616, 619, 730 P.2d 429, 431 (1986) ("[I]t is apparent to us that the Legislature fully anticipated that its work product would require lenders seeking deficiency judgments against any potentially liable defendants . . . to prove the actual existence of a deficiency . . . .").

A trustee's sale triggers a guarantor's anti-deficiency defenses even after an action for breach of guaranty has commenced, thus the lender must prove the actual existence of a deficiency

During a lender's maintenance of an action to enforce a guaranty, the guarantor may assert "any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.4639, inclusive," otherwise known as the anti-deficiency defenses.[1] NRS 40.495(3).[2] Within

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[1]We note that a lender may sue on the guaranty before seeking redress against the borrower or foreclosing on the real property security. *See* NRS 40.495(1) (permitting guarantors to contractually waive the one-action rule's protections); *see also First Nat. Bank of Nevada v. Barengo*, 91 Nev. 396, 398, 536 P.2d 487, 488 (1975) (holding that guarantors may waive the one-action rule and a creditor may sue a guarantor without first proceeding against the borrower or security), *superseded in part by* NRS 40.495. We note that anti-deficiency defenses may be waived only after default, and therefore the Millers' contractual waiver of the anti-deficiency

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the anti-deficiency defenses is NRS 40.459, which at the time of Assurity's trustee's sale provided that once a foreclosure sale occurs, the district court shall not enter judgment against a debtor or guarantor for more than "[t]he amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale; or . . . [t]he amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured . . . , whichever is the lesser amount."[3] Thus, in order to obtain a deficiency judgment, Assurity was required to prove (1) the difference between the indebtedness and the fair market value, and (2) the difference between the indebtedness and the actual sale price. NRS 40.459(a), (b) (2010).

The district court abused its discretion in admitting an uncertified copy of the trustee's deed to prove the actual sale price at the trustee's sale

Here, Assurity presented an uncertified copy of the trustee's deed from the trustee's sale that it obtained from the title company in

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defenses was against public policy and this court shall not enforce such a provision. NRS 40.453.

[2]NRS 40.495 was amended effective June 10, 2011, approximately six weeks after the trustee's sale occurred. 2011 Nev. Stat., ch. 311, § 5.5, at 1743-45. The 2011 amendments created NRS 40.495(4), which expressly requires a creditor to commence a fair value hearing in order to enforce an obligation to pay against a guarantor. *Id.* Because NRS 40.495(3) provides all guarantors the right to assert the anti-deficiency defenses, including NRS 40.459, we need not address the 2011 amendments to NRS 40.495(4).

[3]The Legislature amended NRS 40.459 in 2011, however, these amendments do not affect the outcome of this case. 2011 Nev. Stat., ch. 311, § 5, at 1743.

order to prove the actual sale price. The district court admitted the uncertified trustee's deed into evidence on the basis that it may take judicial notice of a publicly recorded document.

While uncertified documents may be considered if not challenged, *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 298 n.7, 662 P.2d 610, 619 n.7 (1983), the Millers objected to the trustee's deed on the grounds that it was not properly authenticated and that it was hearsay. Specifically, the Millers argued that the trustee's deed was inadmissible because (1) it was an uncertified copy, and (2) Assurity failed to provide independent testimony from an individual who could testify that it was a true and correct copy of the trustee's deed that was recorded. *See* NRS 52.015(1), NRS 52.250. We agree.

NRS 52.125(1) provides that a copy of an official document "authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, is presumed to be authentic *if it is certified as correct by the custodian or other person authorized to make the certification.*" (Emphasis added.) Because Assurity did not provide a certified copy, it was required to authenticate the copy of the trustee's deed in order to support a finding that the copy was what Assurity claimed it to be. *See* NRS 52.015(1), NRS 52.025. Absent independent testimony from an individual who could competently testify that the trustee's deed was a true and correct copy of the trustee's deed that was recorded from the trustee's sale, we must conclude that the district court abused its discretion when it admitted the trustee's deed into evidence. As such, we conclude that the district court's finding of fact that Assurity obtained the subject property for $2,444,239.40 was not supported by substantial evidence.

The district court's finding that Mr. Hill's testimony established the fair market value of the subject property on the date of the trustee's sale was not supported by substantial evidence

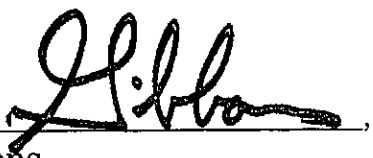
This court has defined fair market value as "the price which a purchaser, willing but not obliged to buy, would pay an owner willing but not obliged to sell, taking into consideration all the uses to which the property is adapted and might in reason be applied." *Unruh v. Streight*, 96 Nev. 684, 686, 615 P.2d 247, 249 (1980). Nevada observes the general rule that an owner, presumed to have special knowledge of his or her property, may testify to its value. *See City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984). But in order to prove fair market value, a creditor generally must provide expert testimony as to the value of the real estate on the date of the trustee's sale. *See Abrams v. Motter*, 83 Cal. Rptr. 855, 865 (Ct. App. 1970); *Torres v. Schripps, Inc.*, 776 A.2d 915, 921 (N.J. Super. Ct. App. Div. 2001).

Here, Assurity did not identify an expert to testify as to the fair market value of the property as of the date of the trustee's sale. Additionally, the district court did not allow the Millers or Assurity to testify as to the fair market value of the property. After Mr. Hill's testimony, the district court stated that it "[did] not recognize any testimony in the record at this time as to fair market value of the property." Additionally, upon closing the bench trial, the district court stated "I am not going to allow [Mr. Miller] to testify because at this stage of the litigation I don't believe the fair market value is relevant. I am going to make a determination that this case is a breach of guarantee [sic] action." Thus, we conclude that the district court's finding of fact that Mr. Hill's testimony established that Assurity's credit bid was based on the

fair market value of the subject property on the date of the trustee's sale was not supported by substantial evidence.

Because Assurity failed to establish both the actual sale price at the trustee's sale and the fair market value of the property on the date of the trustee's sale, we conclude that Assurity did not meet its burden to prove the actual existence of a deficiency. As such, we conclude that the district court's award of a deficiency judgment was error.[4] Accordingly, we

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



_____, C. J.
Gibbons

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. Kathleen E. Delaney, District Judge
Dean J. Gould, Settlement Judge
Marquis Aurbach Coffing
Sylvester & Polednak, Ltd.
Eighth District Court Clerk

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[4]In light of this disposition, we need not address the parties' remaining arguments.