

Amendment No. 343

Assembly Amendment to Assembly Bill No. 471

(BDR 3-1138)

Proposed by: Assembly Committee on Judiciary**Amends:** Summary: Yes Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION				Initial and Date	SENATE ACTION				Initial and Date
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) *green bold dashed underlining* is newly added transitory language.

NMB/RRY



Date: 4/20/2009

A.B. No. 471—Revises provisions relating to the award of deficiency judgments after a sale of real property. (BDR 3-1138)



ASSEMBLY BILL NO. 471—COMMITTEE ON COMMERCE AND LABOR

MARCH 18, 2009

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to the ~~award of deficiency judgments after a~~ sale of real property. (BDR 3-1138)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to real property; ***providing that a deficiency in payment on a mortgage, deed of trust or other encumbrance may be cured under certain circumstances before foreclosure;*** providing that a court shall not award a deficiency judgment on the foreclosure of a mortgage or a deed of trust under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

~~Existing law provides that a trustee may exercise a power of sale on the deed of trust for a breach of obligation on the deed of trust, including a deficiency in performance or payment. Existing law also provides that the trustee may pursue a power of sale and declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust. Existing law further provides that a deficiency may be cured by performance or payment, including incidental costs, within 15 days or 35 days after notice of the default, depending on the date the trust agreement came into effect, and acceleration must not occur if the deficiency is so cured. (NRS 107.080).~~

~~Section 3 of this bill provides that if the deficiency is for payment, the deficiency may be cured by payment of the sum in default, excluding acceleration but including any incidental costs, at any time before the sale. Section 3 also provides that if a notice of default has been recorded and the deficiency has been cured two or more times under the same deed of trust, the trustee may refuse a payment to cure the deficiency and exercise the power of sale. Section 1 of this bill provides a similar right to cure a deficiency in payment on a mortgage or other encumbrance before a judicial foreclosure sale. (NRS 40.430)~~

Under existing law, a judgment creditor or a beneficiary of a deed of trust may obtain, after a hearing, a deficiency judgment after a foreclosure sale or trustee's sale if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due the judgment creditor or beneficiary of the deed of trust. (NRS 40.455)

~~***This Section 2 of this bill*** provides that a court may not award a deficiency judgment to a judgment creditor or a beneficiary of a deed of trust if: (1) the real property is a single-family dwelling and the debtor or grantor was the owner of the property; (2) the debtor or grantor used the loan to purchase the property; (3) the debtor or grantor ~~did not occupy the property before obtaining the loan but~~ occupied the property continuously after obtaining the loan; and (4) the debtor or grantor did not refinance the loan.~~

Section 5 of this bill provides that the amendatory provisions of this bill apply only prospectively to obligations secured by a mortgage, deed of trust or other encumbrance upon real property on or after the effective date of this bill.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 40.430 is hereby amended to read as follows:

40.430 1. Except 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.

2. This section must be construed to permit a secured creditor to realize upon the collateral for a debt or other obligation agreed upon by the debtor and creditor when the debt or other obligation was incurred.

3. Except as otherwise provided in this subsection, at any time before the sale directed by the court, if the deficiency resulting in the action for the recovery of the debt has arisen by failure to make a payment required by the mortgage or other lien, the deficiency may be made good by payment of the deficient sum, other than the entire unpaid balance that would not be due if no deficiency had occurred, and by payment of any costs, fees and expenses incident to making the deficiency good. If a deficiency is made good pursuant to this subsection, the sale may not occur. If, under the same mortgage or other lien on real estate, an action to recover the debt has been filed and the deficiency has been made good pursuant to this subsection two or more times, for a subsequent deficiency the secured creditor may elect to refuse a payment to make good the deficiency and proceed with an action to recover the debt pursuant to this section.

4. A sale directed by the court pursuant to subsection 1 must be conducted in the same manner as the sale of real property upon execution, by the sheriff of the county in which the encumbered land is situated, and if the encumbered land is situated in two or more counties, the court shall direct the sheriff of one of the counties to conduct the sale with like proceedings and effect as if the whole of the encumbered land were situated in that county.

