IN THE SUPREME COURT OF THE STATE OF NEVADA

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PATRICIA ANTHONY; and
WILLIAM ANTHONY,

Appellants,

vs.

FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

Respondent.
_____/

Supreme Court No. 79284

APPELLANT'S REPLY BRIEF

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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

1. Preliminary Statement -The Issue of Whether the Mobile Home was Personal or Real Property was Never Waived

In its Answering brief, the Respondent makes the following statement at page 26:

> As noted above, the Anthonys do not challenge the district court's finding that the '96 Fuqua, connected to a second manufactured home, a '97 Fuqua to form one single family home, and permanently attached to the land, was a real property improvement described in the deed of trust. (See AOB). On this basis, the district court found Fannie Mae obtained title to the property, including the '96 Fuqua, at the foreclosure sale. (AER 436 ¶7). The Anthonys failure to challenge this finding on appeal constitutes a waiver of any claim of error.
>
> Emphasis supplied

This is absolutely false, and a misstatement of the record.

Paragraph 7 of AER 436 is the record cited for this supposed "waiver". AER 436 is a portion of the District Court's Findings of Fact, Conclusions of Law and Order on Parties' Motions for Summary Judgment. Paragraph 7 of the Findings says:

> 7. Fannie Mae obtained title and possession of the property, including the manufactured homes, through its non-judicial foreclosure proceeding, followed by an unlawful detainer action. Plaintiffs MSJ, Exs. 9, 10. It did not convert, or wrongfully take, the property. Fannie Mae properly foreclosed on the property, including the manufactured homes, which were permanently attached to the property and therefore constituted real property.

> However, even if the manufactured homes were personal property, Fannie Mae still properly foreclosed under NRS 104.9604(1)(b), which states that where a security agreement covers both personal and real property, a secured party may foreclose "[a]s to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply." NRS 104.9604(1)(b).

AER 435-436.

The Appellants raised the argument in the District Court that the 1996 FUQUA was personal property, and that its sale violated Article Nine of the Uniform Commercial Code. Appellants raised this in multiple pleadings.

In the Appellants' April 19, 2019 Motion for Partial Summary Judgment (AER 073-144) they state:

> The FUQUA is a consumer good. It is used as the Anthony's home. It is not rented or used for any commercial purpose. NRS 104.614 governs the notice of sale that must be used in a consumer-goods transaction.

AER 077

> Anthony believes Fannie Mae had no security interest in the FUQUA. Simply put, the deed of trust fails to comply with NRS 104.9203(2)(c)(1). With respect to tangible goods, the statute requires a description of the collateral to be included in the written security agreement. The deed of trust contains no such description of the FUQUA.
>
> The argument that the mobile home is an "improvement" is a bad one. Mobile homes are mobile. Unlike a stick built house, they can be taken away to a new location. To call the FUQUA an

> improvement so the security interest attaches is akin to Anthony parking an expensive car on the property and having the lien attach to the vehicle.
>
> AER 080

The Appellants' May 6, 2019 Opposition to Fannie Mae's Motion for Partial Summary Judgment also raised the issue that the FUQUA could not have been considered to be real property at the time of the 2012 foreclosure sale due to non-compliance with NRS 361.244(2).

> The FUQUA was never converted to real property because the affidavit is but one of four steps required to convert the mobile home to real property. Specifically, NRS 361.244(2) states: . . .
>
> There are four conditions, all of which must be met, to legally convert the FUQUA to real property. Evidence of one condition - the affidavit of conversion - is not enough to convert it to real property. Therefore, the FUQUA at all times was personal property.
>
> A mobile home is personal property unless all of the statutory requirements have been fulfilled. *Matter of Colver,* 13 B.R. 521, 524 (Bankr. D. Nev. 1981). For that reason, the FUQUA could not be deemed an improvement at the time of the foreclosure sale, since it was titled property and there was no compliance with the requirements in NRS 361.244.
>
> AER 268-269

Respondent also argues that Appellants do not challenge the district court's finding that the '96 Fuqua, was a real property improvement described in the deed of trust (See AOB)

Once more, this is absolutely false, and a second misstatement of the record.

Appellant's opening brief was filed on April 15, 2020. Pages four and five detail the Appellant's argument that the mobile home was personal property, and not part of the real property:

> At the time of the foreclosure, the Appellants had a 1996 FUQUA Eagle Mobile Home on the real property. This mobile home had not been converted to real property. See NRS 361.244. At that time, it was classified as personal property that had been placed on the real property.

