IN THE SUPREME COURT OF THE STATE OF NEVADA

ONECAP PARTNERS MM, INC., a Nevada corporation; VINCENT W. HESSER, an individual, Appellants, v. KENNEDY FUNDING, INC., a New Jersey Corporation, Respondent.	Supreme Court Case No. 55654 District Court Case No.: A582746 Appeal from Department XI, the Honorable Elizabeth Gonzalez, Eighth Judicial District Court, Clark County, Nevada

KENNEDY FUNDING, INC.'S ANSWERING BRIEF

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The four issues raised on appeal as set forth in Appellants OneCap Partners MM, Inc. ("OneCap MM") and Vincent W. Hesser's ("Hesser") (collectively "Appellants") Docketing Statement Civil Appeals are:

(1) Whether the District Court erred in granting Summary Judgment while material facts remained in dispute;

(2) Whether the District Court erred in granting Summary Judgment in violation of Nevada's One Action rule;

(3) Whether the District Court erred in granting Summary Judgment when no deficiency on the underlying deed of trust was ever established; and

(4) Whether the property, the subject of the deed of trust, is no longer subject to the deed of trust and belongs to the Defendants because the District Court erred in granting Summary Judgment under the Promissory Note.

PRELIMINARY STATEMENT

Appellants appeal from the lower court's Order Granting Plaintiff's Motion for Summary Judgment entered by the Eighth Judicial District Court, Clark County, Nevada, on November 4, 2009 (the "Order"), and Judgment Against OneCap Partners MM, Inc. and Vincent W. Hesser, in favor of Kennedy, entered by the Eighth Judicial District Court, Clark County, Nevada on February 18, 2010 (the "Judgment"). E.R. Tab 6 at 00213 - 00216, Respondent's Answering Brief; and E.R. Tab 7 at 00217 - 00225, Respondent's Answering Brief.

In this Brief "E.R." denotes excerpts of record designated by Appellants or Respondents as identified.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

The appeal before this Court is moot. Since the appeal was filed, there are a number of procedural developments that must be brought to the attention of the Nevada Supreme Court, because the events moot the pending appeal. This appeal is moot for two reasons: (1) the bankruptcy stay under 11 U.S.C. § 362 that is the subject of this appeal expired on March 29,

2010, pursuant to the Ex Parte Order Terminating Automatic Stay. E.R. Tab 8 at 00226 - 00227, Respondent's Answering Brief. Thus, Appellants' request for any collection action against the Guarantors to be stayed by the bankruptcy stay under Section 362 pursuant to the Settlement Agreement is therefore moot; and (2) since the appeal was taken, Kennedy Funding, Inc. ("Kennedy") foreclosed on the Property on June 17, 2010. The Trustee's Deed Upon Sale was recorded July 16, 2010, with the Clark County Recorder's Office as Instrument No. 20107160000364. E.R. Tab 11 at 00230 - 00234, Respondent's Answering Brief. Appellants' request to stay the case pending foreclosure is therefore moot.

In this appeal, Appellants seek reversal of the district court's ruling on Kennedy's Motion for Summary Judgment, resulting in the lower court's order that Respondent Kennedy was entitled to recovery of over $16 million from the Guarantors arising from a default of the $12 million loan to OneCap Partners 2, LLC, the predecessor-in-interest to Nevada Ueno Mita, LLC.

On September 22, 2009, Kennedy filed a Motion for Summary Judgment. On or about October 6, 2009, Harold P. Gewerter, Esq., counsel for Appellants, filed Defendants' Opposition to Plaintiff's Motion for Summary Judgment, and on October 20, 2009, Kennedy filed a Reply in Support of Motion for Summary Judgment. Hearing on Kennedy's Motion for Summary Judgment went forward on October 27, 2009, at which time the lower court granted Kennedy's Motion for Summary Judgment as to liability only. A damages hearing was thereafter scheduled for November 5, 2009, at 9:30 a.m.

On February 18, 2010, the lower court entered a Judgment Against OneCap Partners, MM and Vincent W. Hesser, the guarantors, in the amount of $16,802,025.64 (the "Judgment"). The Judgment expressly provides that to the extent the real property securing Kennedy's Loan is sold or refinanced and such proceeds are paid to Kennedy, any such proceeds shall be deducted from the judgment amount and accruing interest entered against the Guarantors in favor of Kennedy.

In addition to the reasons enumerated above relating to the mootness of the pending appeal, Appellants' appeal should further be denied for the following reasons: (1) Appellants fail

to present any credible evidence that there is a genuine issue of material fact regarding the Guarantors' waiver of the One-Action Rule. Appellants wholly disregard the express waiver of the One-Action Rule as set forth in the Guaranty, E.R. Appendix 3 at 111 – 121/KF00139 – KF00149, Appellants' Opening Brief, which allows lenders to pursue guarantors, such as Appellants, upon the Borrower's bankruptcy filing under NRS 40.430(4)(i). The Borrower filed for Bankruptcy on December 26, 2008, and Kennedy commenced the action that is the subject of the appeal against the Guarantors after the bankruptcy case was filed on February 13, 2009, and in compliance with the exclusion to the One-Action Rule; (2) under Sections 2 and 4 of the Guaranty, E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief, the Appellant Guarantors waived the application of the One-Action Rule, allowing Kennedy to pursue the action against the Guarantors pursuant to NRS 40.495(2). Under the Guaranty, E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief, the Guarantors expressly waived any defense based upon Kennedy's failure to first commence an action against the Borrower, or to proceed against or exhaust any security held by Lender at any time; (3) the Order that is the subject of this appeal ensures that Kennedy does not recover a windfall, in that it provides that the proceeds of the sale or refinance of the Property are to be deducted from the judgment amount and accruing interest entered against the Guarantors; and (4) Appellants fail to present any credible evidence that there is a genuine issue of material fact that the Settlement Agreement stayed the State Court Action against the Guarantors. Section 1.01(g) of the Settlement Agreement approved by the Bankruptcy Court expressly states that Kennedy is not precluded from pursuing the Guarantors under the Guaranty. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

