IN THE SUPREME COURT
OF THE STATE OF NEVADA

Electronically Filed
Apr 09 2021 08:55 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

OMNI FINANCIAL, LLC, a foreign limited liability company Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada limited liability company;

Respondent.

No.: 82028

Eighth Judicial District Court
Case No: A-17-757061-C
(Honorable Richard Scotti)

APPELLANT'S OPENING BRIEF

HOWARD & HOWARD ATTORNEYS PLLC

ROBERT HERNQUIST, ESQ.
Nevada Bar No.010616
BRIAN J. PEZZILLO, ESQ.
Nevada Bar No. 007136
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, Nevada 89169
Attorneys for Appellant Omni Financial, LLC

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.

1. Parent Corporation:
   None.
2. Publicly held company that owns 10% or more of the party's stock:
   None.
3. Law firms who have appeared or are expected to appear for Omni Financial, LLC (including proceedings in the District Court):
   Howard & Howard Attorneys PLLC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

.

I.

STATEMENT OF JURISDICTION

The Supreme Court and/or the Appellate Court of Nevada has jurisdiction over this matter pursuant to NRAP 3A(b)(1) and NRCP 54(b). This appeal is taken from the granting of partial summary judgment pursuant to NRCP 56 and certified as final pursuant to NRCP 54(b). The Order Granting Partial Summary Judgment was entered on the 2nd day of October 2018. Notice of Entry of such Order was given and entered on the 3rd day of October 2018 and served electronically via the Court's ECF system. The Court entered an Order certifying the October 2, 2018 Order Granting Partial Summary Judgment as final pursuant to NRCP 54(b) on September 30, 2020. Notice of Entry of the September 30, 2020 Order was also entered and served via the Court's ECF system on September 30, 2020. Initial notice of appeal pertaining to this Order was filed on October 27, 2020.

II.

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11, 12). The issue of whether a third-party may collaterally attack the meaning of an agreement it is not a party to in order to assert novation does not appear to have been decided by any appellate court in Nevada. Likewise, the issue of whether novation of contract applies when the contract subject of the alleged

novation has been breached has never been addressed. These issues were raised before the District Court in Respondent Kal-Mor-USA, LLC's Motion for Partial Summary Judgment [JA Vol. III, 000566 – 000590] and the Reply in support thereof [JA Vol. VI, 001281 – 001303], Omni Financial, LLC's Opposition to Motion for Partial Summary Judgment [JA Vol. IV-VI, 000785 – Vol. V, 001280] and the Court's Findings of Fact and Conclusions of Law granting the motion for partial summary judgment. [JA Vol.VI, 001307 – 001317]. The issue of novation of contract was further addressed in Appellant Omni Financial, LLC's Motion for Reconsideration of the Court's Findings of Fact and Conclusions of Law [JA Vol. VI, 001331 – 001355] and the Reply in Support of the Motion for Reconsideration [JA Vol. VI, 001371 – 001384] and Kal-Mor-USA, LLC's Opposition thereto. [JA Vol. VI, 001356 - 001370] as well as the District Court's denial of the Motion for Reconsideration. [JA Vol. VI, 001387 - 001393].

The application of novation of contract and whether novation may be asserted by a third-party which is expressly excluded as a beneficiary has important consequences for the application of contract law in general and in particular in the application of contracts which are breached and followed by a settlement agreement. If a person/entity which was not a party to either the underlying contract subject of the alleged novation or the subsequent contract can attack the meaning of the pertinent contracts when the parties to the contracts themselves raise no such dispute

will severely impact the manner in which contracts, including settlement agreements, are drafted and enforced and will raise the potential for an increase in litigation. Contracts should provide for certainty which will be eroded if third parties are permitted to collaterally attack agreements of others and raise arguments of novation when they are not beneficiaries of the agreements at issue. Whether this is the case should be established by the Supreme Court to establish predictability in Nevada contract law.

III.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in finding that a settlement agreement entered into between Omni Financial, LLC and First 100, LLC settling a prior lawsuit acted as a novation of contract when neither Omni Financial, LLC nor First 100, LLC asserted that a novation had occurred and only a third-party, Kal-Mor-USA, LLC, made such a claim;

B. Whether the District Court erred in allowing a third party to attack the validity and enforceability of a settlement agreement which contained a disclaimer of any third-party beneficiaries;

C. Whether the District Court erred in finding that novation applied when the predecessor agreement had been breached prior to the alleged novation;

D. Whether the District Court erred in denying Omni Financial, LLC permission to conduct discovery pursuant to NRCP 56(d) regarding establishment of whether a genuine issue of fact existed to prevent entry of partial summary judgment; and,

E. Whether the District Court relied upon inadmissible evidence under NRCP 56(c) in granting Kal-Mor's Motion for Partial Summary Judgment.

IV.