Although no 'bright line rule exists to determine whether a matter as been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it. *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir. 2010).

AER Document No. #18 (AER 430-440) contains the District Court's findings, conclusions and order. They clearly reflect the Appellants had argued the FUQUA mobile home was personal property. Finding No. 7 States:

> It did not convert, or wrongfully take, the property. Fannie Mae properly foreclosed on the property, including the manufactured homes, which were permanently attached to the property and therefore constituted real property. However, even if the manufactured homes were personal property, Fannie Mae still properly foreclosed under NRS 104.9604(1)(b), which states that where a security agreement covers both personal and real property, a

secured party may foreclose gals to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply." NRS 104.9604(1)(b).

AER 436 Emphasis supplied

Finding No. 7 States:

Even if the claim was not barred by the statute of limitations, the claim fails because the UCC permitted the sale of the manufactured homes even if the manufactured home did constitute personal property. Where a security agreement covers both personal and real property, a secured party may proceed "[a]s to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply." NRS 104.9604(1)(b). Therefore, no violation of the UCC occurred.

Emphasis supplied

The Appellants never waived the issue of whether the FUQUA was personal property. It was briefed, argued and ruled upon. There was no failure to raise the issue below. The Respondent has mis-quoted the record to this Court.

2. Brief Summary of Appellants' Arguments

First, the FUQUA was not an improvement, nor was it real property until the Respondent made it so in 2015. This was all covered by NRS 361.244(3): (Emphasis supplied)

> A mobile or manufactured home which is converted to real property pursuant to this section shall be deemed to be a fixture and an improvement to the real property to which it is affixed.

Compliance with NRS 361.244(2)'s requirements is therefore a condition precedent before a mobile home can be considered real property or an improvement to real property.

The effect of non-compliance was to (1) Prohibit the FUQUA from being considered an improvement to real property under NRS 361.244(3) and (2) Confirmed its status as personal property when the Respondent sold it to itself in 2015 by converting it to the underlying real property it already owned.

Second, the Respondent violated Article Nine of the Uniform Commercial Code by disposing of personal property in violation of Section Six of Article Nine. The Article Nine argument requires the Respondent to have a security interest in the FUQUA. This, in turn, depends upon the collateral description found in the deed of trust.

Third, if the Respondent had no security interest in the FUQUA, then it converted it to its own use when Respondent made it a part of the underlying real property in 2015.

Fourth, The Appellants argued they could raise any time barred statutory damage defense under the equitable doctrine of recoupment.

Fifth, and last, the Respondent committed an abuse of process by excessive attachment. i.e. they took the personal property FUQUA at a point in time where it had no judgment or security interest in the FUQUA. See *Nevada Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601, 503 P.2d 9, (Nev. 1972).

3. Brief Summary of Respondent's Arguments

First, The FUQUA was real property.

Second, The Appellants' failure to convert the FUQUA to real property does not affect the FUQUA's status as a real property improvement.

Third, The sale did not violate the Uniform Commercial Code

Fourth, Any damages are time barred.

Fifth, Recoupment was not plead as an affirmative defense

4. Appellants' Arguments

A. THE FUQUA WAS PERSONAL PROPERTY

NRS 361.244 provides the exclusive means by which personal property may be converted to real property. A mobile or manufactured home becomes real

property when the assessor of the county in which the mobile or manufactured home is located has placed it on the tax roll as real property. NRS 361.244(2).

Subsection (2) continues to say that the assessor shall not place a mobile or manufactured home on the tax roll until:

(a) The assessor has received verification from the Housing Division of the Department of Business and Industry that the mobile or manufactured home has been converted to real property;

(b) The unsecured personal property tax has been paid in full for the current fiscal year;

(c) An affidavit of conversion of the mobile or manufactured home from personal to real property has been recorded in the county recorder's office of the county in which the mobile or manufactured home is located; and

(d) The dealer or owner has delivered to the Division a copy of the recorded affidavit of conversion and all documents relating to the mobile or manufactured home in its former condition as personal property.

The statute is in the conjunctive by use of the term "and" at the end of (c). All four conditions must be met for the transformation. It does not matter of the wheels are removed, the tongue taken off or cement blocks are used to support the home. It is, and always will be, personal property until substantial compliance with NRS 361.244(2)(a)-(d).