B. STATEMENT OF RELEVANT FACTS

Loan Documents

1. Kennedy Funding is a New Jersey Corporation that is located and headquartered in New Jersey.

2. On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and Kennedy, as agent of the Co-Lenders, entered into a Loan and Security

Agreement ("Loan Agreement"), pursuant to which Kennedy made a $12 million loan to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of raw land located along Casino Drive and the Colorado River in Laughlin, Nevada 89029, Clark County Assessor Parcel Numbers 264-25-101-001 and 264-25-201-001 (the "Property"). See Loan and Security Agreement. E.R. Appendix 1, at 1-47/KF-00026-KF00073.

3. Exhibit D to the Loan Agreement identifies the Co-Lenders to the $12,000,000 Loan.[1]

4. On or about June 15, 2006, the Co-Lenders and Kennedy executed the Co-Lenders Agreement, under which the Co-Lenders expressly authorized Kennedy to enforce the Loan on behalf of the Co-Lenders as follows:

> 3. Agent shall service and enforce the Loan and in so doing shall exercise due care...
>
> ***
>
> 7. Upon default in the payment of performance of the Loan Agreement, Lender shall take such appropriate legal action for the enforcement thereof as Agent deems advisable in its sole discretion.
>
> ***
>
> 9. Agent shall have full and complete authorization and shall not be liable to the Lender for any action taken or suggested by it hereunder in good faith and in accordance with the opinion of counsel provided it has complied with the requirement of consent hereunder.

5. Kennedy has the express authority to act on behalf of the Co-Lenders pursuant to the Co-Lenders Agreement, and it has kept the Co-Lenders apprised of the status of the Borrower's bankruptcy case and the Guarantor action.

. . .

. . .

[1] The Co-Lenders are The Simes Family Limited Partnership, M&M Funding, Inc., TLC Funding, Inc. (1.00% portion of the Loan is solely funded by John Prescott), Josh Duitz, CB&M Funding, LLC, Lawton Enterprises, Inc. M/P/P, STC Funding, Inc. M/P/P, Bruce Berger, Solomon Berger, Charles Ira Epstein, Jeffrey A. Mayer, Howard Brown, Presidential Investments, Inc., G&G Investment, Inc., Evergreen CMF Funding, Inc., The Hampshire Generational Fund, LP, JWJ Financial, Inc., MMR Funding, LP, M.I. Beer Investments, Inc., Wilson Kaplen, The Kaplen Foundation and Valley National Bank.

6. The loan is evidenced by a Promissory Note dated June 15, 2006, in the original principal sum of $12 million ("Note"), made by OneCap to pay to the order of Kennedy as agent of the lenders.

7. Under the Note, OneCap promised to pay Kennedy monthly interest only payments at a rate of 11.5% per annum, to accrue from July 1, 2006 to June 1, 2007. Beginning August 1, 2007, OneCap promised to pay Kennedy monthly interest only payments at a rate of 18% per annum, to accrue from July 1, 2007, through the maturity date of June 30, 2009.

8. OneCap agreed to pay all principal, interest and other sums due under the Note in full on the maturity date of June 30, 2009.

9. In the event of a late payment under the Note, OneCap agreed to pay a late charge equal to 10% of the overdue payment.

10. In the event of a default under the Note, OneCap agreed to pay a default rate of 25% per annum.

11. As security for the Note, OneCap executed and delivered to Kennedy a Deed of Trust with Security Agreement, Financing Statement for Fixture Filing and Assignment of Rents ("Deed of Trust") against the Property, which was recorded on June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-0005324.

12. On June 15, 2006, Kennedy, Gary Owen II, LLC ("Option Holder"), and OneCap executed a Subordination and Attornment Agreement ("Subordination Agreement") in which the Option Holder agreed to subordinate its limited option to purchase the Property to Kennedy's Deed of Trust.

13. As additional security for the loan, OneCap executed and delivered to Kennedy, as agent for the lenders, an Assignment of Leases and Rents, dated June 14, 2006, and recorded June 15, 2006, with the Clark County Recorder's Office as Instrument No. 20060615-0005325, and an Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Report, dated June 15, 2006 ("Assignment of Licenses").

14. To further secure payment of the Note, on June 14, 2006, Appellants Hesser and OneCap MM executed personal unconditional guaranties of the loan to Kennedy ("Guaranty").

E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief. At the time of the transaction between OneCap and Kennedy, Hesser was the President of OneCap and OneCap MM.

15. Under the express language of the Guaranty, the Defendants agreed to waive the need to foreclose against the real property before pursuing the Guarantors as follows:

> 4. Guarantor Waivers. The undersigned hereby waives and agrees not to assert or take advantage of any defense based upon:
>
> (g) The failure of Lender to commence an action against Borrow and/or Guarantor or to proceed against or exhaust any security held by Lender at any time, or to pursue any other remedy whatsoever at any time;

E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief.

