

CASE NO. 70786
IN THE SUPREME COURT OF THE STATE OF NEVADA

AMY FACKLAM, an individual,
Appellant,

Electronically Filed
Feb 17 2017 09:51 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE
HONORABLE ELISSA CADISH,

Appellees,

**HSBC BANK USA, National Association, as TRUSTEE for DEUTCHE
ALT-A SECURITIES MORTGAGE LOAN TRUST, MORTGAGE
PASS-THROUGH CERTIFICATES SERIES 2007-AR2**,

Real Parties In Interest.

APPELLANT'S REPLY BRIEF

On appeal from the Eight Judicial District Court,
Clark County, Nevada
District Court Case No. A-16-733762-C
The Honorable Elissa Cadish

HAFTERLAW
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February 17, 2017

NRAP 26.1 DISCLOSURE

Appellant, Ms. Facklam, is an individual and there are no corporate entities that are related to this case. The undersigned counsel of record has served as Ms. Facklam's counsel throughout this case, for all proceedings, and, as such, there are no other attorneys or firms to disclose.

DATED this 17th day of February, 2017.

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ARGUMENT

In reading the briefs in this appeal, two things are clear: 1) the parties appear to be talking past each other, and 2) there are a lot of questions of fact which arise after reading Respondent's Answering Brief. In talking past each other, it seems that Respondents regurgitate the arguments it made in its briefs in the lower court. This, however, is superfluous, as they did not file a cross-appeal to broaden the issues raised by Appellant¹, and the district court's order – the subject of this appeal – is very narrow.

The district court denied Appellant's motion for summary judgment and granted Respondent's counter-motion to dismiss. Accordingly, the

¹ For example, Respondent includes a section of their Answering Brief entitled "NOTICES OF DEFAULT DO NOT ACCELERATE A LOAN." The district court appeared to have believed otherwise, as it ruled that the rescission reset the statute of limitations – something that could only be triggered by the notice of default. Hence, if Respondents wanted to challenge that determination by the district court, it should have filed a cross-appeal. As it did not, such should not be considered by this Court, and the implied ruling that the notice of default in this case did, in fact, trigger the acceleration of the loan should become the law of the case.

concern for this Court is limited to whether Ms. Facklam stated a viable claim. That is a question of law, not fact. To that end, the Respondent's insistence on addressing questions of fact, such as whether Ms. Faclam's actions tolled the statute of limitations must be dealt with on remand through discovery.

Ms. Facklam, however, recognizes that the only way that a remand can occur is if this Court believes that the district court erred in its application of the law in this case. In order to determine this issue, this Court must focus on the actual findings of the district court.

Again, the district court granted the counter-motion to dismiss and denied Appellant's motion for summary judgment based on the following findings:

1. The December 5, 2011, rescission rescinded any acceleration by the 2009 notice of default.
2. Even under Plaintiff's statute of limitations arguments, any time which may have begun to run with that notice no longer applied.

APPX_251.

In other words, the district court made a factual determination that the December 5, 2011, rescission rescinded any acceleration that occurred by the 2009 notice of default. Hence, Respondent's arguments in Sections B through E of its Argument are beyond the scope of this appeal. Mr. Facklam

respectfully requests that this Court disregard those arguments.

In doing so, this Court must focus on the district court's failure to recognize the plain language of the document upon which the district court relief – the Rescission. On a motion to dismiss, plaintiff's allegations must be assumed true. In this case, Ms. Facklam, relying on the plain language of the recession, namely "*that this rescission shall not be construed as waiving, curing, extending to, or affecting any default, either past, present or future, under such Deed of Trust, or as impairing any right or remedy thereunder,*" APPX_145 (*emphasis added*), did not reset any applicable statute of limitations because it had no effect on the acceleration by its own language. This should be accepted as true. If it is accepted as true, then the district court erred in ruling to the contrary. It is really that simple.

Now, Ms. Facklam realizes that when there is an issue of first impression, judicial economy is best served by trying to have those issues resolved by the highest court of the land in an expeditious manner. It would be inefficient to remand the case now, only to have the district court then address what the statute of limitations is. To that end, Ms. Facklam did brief that issue, including the policy arguments related thereto, as this Court is empowered to address such issues at this stage of the case. Ms. Facklam

respectfully requests that this Court address this issue in this appeal.²

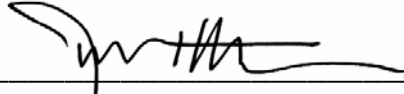
CONCLUSION

For the foregoing reasons, the district court's decision and order should be reversed.

Moreover, Ms. Facklam asks this Court to resolve her request for declaratory judgment, as there are no genuine issues of fact which remain, allowing this Court to, as a matter of law, resolve this case, and issue an order that provides Ms. Facklam the declaratory relief that she seeks.

DATED THIS 17TH day of February, 2017.

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² Mr. Hafter has two other cases in this Court, and one in federal court that all involve this same question of what is the statute of limitations for foreclosing on a mortgage. See Piazza v. US Bank, Case Number 70628, and Castl v. Pennymac Holdings, LLC, Case Number 71990; see also, Bergenfield v. US Bank, Case Number 2:16-cv-1691-RFB-VCF.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[XX] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font; or

[] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style]

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 821 words; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

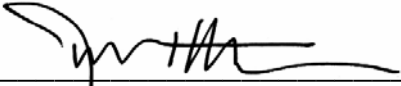
[] Does not exceed _____ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 17TH day of February, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 17TH day of February, 2017,

I served a copy of the **APPELLANT'S REPLY BRIEF** as follows:

- ☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or
- ☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or
- ☐ Hand Delivery—By hand-delivery to the addresses listed below.
- ☒ Electronic Delivery—By e-mailing a true copy to the addresses listed below.

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Honorable Elissa Cadish
Eighth Judicial District Court

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