

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4                                   ONECAP PARTNERS MM, INC., a Nevada  
5                                   corporation; VINCENT W. HESSER; an  
6                                   individual,

7                                   Appellants.

8                                   vs.

9                                   KENNEDY FUNDING, INC., a New Jersey  
10                                  Corporation,

11                                  Respondents,

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Electronically Filed  
Aug 03 2010 11:35 a.m.  
SUPREME COURT CASE NO.: 55654  
Tracie K. Lindeman

Appeal from the Eighth Judicial District  
Court, State of Nevada, in and for the County  
of Clark

District Court Case No.: A582746

17                                   **APPELLANT'S OPENING BRIEF**

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1 **I. STATEMENT OF THE ISSUES**

- 2 A. The District Court Erred in Granting Summary Judgment while Material Facts  
3 Remained in Dispute.  
4 B. The District Court Erred in Granting Summary Judgment in Violation of  
5 Nevada's One Action Rule.  
6 C. The District Court Erred in Granting Summary Judgment when no Deficiency  
7 on the Underlying Deed of Trust was ever established.  
8 D. Whether the property, the Subject of the Deed of Trust, is no longer Subject to  
9 the Deed of Trust and Belongs to the Respondents because the District Court  
10 Erred in Granting Summary Judgment under the Promissory Note.

11 **II. STATEMENT OF THE CASE**

12 **A. Nature of the Case**

13 The issues on appeal essentially deal with deficiency judgments, guarantees in the case of  
14 deficiency judgments and foreclosures.

15 **B. Course of the Proceedings and Disposition in the District Court**

16 The Respondent filed the Complaint in this matter on February 13, 2009 alleging Breach  
17 of Contract on a Note and Guarantee. Respondent filed a Motion for Summary Judgment on  
18 September 22, 2009 which the District Court Granted on February 23, 2010.

19 **III. STATEMENT OF FACTS**

20 On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and  
21 Kennedy Funding, Inc. ("Kennedy Funding") entered into a Loan and Security Agreement  
22 ("Loan Agreement"), (See Appendix "1", page 1, attached hereto) pursuant to which Kennedy  
23 Funding (sometimes "Lender") made the Loan to OneCap to facilitate the purchase of the  
24 Property. The Loan is evidenced by a Promissory Note dated June 15, 2006 in the original  
25 principal sum of Twelve Million and 00/100 Dollars (\$12,000,000.00) ("Note"), from Lender to  
26 Borrower.

27 Pursuant to the Note, OneCap agreed to pay all principal, interest and other sums due  
28 under the Note in full on the Maturity Date of June 30, 2009, with a late charge equal to ten  
percent (10%) of the overdue payment, and a default rate of twenty five percent (25%) per  
annum. As further security for the Loan, Borrower executed and delivered to Lender that certain  
unimproved real property consisting of 78.74+ acres of raw land located in and along Casino

1 Drive and the Colorado River in Laughlin, Nevada 89029, Clark County Assessor Parcel  
2 Number 264-25-101-001 and 264-25-201-001 (the "Property"), dated June 15, 2006, and  
3 recorded on June 15, 2006, with the Clark County Recorder's Office ("Recorder") as Instrument  
4 No. 20060615-0005324. (See Appendix "2", page 48, attached hereto)

5 As security for the Loan, Borrower executed and delivered to Lender that certain  
6 Assignment of Leases and Rents on the Property dated June 14, 2006, and recorded on June 15,  
7 2006, with the Recorder as Instrument No. 20060615-0005325. As additional security for the  
8 Loan, OneCap executed in favor of Kennedy Funding that certain Assignment of Licenses,  
9 Contracts, Plans, Specifications, Surveys, Drawings and Reports ("Assignment of Licenses")  
10 dated June 15, 2006. To further secure payment of the Note, on June 14, 2006, Vincent Hesser  
11 and OneCap Partners MM, Inc. (the "Guarantors") executed a personal unconditional guaranty of  
12 the Note to Kennedy Funding (the "Guarantees").(See Appendix "3", page 111, attached hereto).

13 On April 1, 2008, OneCap defaulted under the Loan and Deed of Trust, including, but not  
14 limited to, OneCap's failure to make monthly installment payments under the Note in the amount  
15 of Two Hundred Fifty Thousand Dollars (\$250,000.00) due April 1, 2008. OneCap subsequently  
16 transferred its interest in the Property to Nevada Ueno Mita, LLC. On December 26, 2008  
17 Nevada Ueno Mita, LLC filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy  
18 Court for the District of Nevada, Case No. BK-S-08-25487-BAM.

19 On August 7, 2009, Nevada Ueno Mita, LLC and Kennedy Funding entered into a  
20 Settlement Agreement (see Appendix "4", page 122, attached hereto) which states in Section  
21 1.01 (f) that "Kennedy Funding agrees to give Debtor up through and until six (6) months after  
22 entry of the Order approving this Settlement Agreement (the "Deadline") to pay off Kennedy  
23 Funding in full before Kennedy Funding forecloses on the property. Section 1.01 (g) states  
24 "The Parties agree that this Settlement Agreement shall not preclude, limit or abridge Kennedy  
25 Funding's rights to pursue any deficiency actions against the Guarantors of Debtor's obligations  
26 owing to Kennedy Funding.

