

IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT HESSER

Petitioner,

vs.

KENNEDY FUNDING, INC.

Respondent

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Case No. 81383 Elizabeth A. Brown
Clerk of Supreme Court

District Court

Case No. 09A582746

APPEAL

From the Eighth Judicial District Court
Department XI
Clark County Nevada
HONORABLE ELIZABETH GONZALEZ

APPELLANT'S OPENING BRIEF

LAW OFFICES OF BYRON THOMAS
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VINCENT HESSER

NRAP 26.1 DISCLOSURE

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 in order that the judges of this court may evaluate possible disqualification or recusal:

Vincent Hesser is an individual and therefore the disclosure requirements pursuant to NRAP 26.1(a) are not applicable.

The Law Offices of Byron Thomas has appeared for Appellant Vincent Hesser in the case and is expected to appear in this Court.

Dated this 3 day of May 2021

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JURISDICTIONAL STATEMENT

This filing is made subsequent to a NRAP 3A(a)(8):

A special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under [NRCP 60\(b\)\(1\)](#) when the motion was filed and served within 60 days after entry of the default judgment.

Notice of entry of the Order was entered on May 21, 2020. The Notice of Appeal was filed on June 19, 2020.

ROUTING STATEMENT

The Nevada Supreme Court should retain jurisdiction of this matter pursuant NRAP 17(a)(9), NRAP 17(a)(9) states that “[t]he Supreme Court shall hear and decide the following: (9) Cases originating in business court.”

This case originated in business court.

ISSUES PRESENTED

1. Did the district court err when it held that substantial compliance with NRS 17.214 was sufficient, when clear Nevada Supreme Court precedent required strict compliance with NRS 17.214

STATE MENT OF THE CASE

Hesser filed a motion for the district court to determine that a judgment against it be deemed expired, because Kennedy did not strictly comply with the time and manner requirements of NRS 17.214, which governs the renewal of judgment. The district court denied the motion and deemed that substantial compliance was sufficient.

STATEMENT OF FACTS

Kennedy Funding (“Kennedy” or “Petitioner”) is a New Jersey Corporation that is located and headquartered in New Jersey. Vol IV VH000725

On June 15, 2006, OneCap Partners 2, LLC (alternatively "Borrower" or "OneCap") and Kennedy, as agent of the Kennedy Co-Lenders, entered into a Loan and Security Agreement ("Loan Agreement"), pursuant to which Kennedy made a \$12 million loan to OneCap to facilitate the purchase of unimproved real property consisting of 78.74± acres of raw land. Vol IV VH000726 ¶ 4.

The loan was evidenced by a Promissory Note dated June 15, 2006, in the original principal sum of \$12 million ("Note"), made by OneCap to pay to the order of Kennedy as agent of the lenders. Id. at ¶ 5.

To further secure payment of the Note, on June 14, 2006, Hesser and OneCap MM executed personal guaranties of the loan to Kennedy ("Guaranty"). At the time of the transaction between OneCap and Kennedy, Hesser was the President of OneCap and OneCap Id. at ¶ 6.

On April 1, 2008, OneCap defaulted under the Note and Deed of Trust. Id. at ¶ 7.

On February 13, 2009, Kennedy filed a Complaint against Hesser for breach of the Guaranty. Id. at ¶ 8.

On September 22, 2009, Kennedy filed a Motion for Summary Judgment against Defendants in the Guarantor Action. Id. at ¶ 9.

On or around October 6, 2009, the Hesser filed an Opposition to the Motion Summary Judgment (the "Opposition"). Id. at ¶ 10.

On November 4, 2009, the Court granted Kennedy's Motion for Summary Judgment. Id. at ¶ 11.

Thereafter, on February 17, 2009, the Court entered Judgment against each Hesser in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount was to be determined (the "Judgment"). Kennedy provided Hesser with notice of entry of judgment on February 23, 2010. Id. at ¶ 12.

On February 18, 2010, the Court entered an Order Awarding Judgment in favor of Kennedy and against Hesser in the amount of \$18,843,912.09. Id. at ¶ 13.

After the guarantee judgment was entered, a foreclosure sale went forward on June 17, 2010, and Kennedy credit bid against the Property. See Notice of Trustee's Sale dated May 25, 2010, recorded in Clark County Recorder's Office on May 27, 2010, as Instrument No. 20100527-0000200. E.R. Tab 9 at 00228-29; see also Trustee's Deed Upon Sale recorded July 16, 2010, recorded in the Clark County Recorder's Office as Instrument No. 2010716-0000364. E.R. Tab 10 at 00230-00234. Vol IV VH000727 ¶ 14.

