

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR.,
and VICENTA LINCICOME,
Petitioners,
vs.

THE THIRD JUDICIAL DISTRICT
COURT OF NEVADA, IN AND FOR
COUNTY OF LYON; HONORABLE
LEON A. ABERASTURI, DISTRICT
COURT JUDGE,
Respondent(s),
and

SABLES, LLC, a Nevada limited
liability Company; FAY SERVICING,
LLC, a Delaware limited liability
company and subsidiary of Fay
Financial, LLC; PROF-2013- M4
LEGAL TITLE TRUST by U.S.
BANK, N.A., as Legal Title Trustee;
BANK OF AMERICA, N.A.

Real Parties in Interest.

CASE NO.: 79152-COA

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DISTRICT COURT CASE NO.:
18-CV-01332

Petition for Writ of Mandamus from the Order of
the Third Judicial District Court
of the State of Nevada
In and For the County of Lyon

SABLES, LLC'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Respectfully Submitted by:
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CORPORATE DISCLOSURE STATEMENT

PURSUANT TO N.R.A.P. RULE 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Respondent Sables, LLC, is a Nevada limited liability company, and is 100% owned by Les Zieve, a resident of Los Angeles, California.

DATED: October 25th, 2019. ZBS LAW, LLP

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INTRODUCTION

Sables, LLC (“Sables”) hereby responds to Plaintiffs’ Albert Lincicome and Vincenta Lincicome’s (“Plaintiffs”) Petition for Writ of Mandamus (“Petition”) pursuant to Order of this Court dated September 25, 2019.

The underlying action centers on a dispute between borrower Plaintiffs and their lenders. Sables is the trustee under the deed of trust at issue, and its role is limited to performing its duties as set forth in NRS Chapter 107. The actions of Sables in the underlying dispute consists of recording the Notice of Default, the Notice of Sale, and subsequently, the Trustee’s Deed upon completing the foreclosure. Sables has not committed any acts, and none are alleged, outside of its duties as trustee set forth in NRS Chapter 107.

First, Plaintiffs seek relief from the Order granting Sables’ Declaration of Non-Monetary Status pursuant to NRS 107.029 (“DNMS”). Plaintiffs make allegations of errors pertaining to their lenders concerning prior dealings which do not concern Sables. Sables, as trustee, is entitled to rely on the information provided by the beneficiary of the deed of the trust in performing its duties under NRS Chapter 107 (NRS 107.028). Plaintiffs allegations of errors pertaining to their loan are properly directed at the lender defendants, and not the trustee. Importantly, not one allegation or stated fact in Plaintiff’s Complaint or its proposed Amended Complaint alleges that Sables violated any statutory duty of a

trustee under NRS Chapter 107. The Complaint focuses on the content of the recorded documents, which is provided by the beneficiary of the deed of trust, which is a defendant participating in the underlying action. (Complaint, Appendix, Vol. 1, 00001-00015, and Proposed Amended Complaint, Appendix Vol. 2-3, 00488-00502). Accordingly, the DNMS was properly sustained over Plaintiffs' objection.

Second, Plaintiffs seek relief from the Order precluding Plaintiffs' request to amend to include new or additional claims as to Sables. The district court properly denied Plaintiffs' request to amend as to Sables, as Plaintiffs provided no factual basis for liability of trustee Sables in performing its duties as set forth in NRS Chapter 107. Plaintiffs continue to try to pin monetary liability on Sables solely due to Sables' recordation of the Notice of Default, Notice of Sale, and now the Trustee's Deed, in the underlying non-judicial foreclosure. However, recording of these notices and the deed is the statutory duty of the trustee, and is not actionable. Plaintiffs' dispute as to the contents of the notices lies with the lender defendants, not Sables. The information contained in the notices is provided by the lender beneficiary of the deed of trust. Sables merely performs the ministerial acts of recording and mailing the notices to interested parties pursuant to the statutes. Based on the facts and claims plead in the Complaint, and in the proposed Amended Complaint, the district court properly denied Plaintiff's request to amend

as to Sables, as the proposed amendment is based on these same set of facts set forth in the Complaint, rendering it futile.

Allowing a borrower in default to sue a non-judicial foreclosure trustee based on a dispute with the lender, solely because the trustee performed its duties by recording the statutorily-required notices, would render the DNMS statute NRS 107.029 meaningless. Sables has no interest in the loan, the property, or the outcome of the dispute. Despite its DNMS being granted, Sables remains bound by the district court's determinations. Accordingly, if the district court finds some actionable or reversible error concerning the loan balance or other information set forth in the notices, Sables would be obligated to comply with the court's ruling as to same, including rescission, if required.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY UPHELD SABLES' DECLARATION OF NON-MONETARY STATUS.

