IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No.: 70786
District Court Case No.: A-16-733762-C

AMY FACKLAM,

Appellant,

vs.

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

Respondent.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REHEARING PURSUANT TO NRAP 40

Respectfully submitted by,

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I. INTRODUCTION

Appellant Amy Facklam's Petition for Rehearing is premised on her characterization that "this Court anchors its ruling" in its Decision of September 14, 2017 to a misinterpretation of its decision over 150 years ago in Henry v. Confidence Gold & Silver Mining Co., 1 Nev. 619 (1865). [Petition, p. 2; 133 Nev. Advance Opinion 65, p. 4.]. Facklam mischaracterizes this Court's Decision as holding that "there is no statute of limitations for foreclosure of property" without any distinction. [Petition, p. 2].

Facklam had argued the Court's Henry and Mackie Opinions from the 1800's in her Opening Brief. [Appellant's Opening Brief, pp. 14-15]. Respondent addressed Facklam's misguided arguments under these cases in its Answering Brief. [Respondent's Answering Brief, p. 13]. In support of her Petition, Facklam argues the Court misinterpreted its Opinions in the Henry and Mackie cases.

As determined, the Henry and Mackie Opinions are not applicable to or controlling in Facklam's underlying action or her appeal herein. This Honorable Court did not misapprehend a material fact or misinterpret the applicable law in reaching its Decision. A rehearing of Facklam's appeal is not required. Facklam's Petition should be denied.

II. STANDARD ON APPELLANT'S PETITION

As Facklam acknowledged, a petition for rehearing may be considered where the court overlooked or misapprehended a material fact in the record, material question of law in the case, or a decision directly controlling a dispositive issue." NRAP 40(c)(2). Also, "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. NRAP 40(c)(1).

III. ARGUMENT

Facklam's Opening Brief argued under the Henry Opinion that Respondent HSBC's right to foreclose was barred by the six year statute of limitations under NRS 11.190(b)(1) as a result of the prior 2009 Notice of Default. [Appellant's Opening Brief, pp. 14-15]. Facklam's Petition is based on the conclusion that this Court deemed the Henry opinion as the controlling dispositive law then misinterpreted it. Facklam maintains that, "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 620-21 (*emphasis* added). [Petition, p. 2].

A. The Court Did Not Misapply the Henry Opinion from 1865

The Court in its Decision summarized Facklam's argument:

> Facklam argues that the statute of limitations, set forth in NRS 11.190(1)(b), extinguishes HSBC's right to pursue a nonjudicial foreclosure. We disagree.

[Decision, p. 4]. NRS § 11.190 expressly states that it applies to "actions other than those for the recovery of real property . . .". As recognized by the Court in its Decision, the *non-judicial* foreclosure proceedings at issue in this appeal were not *actions*, and even if they were, the statute of limitations in Section 11.190(1)(b) would not be applicable to real property foreclosure actions. The Court correctly stated as follows in its Decision:

> In this case, HSBC chose to exercise its right to foreclose outside of the judicial arena….Nonjudicial foreclosure is neither a civil nor a criminal judicial proceeding. It is not commenced by filing a complaint with the court. NRS 11.190 serves only to bar judicial actions, thus, they are inapplicable to nonjudicial foreclosures.

[Decision, p. 5; Respondent's Answering Brief, pp. 11-12].

Facklam's use of Henry v. Confidence Gold & Silver Mining Co., 1 Nev. 619 (1865) in her Opening Brief and Petition contradicts her argument. As the Court determined, the statute of limitations pursuant to NRS 11.190(1)(b) does not bar Respondent HSBC's right to foreclose non-judicially under the Deed of Trust. [Decision, p. 5].

In Henry, the Plaintiff Henry was the debtor and the defendant mining company was the holder of corporate stock from California and Nevada interests under a mortgage, which was the security method used at the time. The plaintiff

Henry requested his stock back from the mining company, but the company refused because the mortgage debt was undisputedly still outstanding. The plaintiff Henry argued that he was entitled to the stock because the debt and thus the mortgage were unrecoverable as barred under the statute of limitations in effect at the time. Id. at 620.

The Henry Court surveyed the competing statutes of limitation theories applicable to debts from California and other jurisdictions, staring with the rule, "When a debt secured by mortgage is barred by the statute of limitations, the mortgage is not thereby extinguished." Id. at 619. The Court discussed one doctrine that a statute of limitations applying to both equitable and legal actions would bar both the debt and the mortgage. Id. at 621.

