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FILED

DEC 20 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Melissa J. Allen*
DEPUTY CLERK

Appellant

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Case No. 85821-COA

Clark County District Court
Case No. A-21-850526-C
(consolidated with A-20-826568-C)

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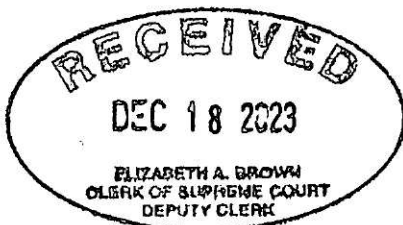
WESLEY RUSCH, an individual, and
OLIVER LONGBOY, an individual,
Plaintiffs,

APPLICATION AND

MOTION FOR SUMMARY JUDGMENT

vs.

THE MARTIN CONDOMINIUM UNIT
OWNERS' ASSOCIATION, a domestic
non-profit corporation; DOE Individuals I
through X; and ROE Corporations and
Organizations I through X,
Defendants.



23-41305

Appellant, Wesley Rusch (hereafter "Rusch") has filed a civil action against The Martin Condominium Unit Owners Association (hereafter The Martin") for breach of written contract for damages as the result of their wrongful and illegal actions.

The Law

Rule 56 - Summary Judgment

Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense-on which summary judgment is sought.

THE CLAIM

Plaintiff is seeking **damages** from the following events as set forth in Rusch's complaint

First Cause the Flooding

FIRST CLAIM FOR RELIEF

(Breach of Contract)

15. Plaintiffs, as the owners of the Subject Property, enter into an agreement with the Martin in the form of a documents entitled Covenants, Conditions and Restrictions ("CC&Rs).

16. Pursuant to the CC&Rs, Martin was under an obligation maintain the common areas surrounding the Subject Property.,

17. Plaintiffs performed their obligations under the CC&Rs.

18. Martin materially breached its CC&Rs as it failed to address the issues stemming from the flood.

19. Due to Martins breach of their obligations under the CC&Rs described herein,

Plaintiffs have been damaged in an amount of \$25,552.92

22. "It is well settled in Nevada that 'every contract imposes upon the contracting parties the duty of good faith and fair dealing.'" *State v. Sutton*, 120 Nev. 972, 989 (2004).

23. By entering into a valid agreement with Plaintiffs, Defendant has a duty to act in a manner consistent with good faith and fair dealing

24. That upon information and belief, Defendant has breached the covenant of good faith and fair dealing implied in every contract which was multiplied by Martin's non-feasance when the flood occurred in addition to pursuing non-judicial foreclosure during the pendency of Rusch's bankruptcy.

25. That as a direct and proximate result of the Defendant's actions, **Plaintiffs have be en**

damaged in the amount of \$27,443.92.

That on or about June 29, a sprinkler or water pipe busted on the floor where the Subject Property was located. As a result of the water pipe busting, water ran throughout the entire floor where the Subject Property was located. the Martin was informed of the water pipe busting shortly after it happened. **The Martin failed to either turn off the water escaping from the busted water pipe or failed to irrigate the water to another location to prevent damage to the Subject Property and its neighboring units.** That as a result, the Subject Property suffered extensive damage including damage to its floors and Plaintiffs personal property. Furthermore, **the damage was so extensive that Plaintiffs were required to vacate the Subject Property and incur large expenses on their part.** Plaintiffs informed the Martin HOA that the damage caused to Plaintiffs' Subject and the expenses incurred to vacate the Subject Property far exceeded any monthly assessments

Third Claim for illegal sale of home in violation of Nevada Law and CCR 17.2

THIRD CLAIM FOR RELIEF

(Breach of contract - Violation of NRS 116 CCR 17.2)

28. Defendant's non-judicial foreclosure of the Subject Property included

disallowed items and Martin took monies discharged in bankruptcy/.

29. The sales of Rusch's condo was in violation of Nevada Law. Red Rock Martin'

agent was required to comply with Nevada Law

30. The **Martin HOA** did not comply with **NRS 116.31162 et seq** and CCR 17.2 when it sold the property,

Notice of Delinquent Assessments

Before starting the foreclosure, the **HOA must mail a notice of delinquent assessment to the homeowner**, which states:

the **amount of the assessments and other sums that are due**
a description of the unit against which the lien is imposed, and the
name of the record owner of the unit. (Nev. Rev. Stat. § 116.31162).

NRS 116.31162 specifically provides that: Foreclosure of liens: Mailing of notice of delinquent assessment; recording of notice of default and election to sell; period during which unit's owner may pay lien to avoid foreclosure; limitations on type of lien that may be foreclosed.

- I. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the **association may foreclose its lien by sale after all of the following occur:**

(a) **The** association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, **a notice of delinquent assessment which states the amount of the assessments and other sums which are due** *The Martin Failed to do this.* in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) **Not less than 30 days after mailing the notice of delinquent assessment** pursuant to paragraph (a), the association or other person conducting the sale **has executed and caused to be recorded, with the county recorder of the county** *The Martin failed to do this* in which the common-interest community or any part of it is situated; a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

whichever date occurs later.

