

IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT HESSER

Petitioner,

vs.

KENNEDY FUNDING, INC.

Respondent

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Case No. 81383

District Court

Case No. 09A582746

APPEAL

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

APPELLANT'S REPLY BRIEF

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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 15 day of September 2021

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STATEMENT OF FACTS

Kennedy Funding 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 Defendants filed an Opposition to the Motion Summary Judgment (the "Opposition"). Id. at ¶ 10.

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

Thereafter, on February 17, 2009, the Court entered Judgment against each of the Defendants in the amount of \$16,802,025.64, excluding attorneys' fees and costs which amount was to be determined (the "Judgment"). The Plaintiff provided Defendants 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 Plaintiff and against Defendants 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.

Plaintiff filed an Affidavit of Renewal of Judgment on December 24, 2015 to renew the judgment. Id. at ¶ 15.

Plaintiff 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). Plaintiff 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). Plaintiff attached a Certificate of Mailing that stated the Affidavit of Renewal of Judgment was sent to Defendant 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).

B. Legal Argument

1. NRS 17.214(1)(b) Does not Require the Judgement Creditor to Obtain a Certified Copy of the Affidavit of Renewal, Therefore the Judgment was Extinguished When Judgment Creditor Failed to Record the Affidavit of Renewal Within the Three day Time Frame of NRS 17.214(1)(b) .

Respondent appears to be arguing that somehow NRS 17.214(1)(a)(9) required it to get the affidavit of renewal certified, which caused a delay in filing, and thus this authorizes the Court to ignore the clear mandate of the legislature, its own precedent, and simply require substantial compliance. Respondent's Answering Brief Section 3 pages 5-9. The Court should not ignore its own precedent and principles of statutory construction. Nevada Courts interpret statutes as follows:

Generally, when “the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” Attorney General v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008) (quotations omitted). However, “[a] statute is ambiguous when it is capable of being understood in two or more senses by reasonably informed persons or it does not otherwise speak to the issue before the court.” Id. at 240, 181 P.3d at 680–81 (quotation omitted). When interpreting an ambiguous statute, this court will review the legislative history to determine the Legislature's intent. Id. at 240, 181 P.3d at 681. Est. of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc., 127 Nev. 855, 857–58, 265 P.3d 688, 690 (2011). Additionally, Nevada construes the words in a statute as a whole, such that no words or phrases become superfluous or nugatory. Mangarella v. State, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001). This

Court has also previously stated that “it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.” City of Reno v. Reno Gazette-J., 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003).

NRS 17.214(1)(a) in relevant part states as follows:

a) Filing an affidavit with the clerk of the court where the judgment is entered and docketed, within 90 days before the date the judgment expires by limitation. The affidavit must be titled as an “Affidavit of Renewal of Judgment” and must specify:

NRS 17.214(1)(b) states as follows:

(b) If the judgment is recorded, recording the affidavit of renewal in the office of the county recorder in which the original judgment is filed within 3 days after the affidavit of renewal is filed pursuant to paragraph;

The plain language of the statute is clear there is no requirement whatsoever for the filed affidavit of renewal to be certified. The legislature certainly knew how to require certification of the renewal affidavit if that was its intent. The legislature required the certification of the judgment. NRS 17.150(2) requires the judgment to be certified. The legislature knew how to include language in the statute requiring certification of the renewal affidavit if it wanted too. It did not do so.

Moreover to interpret NRS 17.214(1)(a)(9) as respondents urge renders NRS 17.214(b) superfluous. Under Respondent’s reading of 17.214(1)(b) a judgement creditor would be excused for the duration of the

time that it took to get the certification, which basically gives judgment creditors an unlimited time to record the judgment. The only other alternative is for the Court to do severe violence to the statute and replace the legislature's deadline with a judicially created timeline.

In addition, there can be no argument that NRS 17.214(1)(a)(9) is a general provision. Where as 17.214(1)(b) is a specific provision. Therefore NRS 17.214(1)(b) simply trumps NRS 17.214(1)(a)(9). It is not reasonable for a judgment creditor to read into the statute the requirement that the affidavit of renewal be certified. It is then equally unreasonable for that judgment creditor to then request that the Court ignore the clear mandate of the legislature and accept its unreasonable interpretation.

The Respondent is urging the Court to rewrite NRS 17.214 to create an absurd result, requiring the renewal affidavit to be certified. Then rewrite the statute again to fix the absurd result, by replacing the three day time frame created by the legislature with a judge made unspecified timeframe. It is certainly much more logical to interpret the statute based on the plain meaning principles of statutory interpretation, which leads one to conclude that the legislature knew what it was doing, and did not require the affidavit of renewal to be certified because it would be difficult to also comply with the three day recording requirements.

Finally, this appears to be the first time that Respondent has raised the argument that NRS 17.214(9) is applicable. A party cannot raise an issue for the first time on appeal therefore the Court should disregard this argument of Respondent.