STATEMENT OF THE CASE

The action concerns ownership of 9 parcels of real property which were subject of an HOA super-priority sale. In 2014, Omni Financial, LLC ("OMNI") agreed to loan up to $5 million to Defendant First 100, LLC ("First 100") to finance the purchase and enforcement of homeowner association ("HOA") receivables (the "Loan"). [JA Vol. I, 000002, ¶6; Vol. IV, 000788, ¶2; Vol. IV, 000819, ¶4]. Deeds of Trust encumbered various properties as security for the Loan. [JA Vol. I, 000002 – 000004; JA Vol. IV, 000820, ¶7]. First 100 defaulted under the agreement with Omni. [JA Vol. I, 000013 – 000014; JA Vol. IV, 000790 – 000792; 000820, ¶12]. Litigation was initiated between First 100 and Omni to which Kal-Mor-USA, LLC ("Kal-Mor") was also a party. [JA Vol. I, 000014 – 000015; JA Vol. IV, 000792]. The litigation was eventually settled through the execution of settlement agreements between Omni and First 100 (the "First 100 Settlement Agreement") [JA Vol. I,

000015, ¶92] and Omni and Kal-Mor (the "Kal-Mor Settlement Agreement"). [JA Vol. IV; JA000795, ¶38 – 000796, ¶39]. Kal-Mor asserted in the Complaint in this action that its interest in the subject properties was superior to those of Omni. [JA Vol. I, 000018 - 000020]. By way of a motion for partial summary judgment, Kal-Mor, in part, argued that the First 100 Settlement Agreement acted as a novation of the Loan agreement between Omni and First 100 and eliminated Omni's interest in the real properties at issue. [JA Vol. III, 000566 – 000590]. Although not a party to the agreement between Omni and First 100, Kal-Mor necessarily contends it is an implied beneficiary of the First 100 Settlement Agreement. The Court granted the motion for partial summary judgment filed by Kal-Mor on the grounds that the settlement agreement between Omni and First 100 operated as a novation of the prior Loan agreement. [JA Vol. VI, 001307 - 001317]. At the time of the Motion for Partial Summary Judgment First 100 had been named as a Defendant by Kal-Mor [JA Vol. I, 000001 – 000024] but had not yet appeared in the action. Subsequently, First 100 did appear and filed an Answer to Kal-Mor's Complaint. [JA Vol. VII, 001593 - 001613].

Omni filed a Motion for Reconsideration with the Court seeking to have the granting of the Partial Summary Judgment reheard. [JA Vol. VI, 001331 - 001355]. After a hearing the Court denied the Motion for Reconsideration. [JA Vol. VI 001387 - 001393]. Omni requested that the Court certify its Order granting the

motion for partial summary judgment as final for purposes of appeal pursuant to NRCP 54(b). [JA Vol. VI, 001398 - 001406]. The Court initially denied the motion. [JA Vol. VI, 001418]. Omni subsequently renewed its motion for certification pursuant to NRCP 54(b) [JA Vol. VII, 001708 - 001718] which was not opposed by Kal-Mor. [JA Vol. VII, 001713 - 001725]. The Court entered its Order certifying its Order granting partial summary judgment as final pursuant to NRCP 54(b) on September 30, 2020. [JA Vol. VII, 001726 - 001729].

This Appeal Followed.

V.

STATEMENT OF FACTS

Omni is a California entity that extends real estate-backed loans. [JA Vol. IV, 000788, lns. 19 - 21]. In 2014, Omni agreed to loan up to $5 million to First 100 to finance the purchase and enforcement of homeowner association ("HOA") receivables (the "Loan"). [JA Vol. IV, 000819]. On May 27, 2014, (i) the two entered into a Loan Agreement; (ii) First 100 executed a Promissory Note, Security Agreement, and multiple Deeds of Trust in Omni's favor; and (iii) certain First 100 principals issued Guarantees in Omni's favor. [*Id.*]. Unbeknownst to Omni when it extended the Loan, First 100 and Kal-Mor were *not* independent parties and the principal of Kal-Mor held a position with First 100. [JA Vol. IV, 000819, ¶5]. In addition to recording UCC-1 financing statements, OMNI was provided multiple

deeds of trust by First 100 to secure the money lent. [JA Vol. IV, 000819, ¶6 – 000820, ¶7].

In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100 ("Kal-Mor Properties"), including the Kal-Mor properties at issue here which were subject of the Deeds of Trust recorded by Omni. [JA Vol. I, 000004 – 000013; JA Vol. IV, JA000780, ¶16; 000820, ¶10]. Kal-Mor alleges with regard to each property purchased that:

> First 100 did not disclose to Kal-Mor that it had previously pledged any interest in any of the Kal-Mor Properties as collateral for the Omni Loan or that any of the Kal-Mor Properties was subject to any of the Omni Deeds of Trust.
>
> Kal-Mor had no actual knowledge or notice of any of the Omni Deeds of Trust when it purchased the Kal-Mor Properties from First 100 in 2014 and 2015.

[JA Vol. I, 00005, ¶¶23 – 25; 000006, ¶¶30 – 32; 000008, ¶¶44 – 46; 000009, ¶¶51 – 53; 000010, ¶¶58 - 60; 000011, ¶¶65 – 67; 000012, ¶¶72 – 74; 000013, ¶79 – 81]. First 100 expressly denies these allegations. [JA Vol. VII, 001596, ¶¶23 – 25; 001597, ¶¶30 – 32; 001598, ¶¶44 – 46; 001600, ¶¶58 – 60; 001600, ¶¶65 – 66, 001601, ¶67; 001601, ¶¶72 – 74; 001602, ¶¶79 - 81]. Prior to Kal-Mor's purchases, First 100 committed the first of its numerous breaches of the Omni Loan. [JA Vol. IV, 00790 – 00792; 00820 - 822]. Among other things, First 100 failed to: (i) pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii)