4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:

(a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or

(b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

(Added to NRS by 1991, 569; A 1993, 2371; 1997, 3121; 1999, 3011; 2003, 2244, 2273; 2005, 2608)

ANALYSIS OF THE CLAIM

No Notice of the August 10 Sale as required by Nevada Law

**Rusch did not receive any written or oral notice of a proposed sale of his property .
Rusch first learned of the sale by a call from an attorney's office. Therefore the sale was illegal and must be reversed.**

The sale of Rusch's condo was in violation of Nevada Law. Red Rock was required to comply with Nevada Law and they did not therefore the sale is invalid and the sale must be reversed and Rusch must be returned to his condo. Therefore the possession of the Martin condo must be restored to Rusch and Longboy immediately

Rusch and Longboy should also be compensated for the time they have been homeless and forced to stay in hotels since their wrongful eviction.

The Subject Property was foreclosed upon and sold at a foreclosure sale conducted by Red Rock Financial Services on behalf of the Martin UOA **without notice to Plaintiffs in violation of Nevada Law. NRS 116.31162 et seq and CCR 17.2**

The complaint seeks damages

THE COMPLAINT IS PRIMARILY FOR COMPENSATION FOR THE MARTINS WRONGFUL AND ILLEGAL SALE OF HIS HOME.

WHEREFORE, Plaintiffs prays for judgment against the Defendant as follow

For monetary damages caused by the flood as a result of Defendant's breach of contract, in an amount of \$25,442.92

For monetary damages as a result of sale of Rusch's home without complying with the Martin CCRs and Nevada Law in an amount of \$ Four Million Dollars each for a total of \$ Eight Million Dollars.

For costs; and

For such other and further relief as the Court may deem just and proper

Default judgment

A defendant is required to respond to a complaint that has been filed by the plaintiff within the time period set by law, usually 20 to 30 days. If the defendant fails to file a timely answer, the plaintiff can ask the court to enter a default judgment. The plaintiff should file a request for entry of default if the defendant fails to timely respond to the summons and complaint. The defendant is then in default.

Through the failure of the Martin to answer Rusch's complaint the Martin has forfeited its right to defend its actions and therefore a default judgment is required to be entered pursuant to NRAP Rule 55 and therefore summary judgment must be awarded to Rusch

Rusch has been severely damaged by the actions of The Martin. First the Flood then the wrongful sale without notice or a demand letter as required by **NRS 116.31162** forcing plaintiff to move from hotel to hotel and eat out at restaurants during a Pandemic.

Rusch has requested Entry of Default Judgment against The Martin who have failed to plead or otherwise defend this action, with no further time having been granted by the Court, and with more than 20 days, exclusive of the day of service of process, having expired since service upon the The Martin of the complaint served on December 7, 2021 with Civil Summons.

Rusch should be compensated for the time they have been homeless and forced to stay in hotels since their wrongful and illegal eviction.

That as a direct and proximate result of the Respondent's actions

The Martin have provided no defense to the claims listed in Rusch's complaint and therefore

SUMMARY JUDGMENT SHOULD BE AWARDED TO RUSCH

Rusch requests summary judgment against the Martin Condominium as it is undisputed that the Martin has **no defense** to claims stated in Plaintiffs complaint.

BY NOT ANSWERING THE COMPLAINT THE MARTIN HAS ADMITTED THEY ARE AT FAULT FOR RUSCH'S DAMAGES

The Martin has admitted they were at fault for the flood that caused Plaintiffs to vacate their condo for over three months so that Nigro could repair the condo.

The Martin has admitted that Red Rock sold Plaintiff's Condo in violation of Nevada Law

The **Martin did not comply with NRS22.116** et seq when it sold the property, There was no notice nor demand letter; a clear violation of the constitutional right to due process of law.

STRICT SCRUTINY IS REQUIRED

Nevada Courts Require **Strict Statutory Compliance to Lien and Foreclosure**

It is implicit that HOAs must also closely follow their own governing documents (CC&Rs, Bylaws, rules and policies), including adopting and following collection policies, in pursuing collection activities authorized under the Act.

Because of the technical nature of the Act and the courts' apparent deference to err in favor of due process protections for HOA owners (not too dissimilar from the protections typically afforded to California tenants in unlawful detainer proceedings), the Act is fertile ground for mistakes. **These recent cases make clear that even minor or technical violations can invalidate the lien and foreclosure process.**

THEREFORE SINCE THE MARTIN HAS NO DEFENSE TO CLAIMS STATED IN RUSCH'S COMPLAINT THE COURT IS REQUIRED TO AWARD RUSCH SUMMARY JUDGMENT

Respectfully Submitted

s Wesley Rusch

Wesley Rusch

Proof of service

Wesley Rusch being duly sworn and deposed and say that at all times herein affiant was and is a citizen of the United States and over 18 years of age

On December 12, 2023 I served attached document to the following address

MARC S. CWIK, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118

/S/ Wesley Rusch
Wesley Rusch