16. The Guaranty further provides that Defendants Hesser and OneCap MM are guarantors and primary obligors, without the need for Kennedy to commence an action against the Borrower:

> 2. Guaranty Clause. The Guarantors hereby absolutely, irrevocably and unconditionally guaranties to Lender the full, prompt and unconditional payment of the Debt, when and as the same shall become due, whether as the stated maturity date, by acceleration or otherwise, and the full, prompt and unconditional performance of each and every term and condition of every transaction to be kept and performed by Borrower under the Note. This Guaranty is a **primary obligation of Guarantor** and shall be a continuing inexhaustible guaranty. Lender may require Guarantor to pay and perform any or all of the Guarantor's liabilities and obligations under this Guaranty **without being required or obligated to bring any proceeding or take any action against** Borrower, any other guarantor or any other person, entity **or property prior thereto**. The liability of the Guarantors hereunder is joint and several with all other guarantors, and is independent of and separate from the liability of Borrower, and other guarantor, person or entity, and is independent of the availability of any collateral security for and/or under any documents granting Lender security for the Loan.

E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief (emphasis added).

17. OneCap also granted a properly perfected security interest to Kennedy by way of a UCC-1 Financing Statement ("UCC-1") filed with the Clark County Recorder's Office on June 15, 2006, as Instrument No. 20060615-0005326.

. . .

18. Kennedy received all money to fund the loan in New Jersey and disbursed those funds from New Jersey. Kennedy also received all payments made by OneCap on the loan in New Jersey and disbursed those payments to lenders from New Jersey.

OneCap Defaults

19. On April 1, 2008, OneCap defaulted under the Note and Deed of Trust by failing to make its monthly installment payment of $250,000 under the Note.

20. In addition, OneCap was in default under the Deed of Trust for failure to provide Kennedy with current proof of liability insurance, and for failure to timely pay its tax obligations relating to the Property. State and County Taxes are outstanding for the fiscal period 2008 to 2009 in the total amount of $41,093.18 on the Property.

21. Based on those defaults, Kennedy accelerated the note and instituted foreclosure proceedings on the property. The notice of breach and election to sell under deed of trust was recorded with the Clark County Recorder's Office on August 20, 2008, as Instrument No. 20080820-00597; and the Notice of Trustee's Sale, with a sale date of December 29, 2008, was recorded on December 8, 2008 as Instrument No. 20081208-00882.

22. On December 26, 2008, three days before the foreclosure sale, Nevada Ueno Mita, LLC ("Nevada Ueno"), filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy for the District of Nevada, Case No. BK-S-08-25487-BAM (the "Bankruptcy Petition").

23. Based upon information obtained from the Bankruptcy Petition, OneCap had transferred its interest in the Property to Nevada Ueno. A Deed from OneCap to Nevada Ueno was recorded with the Clark County Recorder's Office on November 3, 2008, as Instrument No. 20081103-0002469.

24. Under the Deed of Trust and Loan Agreement, OneCap's transfer of the Property to Nevada Ueno is a default.

Defendants Default on the Guaranty

25. Because of OneCap's default under the Note, including failure to make timely payments, OncCap's improper transfer and Nevada Ueno's bankruptcy petition—which halted

the foreclosure action, Kennedy demanded performance from Appellants under the Guaranty. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

26. However, Appellants failed and refused to perform under the Guaranty.

27. As a result of Defendants' refusal to meet their obligations under the Guaranty, on February 13, 2009, Kennedy filed a Complaint against the Appellants for breach of the Guaranty.

Nevada Ueno Bankruptcy

28. In the Nevada Ueno Bankruptcy matter, on May 27, 2009, Kennedy filed a Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(1)-(3), or in the Alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service [Bankruptcy Dkt. No. 54] ("Motion to Terminate Stay"), an filed a Declaration of Steven Evans [Bankruptcy Dkt. No. 56] and Declaration of Matthew Cole [Dkt. No. 57] .

29. Hearing on Kennedy's Motion to Terminate Stay was originally scheduled for June 30, 2009, and was rescheduled to July 6, 2009 [Bankruptcy Dkt. No. 64].

30. On June 11, 2009, Nevada Ueno filed an opposition to Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. § 362 (d)(1)-(3) or in the Alternative, Convert or Dismiss Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) [Bankruptcy Dkt. No. 68], and on June 26, 2009, Kennedy filed a Reply in Support of Motion to Terminate the Automatic Stay Pursuant to 11 U.S.C. §362(d)(1)-(3), or in the Alternative, Convert or Dismiss Bankruptcy Case and Waiver of the 10-Day Stay Under FRBP 4001(a)(3) with Certificate of Service [Bankruptcy Dkt. No. 70].

31. Ultimately, Kennedy and Nevada Ueno reached an agreement wherein the parties agreed that Kennedy would grant Nevada Ueno a six-month extension to allow the Debtor to refinance or market and sell the Property and pay Kennedy. See Section 1.01(f) of the Settlement Agreement, E.R. Appendix 5 at 209-212, Appellants' Opening Brief.[2] Under the

[2] Section 1.01(f) of the Settlement Agreement provides that "Kennedy Funding agrees to give Debtor up through and until six (6) months after entry of the Order approving this Settlement Agreement ('the Deadline') to pay Kennedy Funding in full before Kennedy Funding forecloses on the Property." Id.

terms of the settlement agreement, in the event the Property is not sold within six (6) months of the entry of the Order approving the proposed Settlement Agreement, or in the event Kennedy is not paid within six (6) months of the entry of the Order approving the proposed Settlement Agreement, the Debtor agreed to terminate of the automatic stay as to Kennedy without further hearing. Id.