properly prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly, quarterly, and annual financial statements. [JA Vol. IV, 000820, ¶12]. Omni noticed a UCC sale pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" in January 2016. [JA Vol. IV, 000821, ¶16]. In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale in the U.S. District Court for Nevada. [JA Vol. IV, 000792, ¶31]. Kal-Mor filed a virtually identical lawsuit and emergency TRO request. [*Id.* at ¶32]. The two cases were consolidated by the U.S. District Court. [*Id.* at ¶34]. Giving First 100 and Kal-Mor the benefit of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. [*Id.* at ¶35]. However, several months later, after three days of evidentiary hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to Kal-Mor's TRO bond. [JA Vol. V, 001171 - 1197]. Not only was Kal-Mor a party to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically addressing the properties subject of Kal-Mor's Complaint. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement and Mutual General Release Agreement" [JA Vol. IV, 000966 - 000976]; and (ii) "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO") [JA Vol. V, 001260 - 001269]. Critically, the former states:

> W. The Parties now desire to resolve all differences, disputes and disagreements between them relating to the 2014-2015 Receivables and the ACR Receivables. ***This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties***.
>
> * * *
>
> Notwithstanding the terms provided herein, ***Omni reserves all rights to assert claims and conduct Enforcement Actions relating to any asset or property*** other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables, whether owned (previously, currently, or in the future) by GFY or a third party, including but not limited to the Kal-Mor Real Properties, associated proceeds, rents, and/or other assets.

[JA Vol. IV, 000969, (Recital W); 000970, §4(a)] (emphasis added). Several weeks later, Omni and First 100 entered into a similar agreement (defined in the Motion for Partial Summary Judgment and herein as the "First 100 Settlement Agreement"). [JA Vol. IV, 000978 – Vol. V, 001024]. In fact, while negotiating the First 100 settlement, Jay Bloom of First 100 repeatedly told Martin Boone of Omni that Omni was still secured by the Deeds of Trust. [JA Vol. IV, 000822, ¶19 – 000893, ¶22]. The parties also discussed the fact that any proceeds from foreclosures on those real properties would be credited to First 100. [*Id*.]

Following settlement of the federal case regarding First 100's personalty, Omni turned to foreclosing on the 24 real properties liened in its Deeds of Trust. [JA Vol. IV, 000824, ¶26]. On May 15, 2017, Omni caused a Notice of Breach and Election to Sell under Deeds of Trust (the "Notice of Default") to be recorded with the Clark County Recorder's Office. [*Id.*]. Kal-Mor, believing that it had an

ownership interest superior to that of Omni filed the instant litigation asserting that the First 100 Settlement Agreement acted as a novation of the underlying Loan Agreement and that the all the rights and obligations entered into as part of the original lending agreement, including the Deeds of Trust and right to foreclose, were eliminated. As noted, the District Court agreed with Kal-Mor and granted partial summary judgment on the issue of novation thereby preventing Omni from exercising its rights under the Deeds of Trust used to secure the Loan.

VI.

SUMMARY OF THE ARGUMENT

The District Court erred in granting partial summary judgment in favor Kal-Mor for numerous reasons. The evidence presented and considered by the Court consisted solely of Kal-Mor's interpretation of an agreement it was not a party to and of which it had no personal knowledge. Likewise, the First 100 Settlement Agreement contained an express provision stating that there were no intended third-party beneficiaries. [JA Vol. IV, 000997, §20(f)]. Kal-Mor was specifically listed as a party excluded as a beneficiary under the express language of the First 100 Settlement Agreement. [*Id.*]. Likewise, even if Kal-Mor was a proper party to challenge the meaning and enforcement of the First 100 Settlement Agreement, it was required to demonstrate each element of novation by "clear and convincing" evidence. No such evidence was presented as the only uncontroverted evidence

demonstrated that neither Omni nor First 100 contemplated a novation when entering into the First 100 Settlement Agreement. This was made clear by First 100 assisting Omni with enforcement of rights under the original agreement which Kal-Mor claims was subject of the novation. Finally, to the extent any doubt could be raised regarding the intent of Omni and First 100 the District Court erred in not allowing any discovery at a time when no discovery had taken place and no answer had been filed by any defendant.

Additionally, as set forth herein, a novation requires that a new agreement replace an existing, valid agreement. This element is lacking as the Loan agreement between Omni and First 100 had been breached by First 100 prior to the alleged novation. Accordingly, no valid existing agreement existed that could be subject of a novation.

VII.

ARGUMENT

A. The District Court's Order is Subject to De Novo Review Regarding the Granting of Partial Summary Judgement and Abuse of Discretion Regarding Refusal to Allow Discovery Under NRCP 56(d).

The district court's grant of summary judgment is reviewed de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when "the pleadings and other evidence on file demonstrate that no 'genuine issue as to any

material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (*citing* NRCP 56(c)). When reviewing a motion for summary judgment all evidence must be considered in the "light most favorable to the nonmoving party." *Id*.

The District Court's denial of Omni's request for discovery pursuant to NRCP 56(d) is reviewed for an abuse of discretion. *Choy v. Ameristar Casinos, Inc*., 127 Nev. 870, 872, 265 P.3d 698, 700 (2011).