However, the Henry Court deduced that, "To such a doctrine, we are not ready to assent…A very slight examination of the authorities we think will convince any one that after an action at law upon the debt is barred, the mortgage may still have an existence for some purposes." Id. at 621-22. "So, too, if land is mortgaged to secure the payment of a promissory note after the note is barred, or rather after an action at law on the note is barred by the statute of limitation, the party may maintain his *action* of ejectment for the land mortgaged, or *file* his *bill* in equity. Id. at 622 (*emphasis* added). The Court further explained, "But a

mortgage in the usual form is not an obligation to pay money. It is usually a conveyance of certain property as a security for the payment of a certain debt." Id.

In other words, even if the debt on the note were time barred, the mortgage would remain and an "action" thereon would only be barred under a different four-year statute applicable at the time. As indicated, in the 1800's the procedure of ejectment or a bill to foreclose the land were actions filed by the foreclosing party as a plaintiff. Id. at 622. So even if this decision were interpreted to apply a statute of limitations to a mortgage (which is not a deed of trust), the limitations period applied only to actions filed by the mortgage holder as a plaintiff. The Henry Court did not reach a ruling where, as Facklam here, a debtor/borrower files an action as a plaintiff to assert that the right [by HSBC here] to foreclose on a mortgage was barred by the statute of limitations. The Henry Court phrased it as follows:

> This renders it unnecessary to determine another point which suggested itself to our mind. Could the plaintiff [debtor] come into a Court of equity and ask such affirmative relief as the plaintiff [Henry] asks here whilst acknowledging that the debt for which the property was pledged remains unpaid. The statute is a statute of repose, a statute to protect defendants, not to afford new causes of action to plaintiffs. But it is unnecessary to discuss this point.

Id. at 623.

Based on her misinterpretation of the Henry Opinion, Facklam's Petition offers one conclusory statement regarding the Mackie Opinion which she had also

argued in her Opening Brief: "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." [Petition, p. 4].

Like the Henry Opinion, the one-page Mackie Opinion is no more dispositive of Facklam's arguments in this appeal. In Mackie, the plaintiff was the mortgage holder that filed an action seeking to foreclose. The Mackie Court found the court below was in error when it ruled that the bar of a suit on the debt secured by the first mortgage also barred a suit on the mortgage. The Mackie Court held that a second mortgage, executed after the statute of limitations barred a *lawsuit* on the *note* secured by a first mortgage, but before a *lawsuit* to foreclose the first mortgage was barred, did not take precedence as the bar of the *debt* secured by the first mortgage did not bar the mortgage executed in 1862 when Nevada was a territory. Mackie at 302.

Here, Facklam's outstanding debt under the Note secured against the property by the *Deed of Trust* was undisputed. [Respondent's Answering Brief, p. 2]. Respondent did not file an action for judicial foreclosure, and was not the plaintiff in the underlying action filed by Facklam. This Honorable Court did not misapprehend the facts or misinterpret the law. The Court affirmed the District Court and properly concluded "that NRS 11.190(1)b) does not apply to nonjudicial

foreclosures because nonjudicial foreclosures are not judicial actions and NRS 11.190 applies only to judicial actions." [Decision, p. 2].

B. Even if the Statute of Limitations Applied, the Limitations Period Terminated Upon Rescission of the Non-judicial Foreclosure

Facklam's Petition does not address any other consideration on which the Court based or may base its Decision. For example, Facklam's Petition ignores the language of NRS 11.190(1)(b), the statute of limitations upon which she based her action and appeal. As pointed out by the Court, Section 11.190(1)(b) is expressly inapplicable to "actions" like hers below involving the "recovery of real property." [9/14/17 Decision, p. 4].

Another example, Facklam's Petition does not address the difference between a judicial foreclosure and a non-judicial foreclosure under the Deed of Trust, as was the case here. [9/14/17 Decision, pp. 4, 5].

As a further example, Respondent and the District Court established that the non-judicial foreclosure that had been commenced with the September 25, 2009 Notice of Default, upon which Facklam based her appeal, was rescinded on December 5, 2011 thereby extinguishing any arguable running of the limitations period. [Respondent's Answering Brief, pp. 2, 3, 20, 22, 24; JA Vol. I, pp. 59-61; Vol. II, p. 246 lns. 15-17]. The District Court agreed. (JA, Vol. II, pp. 246-247 lns. 20-24). Facklam's Petition does not address this point either.

IV. CONCLUSION

For the reasons set forth above, this Honorable Court should deny Appellant Facklam's Petition for Rehearing.

DATED: December 11, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this answering 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times Roman font.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) and NRAP 40(b)(3) & (4) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,185 words, or does not exceed 10 pages.

Finally, I certify that I have read RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REHEARING, and to the best of my knowledge, information and belief, it is not frivolous or interposed for an 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 assertions in the brief regarding matters in the record to be supported by a reference to the page and volume number, in any, of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of December, 2017. Electronic service of the foregoing **RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REHEARING PURSUANT TO NRAP 40** shall be made as follows:

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