#### IV. ARGUMENTS

The Court should not have granted any type of deficiency judgment amount against the Guarantor pursuant to the *Settlement Agreement* (the “Agreement”) entered into by and between Kennedy Funding and Nevada Ueno Mita, LLC (the “Debtor”) on August 7, 2009 in The United States Bankruptcy Court, District of Nevada, Case No. BK-S-08-25487-BAM. The Agreement states in paragraph 1.01 subsection (g) “*The Parties agree that the Settlement Agreement shall not preclude, limit or abridge Kennedy Funding’s rights to pursue any deficiency actions against the Guarantors of Debtor’s obligations owing to Kennedy Funding.*”

Therefore, Kennedy Funding may obtain a judgment based upon the settlement agreement in Bankruptcy Court, but ONLY for any deficiency as the parties agreed and stipulated to. Any other collection action would be stayed by Bankruptcy Court Agreement.

To first determine deficiency under Nevada Law, the court must review the appraised value based on NRS 40.457, which states:

**NRS 40.457 Hearing before award of deficiency judgment; appraisal of property sold.**

1. Before awarding a deficiency judgment under [NRS 40.455](#), the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee’s sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing.
2. Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee’s sale. Such appraiser shall file with the clerk his appraisal, which is admissible in evidence. The

1 appraiser shall take an oath that he has truly, honestly and  
2 impartially appraised the property to the best of his knowledge and  
3 ability. Any appraiser so appointed may be called and examined as  
4 a witness by any party or by the court. The court shall fix a  
5 reasonable compensation for the appraiser, but his fee shall not  
6 exceed similar fees for similar services in the county where the  
7 encumbered land is situated.

8 The Guarantor has submitted to the Court an appraisal of the collateral property at the  
9 hearing on November 5, 2009 as well as supportive testimony from the appraiser in compliance  
10 with NRS 40.457, which concluded that the fair market value of the property is Twenty Seven  
11 Million Six Hundred Thousand Dollars (\$27,600,000.00). (See Appendix “5”, page 209, attached  
12 hereto). Nevada law also only allows a deficiency judgment if the amount the debt exceeds the  
13 fair market value in accordance with NRS 40.459 as follows:

14 **NRS 40.459 Limitations on amount of money judgment.** After the hearing,  
15 the court shall award a money judgment against the debtor, guarantor or surety  
16 who is personally liable for the debt. The court shall not render judgment for more  
17 than:

- 18 1. The amount by which the amount of the indebtedness which was  
19 secured exceeds the fair market value of the property...

20 Since Kennedy Funding admitted that the secured debt due and owing was less than  
21 Seventeen Million (\$17,000,000.00), which is less than the fair market value of the property,  
22 which is Twenty Seven Million Six Hundred Thousand Dollars (\$27,600,000.00), under Nevada  
23 law there cannot be award for a monetary judgment against the guarantor. Therefore, under NRS  
24 40.459, the judgment amount must be zero dollars (\$0.00) under the Nevada Statutes.

25 The One Action Rule as set forth in NRS 40.430 says “there may be but one action for  
26 recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien  
27 upon real estate. That action must be in accordance with the provisions of NRS 40.430 to  
28 40.459, inclusive.” The lender must complete the foreclosure process, or “exhaust the security

1 before recovering from the debtor personally,” before chasing the borrower (or guarantor) for  
2 payment of the debt. *Bonicamp v. Vazquez*, 120 Nev. 377, 91 P.3d 584, 586 (2004).

3 NRS 40.435(2) states:

4 ... 2. If the provisions of NRS 40.430 are timely interposed as an affirmative  
5 defense in such a judicial proceeding, upon the motion of any party to the  
6 proceeding the court shall:

- 7 (a) Dismiss the proceeding without prejudice; or  
8 (b) Grant a continuance and order the amendment of the pleadings to  
9 convert the proceeding into an action which does not violate NRS  
10 40.430.

11 3. The failure to interpose, before the entry of a final judgment, the provisions  
12 of NRS 40.430 as an affirmative defense in such a proceeding waives the  
13 defense in that proceeding. Such a failure does not affect the validity of  
14 the final judgment, but entry of the final judgment releases and discharges  
15 the mortgage or other lien.

16 Since the action in this case was commenced prior to a foreclosure, either the case should  
17 have been stayed pending any such foreclosure or the judgment entered herein released the  
18 Respondent’s lien on the property.

## 19 V. CONCLUSION

20 The District Court exceeded its authority and its jurisdiction by entering its Summary  
21 Judgment Order against Petitioners.

22 Therefore, it is respectfully requested that this Honorable Court reverse the District  
23 Court’s Order of Summary Judgment, filed on February 18, 2010 and instruct the District Court  
24 to stay further proceedings pending the final results of any foreclosure or keep the Judgment  
25 intact and release the lien on the property.

26 DATED this 3<sup>rd</sup> day of August 2010.

27 HAROLD P. GEWERTER, ESQ., LTD.

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DATED this 3<sup>rd</sup> day of August, 2010.

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**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on the 3<sup>rd</sup> day of August 2010, I personally served a true copy of the foregoing APPELLANT’S OPENING BRIEF, by placing a true copy thereof in the United States Mail, postage fully prepaid, addressed as follows:

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