B. The District Court Erred in Granting Partial Summary Judgment to Kal-Mor as Material Issues of Fact Regarding the Intent of the Parties to the First 100 Settlement Agreement Existed.

The Court granted partial summary judgment on the issue of novation, finding that the First 100 Settlement Agreement entered into between Omni and First 100 constituted a novation of the earlier lending agreement. [JA Vol. VI, 001307 - 001317]. The Court's finding that a novation of contract occurred is erroneous. In order to demonstrate that a novation has occurred four elements must be shown: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193 (Nev. 1989). "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion." *Id.* "Moreover, the party asserting novation has the burden of proving all the essentials of novation by *clear*

and convincing evidence." *Id.* at 509 (emphasis added). Novation is a question of law only when the agreement and consent of the parties are unequivocal. *Id*. at 508. Critically, it is the intent of the parties to the agreement that is relevant, not that of a third party. The intent of the parties is controlling, and it must be shown that the parties to the purported novation had a clear intent to enter into a novation. *Id.* at 508. Moreover, a "novation may be defined as a mutual agreement **between the parties concerned** for the discharge of a valid existing obligation . . ." 58 Am. Jur.2d *Novation* §1. "Whether a novation exists in any situation depends on factual allegations and proof, not on legal conclusions." *Capital Nat'l Bank of Tampa v. Hutchinson*, 435 F.2d 46, 50 (5th Cir. 1970). To this end if anything remains of the original obligation, then no novation exists. *Moffet County State Bank v. Told*, 800 P.2d 1320, 1323 (Colo. 1990)("A mere modification will not suffice; anything remaining of the original obligation prevents a novation.").

As these authorities make clear, it is the intent of the parties to the subject agreement that is relevant. In the District Court, no authority was cited by Kal-Mor or the District Court that supports the proposition that the intent of a third party is relevant when the parties to an agreement do not have a dispute about its application. Kal-Mor's challenge is understandable as a finding that Omni's Deeds of Trust are valid encumbrances on the affected properties will result in a finding that Omni has superior title vis-a-vis Kal-Mor. This outcome, however, does not change the fact

that Kal-Mor's intent and understanding is not relevant in determining whether a novation has occurred. The intent of Omni and First 100 was to enter into a settlement agreement, not a novation. The only competent evidence presented in relation to Kal-Mor's Motion for Partial Summary Judgment was that of Omni. Kal-Mor is not, and never was a party to any agreements entered into between Omni and First 100, thus the only evidence which should rightfully have been considered by the District Court was Omni's interpretation of the First 100 Settlement Agreement. Kal-Mor's interpretation of an agreement it is not a party to is irrelevant. More importantly, and as discussed in greater depth herein, it is inadmissible as there is no evidence in the record which establishes that Kal-Mor has any personal knowledge of either Omni or First 100's intent in entering into the First 100 Settlement Agreement. There is no dispute that Omni had the right to enforce its rights under the relevant Deeds of Trust as First 100 actively assisted in that endeavor, thus, not all provisions of the original agreement were replaced.

Kal-Mor focused upon select language of the First 100 Settlement Agreement in bringing its Motion for Partial Summary Judgment. [JA Vol. III, 000584]. First 100 relied upon certain language it asserted demonstrated a clear intent that Omni was resolving and waiving all rights under any other agreement. [*Id.*]. Assuming that such an approach was proper, the analysis could still not overcome the undisputed intent of the parties to the actual agreement. As noted by the Ninth

Circuit Court of Appeals:

> The conduct of the parties subsequent to the execution of a contract and before any controversy had arisen as to its effect, is persuasive evidence in determining the meaning of the agreement. "This rule of practical construction is predicated on the common sense concept that **actions speak louder than words**." **Words are frequently but an imperfect medium to convey thought and intention**. When the parties to a contract perform under it and demonstrate by their conduct that they know what they were talking about, *the courts should enforce that intent*.

Fanucchi & Limi Farms, 2003 WL 22670509, *32 – 33 (9th Cir. 2003) (emphasis added) *citing Davies Machinery Co. v. Pine Mountain Club, Inc.* 39 Cal.App.3d 18, 26-27 (1974)(emphasis in original); *Sans Souci v. Div. of Florida Land Sales & Condos*., 448 So. 2d 1116, 1121 (Fla. 1st DCA 1984)("Consent, however, need not be shown by express words, but may be implied from the circumstances of the transaction and by the conduct of the parties thereafter."), *citing* 58 Am. Jur.2d *Novation* §16 (1971).

The District Court was provided uncontroverted evidence that the actions of Omni and First 100 were not consistent with a novation having been contemplated when entering into the First 100 Settlement Agreement. It was established in Omni's Opposition to the Motion for Partial Summary Judgment, and was uncontested by Kal-Mor, that subsequent to execution of the First 100 Settlement Agreement, Omni was in need of a Lost Note Affidavit as it could not locate the original 2014 Promissory Note which its trustees (under the Deeds of Trust) were requesting. [JA

