IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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PATRICIA ANTHONY; and
WILLIAM ANTHONY,

No. 79284-COA

Appellants,

vs.

PETITION FOR REHEARING

FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

Rule 40

Respondent.
_____/

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PATRICIA ANTHONY and
WILLIAM ANTHONY

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TABLE OF AUTHORITIES

Cases

Statutes and Rules

1. Introduction

Appellants, Patricia Anthony and William Anthony, respectfully petition this Court for a rehearing with respect to this Court's December 16, 2020 Order of Affirmance. The Order said that the manufactured home was included in the property properly foreclosed upon by the March of 2012 foreclosure sale since it was an improvement thereby making the Anthonys' claims time barred.

2. Relief Requested

Relief is appropriate when the petitioner believes the Court has overlooked or misapprehended points of law or fact. Nev. R. App. Pro 40(a)(2). Petitioners believe there are two points of law that were overlooked. **First**, as a matter of law the manufactured home could not be an improvement, for NRS 361.244(3) requires it to be converted to real property before it can be deemed to be an improvement. **Second**, the conversion claim was not time barred.

3. Legal Standard

Nev. R. App. Pro 40(a)(2) says in relevant part that the petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

4. Argument

A. THE MANUFACTURED HOME COULD NOT BE AN IMPROVEMENT

A copy of this Court's December 16, 2020 Order has been attached for the Court's convenience as Exhibit "1". At page four of the Order this Court said:

> There is overwhelming evidence that Fannie Mae properly foreclosed on the Anthonys' property, which included the manufactured home. The Anthonys' loan application listed the home, including the manufactured home, as collateral, the Anthonys had an extensive appraisal done on their home for the loan application, and the deed of trust issued at foreclosure listed the Anthonys' address, as well as all improvements to the land. Even if the manufactured home was not real property, it was an improvement and subject to the foreclosure sale. See *Flyge v. Flynn*, 63 Nev. 201, 230, 166 P.2d 539, 522 (1946) (holding that improvements include buildings on land).

In other words, the Court made a finding based upon *Flyge vs. Flynn*, supra that the manufactured home was an improvement. Improvements are part of the legal description in the deed of trust. Respondent's security interest attached to the manufactured home for that reason.

Flyge vs. Flynn, supra, did set forth the general rule regarding what an improvement is. It said in relevant part that: "*As a general rule, improvements of a permanent character made on real estate and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee as his own property within the protection of the law which renders the removal or destruction thereof an act of waste.*" Based upon that

definition, the Court found that the Diesel engine and deep-well pump attached to the realty. Id 63 Nev. at 229.

There can be no doubt that under *Flyge vs. Flynn's* definition, the manufactured home is an improvement. However, in 1979 the Nevada Legislature enacted NRS 361.244, which carves out a statutory exception for manufactured homes that have not been affixed to the realty by following the statute's procedural rules. NRS 361.244(3) provides: (Emphasis supplied)

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

Use of the word "shall" makes compliance with the statute mandatory before the manufactured home can be legally considered to be an improvement. Therefore *Flyge vs. Flynn*, supra, was not applicable to manufactured homes after 1979. This means there was no security interest held by Respondent, but it titled the home into its own name by converting the home to real property in 2015. It is a transfer to itself when Respondent held no legal interest in the home.

B. <u>THE CLAIM FOR CONVERSION WAS NOT TIME BARRED.</u>

Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043, (Nev. 2000). By converting the manufactured home to real property it already owned, the

Respondent has committed a distinct act that is inconsistent with the Anthonys' title to the home.

The reason is simple. On October 15, 2015 the Respondent filed an affidavit of conversion of manufactured home to real property. The recording of this affidavit caused the FUQUA to become a part of the Respondent's real property located at 3705 Anthony Place, Sun Valley, Nevada (Appendix Bate 134).

Prior to October 15, 2015, the manufactured home was personal property with a certificate of title showing the Appellants as owners. At anytime before October 15, 2015, the Appellants could have sold the manufactured home to another party. To do so, the Appellants would be required to sign over the certificate of title. When the manufactured home became part of the Respondent's real property, the Appellants' ability to sell it vanished. The manufactured home could no longer be sold by the Appellants as personal property. That is an act which is inconsistent with the Anthonys' title to the home.