32. At the time the Debtor Borrower and Kennedy entered into the Settlement Agreement in August 2009, Kennedy had already commenced the action against the Guarantors, which action commenced before the lower court on February 13, 2009. The Debtor Borrower and Kennedy, the only parties to the Settlement Agreement, agreed that the Settlement Agreement would have no impact on the continuation of the Guarantor Action. See Settlement Agreement, p. 3, Section 1.01(g), E.R. Appendix 5 at 209-212, Appellants' Opening Brief (stating that "[t]he Parties agree that this Settlement Agreement shall not preclude, limit or abridge Kennedy's rights to pursue any deficiency actions against the Guarantors of Debtor's obligations owing to Kennedy Funding").

33. On August 18, 2009, Kennedy filed a Motion to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Approving Settlement Between Debtor and Kennedy Funding, Inc., with Certificate of Service [Bankruptcy Dkt. No. 82], and the Order Granting Motion to Approve Compromise and Settlement Pursuant to Bankruptcy Rule 9019 Between Debtor and Kennedy Funding, Inc., was entered on September 18, 2009 [Bankruptcy Dkt. No. 91].

34. Based upon the entry of the Settlement Order and pursuant to the terms of the Settlement Agreement, the Debtor was required to pay Kennedy no later than March 18, 2010 [Bankruptcy Dkt. No. 82].

35. Kennedy received no payoff from the Debtor Nevada Ueno by the deadline agreed upon in the Settlement Agreement, and, as a result, an Ex Parte Order Terminating the Automatic Stay was entered by the Bankruptcy court on March 29, 2010 [Bankruptcy Dkt. No. 96], terminating the automatic stay under 11 U.S.C. § 362 and allowing Kennedy to foreclose on the Property. E.R. Tab 8 at 00226-27, Respondent's Answering Brief.

36. After proper notice, a foreclosure sale went forward on June 17, 2010, and Kennedy credit bid against the Property. See Notice of Trustee's Sale dated May 25, 2010, recorded in Clark County Recorder's Office on May 27, 2010, as Instrument No. 201005270000200. E.R. Tab 9 at 00228-29, Respondent's Answering Brief; see also Trustee's Deed Upon Sale recorded July 16, 2010, recorded in the Clark County Recorder's Office as Instrument No. 20107160000364. E.R. Tab 10 at 00230-00234, Respondent's Answering Brief

37. On September 22, 2009, Kennedy filed a Motion for Summary Judgment against the Defendants in the Guarantor Action.

38. On or around October 6, 2009, the Defendants filed an Opposition to the Motion for Summary Judgment (the "Opposition"). See Opposition, E.R. Tab 11, Respondent's Answering Brief.

39. In the Opposition, the Defendants concede that they guarantied OneCap's indebtedness owing to Kennedy, stating as follows:

> To further secure payment of the Note, on June 14, 2006, Vincent Hesser and OneCap Partners MM, Inc. (the "Guarantors") executed a personal unconditional guaranty of the Note to Kennedy Funding (the "Guaranties"). On April 1, 2008, OneCap defaulted under the Loan and Deed of Trust, including, but not limited to, OneCap's failure to make monthly installment payments under the Note in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) due April 1, 2008.

See Opposition, p. 2, ll. 22-27, E.R. Tab 11 at 00235 – 00244, Respondent's Answering Brief.

40. Thus, there is no genuine issue of material fact that the Defendant Guarantors are liable for the outstanding indebtedness due and owing to Kennedy arising from the Debt and the Borrower's default.

41. In Appellants' Opposition to the Motion for Summary Judgment, Appellants never refuted that they waived the One-Action Rule, and they never demonstrated that there was a genuine issue of material fact that Section 4(g) of the Guaranty did not require Kennedy to foreclose against the real property before pursuing the Guarantors as a result of the waiver of the One-Action Rule. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

C. STANDARD OF REVIEW

An order granting summary judgment is reviewed by this court de novo. See Dictor v. Creative Management Services, LLC, 223 P.3d 332, 334 (Nev. 2010) (citing Ozawa v. Vision Airlines, 125 Nev. ----, ----, 216 P.3d 788, 791 (2009)). Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and there is no genuine dispute of any material fact. Id. The Nevada Supreme Court will not consider an argument raised for the first time on appeal. See Kahn v. Morse & Mowbray, 121 Nev. 464, 480 n. 24, 117 P.3d 227, 238 n. 24 (2005).

D. SUMMARY OF ARGUMENT

The lower court properly found that there were no genuine issues of material fact that the Guarantors waived Nevada's One-Action Rule under Paragraph 4(g) of the Guaranty, and that the judgment against the Guarantors for the outstanding indebtedness owing under the Note was therefore proper. The lower court also properly found that the Settlement Agreement entered into between Kennedy on one hand and the borrower, and Nevada Ueno Mita—the Debtor in bankruptcy—on the other hand, did not preclude Kennedy from commencing the action against the Guarantors. The lower court properly found that Section 1.01(g) of the Settlement Agreement expressly permitted Kennedy to continue its action against the Guarantors, and that the Bankruptcy Stay as set forth in Section 1.01(f) of the Settlement Agreement did not extend to the Guarantors. As a result, Kennedy is entitled to summary judgment.