Vol. IV, 000823, ¶24). First 100 signed and returned a Lost Note Affidavit on January 30, 2017 and another version on April 21, 2017. [*Id.*; JA Vol. V, 001026 - 001028; 001030 - 001031]. Had a novation been intended, as argued by Kal-Mor, and accepted by the District Court, the providing of the Lost Note Affidavit would have been unnecessary and would have been a futile act. Indeed, if it had been the intention of Omni and First 100 for the First 100 Settlement Agreement to constitute a novation, the First 100 Settlement Agreement would have contained a provision requiring the release of Omni's Deeds of Trust, however, no such requirement exists in the First 100 Settlement Agreement. The lack of any requirement that Omni's Deeds of Trust be released, coupled with the fact that First 100 took affirmative steps to assist Omni with the foreclosure of its Deeds of Trust, demonstrates that the parties never intended for the First 100 Settlement Agreement to act as a novation of their earlier lending agreement. Even if one were assume that the express language of the Settlement Agreement was not as clear as it theoretically could have been, it was not foreseeable that a third party [Kal-Mor] would collaterally attack the two-party agreement long after it was executed. *See Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (noting that an individual obtains third-party-beneficiary status when contracting parties demonstrate a clear intent to benefit the individual, a third party, by their contract and only then do they have standing); *Barron v. Bank of N.Y. Mellon*, No. 2:15-cv-00242-APG-GWF (D.

Nev. Feb. 15, 2017), p. 2 (one must be a party or third party beneficiary to challenge validity of a contractual assignment).

C. The Settlement Agreement Upon Which Kal-Mor Based its Motion Constitutes an Executory Accord, not a Novation.

Novation is often confused with executory accords. *See Cohen v. Treuhold Capital Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010). The difference, however, is critical as an executory accord does not result in the replacement of the original agreement, but rather, provides two avenues of recovery – either the breached accord agreement or the original agreement. The critical distinction lies in the difference between an "accord" and an "accord and satisfaction". Under Nevada law, to establish an accord and satisfaction, it must be clearly shown " . . . there was a meeting of the minds of the parties, accompanied by sufficient consideration." *Mountain Shadows of Incline v. Kopsho*, 555 P.2d 841, 842 (1976). In the context of novation, a subsequent agreement may itself be accepted as immediate satisfaction and discharge of a prior contractual obligation (accord and satisfaction) or the performance of the subsequent agreement may form the discharge (accord). *See Rivard-Crook v. Accelerated Payment Techs.*, 2:10-cv-02215-MMD-GWF (D. Nev. Jan 8, 2014). In discussing the distinctions between novation and executory accords the court in *Cohen* stated:

> It is often difficult to determine whether a new agreement is a novation or an executory accord. *See Stahl Mgmt. Corp. v. Conceptions Unlimited,* 554 F. Supp. 890, 894 (S.D.N.Y. 1983). **The difference**

between the two turns upon whether the parties intended the new agreement to discharge their previously existing obligations. *See Sudul*, 917 F. Supp. at 1047 (citing *May Dep't Stores Co*.,[**15] 1 F.3d at 140). Under New York law, when parties agree to a "novation," the existing obligation is extinguished immediately by acceptance of new agreement; however, if parties intend that under the new agreement, the existing claim would be discharged in the future by rendition of substituted performance, the new agreement is an executory accord. *See id*. at 1047-48. "At times, the matter of intention may be discerned as a matter of law from documents exclusively, and, in other situations, a court must look to any extrinsic proof that may exist." *Koenig Iron Works, Inc. v. Sterling Factories, Inc*., No. 89 Civ. 4257, 1999 WL 178785, at *8 (S.D.N.Y. Mar. 30, 1999) (*citing Mallad Constr. Corp. v. County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 292-93 (1973)). If the intent of the parties can be found in the unequivocal language of the contract, the court may grant summary judgment. *Nat'l Am. Corp*., 448 F.Supp. at 643.

The characterization of the subsequent agreement — as a novation or an executory accord — is determinative of the remedy to which the non-breaching party is entitled. **Because a novation has the effect of extinguishing the prior contract between the parties, the existence of a novation "must never be presumed**," *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc*., 736 F. Supp. 1281, 1284 (S.D.N.Y. 1990), and the party asserting the novation's existence has the burden of proving that the subsequent agreement was intended as a complete substitute for the parties' prior agreements. *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 116 B.R. 887, 907 (Bankr. S.D.N.Y. 1990) (citation omitted); *see also Ventricelli v. DeGennaro*, 633 N.Y.S.2d 315, 316 (App. Div. 1995) ("The trial record reveals that the defendant failed to sustain his burden of proof of establishing that it was the intent of the parties to effect a novation substituting a new obligor or another contract for the original obligation."); *Goldbard v. Empire State Mut. Life Ins. Co*., 171 N.Y.S.2d 194, 202 (App. Div. 1958) ("It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was performed." (citation omitted)); *Beck v. Mfrs. Hanover Trust Co*., 481 N.Y.S.2d 211, 214 (Sup. Ct. 1984) ("In order to prove a novation, there must be a `clear and definite intention on the part of all concerned that such is the purpose of the agreement. Not only must the intention to effect a

> novation be clearly shown, but a novation [must] never . . . be presumed." (quoting 22 N.Y. Jur. 2d, Contracts, § 406)).

