

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,)

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.)

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District Court Case No.: 18-CV-01332

PETITIONERS' REPLY TO RESPONSES TO
PETITION FOR WRIT OF MANDAMUS

Pursuant to the Court's Order dated September 25, 2019, Petitioners Albert Ellis Lincicome, Jr. and Vicenta Lincicome's submit this Reply to the Answers, Responses and Joinders filed by real parties in interest Sables, LLC, Bank of America, N.A., Fay Servicing, LLC, and U.S. Bank N.A., as Legal Title Trustee to the Petition for Writ of Mandamus filed July 12, 2019.

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REPLY TO ANSWERS TO PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

Petitioners Albert Ellis Lincicome, Jr. and Vicenta Lincicome (hereinafter “Petitioners”) seek the issuance of a Writ of Mandamus instructing the District Court to vacate the portions of its May 30, 2019 order granting Sables, LLC’s Declaration of Nonmonetary Status and enter an order granting Petitioners’ leave to amend their Complaint so that additional causes of action may be alleged against Sables, LLC (hereinafter “Sables”).

Petitioners specifically respond herein to *Sables, LLC’s Response to Petition for Writ of Mandamus*, filed by Sables on October 25, 2019. Petitioners also respond to *Bank of America, N.A.’S Response to Petition for Writ of Mandamus*.

Petitioners assert that the record, including the District Court’s December 31, 2018 Order, and the *Objection to Sables Declaration of Nonmonetary Status* establish that a sufficient factual basis exists upon which a determination of Sables’ liability for the conduct alleged in Petitioners’ Complaint and their proposed Amended Complaint may be made.

Therefore, it is respectfully requested that this Court grant Petitioners’ Petition for issuance of a Writ of Mandamus as set forth above.

II. ISSUES PRESENTED

1. Whether the District Court committed Reversible Error by Granting *Sables, LLC's Declaration of Nonmonetary Status* over Petitioners' Objection.
2. Whether the District Court abused its discretion by denying Petitioners leave to amend their Complaint to assert additional claims for relief against Sables, LLC.

III. SABLES, LLC'S RESPONSE

1. Petitioners' Complaint is Sufficiently Pleaded

Real party in interest Sables, LLC (hereinafter "Sables") argues that the District Court did not abuse its discretion by denying Petitioners leave to amend their Complaint upon the assertion that Petitioners' proposed Amended Complaint was insufficiently pleaded to subject it to liability. Sables Resp., p.6.

In Sables' Response to the Petition, it limited much of its analysis to the question of whether the Complaint and proposed Complaint were sufficiently pleaded. In doing so, Sables failed to acknowledge that the District Court's basis in denying Petitioners' *Motion for Leave to File Amended Complaint to Substitute Parties and Add Additional Claims for Relief*, as it pertains to claims against Sables, was based upon the District Court's grant of *Sables LLC's Declaration of Nonmonetary Status* (hereinafter "Declaration"). App. Vol. III, pp.713-717.

Accordingly, the District Court made no specific findings that Petitioners' proposed Amended Complaint was properly pleaded in its April 15, 2019 Order. Cf. App. Vol. III, pp. 713-717.

Thus, Sables' argument concerning the sufficiency of the Complaint and the proposed Amended Complaint are misplaced. Notably, in making this argument, Sables simply ignores the District Court's findings made in its December 31, 2018 Order, as well as the allegations set forth in Petitioner's *Objection to Sables' LLC's Declaration of Nonmonetary Status* (hereinafter "Objection") which are relevant to the District Court's determination under NRS 107.029, and to this Court's determination of whether the District Court committed Reversible Error in granting Sables' Declaration. *See e.g.* Sables Resp., pp. 1-2, 4, 6-9.

In this regard, Sables argues that "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." Sables Resp., pp. 1-2.

Contrary to Sables assertion, the Complaint and the proposed Amended Complaint do allege that Sables violated its duties. *See e.g.* App. Vol. II, pp. 492-493 ¶¶ 62-68. However, more importantly, Petitioners' Complaint and proposed Amended Complaint easily satisfies the NRCP 8(a) and 8(d) pleading standards. *See* NRCP 8(a), (d).