A. Sables, as trustee, performed its limited duties set forth in NRS Chapter 107.

Plaintiffs' allegations as to Sables all stem from its recording of the Notice of Default and Notice of Sale, and now the Trustee's Deed – all of which are statutorily required functions of a trustee under NRS Chapter 107. Plaintiffs appear to take issue with the content of the notices, however that information is provided by the beneficiary of the deed of trust, which is a party to this case.

Sables has no right or duty to perform an audit of the loan information provided, but on the contrary, is entitled to rely on the information provided by the beneficiary. Indeed, “A rebuttable presumption that a trustee has acted impartially and in good faith exists if the trustee acts in compliance with the provisions of NRS 107.080. (NRS 107.028(6)). Plaintiffs have not alleged that Sables violated any provision of NRS 107.080, but have merely alleged that Sables was on notice of the alleged errors with the loan, which is the subject of the underlying litigation and remains to be resolved (Complaint, Appendix, Vol. 1, 00001-00015, and Proposed Amended Complaint, Appendix Vol. 2-3, 00488-00502). Sables is caught in the middle of a dispute between the borrower Plaintiffs and their lender defendants, and is not an independent source, nor an auditing authority of the contested information. Such disputes between lenders and borrowers is common, which is the entire purpose of shielding the trustee in NRS 107.029. Accordingly, the presumption of good faith and impartiality remains as to Sables, and its DNMS was properly sustained.

B. No error has been established requiring correction by Sables.

NRS 107.028(6) provides: “In performing acts required by NRS 107.080, the trustee incurs no liability for any good faith error resulting from reliance on information provided by the beneficiary regarding the nature and the amount of the default under the obligation secured by the deed of trust if the trustee corrects

the good faith error not later than 20 days after discovering the error.” Plaintiffs allege that Sables was on notice of errors alleged by Plaintiffs, however, these remain merely allegations in a litigated case, not actionable or established errors. The allegations remain at issue in the underlying litigation, which until resolved, remain only allegations. Notably, Sables has complied with all orders of the district court, including the injunction, but Plaintiffs then failed to post the required bond, allowing the sale to proceed per order of the Court and the direction of the beneficiary. Sables takes no side in the dispute and has complied with all applicable law and court orders. Should the district court find that there was an error requiring rescission of the foreclosure notices, Sables would immediately comply with the Court’s Order to correct any errors, in compliance with NRS 107.028(6).

C. Sables has complied with its statutory duties under NRS Chapter 107.

NRS 107.080 imposes a “substantial compliance” requirement, not a strict compliance standard. Schleining v. Cap One. Inc., 326 P.3d 4, 10-11 (Nev., 2014). “Substantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice.” Id., at 12. Plaintiffs do not allege Sables failed to provide notice, nor have they alleged any resultant prejudice from the content of the notices. Plaintiffs did not make payments on the loan for nearly

a decade, but now allege minor discrepancies with the date of default and the loan balance associated with the disputed loan modification, are contained in the Notice of Default. However, without any articulable or alleged prejudice, these items are not actionable, especially as to Sables, which relies on the beneficiary to provide its loan balance and default information. Plaintiffs cannot argue they were prejudiced by the foreclosure notices, as they subsequently obtained an injunction but failed to post a bond in amount less than the default amount. If Plaintiffs were able to cure the default, surely they would have posted the bond of a lesser amount. Plaintiffs received all required notices, and have not alleged and cannot allege any prejudice resultant from the information contained therein. Accordingly, Sables has complied with the requirements of NRS 107.080 *et seq.*, and its DNMS should stand.

III. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION TO AMEND AS TO SABLES, AS PLAINTIFFS PLEAD NO NEW FACTS TO SUPPORT LIABILITY OF THE TRUSTEE.

A. Amendment was properly denied as futile where no new facts are alleged as the basis for Sables' liability.

Plaintiff's proposed Amended Complaint continues to allege the same facts as in the first Complaint pertaining to Sables, which resulted in the granting of Sables' DNMS. Specifically, all of Plaintiffs' allegations as to Sables centers on Sables' recordation of the Notice of Default, Notice of Sale, and Trustee's Deed –

all of which are statutorily-required duties of the trustee. Leave to amend a pleading should not be granted if the proposed amendment would be futile. Halcrow, Inc. v. Eighth Jud. Dist. Ct., 129 Nev. 394, 302 P.3d 1148 (2013). Plaintiffs' proposed claims as to Sables are again based solely on Sables' recording of the Notice of Default, Notice of Sale, and Trustee's Deed – statutory duties of a trustee under NRS Chapter 107. If amendment were allowed, Sables would file another DNMS, which would again be upheld by the district court, as the proposed Amended Complaint is based on the same operative facts. In sum, Sables as trustee is not liable for recording the Notice of Default, Notice of Sale, or Trustee's Deed, even if errors are found to exist concerning the loan balance and default information provided by the beneficiary as alleged by Plaintiffs.