The record does reflect William Anthony filed a two page Affidavit Application for Certificate of Ownership with the Department of Manufactured Housing on October 18, 2012 (AER 142-143). This Affidavit is not the one required by NRS 361.244(2)(c). That statute requires an "Affidavit of Conversion". Mr. Anthony filed an application for a certificate of ownership because "The manufacturer's Statement of Origin was lost by the Title Company". Id.

Total compliance with with NRS 361.244(2) is required before the FUQUA could be placed on the tax roll, and that did not happen until the Respondent filed the paperwork with the Department of Manufactured Housing in 2015.

B. ARTICLE NINE APPLIED TO THE FUQUA IN 2015

Two points of clarification are warranted at the outset of this argument. **First**, NRS 361.244(3) does say that a mobile or manufactured home shall be deemed to be a fixture and an improvement to the real property to which it is affixed when compliance with that statute is complete. The record is clear that

there was no compliance until the Respondent filed the paperwork with the Department of Manufactured Housing in 2015.

Second, under Article Nine, the FUQUA could be an "improvement" that did not qualify to transform it into real property under Chapter 361 of the Nevada Revised Statutes. The end effect of that argument is the FUQUA did attach as personal property collateral for the underlying loan. Respondent's security interest therefore covered both real and personal property.

The question thus becomes whether or not Respondent's security interest attached to the personal property in 2002. The deed of trust was recorded on June 26, 2002. The collateral description was:

> Real property with the address of 3705 Anthony Place, Sun Valley, Nevada together with all the improvements now or hereafter erected on the property"
>
> (Appendix Bate 092)

NRS 104.9108 describes various methods to describe collateral. NRS 104.9108(2)(f) is the catch-all provision. It says that a description is sufficient if the identity of the collateral is objectively determinable. Drafter's comment 2 to the statute says "*The test of sufficiency of a description under this section, as*

under former Section 9-110, is that the description do the job assigned to it: make possible the identification of the collateral described."

In the Appellants' motion for summary judgment they did concede, for the purposes of the motion only, that they believed the loan included the FUQUA as personal property collateral (AER 074). This should be enough for attachment under NRS 104.9203. Once there is attachment, then what happens after default matters.

NRS 104.9625(3)(b) contains the statutory damage formula, which has been discussed extensively in Appellants' opening brief. NRS 104.9625(3)(b) is patterned on former Section 9-507(1). The drafter's comments to that section say the statute is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted.

C. THE DISPOSITION OF THE FUQUA VIOLATED UCC

Respondents have never argued that it issued a notice of sale of personal property that was compliant with NRS 104.9613 and NRS 104.614. Rather, they

rely upon NRS 104.9604(1)(b).That statute says that when the collateral is both real and personal property, compliance with Nevada's real property statutes is sufficient and the requirements of the UCC may be ignored.

That would be a great argument had the notice of sale actually bothered to use the term "improvement" or "mobile home" or "FUQUA". It did not. To compound matters, the notice of sale confirms only real property is being sold at that sale.

All notices of sale for personal property must describe the collateral that is the subject of the intended disposition. NRS 104.9613(1)(b).

Nevada's foreclosure statutes also require the foreclosing creditor to particularly describe the property in the notice of sale. NRS 107.080(4)(b) says the trustee shall, before the making of the sale, give notice of the time and place thereof by recording the notice of sale and by . . . . (b) Posting a similar notice particularly describing the property, for 20 days successively, in a public place in the county where the property is situated (emphasis supplied)

The notice of sale is found at AER 105. It does two things. **First**, it only describes the property located at 3705 Anthony Place, Sun Valley, Nevada. The FUQUA is not mentioned. **Second**, it uses the following description of what is being sold "*[A]ll right, title and interest conveyed to and now held by it under said Deed of Trust, in the property situated in said County and State and as more fully described in the above referenced Deed of Trust. The street address and other common designation, if any, of the real property described above is purported to be: 3705 Anthony Place, Sun Valley, NV 89433".*

This Notice of Sale could never have included the personal property FUQUA for two reasons. **First**, the term improvement is not used in the notice. It only appears in the referenced deed of trust. **Second**, after the notice references the deed of trust; it continues to say "The street address . . . . of the "**real property described above**" . . . . . is purported to be 3705 Anthony Place, Sun Valley, NV 89433." (Emphasis supplied)

The notice of trustee's sale was ineffective as to the FUQUA under both Article Nine and NRS 107.080(4)(b). The safe harbor provision of NRS 104.9604(1)(b) does not apply.