NRCP 8(a) requires that a claim for relief contains “a short and plain statement” as to (1) the court’s jurisdiction; (2) a “showing that the pleader is entitled to relief;” (3) a “demand for the relief sought;” and (4) a statement of whether damages of more than \$15,000 is sought. NRCP 8(a). As well, NRCP 8(d) provides that “[e]ach allegation must be simple, concise, and direct” and that “[n]o technical form is required.” NRCP 8(d).

Petitioners’ Complaint and proposed Amended Complaint satisfy these requirements without question. *See* App. Vol. I, pp. 1-16; App. Vol. II, pp. 483-500; App. Vol. III, pp.501-506.

As well, nothing in NRS 107.029 or any other section of chapter 107 would indicate that a heightened pleading standard is applicable to claims made against a trustee. *Cf.* NRS 107.

Accordingly, even though the allegations of the Complaint and proposed Amended Complaint are not at issue, if the Court determines it necessary to consider Sables’ argument as to the sufficiency of Petitioners’ Complaint and proposed Amended Complaint, the Court should find that both are sufficiently pleaded under NRCP 8. *See* NRCP 8.

Additionally the Court should find that Sables argument regarding the sufficiency of Petitioners’ Complaint or Amended Complaint do not undermine

Petitioners' assertion that the District Court abused its discretion in denying Petitioners leave to amend their Complaint.

2. A Factual Basis for Petitioners' Objection Exists

Sables argues in its Response to the Petition that the District Court did not commit reversible error in granting its Declaration because no factual basis for liability or error requiring Sables' correction was established by Petitioners. Sables Resp., p.2, 4. Sables is wrong.

NRS 107.029(3) requires that any party that objects to a declaration of non-monetary status "must set forth the factual basis on which the objection is based." NRS 107.029(3).

In the Objection, Petitioners outlined the events and conduct that establish in part Sables' liability. App. Vol. II , p.327. Petitioners therein assert that Sables was served with a copy of the Complaint and that it was thereby placed on notice of its violations of NRS 107.400 to NRS 107.560, for recording a Notice of Default that failed to comply with NRS 107.0805. App. Vol. II, pp.327-328. Additionally, it is noted in the Objection that the filing of Sables' Declaration was moot because the District Court Clerk had previously taken Sables' default. *Id.*

It is relevant to the analysis that filing of Petitioners' Objection was preceded with the District Court's December 31, 2018 Order. *See* App. Vol. II, pp.308-315. In that Order, the District Court found that Sables had not accurately

reported the “total balance owed,” “the principal obligation owed,” “the date through which [the loan was] . . . paid,” or “the current interest rate effective under the 2007 [Deed of Trust] as modified under the [Loan Modification Agreement]” [by] Vicenta Lincicome under the [Deed of Trust] as modified by the [Loan Modification Agreement].” App. Vol. II, p.312.

Additionally, the District Court also stated that “Plaintiffs have established that they will succeed on their claim that Defendants have violated NRS 107.500(1)(b) for failing to provide accurate information required to be provided prior to the initiation of a foreclosure.” App. Vol. II, p.313.

In only touching upon the subject of errors, Sables states that allegations of errors pertaining to Petitioners’ dealings with prior lenders “do not concern Sables” and “errors pertaining to [Petitioners’] loan are properly directed at the lender defendants, and not the trustee.” Sables Resp., p.1. Later in the Response, Sables states that allegations of wrongdoing are “merely allegations in a litigated case, [and] are not actionable. *Id.* at p.5.

These assertions make it apparent that Sables lacks an understanding of its duties under Chapter 107, including its duties to correct recorded documents as required by NRS 107.028(6) or verify that the grantor of the deed of trust is in default as required by NRS 107.080(2)(a)(2). *See id.*; NRS 107.028(6); NRS 107.080(2)(a)(2).