Plaintiffs attempt to put the cart before the horse by alleging Sables was on notice of errors, however, the errors are merely *allegations* in the underlying case, and have yet to be resolved. This highlights the policy of the DNMS statute. The dispute is between Plaintiffs and the beneficiary of the deed of trust, as it pertains to the history of the loan and loan balance. The trustee is merely a third-party bystander to the dispute, aside from Plaintiffs' attempts to pin liability on the trustee for recording the notices required by NRS Chapter 107. Importantly, Plaintiffs have not alleged that they cured the default, and no prejudice has been alleged resulting from the alleged errors. Of equal importance is the fact that the

district court granted the injunction, provided that Plaintiffs pay the security bond, but Plaintiffs either refused to pay it or were unable to. After not making payments on the mortgage loan for roughly a decade, the Plaintiffs should have funds set aside equal to their missed payments.

Since Plaintiffs' claims in the proposed amended complaint are still centered on nothing more than Sables' act of recording documents as required of a trustee by NRS Chapter 107, the DNMS would still stand under the prior analysis. The district court properly denied amendment, as Sables would otherwise be required to re-litigate the DNMS based on the same factual allegations. Accordingly, amendment would be futile and was properly denied.

B. NRS 107.560 is inapplicable to trustee Sables.

NRS 107.560, part of the Nevada Homeowner's Bill of Rights ("HOB") codified in NRS 107.400 – NRS 107.560, is not applicable to a trustee such as Sables. This statutory scheme does not once reference the duties of a trustee, much less liability of a trustee. The HOB statutes, including NRS 107.560, routinely reference the duties and liabilities of a "mortgage servicer, mortgagee, beneficiary of the deed of trust or an authorized agent," which arguably pertains to the other defendants in this action. "Trustee" is defined in NRS 107.015(15)(as amended by SB 382), and is routinely referred to as "trustee" throughout NRS Chapter 107. This lends the inference that the legislature intentionally left

“trustee” out of NRS 107.400 - 107.560, rather than include it by its role as defined by the statute. The legislatures intent to not include trustee in the HOBR statutes, much less provide for liability of the trustee in these statues is compelling, and further supports the district court’s granting of Sables’ DNMS.

C. The necessary parties are in the case without Sables’ participation.

Even without Sables as a party defendant, the necessary parties are present to afford Plaintiffs the relief requested in the complaint and the proposed amended complaint (Complaint, Appendix, Vol. 1, 00001-00015, and Proposed Amended Complaint, Appendix Vol. 2-3, 00488-00502). The beneficiary of the deed of trust and the prior lenders and servicers responsible for the loan at issue are parties to the case, and appropriate relief is available without the participation of Sables. As stated previously, Sables has no interest in the loan, the property, or the outcome of the dispute. Sables will continue to perform its duties as trustee, as directed by the court and the applicable statutes.

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CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Mandamus, finding that: 1) Sables' recordation of the notices as required by NRS Chapter 107 is not actionable by Plaintiffs; 2) that Sables' Declaration of Non-Monetary Status was properly upheld by the district court, and 3) denial of leave to amend as to Sables was proper where Plaintiffs fail to allege new facts outside of actions constituting the trustee's duties under NRS Chapter 107.

DATED: October 25th, 2019. ZBS LAW, LLP

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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 this brief has been prepared in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 31(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,158 words.

FINALLY, I HEREBY CERTIFY that I have read this **RESPONSE TO PETITION FOR WRIT OF MANDAMUS**, 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 be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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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: October 25th, 2019

ZBS LAW, LLP

By: /s/ Shadd A. Wade
Shadd A. Wade, Esq.
Attorneys for Sables, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this 25th day of October, 2019, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF MANDAMUS**, through this Court's electronic filing system to the following:

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Electronic notification will be sent to the following:

Ariel Stern
Shadd Wade
Ramir Hernandez
Darren Brenner
Scott Lachman
Michael Millward

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Notification by traditional means must be sent to the following:

/s/ Sara Hunsaker
an employee of ZBS LAW, LLP