It is anticipated the Respondent will say the term is ambiguous and should have included the personal property FUQUA. Appellants believe the use of the term "*real property described above*" negates a sale of any personal property. All that was sold on that day was the land. The personal property was sold later.

At the time of sale, the Respondent had multiple items of collateral. It had the real property located at 3705 Anthony Place, and it had the FUQUA as a non-real property improvement. The notice clarified the above described property as "*real property*", and if that can be considered to create any ambiguity, it has to be construed against the Respondent drafter. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007).

This was not a single sale of land and personal property pursuant to Nevada's foreclosure laws. There are two arguments to support Appellants' proposition. **First**, both the notice of foreclosure sale and the foreclosure deed do

not mention the FUQUA nor the term "Improvement". It is axiomatic that a notice of sale must describe what is being sold.

Second, Article Nine contemplates multiple sales when there is more than one item of collateral. NRS 104.9610(2) says in relevant part that "*a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.*"

The FUQUA was on the land as personal property reflecting the Anthonys as the owners with no lienholder (AER 110). When the Respondent went to the Department of Manufactured Housing, it made the following representations.

(1) The FUQUA's title had been lost (AER 113);

(2) The FUQUA had been acquired at a foreclosure sale in 2012 (AER 117);

(3) The Respondent is the owner of the FUQUA with no lienholder (AER (109, 111 and 117-118); and

(4) The Respondent filed an affidavit/application for ownership for the FUQUA disclosing it was the owner of the FUQUA with no lienholder.

The Respondent transferred title to itself in 2015[1]. Up to that point the FUQUA had not been sold. The notice of sale and the deed upon sale confirmed that only the real property at Anthony Place was sold. No "improvement", including the FUQUA, was ever sold in 2012. The Respondent's 2015 transfer of the FUQUA to itself was a disposition of collateral by a secured creditor with absolutely no notice or the information required by NRS 104.9613 and NRS 104.9614.

That is a serious violation of Section Six of Article Nine; it took place within three years of the subject lawsuit and the Anthony's claim for statutory damages is not time barred.

D. CONVERSION AND ABUSE OF PROCESS

NRS 104.9625(3)(b) allows recovery of actual or statutory damages, whichever is greater. The statutory damages in this case would be $307,120.00. If this Court should determine no security interest ever attached to the FUQUA, then

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[1] See NRS 104.1201(2)(cc) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.

the Appellants' damages would be limited to those for conversion and/or excessive attachment.

These claims for relief were plead in the District Court as alternative relief should there be no security interest in the FUQUA.

NRS 104.9610(1) says only a secured party may dispose of the collateral after default. If one is not a secured party, then there is no collateral to sell. In order for a security interest to attach, the agreement must provide a description of the collateral. NRS 104.9203(2)(c)(1). The "trigger" term in the deed of trust is the real property plus "improvements". As noted in the prior section, NRS 361.244(3) prohibits a mobile home from becoming an "improvement" to real property until all four criteria in NRS 361.244(2)(a)-(d) have been met.

It is Appellants' position that NRS 104.9203(2)(c)(1) and NRS 361.244(3) serve separate purposes. The former controls attachment of personal property security interests. The latter governs the procedure to transform a mobile home into real property. NRS 104.9108 describes the sufficiency of a description for attachment. The Drafter's Comments tell us that it is whether or not it is possible to

identify the collateral described. Appellants believe the description was sufficient, and the FUQUA was personal property collateral for the loan.

If this Court should determine that the security interest did not attach based upon NRS 361.244(2), then the matter should be remanded in order for the District Court to calculate actual damages for conversion and/or excessive attachment.

E. RECOUPMENT

NRS 104.9604(1)(b) says that when the collateral is both real and personal property, compliance with Nevada's real property statutes is sufficient and the requirements of the UCC may be ignored.

The notice of sale required by NRS 107.080 is found at AER 105. As noted above, it only describes the property located at 3705 Anthony Place, Sun Valley, Nevada. The FUQUA is not mentioned.

NRS 107.080(4)(b) says a similar notice particularly describing the property must be posted. The notice does not describe the FUQUA; and if it was part of what is being sold in 2012, there was not compliance with Nevada's real property foreclosure laws.

