

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

AMY FACKLAM, an individual,
Appellant,

Electronically Filed
Sep 19 2017 04:01 p.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 PETITION FOR REHEARING
PURSUANT TO NRAP 40

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

HAFTERLAW
JACOB L. HAFTER, Esq.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
jhafter@hafterlaw.com

September 19, 2017

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL STANDARD FOR PETITION FOR REHEARING

NRAP 40(c)(2) permits this Court to grant a petition for rehearing when it has overlooked or misapprehended a material fact or has overlooked or misapplied controlling law. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. —, —, 245 P.3d 1182, 1184 (2010). In petitions for rehearing, parties may not reargue matters they presented in their appellate briefs and during oral arguments, and no point may be raised for the first time. NRAP 40(c)(1).

ARGUMENT

This Court anchors its ruling in this case to a ruling that this Court published in its very first volume of published case law; unfortunately, this Court has misinterpreted that case to support a very generous gift to this State's lenders, a gift that there is no statute of limitations for foreclosure of property. *See Opinion* at 4 (*citing Henry v. Confidence Gold & Silver Mining Co.*, 1 Nev. 619, 621 (1865)). That, however, is NOT what this Court said 150 years ago. Rather, the Court in *Henry* recognized that the statute of limitations to collect on a debt was six months, but that an action to foreclose was limited to a four (4) year statute of limitations. *Henry*, 1 Nev. at 620-621. This was reaffirmed by this Court in *Mackie v. Lansing*, 2 Nev. 302 (1866),

when it said, citing Henry, that “although the plaintiff's right to sue on the note itself may have been barred at one time, his right to foreclose the mortgage is not barred until the lapse of four years.” (*emphasis added*).

This Court’s reading of Henry to support the position that there is no limitations on when a foreclosure can be brought is questionable when reading the language of the Henry decision. In Henry, the Court looked at competing legal theories – one from the California Supreme Court and one from the federal circuit court. The Court stated that it was “of opinion then, that so far as this branch of the case goes, the supreme court of California was right, and the circuit court was in error in the views expressed in Sparks & Kelsey v. Pico.” Henry, 1 Nev at 621. Specifically, this Court “referred to the decision of the California supreme court in the case of Lord v. Morris, 18 Cal. 482, to sustain the proposition that the debt being barred by the statute of limitation, the mortgage is in effect extinguished.” Id.

In reaching its decision, the Henry court recognized that a foreclosure action was one that has its foundation in equity. As such, there needs to be some equitable limitation on when a bill of foreclosure could proceed. Hence, while there was a statute of limitation for collection of debts equal to six (6) months, at the time, the limitation for foreclosures was set at four (4) years. Hence, the re-affirmance of the Henry decision the next year by this Court in

Mackie v. Lansing, 2 Nev. 302 (1866), limiting a foreclosure to four (4) years.

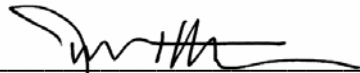
This is an equitable result.

What this Court has now done in this case is extend a foreclosure action indefinitely. There is no logical, yet alone, equitable justification for such legislation from the bench. In the days of Henry and Mackie, there was no such thing as a 15 year, a 30 year or even a 40 year mortgage. These extended term debt instruments have only been used for approximately 1/3 of the time that this Court has been in existence. Accordingly, the reliance on a housecleaning statute that allows a county recorder to remove stale deeds of trust from property records as the statute of limitations for bringing a foreclosure statute results in foreclosures which could be brought as long as 49 years after a breach (assuming a 40 year mortgage is breached in the first year it is in effect). That policy is not reasonable, yet alone equitable. Such policy flies in the face of all of our jurisprudence which requires a timely resolution of claims.

Accordingly, Appellant asks this Court to reconcile the four (4) year limitation on foreclosing set forth in Henry, the case upon which this Court based its decision, with the much longer period which would be in effect as a result of this Court's partial reading of the decision in Henry, as affirmed by Mackie, and the general principles of equity which govern a foreclosure.

DATED this 19th day of September, 2017.

HAFTERLAW

By: _____

JACOB L. HAFTER, ESQ.

Nevada Bar Number 9303

6851 Charleston Boulevard

Las Vegas, Nevada 89117

jhafter@hafterlaw.com

Counsel for Appellant

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 763 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 19th day of September, 2017.

HAFTERLAW


By: 
JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
702-405-6700 telephone
jhafter@hafterlaw.com

Counsel for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 19TH day of September, 2017, I served a copy of the **PETITION FOR REHEARING** to all parties who receive service through this Court's electronic court filing system.

HAFTERLAW

By: 

JACOB L. HAFTER, ESQ.
Nevada Bar Number 9303
6851 W. Charleston Boulevard
Las Vegas, Nevada 89117
702-405-6700 telephone
jhafter@hafterlaw.com

Counsel for Appellant