Additional evidence of Sables' lack of understanding of its duties is found in Sables' assertion that the Home Owners Bill of Rights ("HOBR") codified in NRS 107.400 to NRS 107.560 "is not applicable to a trustee such as Sables." Sables Resp., p.8.

Specifically on this point, NRS 107.480 provides that the "exercise of a trustee's power of sale pursuant to NRS 107.080 with respect to a deed of trust securing a residential mortgage loan is subject to the provisions of NRS 107.400 to NRS 107.560, inclusive." NRS 107.480.

Sables' belief that it need not comply with or concern itself with HOBR is wrong and is specifically controverted by the terms of NRS 107.480 discussed above as well as NRS 107.028(7), which requires a trustee to comply with all of the provisions of Chapter 107.

Sables' contentions as to its duties, or the lack thereof, is shocking in the context of Petitioners' allegations. Thus, it must be concluded that Sables general responses, excuses and defenses and misstatements of the law and its duties do nothing to address or controvert the fact that a factual basis for Sables liability was presented in Petitioners' Objection, as well as established by the District Court's December 31, 2018 Order.

Therefore, this Court should conclude that the District Court committed reversible error in granting *Sables LLC's Declaration of Nonmonetary Status*.

3. Sables is not Immune from Liability

Sables argues that the District Court did not commit reversible error in granting its Declaration because Chapter 107 shields it from liability. *See Sables Resp.*, p.7.

Sables argues that it cannot be “liable for recording the Notice of Default, Notice of Sale, or Trustees Deed, even if errors are found to exist concerning the loan balance and default information provided by the beneficiary.” *Id.* In this regard Sables states that it 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” and thereafter cites NRS 107.028. *Sables Resp.*, p.1.

Sables goes on to state that it “has no right or duty to perform an audit of the loan information provided, but . . . is entitled to rely on the information provided by the beneficiary.” *Sables Resp.*, p.3. Sables is wrong.

NRS 107.028(6) provides that a trustee has a duty to act “impartially” and “in good faith” and that it will not incur liability “if the trustee corrects [a] good faith error not later than 20 days after discovering the error.” NRS 107.028(6)

NRS 107.028(7) provides that “[i]f, in an action brought by a grantor . . . the court finds that the trustee did not comply with this section, any other provision of this chapter, . . . the court must award the grantor . . . damages of \$5,000 or treble

the amount of actual damages, whichever is greater; . . . and . . . [r]easonable attorney's fees and costs." NRS 107.028(7).

It is notable in this regard, that the District Court's December 31, 2018 Order concluded that Petitioners will succeed on their claim that Defendants violated NRS 107.500(1)(b) "for failing to provide accurate information required to be provided prior to the initiation of a foreclosure." App. Vol. II, p.313.

Sables cannot hide behind the beneficiary from the verifiable evidence that establishes it had a duty to correct the errors in the recorded documents, or jeopardize being liable for its failure to do the same. *See* NRS 107.028(6)-(7).

For example, the evidence supporting Petitioners' contention that Sables had a duty to correct its Notice of Default are public documents that were previously admitted into evidence at the November 20, 2018 hearing upon Petitioners' application for issuance of a temporary restraining order. App. Vol. II, pp.309.

The documents admitted at said hearing include: (1) a Deed of Trust given by Petitioner Vicenta Lincicome on May 23, 2007, and recorded by the Lyon County Recorder on May 25, 2007 (hereinafter "2007 DOT") (App. Vol. I, pp.154-179); (2) the Loan Modification Agreement (hereinafter "LMA") modifying the 2007 DOT which was executed by Vicenta Lincicome, individually, and James Smith, on behalf of Bank of America, and was recorded by Bank of America on May 4, 2011 (App. Vol. I, pp.181-186); and (3) the Notice of Default issued by

Sables on November 1, 2017, and recorded on November 3, 2017 (hereinafter “NOD”), acknowledging that the 2007 DOT was modified by the LMA (App. Vol. I, pp.240-245).