422 B.R. at 374 (emphasis added).

The *Cohen* matter is instructive in the context of alleged novation involving settlement agreements. In *Cohen*, two parties, Metropolitan and Treuhold entered into an agreement where they would purchase, refurbish and sell homes and property. *Id.* at 361. Metropolitan would locate properties and then approach Treuhold regarding purchasing the properties. *Id.* If Treuhold was interested, it would purchase the property either using its own funds or through use of financing through a third party, Medallion Business Credit LLC. *Id.* Once the properties were refurbished a buyer would be sought. *Id.* Once the property was sold, Treuhold would receive back funds it had expended, Metropolitan would receive back funds expended in repairing/refurbishing the properties and then any profits would be split between the two parties. *Id.* Ultimately Metropolitan and its principals failed to make payments as required to Treuhold. As a result, the parties entered into a January 2007 Letter Agreement which set forth repayment terms to Treuhold. *Id.* at 362. Metropolitan then requested an extension of the terms of the January 7 letter agreement and the parties entered into an April 2007 settlement agreement. *Id.* As in this matter, the April 2007 Agreement contained a merger clause which stated that all prior agreements "are superseded by this Agreement, which fully and completely expresses the agreement between the parties hereto with respect to the subject matter

hereof." *Id.* at 364.

After having breached the April 2007 Agreement, Cohen, a principal of Metropolitan, filed bankruptcy and asserted that Treuhold's only remedy was to assert a breach of the April 2007 Agreement as that agreement constituted a novation of any prior agreements. The Court rejected the argument that the April 2007 Agreement constituted a novation of the earlier, breached agreement, in part, because the evidence did not indicate that a novation was what was intended. As here, it was the intention of the parties that only the performance of the settlement agreement would discharge the obligations between the parties under the prior agreements. As the court noted, it is generally more reasonable to assume that a party intends to surrender its old rights only upon performance of the new contract. *Id.* at 373 *citing Goldbard v. Empire State Mut. Life Ins. Co.*, 171 N.Y.S.2d 194, 202 (App. Div. 1958).

The facts of the case demonstrate that neither Omni nor First 100 ever intended for the First 100 Settlement Agreement reached to create a situation in which Omni was waiving any rights with regard to the real property at issue. The First 100 Settlement Agreement [JA Vol. IV, 000978 – Vol. V, 000993] reflects a mutual understanding that Omni was not relinquishing any rights to the real properties. Again, this is underscored by the fact that First 100 actively assisted Omni in foreclosing upon the real properties at issue by supplying "lost Note

Affidavits" when original documentation could not be located. [JA Vol. IV, 000823, ¶24; JA Vol. V, 001026 – 001028; 001030 – 001031]. If any doubt existed, the District Court should have considered the negotiations and conduct of Omni and First 100. The fundamental objective of contract construction is to ascertain the intention of the parties. *Whiteside v. Tenet Healthcare Corp*., 124 Cal. Rptr. 2d 580, 585 (Cal. App. Ct. 2002). When the terms of a contract are clearly expressed, the intention of the parties is to be determined from the language of the contract. *Ringle v. Bruton*, 86 P.3d 1032, 1039 (Nev. 2004). However, when a contract's terms are ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Id.; see also Lowden Inv. Co. v. Gen. Elec. Credit Co*., 741 P.2d 806, 809 (Nev. 1987) (stating that parol evidence "is not admissible to vary or contradict the terms of a written agreement" but "is admissible to resolve ambiguities in a written instrument"). Finally, where there is doubt concerning the construction of contractual covenants, the terms should "be construed against the person seeking enforcement." *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310, 312 (Nev. 1993). As a stranger to the contract Kal-Mor's interpretation of the First 100 Settlement Agreement should not have been accorded any weight. As the cited cases make clear, it is the intent of the parties to the agreement that should control in determining whether a novation has occurred.

The best approach for interpreting an ambiguous contract is to delve beyond

its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Hilton Hotels v. Butch Lewis Prod.*, 808 P.2d 919, 921 (Nev. 1991). This inquiry includes not only the circumstances surrounding the contract execution, but also the subsequent acts and declarations of the parties. *Trans Western Leasing v. Corrao Constr. Co.*, 652 P.2d 1181, 1183 (Nev. 1982). Here, the only way this could have happened is for the District Court to have admitted extrinsic evidence and allow the case to proceed through discovery and trial.

The conduct of Omni and First 100 reflects a mutual understanding and intent that Omni would pursue foreclosure actions against the real properties. The provisions in the Kal-Mor settlement documents recognizing Omni's claims to the Kal-Mor Properties are consistent with the negotiations and discussions that occurred between Martin Boone and Greg Darroch (the principals of Omni and Kal-Mor, respectively) preceding the settlement. During those discussions, Omni repeatedly informed Kal-Mor that it intended to pursue foreclosures against the Kal-Mor Properties. [JA Vol. IV, 000822, ¶19]. Although they tried to reach a resolution that included the real properties, they were unable to do so and instead agreed on the language that appears in the settlement agreement and stipulation. *Id.*

D. The Settlement Agreement Cannot Constitute a Novation as the Original Agreement Had Been Breached by First 100.

The "party asserting novation has the burden of proving **all the essential**

elements" by clear and convincing evidence. *United Fire Insurance*, 105 Nev. at 509, 780 P.2d at 196 (emphasis). Here, Kal-Mor failed to raise, and the District Court failed to adequately address, the lack of a valid contract existing at the time of the alleged novation. There "cannot be a novation in a case where the original contract has already been breached since a previously valid obligation does not exist at the time the new contract is made." 58 Am. Jur.2d Novation §7, *citing In re Cohen* 422 B.R. 350 (E.D.N.Y. 2010). In rejecting the argument that the April 2007 Agreement constituted a novation the court in *Cohen* stated:

> The underlying principle is that "novation requires the consent of all parties to substitute one obligation or agreement for another." *Raymond v. Marks*, 116 F.3d 466, 466 (2nd Cir. 1997). Where the original contract has already been breached, there cannot be a novation, because a previously valid obligation did not exist at the time the new contract was made.