In its Brief, Appellants identify the Statement of Issues, but in the body of Appellants' Opening Brief, Appellants fail to address all of the discrete Statement of the Issues. For instance, the first Statement of the Issues relates to the lower court's purported error in granting summary judgment while material facts remained in dispute. However, the Appellant's Brief fails to identify which material facts remained in dispute. See Appellants' Brief. Appellants' appeal must be limited to the record before the lower court on the Opposition to Kennedy's Motion for Summary Judgment, and the inclusion of arguments beyond the scope of the Opposition to the Motion for Summary Judgment should not be entertained.

. . .

As to the second and third issue identified in the Statement of the Issues, Appellant misleads this Court regarding the lower court's alleged error in relation to the One-Action Rule and the need to establish a deficiency notwithstanding the waiver. Appellants' Brief omits Section 4(g) of the Guaranty, which provides for an express waiver of the One-Action Rule. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief. It was upon this basis, the Guarantors' express waiver of the One-Action Rule, that the lower court entered the judgment. At the time the Motion for Summary Judgment was before the lower court, Appellants conceded that "the action was commenced prior to a foreclosure..." See Appellants' Brief, p. 8, l. 12. Moreover, the foreclosure was stayed by the automatic stay under Section 362 of the Bankruptcy Code, which was still in place at the time of the Summary Judgment proceedings. In light of Kennedy's inability to foreclose on the Property when it commenced the Guarantor Action and during the Summary Judgment proceedings, the Appellants were not entitled to stay the proceedings until a deficiency was established, nor were Appellants entitled to invoke NRS 40.495(3) or NRS 30.435(2) in light of the Guarantors' express waiver of the One-Action Rule. The fourth issue identified in Appellants' Statement of Issues, whether the Property is no longer subject to the Deed of Trust and belongs to Kennedy because the lower court erred in granting summary judgment, is wholly unsupported by law and hinges entirely on the success of the first three issues. Thus, the fourth issue lacks merit. See Appellants' Brief.

1. Appeal Must be Dismissed as Moot, because the Bankruptcy Stay has Terminated, and Kennedy has Foreclosed on the Property.

This appeal is moot, and should be dismissed because the basis for Appellants' appeal is no longer at issue. First, Appellants assert that the lower court erred because the collection action should be stayed under Section 1.01(g) of the Settlement Agreement filed in the Bankruptcy Court. See Appellants' Brief, p. 6, l. 11. The basis of Appellants' argument rests upon a Settlement Agreement approved by the Bankruptcy Court, which provided that the foreclosure of the Property would be stayed until March 18, 2010. See Settlement Agreement, Section 1.01(f), E.R. Appendix 5, at 209 - 212, Appellants' Opening Brief. However, this appeal is moot because pursuant to the deadlines set forth under the Settlement Agreement, the bankruptcy stay

under 11 U.S.C. § 362 expired on March 29, 2010. E.R. Tab 8 at 226 - 227, Respondent's Answering Brief. Thus, Appellants' request for any collection action against the Guarantors to be stayed as long as the bankruptcy stay under Section 362 is in place pursuant to the Settlement Agreement is moot.

Second, Appellants posit that because the action commenced by Kennedy was commenced prior to foreclosure, either the case should have been stayed pending any such foreclosure or the judgment entered should release the Respondent's lien on the property. See Appellants' Brief, p. 8, ll. 12-14. However, the appeal on this basis is moot, because since the appeal was taken, Kennedy foreclosed on the Property on June 17, 2010. See the Trustee Deed Upon Sale, recorded July 16, 2010, recorded in the Clark County Recorder's Office as Instrument No. 20107160000364. E.R. Tab 10 at 00230 - 00234, Respondent's Answering Brief. Appellants' request to stay the case pending foreclosure is therefore likewise moot.

2. Appellants Raise Issues Not Raised Before Lower Court and Should Not be Entertained.

One of the issues on appeal Appellants raise is whether the "District Court Erred in Granting Summary Judgment While Material Facts Remained in Dispute." See Appellants' Brief, p. 4, Item A. However, the section entitled "Statement of Issues" is the only place in Appellants' Brief that makes mention of material facts that remain in dispute. Specifically, the body of Appellants' Opening Brief fails to identify which issues of material fact exist. Appellant's Brief fails to identify any citation to the excerpts of the record that the lower record erred in determining there were no genuine issues of material fact.

The only issues identified in Appellants' Brief relate to legal issues arising under NRS 40.457, NRS 40.459 and NRS 40.435(2). NRS 40.435(2) was never raised in Appellants' Opposition to the Motion for Summary Judgment, and NRS 40.457 and NRS 40.459 were raised only in connection with the damages hearing, not the hearing as to liability, which Order as to liability was entered on November 4, 2009. There is no specificity in the Appellants' Brief identifying which material facts, if any, remain in dispute. See Appellants' Brief. To the contrary, Appellants concede in their Brief that the Guarantors "executed a personal

unconditional guaranty of the Note to Kennedy Funding". See Appellants' Brief, p. 5, ll. 11-12. Appellants' Brief makes no mention of, nor any dispute regarding, the Guarantors' waiver of Nevada's One-Action Rule.

This is a glaring omission, especially where the waiver of the One-Action Rule was the crux of lower court's ruling. Appellants' appeal must be limited to the record before the lower court as set forth in the Opposition to Kennedy's Motion for Summary Judgment, filed on or around October 6, 2009. The sole argument raised in Appellants' Opposition to the Kennedy's Motion for Summary Judgment was that Section 1.09(g) of the Settlement Agreement filed in the Bankruptcy Court raised a genuine issue of material fact that required a stay of the Guarantor Action. See Opposition, E.R. Tab 11, Respondent's Answering Brief. Thus, inclusion of arguments in Appellants' Brief beyond the scope of the Opposition to the Motion for Summary Judgment should not be entertained.