Kennedy filed an Affidavit of Renewal of Judgment on December 24, 2015

to renew the judgment. Id. at ¶ 15.

Kennedy was required to record the Affidavit of Renewal of Judgment within three (3) days of filing the Affidavit of Renewal of Judgment as set forth in NRS 17.214(1)(b). Kennedy failed to do so and recorded it fifteen (15) days later on January 8, 2016 with the Clark County Recorder's Office as Instrument No. 20160108-000229. Vol IV. VH000729-748.

Kennedy was required to mail the Affidavit of Renewal of Judgment to Hesser by certified mail, within a mandatory three (3) day deadline as set forth in NRS 17.214(3). Kenney attached a Certificate of Mailing that stated the Affidavit of Renewal of Judgment was sent to Hesser on December 24, 2015, but the last page of the Affidavit of Renewal of Judgment has the following stamp from the district court:

CERTIFIED COPY DOCUMENT ATTACHED IS A TRUE AND
CORRECT COPY OF THE ORIGINAL ON FILE ... CLERK OF
THE COURT JAN 6, 2016.

Vol IV VH000699-000701. Therefore the Affidavit of Judgment was sent well after the three (3) day deadline. Id.

Nonetheless the district court found that Respondent complied with the service requirements of NRS 17.214(b)(3) and that Petitioner was served with the affidavit of renewal on the same day it was filed; and that the judgment renewal affidavit and the affidavit pursuant 17.150 were recorded before the judgment

expired. Vol V VH000912. There was no finding that the affidavits were recorded within time allowed by NRS 17.214(3). Id.

SUMMARY OF ARGUMENT

NRS 17.214 governs the time and manner of the renewal of a judgement. This Court has held that NRS 17.214 needs to be strictly construed and it has no grace period. Kennedy failed to comply with the mandatory time requirements of NRS 17.214. Therefore, the district court erred when it found that the Kennedy's judgment was successfully renewed.

ARGUMENT

A. Standard of Review

The Supreme Court reviews issues of statutory construction de novo. Similarly, whether a statute's procedural requirements must be complied with strictly or only substantially is a question of law subject to our plenary review. Leven v. Frey, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007).

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B. Legal Argument

1. The District Court Erred When it Found that Kennedy had Complied with NRS 17.214(1)(b).

NRS 17.214(1)(b), mandates the recording of the affidavit of renewal in the offiche county recorder in which the original judgment was filed within three (3) days after the affidavit of renewal is filed.

The Nevada Supreme Court has addressed this timing issue specifically, in *Leven v. Frey*, 123 Nev. 399, 168 P.3d 712, (2007) (See also, *O'Lane v. Spinney* 110 Nev. 496, 874 P2d 754). As a matter of fact the Court expressly addressed the need to strictly comply with NRS 17.214(b):

Legislature's clear and express language. As a practical matter, substantial compliance with the recording requirement is not supportable, as it would undermine the Legislative intent that the debtor and third parties be promptly notified that the lien on the debtor's real property has continued. Substantial compliance could create situations in which a title search would indicate that a judgment lien has terminated when, in fact, it has not. These types of situations were meant to be avoided by the Legislature's adoption of NRS 17.214(1)(b)'s recording requirement. Consequently, a judgment creditor must strictly comply with this requirement, which Frey concedes that he failed to do.

Leven v. Frey, 123 Nev. 399, 409, 168 P.3d 712, 719 (2007).

Moreover, the Leven Court pointed out that strict compliance is required when a statute has an express time upon which a party is to act, such as the three (3) day requirement in NRS 17.274(1)(b). *Moreover, NRS 17.214(b)* does not include a grace period or safety valve provision, its explicit and mandatory three-day language leaves no room for judicial construction or “substantial compliance”

analysis. (*Leven*, 718.)¹

The affidavit of renewal was filed on December 24, 2015. Vol IV VH000668-670. Therefore, the affidavit of renewal had to be recorded within three (3) days of December 24, 2015. The official Record of the Clark County Recorder indicated that the affidavit of renewal was not recorded until January 8, 2016. Vol V VH000852-871. Well past the three (3) day deadline for recording of the affidavit of renewal.

