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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANCH BANKING AND TRUST COMPANY,)	3:12-cv-00644-HDM-VPC
)	
Plaintiff,)	ORDER
vs.)	
)	
THOMAS M. BROWN, KATHLEEN R.)	
BROWN, et al,)	
)	
Defendants.)	
_____)	

The plaintiff, Branch Banking and Trust Company, has filed a complaint against the defendants, Thomas M. and Kathleen R. Brown, for breach of their commercial guarantees of three loans extended to T.M.B. Builders, LLC. (See Compl. 8-10). The court has granted partial summary judgment to the plaintiffs on the issue of liability (#46). Presently before the court is the plaintiff's motion for leave to challenge the applicability of NRS 40.495(4) (#43). The defendants have opposed (#44) and the plaintiff has replied (#45).

The defendants first specifically raised the issue of NRS 40.495(4) and its bearing on the case at hand in its opposition (#34) to the plaintiff's motion for partial summary judgment (#28).

1 The plaintiff filed a second motion for partial summary judgment
2 concerning NRS 40.495(4) (#41) on November 12, 2013, but that
3 motion, which was filed well outside the dispositive motions
4 deadline, was stricken from the record by the court (#42).
5 Subsequently, the plaintiffs filed a motion (#43) requesting leave
6 to address the applicability of the statute. The plaintiff asks
7 that its motion for summary judgment concerning NRS 40.495 (#41)
8 now be briefed and considered on the merits. (P. Mot. 9.)

9 The 2011 Nevada Statute NRS 40.495(4) provides that
10 "[i]f, before a foreclosure sale of real property, the obligee
11 commences an action against a guarantor . . . [t]he court must
12 hold a hearing and take evidence presented by either party
13 concerning the fair market value of the property as of the
14 date of the commencement of the action . . . After the
15 hearing, if the court awards a money judgment against the
16 guarantor . . . the court must not render judgment for more
17 than (1) The amount by which the indebtedness exceeds the fair
18 market value of the property as of the date of the
19 commencement of the action; or (2) If a foreclosure sale is
20 concluded before a judgment is entered, the amount that is the
21 difference between the amount for which the property was
22 actually sold and the amount of the indebtedness which was
23 secured, whichever is the lesser amount."

24 Nev. Rev. Stat. Ann. § 40.495. Therefore, if the statute does
25 apply to the case at hand, a hearing to determine the fair market
26 value of the property in question must be held prior to any
27 determination of damages by this court. As the plaintiff points
28 out in its motion, "[w]hether or not NRS 40.495(4) applies to this
case must [therefore] be decided at some point." (P. Mot. 7.)

While the defendants did list as an affirmative defense in
their Answer (#6) "The protections afforded the Browns under Nevada
law including, but not limited to, those found in NRS 40.430 et al
and NRS 40.459 as amended by AB 273" (Answer ¶ 3), they never
raised NRS 40.495(4) *specifically* until their opposition (#34) to

1 the plaintiff's motion for partial summary judgment (#28), despite
2 having ample opportunity to do so. (See P. Mot. 6-7). Yet, the
3 statute, if it applies, could affect amount of damages that the
4 plaintiff is able to recover from the defendants.

5 Whether or not the statute applies also affects the timeline
6 of this lawsuit, as well as what information both parties need to
7 acquire and prepare in order to litigate the issue of damages. As
8 the plaintiff notes, discovery in this matter concluded on August
9 1, 2013, and neither party produced, disclosed, or requested
10 information relating to the property's fair market value. (P. Mot.
11 9-10.) The plaintiff argues that discovery would need to be
12 reopened "for the limited purpose of developing the fair-market-
13 value issue" if the court finds that NRS 40.495(4) applies. (P.
14 Mot. 10.)

15 The defendants argue that allowing the plaintiff to address
16 whether or not NRS 40.495(4) applies at this juncture "will unduly
17 prejudice an innocent party." (Def. Opp'n 5.) However, the court
18 concludes that, in the interest of fairness and judicial economy,
19 whether NRS 40.495(4) applies to the case at hand should be briefed
20 and addressed now.

21 Accordingly, the plaintiff's motion for leave to challenge the
22 applicability of NRS 40.495(4) (#43) is **GRANTED**. The plaintiff's
23 motion for summary judgment concerning NRS 40.495(4) (#41), which
24 was formerly stricken from the record by the court, shall be
25 reinstated and shall be considered to have been filed on the date
26 of this order for the purposes of the briefing schedule. Pursuant
27 to F.R.C.P. 6(d), 56(b), and LR 7-2(e), Defendants shall therefore
28 have 24 days from the date of this order to file any response to

1 the plaintiff's motion for summary judgment (#41), and the
2 plaintiff shall have 17 days from the date of the defendants'
3 response, if any, to file any reply.

4 **IT IS SO ORDERED.**

5 DATED: This 13th day of January, 2014.

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Howard D McKibbin

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UNITED STATES DISTRICT JUDGE

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