This, in turn, leads to the possibility that the notice of sale for the FUQUA was given in 2012 in the form of the notice of trustee's sale. Not only is it defective under NRS 107.080(4)(b), it is also defective under NRS 104.9614 in the following respects:

1. It fails to identify the FUQUA as collateral;
2. It fails to inform Anthony of their right to an accounting,
3. It fails to give a description of any liability for a deficiency of the person to which the notification is sent

Whether or not recoupment applies depends upon when the statute of limitation expired. There is a three year statute of limitation for liability created by statute. If this Court should find that NRS 104.9604(1)(b) is inapplicable because the notice of sale failed to particularly describe the specific property being sold as required by NRS 107.080(4)(b), then there is a notice violation outside the three year period.

The Appellants are entitled to recoup their time barred statutory damages against any recovery Respondent may be entitled to. Respondent argues this was not raised as an affirmative defense. This is correct; however, the defense was raised in the Appellants' counterclaim.

A copy of the Appellants' counterclaim may be found at AER 031-042. The first claim for relief is for violations of UCC Article Nine. Paragraphs 31-47 detail the defective 2012 notice and Respondent's liability for statutory damages. See AER 037-039.

Nev. R. Civ. Pro. 8(c)(2) says that if a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

The counterclaim is factually specific regarding the 2012 notice given, its defects and the statutory damage consequences. The Appellants are entitled to assert recoupment as an affirmative defense even though the underlying cause of action was brought as a counterclaim.

5. Conclusion

The FUQUA was personal property. The deed of trust mentioned the real property and "improvements". Under the Uniform Commercial Code, the security interest attached to the FUQUA. The disposition took place in 2015 when

Respondent sold it to itself. The disposition was not in 2012 as the notice of sale never mentioned an improvement or the FUQUA, and Nevada's foreclosure statutes require a particular description of the property being sold.

Because the Respondent's sale of the FUQUA to itself violated Section Six of Article Nine, the Appellants are entitled to statutory damages. Even if the sale were deemed to have taken place in 2012, the Appellants are still entitled to the remedy of recoupment as to those damages. Last, if the Court finds the security interest never attached to the FUQUA based upon NRS 361.244(3), then a remand is warranted so the Court can calculate damages for conversion and/or excessive attachment.

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/ /

6. Rule 26.1 Disclosure

Pursuant to NRAP 26.1 I hereby disclose that I represent Patricia Anthony and William Anthony. There is no corporation.

Affirmation
Pursuant to NRS 239B.030

The Undersigned does hereby affirm that the preceding document filed in the case herein does not contain the social security number of any person.

Dated: This 20 day of August, 2020

By: _____
Michael Lehners, Esq.
429 Marsh Ave.
Reno, Nevada 89509
Nevada Bar Number 003331

7. Certificate of Compliance NRAP 32(a)

Pursuant to NRAP 32(a)(9) 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 4.0 in 14 point New York font.

I further certify that this brief complies with the type - volume limitations of NRAP 32(a)(7)(ii) 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 4,313 words.

Affirmation
Pursuant to NRS 239B.030

The Undersigned does hereby affirm that the preceding document filed in the case herein does not contain the social security number of any person.

Dated: This 20 day of August, 2020

By: _____

Michael Lehners, Esq.
429 Marsh Ave.
Reno, Nevada 89509
Nevada Bar Number 003331

8. Rule 28.2 Certificate

Pursuant to NRAP 28.2, I hereby certify as follows:

1. That I have read this brief.

2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

Affirmation
Pursuant to NRS 239B.030

The Undersigned does hereby affirm that the preceding document filed in the case herein does not contain the social security number of any person.

Dated: This 20 day of August, 2020

By: _____

Michael Lehners, Esq.
429 Marsh Ave.
Reno, Nevada 89509
Nevada Bar Number 003331

CERTIFICATE OF SERVICE BY MAIL

Pursuant to Nevada Rule of Civil Procedure 5(b), I certify that on the 20 day of August, 2020 I deposited for mailing in the United States Post Office in Reno, Nevada, with postage thereon fully prepaid, a true copy of the within **APPELLANTS' REPLY BRIEF** addressed as follows:

Melanie Morgan, Esq.
Akerman, LLP
1635 Village Center Circle
Suite 200
Las Vegas, Nv 89134

A copy of this Notice is also served upon Ackerman, LLP through the court's Eflex System.

Dolores Stigall