October 15, 2015 was when the conversion took place. Conversion has a three year statute of limitations. Please see NRS 11.190(3)(c). See also *Palludan v. Bergin*, 78 Nev. 441, 443, 375 P.2d 544, 545 (1962), holding a cause of action for conversion accrues and the statute of limitations thereon commences to run at the time of an unauthorized sale of the property. Here the Respondents sold the home to themselves since it was not an improvement of the real property as a matter of law. The sale or transfer took place on October 15, 2015. The complaint was filed

on May 2, 2017. The counterclaim was filed on August 21, 2017. The second claim for relief was conversion. It was timely.

5. Conclusion

If the manufactured home was not an improvement, then Respondent's security interest never attached to it. NRS 361.244(3) says a manufactured home shall become an improvement only if it is converted to the real property by following the procedures contained in that statute. That was not done until October 15, 2015. At the time of the 2012 foreclosure sale, only the real property was foreclosed upon. The manufactured home remained as the Appellants' personal property until it was taken by Respondent on October 15, 2015. While the Respondent did not physically remove the home, their actions deprived the Appellants of the home's title. That made any sale of the home to another impossible. That is an act inconsistent with the Appellants' title and rights in the home. That is conversion, and the counterclaim alleging conversion was timely filed. Remand for damages is warranted.

Dated: This 29 day of December, 2020

By: _____

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

Certificate of Compliance NRAP 40(b)

Pursuant to NRAP 40(b) I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and NRAP 40(b). The Petition less the exhibit contains fewer than 10 pages, and no more than 4,667 words. 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 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 1,174 words.

Dated: This 29 day of December, 2020

By: _____

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

CERTIFICATE OF SERVICE BY MAIL AND EFLEX

Pursuant to Nevada Rule of Civil Procedure 5(b), I certify that on the 29th day of December, 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 **PETITION FOR REHEARING** addressed as follows:

Holly E. Walker, Esq.
Akerman, LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nv 89134

In addition on the 29th day of December, 2020, I copy of the petition was served upon the following by email through Court's Master Service List for this matter

Ariel Stern, Esq.
Holly Walker, Esq.
Melanie Morgan, Esq.
Lilith Xara
Carolyn Worrell

AFFIRMATION
Pursuant to NRS 239B.030

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

/s/ Dolores Stigall
Dolores Stigall

Exhibit List

Exhibit 1	December 16, 2020 Order

Exhibit 1

Exhibit 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATRICIA ANTHONY; AND WILLIAM ANTHONY,
Appellants,
vs.
FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Respondent.

No. 79284-COA

FILED

DEC 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Patricia and William Anthony appeal from a district court order on competing summary judgment motions, where the district court granted Fannie Mae's motion and denied the Anthonys' motion and counterclaims. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Patricia and William Anthony (Anthonys) obtained a refinance loan on their property.[1] Their property consisted of a parcel of land with two manufactured homes. The two manufactured homes, a 1996 Fuqua and a 1997 Fuqua, were combined to create one large residence. The two manufactured homes were treated as one residence (referred to as the manufactured home) and included in the appraisal for the loan, but no personal property was included in the estimate of the final value. The appraisal specifically recognized that the residence was "permanently attached to the site."

The Anthonys defaulted on their loan, and the Federal National Mortgage Association (Fannie Mae) purchased the property at a non-judicial foreclosure sale in 2012. Yet, the Anthonys refused to vacate the property. Because the Anthonys would not leave, Fannie Mae brought an

[1]We do not recount the facts except as necessary to our disposition.

unlawful detainer action against the Anthonys, which the court granted. Despite this, and two subsequent writs of restitution, the Anthonys returned to the property. Fannie Mae then sued the Anthonys for trespass and injunctive relief to prevent the Anthonys from re-entering the property and continuing to occupy the property. The Anthonys responded with counterclaims for violation of Article Nine of the Uniform Commercial Code (UCC), conversion, and abuse of process/excessive attachment. Both parties moved for summary judgment.

The district court granted summary judgment in favor of Fannie Mae and denied it for the Anthonys. The district court also denied all of the Anthonys' counterclaims, finding that each were time-barred and failed as a matter of law.