Nonetheless the District Court stated as follows:

(3) the Judgement Renewal Affidavit and the Affidavit Pursuant to NRS 17.150 Regarding Movant Vincent W. Hesser (signed under penalty of perjury by attorney Ogonna M. Brown, Esq.) were together lodged with the Clark County Recorder and recorded in the Official Record of the Clark County Recorder as Instrument No. 20160108-0000229, before the underlying original judgement expired.

The district court made no reference to NRS 17.214(1)(b), and simply states that the Affidavit of Renewal was recorded before the judgment expired. However, that is not the standard, for determining whether the judgment was renewed. The

¹ The Court found all three requirements of NRS 17.214, concerning filing, recording, and serving the affidavit, clear and unambiguous, and must be strictly complied with. As we have previously explained, “shall” is a mandatory term indicative of the Legislature's intent that the statutory provision be compulsory, thus creating a duty rather than conferring discretion. *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, ___148 P.3d 790, 793 (2006).

standard for determining whether a judgment is renewed is whether there was strict compliance with NRS 17.214 in general, and NRS 17.214(1)(b) in particular in the instant case. Kennedy clearly did not comply with the three (3) day requirement as the Affidavit of Renewal was recorded fifteen (15) days after it was filed in the district court, and not within the three days (3) as required by NRS 17.214(b). The district court did not have the authority to allow for substantial compliance. Therefore, Hesser respectfully requests that the Court reverse the district court, and declare the judgment expired.

2. **Kennedy did not Serve the Affidavit of Renewal Within the Three (3) Day Time Period as Required by NRS 17.214(3).**

NRS 17.214(3) states in relevant part:

The judgment creditor or the judgment creditor's successor in interest shall notify the judgment debtor of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail, return receipt requested, to the judgment debtor at his or her last known address within 3 days after filing the affidavit.

NRS 17.214(3) also requires strict compliance:

Thus, we conclude that a judgment creditor must strictly comply with the timing requirement for service under NRS 17.214(3) in order to successfully renew the judgment. As Frey failed to comply with this service requirement as well as the recordation requirement, the judgment against Leven was not properly renewed and thus, it expired.

Leven v. Frey, 123 Nev. 399, 409, 168 P.3d 712, 719 (2007). Hesser submitted an affidavit in this case. In the affidavit he attested to that the Affidavit of Renewal contained a notary and signature date of January 7, 2019. Vol IV VH000695 _ at ¶

17. However, what the affidavit was referring to was the district court's stamp and signature of the Clerk certifying the affidavit. VH000701. Kennedy ignored this discrepancy, and instead points Hesser to the certificate of service which does not address why the renewal of judgment affidavit has a district court clerk stamp with a date of January 7, 2016 on it. Vol V VH000786. Moreover, the Court did not even address this discrepancy:

Kennedy complied with the timely service requirement NRS 17.214 ... because Defendant was served with the Judgment Renewal Affidavit via certified mail, return receipt requested, on the same date that the document was filed with the Court.

Vol V VH000. The Judgment of Renewal was not properly served within the three (3) day window as required by NRS 17.214(3). Therefore, NRS 17.214 was not strictly complied with and the Court should rule that the district erred and the judgment was not properly renewed.

Moreover, the district court's interpretation violates the basic rules of statutory interpretation. Statutes "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Butler v. State, 120 Nev. 879, 892–93, 102 P.3d 71, 81 (2004) (internal quotations omitted). " 'A statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated.' " 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory

Construction § 46:5 n. 10 (7th ed. 2008) (quoting Bertera's Hopewell Foodland, Inc. v. Masters, 428 Pa. 20, 236 A.2d 197, 204 (1967), overruled on other grounds by Goodman v. Kennedy, 459 Pa. 313, 329 A.2d 224, 231 (1974)). Blackburn v. State, 129 Nev. 92, 97, 294 P.3d 422, 426 (2013). In the instant case the district court's order would render the three (3) day requirements of NRS 17.214(1)(b) and (3) superfluous and null and void.

CONCLUSION

Kennedy did not strictly comply with NRS 17.214(1)(b) and (3). The statutes are time and manner statutes, and thus require strict compliance. The Courts do not have the power or authority to alter time and manner statutes.

Dated this 3rd day of May 2021.

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CERTIFICATE OF COMPLIANCE

The below-signed hereby certifies that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points or more and contains 3034 words. 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.

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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 3rd day of May 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 3, 2021. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A copy of the foregoing shall be electronically transmitted from the Court to the email addresses on file for each of the following:

Michael Lynch, Esq. attorney for Kennedy Funding, Inc.

Dated this 3rd day of May, 2021.

/s/ Byron Thomas

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