2. The Filing, Service, and Recording Statutes of NRS 17.214 Require Strict Compliance.

Respondents insistence on a substantial compliance standard ignores this Court's prior precedent. The legislature crafted the recording requirement so as to give debtors and third parties prompt notification that the lien on property was or was not going to be extinguished:

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)(emphasis added).

The Leven Court made it clear that this is why substantial compliance simply will not work for the recording requirement. Moreover this Court has recently affirmed that strict compliance is required for the recording

NRS 17.214(1) indicates the procedure by which “[a] judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by” timely filing, recording, and servicing an

affidavit. In *Leven v. Frey*, 123 Nev. 399, 409-10, 168 P.3d 712, 719 (2007), we held that such procedures for judgment renewal required strict compliance.

Kuptz-Blinkinsop v. Blinkinsop, 136 Nev. 360, 363, 466 P.3d 1271, 1275 (2020).

Respondents have failed to explain how extending the recording deadline six fold could possibly address the concerns of the legislature about providing prompt notice of liens for debtors and third parties.

3. **Strict Compliance is Required When a Statute Provides a Specific Deadline.**

What makes a time and manner statute mandatory is the specific deadline in the statute set by the legislature:

This court has long held that when a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise. It follows, then, that statutes creating time or manner restrictions are generally construed as mandatory. In contrast, statutes are typically considered directory, or advisory only, when they require performance within a reasonable time or provide specifically that substantial compliance is sufficient.

Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization, 124 Nev. 1079, 1086–87, 194 P.3d 1254, 1259 (2008)(Although statutes allowing for a ‘reasonable time’ to act are subject to interpretation for substantial compliance, those with set time limitations are not.”)(citation omitted). “[F]orm and content” provisions, on the other hand, dictate who must take action and what information that party is required to provide, *Einhorn*, 128 Nev. at —, 290 P.3d at 254 (stating that “who brings which documents ... is a matter of ‘form’ ”). Markowitz v. Saxon Special Servicing, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013)

In this particular case the form and content provisions of the statute govern the content of the Affidavit of Renewal. It certainly does not apply to the recording provisions which set a deadline for an action and therefore it is a time and manner statute. Respondent's claim that this is a form and content provision is simply without merit, and does not stand up to analysis under the Court's well settled precedent.

Respondents make much of the fact that the time to renew the judgment had not expired when affidavit of renewal was recorded. Respondents' Answering Brief p. 11-14. The legislature specifically gave a ninety-day window in which to renew the statute. It was therefore aware that a situation like this could occur. Nonetheless the legislature kept the three day deadline without including 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 By starting the clock running at 90 days before the date of expiration the legislature meant to encourage judgment creditors to provide notice as quickly as possible. Respondent's rule would allow a Judgment Creditor to file the application of renewal on the first day and not record it till the last thus destroying the legislatures purpose of providing prompt notice to debtors and third parties. Again it would require the Court to ignore the clear mandate of the

legislature and allow unelected judges to rewrite a statute. NRS 17.214 is a reasonable and logical statute when the statute is interpreted based on the plain language of the statute.

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

Respondent alleges that Appellant is confused about the record. That is simply not the case. Respondent did not timely serve the complaint by certified mail, and Respondent has never provided a stamped return receipt identifying when the affidavit of renewal was mailed to Appellant. 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 that the Affidavit of Renewal contained a notary and signature date of January 7, 2015. Vol IV VH000695 _ at ¶

17. The affidavit is referring to the district court's stamp and the signature of the Clerk certifying the affidavit. VH000701. If the affidavit of renewal was sent certified mail return receipt requested on December 24, 2015, how did Hesser receive an affidavit of renewal with a Court stamp dated January of 2015? Moreover, Respondents Opposition to Motion to Declare the Judgment Expired, states that the return receipts for the certified mailing indicates they were sent on December 24, 2015 and are attached as an Exhibit 6. Vol. VI VH000919 paragraph 12 p. But a review of exhibit indicates that there was no stamp or date of any kind on the receipts. Vol VI VH000982-84. Respondent has never come forward with the return receipt showing the date that it was actually sent. Respondent cannot show it sent the affidavit to Hesser return receipt requested.

Respondent 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.

CONCLUSION

The recording, filing and service requirements of NRS 17.214 are strictly construed. There is absolutely no need to deviate from that standard for the benefit of Respondent. Strictly interpreting the recording filing and service requirements would in know way result in an absurd result. The legislature provided for a ninety day window to renew the judgment therefore Respondent's position was certainly foreseeable, but the legislature did not create a grace, tolling, or any exemptions to 3 day recording and filing requirements. Most importantly the judicial activism that Respondent is requesting is extreme and do excessive violence to the statute. Dated this 15th day of September 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 3718 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 15rd day of September 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 September 15, 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 15th day of September, 2021.

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