~~44~~ 5. As used in this section, an "action" does not include any act or proceeding:

(a) To appoint a receiver for, or obtain possession of, any real or personal collateral for the debt or as provided in NRS 32.015.

(b) To enforce a security interest in, or the assignment of, any rents, issues, profits or other income of any real or personal property.

(c) To enforce a mortgage or other lien upon any real or personal collateral located outside of the State which does not, except as required under the laws of that jurisdiction, result in a personal judgment against the debtor.

(d) For the recovery of damages arising from the commission of a tort, including a recovery under NRS 40.750, or the recovery of any declaratory or equitable relief.

(e) For the exercise of a power of sale pursuant to NRS 107.080.

(f) For the exercise of any right or remedy authorized by chapter 104 of NRS or by the Uniform Commercial Code as enacted in any other state.

(g) For the exercise of any right to set off, or to enforce a pledge in, a deposit account pursuant to a written agreement or pledge.

(h) To draw under a letter of credit.

(i) To enforce an agreement with a surety or guarantor if enforcement of the mortgage or other lien has been automatically stayed pursuant to 11 U.S.C. § 362 or pursuant to an order of a federal bankruptcy court under any other provision of the United States Bankruptcy Code for not less than 120 days following the mailing of notice to the surety or guarantor pursuant to subsection 1 of NRS 107.095.

(j) To collect any debt, or enforce any right, secured by a mortgage or other lien on real property if the property has been sold to a person other than the creditor to satisfy, in whole or in part, a debt or other right secured by a senior mortgage or other senior lien on the property.

(k) Relating to any proceeding in bankruptcy, including the filing of a proof of claim, seeking relief from an automatic stay and any other action to determine the amount or validity of a debt.

(l) For filing a claim pursuant to chapter 147 of NRS or to enforce such a claim which has been disallowed.

(m) Which does not include the collection of the debt or realization of the collateral securing the debt.

(n) Pursuant to NRS 40.507 or 40.508.

(o) Which is exempted from the provisions of this section by specific statute.

(p) To recover costs of suit, costs and expenses of sale, attorneys' fees and other incidental relief in connection with any action authorized by this subsection.

~~Section 1.~~ **Sec. 2.** NRS 40.455 is hereby amended to read as follows:

40.455 1. ~~Upon~~ *Except as otherwise provided in subsection 3, upon* application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

2. If the indebtedness is secured by more than one parcel of real property, more than one interest in the real property or more than one mortgage or deed of trust, the 6-month period begins to run after the date of the foreclosure sale or trustee's sale of the last parcel or other interest in the real property securing the indebtedness, but in no event may the application be filed more than 2 years after the initial foreclosure sale or trustee's sale.

3. *The court may not award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust, even if there is a deficiency of the proceeds of the sale and a balance remaining due the judgment creditor or beneficiary of the deed of trust, if:*

(a) *The real property is a single-family dwelling and the debtor or grantor was the owner of the real property at the time of the foreclosure sale or trustee's sale;*

(b) *The debtor or grantor used the amount for which the real property was secured by the mortgage or deed of trust to purchase the real property;*

(c) ~~The debtor or grantor did not occupy the real property before securing the mortgage or deed of trust;~~

~~(d)~~ *The debtor or grantor continuously occupied the real property as his principal residence after securing the mortgage or deed of trust; and*

~~(e)~~ (d) *The debtor or grantor did not refinance the mortgage or deed of trust after securing it.*

Sec. 3. NRS 107.080 is hereby amended to read as follows:

107.080 1. Except as otherwise provided in NRS 107.085, if any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security.