Id. at 372. As determined by the District Court and reflected in its Findings of Fact and Conclusions of law granting the partial summary judgment the original lending agreement between Omni and First 100 had been breached by First 100. [JA Vol. VI, 001311, ¶12]. Thus, Kal-Mor, as a matter of law, could not prevail upon its motion as it failed to establish the first element of novation – the existence of an existing, valid agreement. *See United Fire Insurance*, 105 Nev. at 508; 58 Am. Jur.2d Novation, §7. The burden was squarely upon Kal-Mor to prove each and every element of novation by clear and convincing evidence. Kal-Mor failed to address this threshold element in its Motion, although it admitted that the prior loan

agreement had been breached by First 100 prior to the First 100 Settlement Agreement being entered into. [JA Vol. III, 000573, ¶21]. Given this admission it was error to grant summary judgment in favor of Kal-Mor.

E. Kal-Mor is Not an Intended Beneficiary of the First 100 Settlement Agreement and Kal-Mor's Interpretation of the Settlement Agreement is Irrelevant

It was error to give any credence to Kal-Mor's interpretation of the First 100 Settlement Agreement entered into between Omni and First 100. The entire basis of Kal-Mor's novation argument was its own, subjective interpretation of the meaning of the words used by and between Omni and First 100. It was plain error to attribute any weight to such an interpretation. The First 100 Settlement Agreement plainly states that there are no intended third-party beneficiaries of the Settlement Agreement, to wit:

> This Agreement shall inure to the benefit of and be binding upon the Parties and their respective heirs, successors and assigns. Except as expressly set forth herein, (i) **nothing in this Agreement shall be construed to give any person/entity** (e.g., GFY, **Kal-Mor**, or APV) other than the Parties (and their permitted successors and assigns) **any legal or equitable right, remedy, or claim under or with respect to this Agreement** or any provision of this Agreement, and (ii) **this Agreement is for the sole and exclusive benefit of the Parties** (and their permitted successors and assigns, as well as the principals and agents thereof if expressly referenced herein).

[JA Vol. IV, 000997, §20(f)(emphasis added)]. As seen, Kal-Mor was expressly excluded as a party with any interest, legal or equitable, in the First 100 Settlement Agreement. Nevertheless, the entire basis of its Motion for Partial Summary

Judgment was that Kal-Mor was somehow entitled to enforce its interpretation of a private agreement between Omni and First 100. Moreover, the District Court erred in adopting this argument and in doing so conferred beneficiary status on Kal-Mor. Kal-Mor, however, lacks standing to have collaterally attacked the First 100 Settlement Agreement. "This court has a `long history of requiring an actual justiciable controversy as a predicate to judicial relief."` *Stockmeier v. State, Dep't of Corrections*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006) (*quoting Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). In the present matter there was no justiciable controversy for the District Court to rule upon as no dispute existed between Omni and First 100 - the only parties with rights under the First 100 Settlement Agreement. The undisputed evidence indicates that there is no dispute between these two parties with regard to the interpretation of the First 100 Settlement Agreement. The absolute most Kal-Mor could have established was that the language used between Omni and First 100 could have been more precise, nevertheless, there has been no showing that either Omni or First 100 did not fully understand the meaning of their own agreement. Omni treated the First 100 Settlement Agreement as an executory accord which could only result in its rights under the original lending agreement being discharged through satisfaction of all conditions of the First 100 Settlement Agreement. First

100, the only other party to the First 100 Settlement Agreement, offered no evidence to the contrary. Moreover, as set forth above, First 100 assisted Omni in pursuing its rights under the original agreement and its Deeds of Trust on more than one occasion by voluntarily providing Lost Note Affidavits which would allow Omni to foreclose upon the Deeds of Trust. It is error to allow a third-party, with no standing, to attack the nature and meaning of an agreement which is not in dispute between the two contracting parties. If strangers to a contract could attack its meaning then any contractual agreement could be subject of collateral attack by a third party who felt it was in their interests to do so even if this meant disregarding the intent of the parties who made the agreement. Such a result undermines the very purpose of contracts, which is to protect the "reasonable expectations of the parties who enter into the bargain, which, in turn, promotes and facilitates business agreements." *Starlite, LP v. Landry's Restaurant, Inc.*, 780 N.W.2d 396, 398 (Minn. Ct. App. 2010). Contracts likewise provide certainty and predictability in contractual relationships. *Id*. Here, it was error to allow Kal-Mor to undermine the intent of the parties to the First 100 Settlement Agreement.

F. The Granting of Kal-Mor's Motion for Partial Summary Judgment Was Premature and Improper and Omni Was Entitled to Conduct Discovery of the Relevant Issues

Courts routinely deny motions for summary judgment when they are made before any opportunity for discovery has been afforded:

> Though Rule 56 allows a party to move for summary judgment 'at any time,' the granting of summary judgment is limited until after adequate time for discovery. A grant of summary judgment is premature and improper when basic discovery has not been completed, particularly when the moving party has exclusive access to the evidence necessary to support the nonmoving party's claims.