The Anthonys argue on appeal that the district court erred in granting Fannie Mae's motion for summary judgment and in finding Fannie Mae properly foreclosed on the 1996 manufactured home, and also erred in finding Fannie Mae did not convert that manufactured home to real property in 2015 when it reclassified it for tax purposes and, in doing so, violated Article Nine of the UCC.[2]

The Anthonys specifically argue that the 1996 Fuqua was personal property, and therefore, Fannie Mae did not obtain lawful possession of it at the foreclosure sale. They assert that when Fannie Mae converted it to real property for tax purposes, Fannie Mae either violated

[2]The Anthonys also argue that the district court erred by not allowing them to use the defense of recoupment. This argument is inapplicable because the district court did not award Fannie Mae any money.

Article Nine of the UCC by failing to give them notice[3] and therefore owes them statutory damages under NRS 104.9625(3)(b)[4], or, in the alternative, that Fannie Mae wrongfully converted it and owes them actual damages.[5] Fannie Mae argues that the manufactured home was included in the property properly foreclosed upon when the Anthonys defaulted on the refinanced loan, and further that the Anthonys' counterclaims were time-barred. We agree with Fannie Mae and affirm the district court's order.

We review a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file, viewed in the light most favorable to the non-moving party, demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

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[3]The Anthonys argue that Fannie Mae "sold" the manufactured home in 2015 when it converted it to real property and that the UCC required Fannie Mae to give notice to the Anthonys about the "sale." However, we conclude Fannie Mae lawfully owned the manufactured home when it purchased it at the foreclosure sale in 2012 and therefore it was not a "sale" when Fannie Mae converted it to real property for tax purposes in 2015.

[4]The Anthonys cite to NRS 104.625(3)(b) in their motion for summary judgment and on appeal; however, that statute does not exist. We believe they are referring to NRS 104.9625(3)(b) and will review this matter pursuant to that statute.

[5]As we conclude Fannie Mae lawfully obtained the 1996 manufactured home at the foreclosure sale, the Anthonys are not entitled to statutory damages under the UCC, and subsequent to the foreclosure sale Fannie Mae owned the manufactured home, thus, it could not convert property it already owned.

There is overwhelming evidence that Fannie Mae properly foreclosed on the Anthonys' property, which included the manufactured home. The Anthonys' loan application listed the home, including the manufactured home, as collateral, the Anthonys had an extensive appraisal done on their home for the loan application, and the deed of trust issued at foreclosure listed the Anthonys' address, as well as all improvements to the land. Even if the manufactured home was not real property, it was an improvement and subject to the foreclosure sale. *See Flyge v. Flynn*, 63 Nev. 201, 230, 166 P.2d 539, 522 (1946) (holding that improvements include buildings on land).

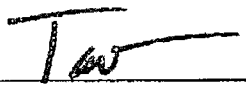
"Summary judgment is proper when a cause of action is barred by the statute of limitations." *Clark v. Robison*, 113 Nev. 949, 950-51, 944 P.2d 788, 789 (1997). Further, the statute of limitations for an "action upon a liability created by statute, other than a penalty or forfeiture," and for an "action for taking, detaining or injuring personal property," is three years. NRS 11.190(3)(a); NRS 11.190(3)(c).

The statute of limitations bars the Anthonys' counterclaims. The foreclosure sale occurred in March of 2012, which is when the statute of limitations began to run. The Anthonys did not claim then that Fannie Mae did not lawfully own the manufactured home. Later that year in November of 2012, Fannie Mae instituted a successful unlawful detainer action to remove the Anthonys from the property—including both manufactured homes. The Anthonys did not claim then that Fannie Mae did not lawfully own the manufactured home. Fannie Mae successfully brought a writ of restitution in 2013 and again in 2016. The Anthonys did not claim then that Fannie Mae did not lawfully own the manufactured home. Needless to say, when the Anthonys filed their counterclaims in

2017, about five years after the foreclosure sale, the statute of limitations on their claims against Fannie Mae's ownership of the manufactured home had expired. *See* NRS 11.190(3)(a); NRS 11.190(3)(c). Accordingly, the district court did not err in finding the Anthonys' counterclaims were time barred. Accordingly, we

ORDER the entire judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Michael C. Lehners
Akerman LLP/Las Vegas
Washoe District Court Clerk