

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

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

8 Appellants.

9 vs.

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

12 Respondents,

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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

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16 **APPELLANT'S REPLY BRIEF**

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I.

ARGUMENT

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

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

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

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

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

21 Since Kennedy Funding admitted that the secured debt due and owing was less than
22 Seventeen Million (\$17,000,000.00), which is less than the fair market value of the property,
23 which is Twenty Seven Million Six Hundred Thousand Dollars (\$27,600,000.00), under Nevada
24 law there cannot be award for a monetary judgment against the guarantor. Therefore, under NRS
25 40.459, the judgment amount must be zero dollars (\$0.00) under the Nevada Statutes.

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

1 40.459, inclusive.” The lender must complete the foreclosure process, or “exhaust the security
2 before recovering from the debtor personally,” before chasing the borrower (or guarantor) for
3 payment of the debt. *Bonicamp v. Vazquez*, 120 Nev. 377, 91 P.3d 584, 586 (2004).

4 NRS 40.435(2) states:

5 ... 2. If the provisions of NRS 40.430 are timely interposed as an affirmative
6 defense in such a judicial proceeding, upon the motion of any party to the
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
convert the proceeding into an action which does not violate NRS
9 40.430.

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

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

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1 II.

2 CONCLUSION

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

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

9 DATED this 1st day of October, 2010.

10 HAROLD P. GEWERTER, ESQ., LTD.

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DATED this 1st day of October, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 1st day of October, 2010, I personally served a true copy of the foregoing APPELLANT’S REPLY BRIEF, by placing a true copy thereof in the United States Mail, postage fully prepaid, addressed as follows:

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