2. The power of sale must not be exercised, however, until:

(a) In the case of any trust agreement coming into force:

(1) On or after July 1, 1949, and before July 1, 1957, the grantor, or his successor in interest, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property, has for a period of 15 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance ~~for~~ other than payment; or

(2) On or after July 1, 1957, the grantor, or his successor in interest, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property, has for a period of 35 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance ~~for~~ other than payment;

(b) The beneficiary, the successor in interest of the beneficiary or the trustee first executes and causes to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of the breach and of his election to sell or cause to be sold the property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of the notice.

3. The 15- or 35-day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by registered or certified mail, return receipt requested and with postage prepaid to the grantor, and to the person who holds the title of record on the date the notice of default and election to sell is recorded, at their respective addresses, if known, otherwise to the address of the trust property.

4. The notice of default and election to sell must describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if ~~the~~ :

(a) The deficiency in performance ~~for~~ other than payment is made good and any costs, fees and expenses incident to the preparation or recordation of the notice and incident to the making good of the deficiency in performance ~~for~~ other than payment are paid within the time specified in paragraph (a) of subsection 2, ~~or~~ :

(b) The deficiency in payment is made good and any costs, fees and expenses incident to the preparation or recordation of the notice and incident to the making good of the deficiency in payment are paid at any time before the sale as specified in the notice provided pursuant to subsection 6, unless the trustee elects to refuse payment pursuant to subsection 5.

5. Except as otherwise provided in this subsection, at any time before the sale, if the deficiency has arisen by failure to make payments required by the deed of trust, the deficiency may be made good by payment of the deficient sum, other than the entire unpaid balance that would not be due if no deficiency had occurred, and by payment of any costs, fees and expenses incident to the preparation or recordation of the notice of default and election to sell and

incident to the making good of the deficiency. If a deficiency is made good pursuant to this subsection, the sale may not occur. If, under the same deed of trust, a notice of default and election to sell has been recorded and the deficiency has been made good pursuant to this subsection two or more times, for a subsequent deficiency the trustee may elect to refuse a payment to make good the deficiency and exercise the power of sale.

~~¶¶~~ 6. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of the notice of breach and election to sell, and before the making of the sale, give notice of the time and place thereof by recording the notice of sale and by:

(a) Providing the notice to each trustor and any other person entitled to notice pursuant to this section by personal service or by mailing the notice by registered or certified mail to the last known address of the trustor and any other person entitled to such notice pursuant to this section;

(b) Posting a similar notice particularly describing the property, for 20 days successively, in three public places of the township or city where the property is situated and where the property is to be sold; and

(c) Publishing a copy of the notice three times, once each week for 3 consecutive weeks, in a newspaper of general circulation in the county where the property is situated.

~~¶¶~~ 7. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor and his successors in interest without equity or right of redemption. A sale made pursuant to this section may be declared void by any court of competent jurisdiction in the county where the sale took place if:

(a) The trustee or other person authorized to make the sale does not substantially comply with the provisions of this section;

(b) Except as otherwise provided in subsection ~~¶¶~~ 8, an action is commenced in the county where the sale took place within 90 days after the date of the sale; and

(c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 30 days after commencement of the action.

~~¶¶~~ 8. If proper notice is not provided pursuant to subsection 3, 4 or paragraph (a) of subsection ~~¶¶~~ 6 to the grantor, to the person who holds the title of record on the date the notice of default and election to sell is recorded, to each trustor or to any other person entitled to such notice, the person who did not receive such proper notice may commence an action pursuant to subsection ~~¶¶~~ 7 within 120 days after the date on which the person received actual notice of the sale.

~~¶¶~~ 9. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.

Sec. 4. NRS 107.084 is hereby amended to read as follows:

107.084 A person who willfully removes or defaces a notice posted pursuant to subsection ~~¶¶~~ 6 of NRS 107.080, if done before the sale or, if the default is satisfied before the sale, before the satisfaction of the default, is liable in the amount of \$500 to any person aggrieved by the removal or defacing of the notice.

Sec. 5. The amendatory provisions of this act apply only to an obligation secured by a mortgage, deed of trust or other encumbrance upon real property on or after October 1, 2009.