These three documents taken together establish that Sables violated its duty to rescind and correct the NOD. In the NOD, Sables stated that “[t]he subject Deed of Trust was modified by Loan Modification Agreement recorded on 5/4/2011,” however the NOD does not reflect any of the LMA’s modified terms. *Compare* App. Vol. I, pp.182-183; (LMA); App. Vol. I, p.240 (NOD). Rather, the NOD only reflects the terms of the original 2007 DOT. *Compare* App. Vol. I, p.240 (NOD), App. Vol. I, pp.155; 167-168; 173-174 (2007 DOT).

Sables’ asserts that it was justified in unquestionably relying upon the beneficiary of the 2007 DOT for information, however, that justification does not reflect well upon Sables recognition of its duty to be impartial or to act in good faith once it was put on notice of the errors. *See* Sables Resp. p.1, 3; NRS 107.028(6).

Thus, had Sables recognized its duty to be impartial and act in good faith, it would have investigated and corrected the recorded documents as required by NRS 107.028(6) within 20 days of November 7, 2018, the date it was initially served with the Complaint, or on November 18, 2018 when it received personal service of the Summons and Complaint. *See* App. Vol. I, pp. 128-129; 297-299, 300-301.

Likewise, Sables' blind obedience to the beneficiary directions prevented it from impartially determining that Petitioners were not in default before exercising the power of sale, which is one of Petitioners' primary contention in this matter. *See* NRS 107.080(2)(a)(2); App. Vol. III, pp.589-590.

Petitioners have argued that Bank of America defaulted upon 2007 DOT as modified by the LMA when it refused Petitioners' payments in 2009 when Petitioners were informed that the LMA did not exist in their system. *See* App. Vol. I, pp.4-5, ¶¶ 18-25.

The evidence admitted before the District Court establishes that Bank of America did not acknowledge the LMA in December of 2011, even though it had recorded the fully executed LMA with the Lyon County Recorder seven months prior. *See* App. Vol. I, p.102; pp. 181-186.

Rather than confronting these troubling facts, Sables uses its Response to the Petition to blast Petitioners for not making "payments on the loan for nearly a decade" and for not being "able to cure the default." Sables Resp., p.6.

Sables' conduct in this matter is abhorrent. Chapter 107 of the Nevada Revised Statutes does not shield a trustee from liability when it shirks its duties, let alone exercises the power of sale when the borrow is not in default, yet Sables has. *See* NRS 107.080(2)(a)(2); App. Vol. I, p.102; pp.181-186.

Had Sables taken just a few minutes to investigate the loan, or even consider the findings of the District Court's December 31, 2018 order, it would have discovered that at no point in the history of the mortgage had Petitioners ever been given the opportunity to make a payment upon LMA's terms. *See App. Vol. I, p.4-10.* It would have realized that some exercise of caution was in order because maybe, just maybe, Petitioners are not in default on their mortgage.

Petitioners' have established the factual basis for Sables' liability and have articulated a very real and actual prejudice resulting from of Sables' reckless conduct, namely the wrongful foreclosure of their home. *See App. Vol. I, p.425-433.* Sables' own failure to research and investigate Petitioners' allegations, which its Response implies did not happen, is sufficient to establish liability under NRS 107.028(7).

In short, Sables' argument that, as trustee of the 2007 DOT, it cannot be liable for violations of specific requirements of NRS 107, including HOBR, is ludicrous and is not an accurate reflection of Nevada law.

Accordingly, because sufficient evidence exists that establishes a factual basis for Sables' liability upon its conduct, Petitioners respectfully request that this Court find that the District Court committed reversible error by granting *Sables LLC's Declaration of Nonmonetary Status* and issue a writ of mandamus directing the Third Judicial District Court to vacate portions of its May 30, 2019 Order.

IV. BANK OF AMERICA, N.A.'S RESPONSE

Real Party in Interest Bank of America, N.A. (hereinafter “BANA”), filed its Response to Petition for Writ of Mandamus on November 12, 2019, therein joining Sables’ Response, but also attempting to derail this Court’s review of the *Petition for Writ of Mandamus* by raising the issue of whether the District Court also erred in denying in part BANA’s March 22, 2019 Motion to Dismiss.