All of the arguments raised in the Appellant's Brief, with the exception of the argument regarding the applicability of the Settlement Agreement filed in Bankruptcy Court, are beyond the scope of the evidence Appellants presented to the lower court when Appellants filed their Opposition to the Motion for Summary Judgment. See Appellants' Brief. As no additional discovery was conducted, and no supplemental pleadings were timely filed with the lower court in connection with the Motions for Summary Judgment, Appellant's Brief impermissibly seeks to introduce new arguments on appeal that were not properly raised before the lower court. See Appellant's Brief.

Because the Nevada Supreme Court will not consider an argument raised for the first time on appeal, see Kahn v. Morse & Mowbray, 121 Nev. at 480 n. 24, 117 P.3d at 238 n. 24, this Court's de novo review is limited to the arguments raised below in Appellants' Opposition to the Motion for Summary Judgment. Appellants' Brief is nothing more than an attempt to cure the shortcomings of the Opposition below by now making the arguments that were absent in the Opposition. Appellants' Brief also makes an argument raised on appeal that was never raised in the Opposition below in connection with NRS 40.435(2), and should not be considered on appeal, as it is beyond the scope of the record on appeal.

Appellants' efforts to use Appellants' Brief as a vehicle by which to raise arguments for the first time on appeal should not be entertained by this Court on appeal. De novo review is limited to the pleadings before the lower court and does not enable Appellants to expand the record on appeal.

3. Appellants fail to Demonstrate that Material Issues of Disputed Fact Preclude a Finding of Summary Judgment.

NRCP 56(c) provides in relevant part as follows:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See Nev. R. Civ. P. 56(c).

Summary judgment is appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. See Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005) (citing NRCP 56(c); Tucker v. Action Equip. and Scaffold Co., 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)). The Nevada Supreme Court has made abundantly clear that when a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue. Id. at 1030-31. The United States Supreme Court employed similar language in *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The Nevada Supreme Court enunciated the discontinued viability of the "slightest doubt" standard, and expressly adopted the standard employed in *Liberty Lobby*, *Celotex*, and *Matsushita*:

> Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. . . when reviewing a

> motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.

Id. at 1031 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). In order to defeat a motion for summary judgment, the nonmoving party must show specific facts demonstrating the existence of a genuine issue for trial. See Boland v. Nevada Rock and Sand Co., 111 Nev. 608, 614, 894 P.2d 988, 990 (1995).

Summary judgment is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. See Alberter v. McDonald's Corp., 70 F.Supp.2d 1138, 1141 (D.Nev. 1999). Conversely, if a reasonable jury could find for the non-moving party, summary judgment is appropriate. See Borgerson v. Scanlon, 117 Nev. 216, 19 P.3d 236 (2001). To avoid summary judgment, **specific facts, rather than general allegations and conclusions**, presenting a genuine issue of material fact **must be shown by competent evidence** (emphasis added). Bird v. Casa Royale W., 97 Nev. 67, 624 P.2d 17 (1981). Furthermore, when a motion for summary judgment is made and properly supported, the party opposing the summary judgment may not rest on "mere allegations" of the pleadings, but must, by affidavit or otherwise, establish through admissible evidence facts demonstrating the existence of a genuine issue of material fact for trial. Id.

A party opposing a motion for summary judgment is not entitled to build a case on mere gossamer threads of whimsy, speculation and conjecture. Collins v. Union Fed. Sav. & Loan Ass'n., 99 Nev. 284, 302, 662 P.2d 610 (1983). Only material facts on genuine issues will preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Masonry and Tile Contractors Ass'n v. Jolley, 113 Nev. 737, 740, 941 P.2d 486 (1997). Only disputes of material facts that could affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Anderson, 477 U.S. at 247. Factual disputes which are immaterial or unnecessary will not be considered. Finally, conclusory statements do not create an issue of material fact. See Havas v. Long, 85 Nev. 260, 263, 454 P.2d 30 (1969).

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a. Summary Judgment on a Contract is Proper, Where Appellant Submits No Competent Evidence that Raises Genuine Issue of Fact.

When the question before the trial court is the meaning or effect of a written instrument between the parties, and the instrument is unambiguous, it speaks for itself and the "true intent" of the parties cannot be said to constitute a "genuine" issue of fact. See Parman v. Petricciani, 70 Nev. 427, 272 P.2d 492 (1954). Rather, issues of unambiguous contractual construction present questions of law for the court and are suitable for determination by summary judgment. See Nelson v. Cal. State Auto. Ass'n Inter-Ins. Bureau, 114 Nev. 345, 956 P.2d 803 (1998); Margrave v. Dermody Props., Inc., 110 Nev. 824, 878 P.2d 291 (1994); Ellison v. Cal. State Auto Ass'n, 106 Nev. 601, 797 P.2d 975 (1990). When the questions before the trial court is the meaning and effect of a written instrument between the parties, a construction by one party which is unreasonable under all of the facts and circumstances of the case may be disregarded and may not create a "genuine" issue of fact. If one construction is reasonable and the other unreasonable, the trial court may enter summary judgment in favor of the reasonable construction. See Parman v. Petricciani, 70 Nev. at 431-32, 272 P.2d at 494.

b. Appellants Present No Genuine Issue of Material Fact Regarding Guarantors' Waiver of One-Action Rule, and Summary Judgment on Breach of Contract against Appellants is Supported by the Record

On de novo review, there is no new evidence before this Court that warrants overturning the District Court's findings, because Appellants submit no competent evidence that rises to a genuine issue of material fact that Appellants waived Nevada's One-Action Rule. Therefore, the lower court properly allowed the commencement of an action by Kennedy before the foreclosure of the Property.