According to this Court’s September 25, 2019 *Order Directing Answer*, the Court requested that real parties in interest “file and serve an answer, including authorities addressing the issues raised in the petition.”

BANA raised the issue pertaining to the District Court’s denial of BANA’s Motion to Dismiss, under the precedent established in *Ford v. Showboat Operating, Co.*, 110 Nev. 752, 877 P.2d 546 (1994). *Ford* concerns the issue of whether a party may cross-appeal as a matter of right, even when the party does not “appear to have been aggrieved.” *Id.*

However, this matter concerns a petition for extraordinary relief sought prior to judgment, of which no party is entitled to consideration as a matter of right. Thus, BANA is not entitled to have this Court consider the equivalent of a cross-appeal in this matter as a matter of right. BANA can certainly file its own petition for extraordinary relief if it believes that such relief is warranted. However, this Court should not extend the holding in *Ford* to permit BANA the right to muddy

up this proceeding by derailing the Court's focus from a determination of the issues presented in the Petition.

Notably, BANA's Response does not add any additional argument or authorities relevant to the Petition under consideration. Furthermore, according to this Court's September 25, 2019 Order, the issues raised by BANA exceeds the scope of the issues for which real parties in interest were requested to respond.

Accordingly, because BANA provides no additional relevant arguments or authorities addressing the issues raised in the Petition, Petitioners believe it to be improper to address the issues raised by BANA. However, if the Court believes that BANA has properly sought extraordinary relief, and maybe entitled to the same, Petitioners request that the Court enter an order providing all real parties in interest, including Petitioners' the right to respond.

V. CONCLUSION

For the reasons stated herein above, and also presented in Petitioners' *Petition for Writ of Mandamus*, Petitioners respectfully request that this Court conclude that the Third Judicial District Court committed reversible error in granting *Sales, LLC's Declaration of Non-Monetary Status* and further abused its discretion in denying Petitioners leave to amend their Complaint to assert additional claims against Sables.

It is further requested that the Court grant Petitioners' Petition and issue a Writ of Mandamus instructing the District Court to vacate the portions of its May 30, 2019 Order granting *Sables, LLC's Declaration of Nonmonetary Status*. It is also requested that the District Court be instructed to enter an order granting Petitioners leave to amend their Complaint as to Sables, LLC, so that additional causes of action may be alleged.

Dated this 27th day of November, 2019.

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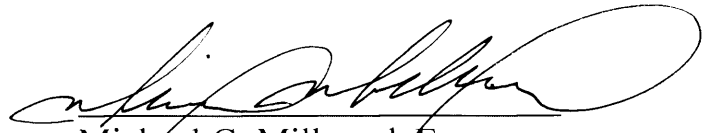
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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
)ss.:
COUNTY OF DOUGLAS)

I, Michael G. Millward, Esq., hereby certify that this reply follows the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This petition has been prepared and proportionally spaced using Microsoft Word 2010 in Times New Roman, 14 point and with 1 inch margins.

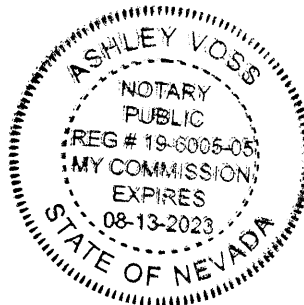
I further hereby certify that I have read this petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed of any improper purpose. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.


Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before
Me this 27th day of November, 2019.



NOTARY PUBIC in and for said
COUNTY AND STATE



CERTIFICATE OF SERVICE

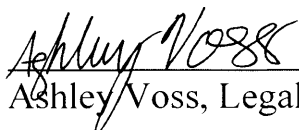
I, Ashley Voss, hereby certify that I am an employee of Millward Law Ltd., and that on the 27th day of November, 2019, I deposited for delivery a true and correct copy of the **REPLY TO RESPONSES TO PETITION FOR WRIT OF MANDAMUS** for service by placing an original or true copy thereof in a sealed envelope placed for collection and mailing in Minden, Nevada, on said date, following ordinary business practices to the following:

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