Appellants failed to present specific facts below and again before this Court to defeat summary judgment on the issue that the Settlement Agreement required the lower court to stay the Guarantor Action against Appellants. Rather, Appellants impermissibly relied below and again here upon general allegations and conclusions, presenting no competent evidence to create a genuine issue of material fact, E.R. Tab 11, at 00235 - 00244, Respondent's Answering Brief,

which is contrary to this Court's well established ruling in *Bird v. Casa Royale W.*, 97 Nev. 67, 624 P.2d 17.

On appeal, Appellants still cannot defeat the Motion for Summary Judgment, because Appellants offer only conclusory statements based upon the record below that do not create an issue of material fact relating to the scope of the Settlement Agreement filed before the Bankruptcy Court. Appellants present no competent evidence to overcome the language of the Settlement Agreement when read as a whole.

There is no genuine issue of material fact set forth in the Opposition reviewed by the Court below that Appellants waived the One-Action Rule. Thus, this Court should affirm the lower court's Order granting Kennedy's Motion for Summary Judgment.

There is no genuine issue of material fact that the Appellants executed the Guaranties, and that Sections 2 and 4(g) of the Guaranties contain the express waiver of the One-Action Rule. There is no genuine issue of material fact that at the time Kennedy commenced the action against the Guarantors that the Borrower had filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code. There is also no genuine issue of material fact that Section 1.01(g) of the Settlement Agreement does not operate to extend the automatic stay to the Guarantors.

Under NRS 40.430(4)(i), Secured Creditor May Pursue Guarantors before Foreclosure if Borrower is in Bankruptcy

Nevada's "One-Action Rule" is contained in NRS 40.430, which provides in pertinent part:

> [T]here 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 this section and NRS 40.433 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.

Nevada's One-Action Rule, NRS 40.430(1), applies to guarantors or surety of a debt secured by an interest in real property, requiring that a creditor must seek recovery against the property through judicial foreclosure before recovering from the guarantor personally. See

McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. Adv. Op. 79, at 3, 123 P.3d 748, 750 (2005) (per curiam). The purpose of this Rule "is to compel one who has taken a special lien to secure his debt to exhaust the secured property before having recourse to the general assets of the debtor." See U.S. v. Cail, 746 F.Supp. 1035, 1038 (Dist. Nev. 1990) (citing McMillan v. United Mortgage Co., 84 Nev. 99, 101-02, 437 P.2d 878 (1968)).

Subsection 4 of Nevada's One-Action Rule enumerates a number of acts and proceedings that do not constitute an "action" for purposes of the One-Action Rule. Among the exceptions to the One-Action Rule and excluded from the definition of an "action" under the One-Action Rule is any act or proceeding 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. See NEV. REV. STAT. § 40.430(4)(i).

The commencement of an action against the guarantor after the borrower files for bankruptcy does not constitute an "action" under the One-Action Rule. Thus, there is no genuine issue of material fact that Appellants' waiver of the One-Action Rule under their Guaranty permits the entry of a judgment against the Guarantors arising from the Guarantor Action. Thus, the lower court did not err in the entry of the judgment in light of the Guarantors' waiver of the One-Action Rule. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

Under NRS 40.495, Secured Creditor May Pursue Guarantors Before Foreclosure if Guarantor Waives One-Action Rule.

NRS 40.495 governs the waiver of rights relating to the One-Action Rule, and provides in pertinent part as follows:

> 2. Except as otherwise provided in subsection 4, a guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, may waive the provisions of NRS 40.430. If a guarantor, surety or other obligor waives the provisions of NRS 40.430, an action for the enforcement of that person's obligation to pay, satisfy or purchase all or part of an indebtedness or obligation

> secured by a mortgage or lien upon real property may be maintained separately and independently from:
>
> (a) An action on the debt;
>
> (b) The exercise of any power of sale;
>
> (c) Any action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby; and
>
> (d) Any other proceeding against a mortgagor or grantor of a deed of trust.

The Guaranty falls within the ambit of the exceptions of the One-Action Rule because the waiver language contained in Sections 2 and 4 of the Guaranty uses the key words as set forth under NRS 40.495(2), resulting in the waiver of the One-Action Rule. Namely, under Section 2, the Defendant Guarantors expressly agreed that Kennedy did not have to bring an action against the Borrower or the Property before suing the Guarantors. See Guaranty, p. 1, ¶ 2. E.R. Appendix 3 at 111–121/KF00139–KF00149, Appellants' Opening Brief.

As for the waiver under Section 4 of the Guaranty, the Guarantors expressly waived any defense based upon Kennedy's failure to commence an action against the Borrower, or to proceed against or exhaust any security held by Lender at any time, in this case the Property. See Guaranty, p. 3, ¶ 4(g). E.R. Appendix 3 at 111-121/KF00139-KF00149, Appellants' Opening Brief. Both before the lower court and again in this appeal, Appellants wholly disregard the express exclusion in the One-Action Rule provided under NRS 40.430(4)(i), which allows lenders to pursue guarantors, such as Appellants, upon the Borrower's bankruptcy filing.

Due to the procedural posture of the case at the time the hearing on the Motion for Summary Judgment was heard by the lower court, the defenses under the anti-deficiency statute afforded under NRS 40.495(3)[3] are inapplicable, because there was no foreclosure pending at the time of the proceedings before the lower court. At the time the Motion for Summary Judgment was before the lower court, the Borrower had already filed for Bankruptcy on December 26,

[3] Subsection 3 provides that "If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to NRS 40.463, inclusive."

2008. Kennedy commenced the action that is the subject of this appeal, against the Guarantors on February 13, 2009, after the bankruptcy case was filed and in compliance with the exclusion to the One-Action Rule. Under the Guaranty, the Guarantors expressly waived any defense based upon Kennedy's failure to first commence an action against the Borrower, or to proceed against or exhaust any security held by Lender at any time. E.R. Appendix 3 at 111 – 149/KF00139 – KF00149, Appellants' Opening Brief.

Because of the timing of the bankruptcy filing and the waiver of the One-Action Rule, the lower court did not err in proceeding with the hearing on the Motion for Summary Judgment, because NRS 40.495(3) was not triggered, as there was no foreclosure. The lower court contemplated the timing issues relating to the commencement of the Guarantor Action under the waiver of the One-Action Rule, and the future foreclosure or sale of the Property, as evidenced in the Judgment that is the subject of this appeal. The Judgment ensures that Kennedy does not recover a windfall, in that it provides that the proceeds of the sale or refinance of the Property are to be deducted from the judgment amount and accruing interest entered against the Guarantors. See Judgment, p. 2, ll. 22-25. E.R. Tab 7 at 00217 - 00225, Respondent's Answering Brief. Thus, the District Court's finding of summary judgment in favor of Kennedy should be affirmed.

4. There is No Genuine Issue of Material Fact that the Settlement Agreement Filed in the Bankruptcy Court Does Not Operate to Stay the Guarantor Action.

The lower court properly found that there is no genuine issue of material fact regarding the applicability of the stay under Section 362 Settlement Agreement to the Appellants. First, the Settlement Agreement makes express reference to the Guarantor Action pending before this Court and makes clear that the Settlement Agreement approved by the Bankruptcy Court in no way precludes Kennedy from continuing to pursue its State Court Action against the Defendant Guarantors. The Settlement Agreement expressly stayed Kennedy's foreclosure of the Property for six (6) months, and does not purport to stay any actions, including the Guarantor Action, for any period of time. See Settlement Agreement, Sections 1.01(f) & (g), E.R. Appendix 5 at 209-212, Appellants' Opening Brief.

The timing of the Settlement Agreement is also telling. At the time the Debtor Borrower and Kennedy entered into the Settlement Agreement in August 2009, Kennedy had already commenced the action against the Guarantors six (6) months prior. The Debtor Borrower and Kennedy, the only parties to the Settlement Agreement, agreed that the Settlement Agreement would have no impact on the continuation of the Guarantor Action. See Settlement Agreement, p. 3, Section 1.01(g), E.R. Appendix 5 at 209-212, Appellants' Opening Brief (stating that "[t]he Parties agree that this 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.").

Secondly, Appellants were not a party to the Settlement Agreement filed in the Bankruptcy Court, see Settlement Agreement, E.R. Appendix 5 at 209-212, Appellants' Opening Brief, and, therefore, there is no privity of contract between the Guarantors and Kennedy as to the stay protection afforded exclusively to the Debtor under Section 362 of the Bankruptcy Code. Third, the Borrower Debtor and Kennedy were the only parties to the Settlement Agreement, and, thus, the Bankruptcy Court lacked jurisdiction regarding applicability of the bankruptcy stay over the non-debtor guarantors as it relates to the Guarantor Action.

Fourth, Appellants espouse a hyper-technical reading of the Settlement Agreement focusing on two words of the Settlement Agreement, namely "deficiency action", instead of reading the Settlement Agreement as a whole. Appellants' reading is inconsistent with the rest of the Settlement Agreement, namely Section 1.01(f), which provides that under Section 362 of the Bankruptcy Code, the parties agreed that automatic stay of the foreclosure would be extended six (6) months by agreement of the parties. The stay of the foreclosure under the Settlement Agreement by necessity precludes a deficiency from arising. Thus, the use of the term "deficiency action" was used to refer to the Guarantor Action, and was not a label for the nature of the underlying Guarantor Action as defined under Chapter 40 of the Nevada Revised Statutes. The terms "deficiency action", "collection action" and "guarantor action" all relate to the underlying State Court action against the Guarantors, none of which are defined terms that would bind Kennedy to a legal meaning under Chapter 40 of the Nevada Revised Statutes.

Regardless of the characterization of the action pending against the Guarantors before the District Court as the "deficiency action", when the Settlement Agreement is read as a whole, Section 1.01(g), when read in conjunction with Section 1.01(f), operates to ensure the action against the Guarantors would not be stayed as a result of the Settlement Agreement in the Bankruptcy. Appellants fail to meet their burden that there is genuine issue of material fact regarding the meaning of the Settlement Agreement. Accordingly, the lower court properly granted Kennedy's Motion for Summary Judgment and did not err in finding that the State Court Action against the Guarantors was not stayed under Section 1.01(g) of the Settlement Agreement.

E. CONCLUSION

The District Court's Order and Judgment should be affirmed.

DATED this 2nd day of September, 2010.

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III. CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of September, 2010.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 2nd day of September, 2010, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF**, postage prepaid and addressed to:

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