Ferm v. Crown Equity Holdings, Inc., 2011 U.S. Dist. LEXIS 84433 at *8 (D. Nev. 2011)(quoting *Phongsavane v. Potter*, 2005 U.S. Dist. LEXIS 12439, 2005 WL 1514091, at *5 (W.D. Tex. 2005) (internal citation omitted)). When Kal-Mor filed its Motion, the parties had not even discussed discovery and discovery deadlines under NRCP 16.1 and thus no discovery had occurred in this matter. In fact, when the District Court entered its Findings of Fact and Conclusions of Law on October 2, 2018 [JA Vol. VI, 001307 – 001317] no answer had been filed in the action. First 100 did not file its Answer until November 25, 2019. [JA Vol. VI, 001593 – 001613]. Omni did not file its Answer until August 12, 2019. [JA Vol. VI, 001422 – 001449]. Thus, the District Court disposed of a primary issue in the case prior to any discovery being afforded or even answers having been filed. No attempt to ascertain the intent of First 100 was made. At a minimum, discovery was required in order to establish the intent of the parties to the First 100 Settlement Agreement.

NRCP 56(d) gives the court reviewing a motion for summary judgment broad discretion to deny or continue the motion if the nonmoving party needs time to discover essential facts. *California Union Ins. Co. v. American Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990). Although a party may move for

summary judgment at any time district courts should grant a Rule 56(d) motion when the nonmoving party has not had a "realistic opportunity to pursue discovery relating to its theory of the case." *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In fact, where the nonmoving party has not had the opportunity to discover any information essential to its theory of the case, the Supreme Court has "restated the rule as requiring, rather than merely permitting, discovery." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)(citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986)). To be entitled to Rule 56(d) discovery, the nonmoving party must identify facts showing there is a genuine issue for trial. *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

Omni properly made a request pursuant to NRCP 56(d) for discovery on the various issues outstanding in opposing the Motion for Partial Summary Judgment. [JA Vol. IV, 000815]. In opposing the motion Omni relied upon affidavits of Martin Boone, principal of Omni as well as Robert Hernquist, counsel for Omni, which set forth ample facts requiring discovery. [JA Vol. IV, 000819 – 000824; 001199 – 001201]. Specific discovery that was needed was identified as the deposition of Martin Boone, Jay Bloom, principal of First 100 and Greg Darroch principal of Kal-Mor. [JA Vol. V, 001199]. If discovery had been permitted the issues addressed would have addressed the intent of the parties to the First 100 Settlement Agreement

as well as the negotiations and circumstances surround the execution of the First 100 Settlement Agreement.

G. Kal-Mor's Motion Was Procedurally Defective

It is well settled that only *admissible* evidence may be relied upon by the Court in ruling upon a summary judgment demand. NRCP56(c); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, (9th Cir. 2002). In support of its Motion for Partial Summary Judgment, Kal-Mor offered the Declaration of Greg Darroch [JA Vol. III – IV, 000591 – 000784]. Mr. Darroch's Declaration was filled with statements based upon his "information and belief." [JA Vol. III, 000592 – 000605, ¶¶ 3, 4, 5, 7, 10, 17, 24, 31, 32, 38, 45, 46, 52, 53, 59, 60, 66, 67, 72, 75, 84, 87]. Over 25% of his paragraphs consist solely of his conjecture. A declarant's naked, unsupported beliefs are not "evidence" for summary judgment purposes. Mr. Darroch's beliefs were not admissible and failed to meet the requirements of NRCP 56(c), as such testimony would not be permitted at trial. *Compare Collins v. Union Fed. Savings & Loan*, 662 P.2d 610, 621 (Nev. 1983) (summary judgment cannot be built "on the gossamer threads of whimsy, speculation and conjecture"); *State v. Eighth Judicial Dist. Court*, 42 P.3d 233, 241 n.26 (Nev. 2002). Omni raised the issue of a lack of admissible evidence before the District Court [JA Vol. IV, 000800], however, the District Court failed to address the deficiency or exclude improper evidence.

As set forth above, and as admitted by Kal-Mor, Kal-Mor is not a party to the

First 100 Settlement Agreement and has no personal, admissible knowledge of the meaning of the terms used in the First 100 Settlement Agreement upon which it based its Motion for Partial Summary Judgment. There is no controversy regarding the meaning of the First 100 Settlement. Kal-Mor offered no evidence, other than its own, unsupported opinion that the First 100 Settlement Agreement means something other than how Omni and First 100 treated it. Having failed to offer anything other than its own opinion, no relevant, admissible evidence was before the District Court which would support the granting of partial summary judgment.

VIII.

CONCLUSION

Based upon the facts and law set forth above, Appellant hereby requests that the Court reverse the Order granting partial summary judgement issued by the District Court and remand the matter back to the district court for further proceedings on the merits.

Dated this 8th day of April 2021.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/ Brian J. Pezzillo*
BRIAN J. PEZZILLO, ESQ.
Nevada Bar No. 007136
ROBERT HERNQUIST, ESQ.
Nevada Bar No. 010616
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, Nevada 89169
Attorneys for Appellant Omni Financial, LLC

CERTIFICATE OF COMPLIANCE

1. 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word version 2016 in 14pt Times New Roman Font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. 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 either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 7,682 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, 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. 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 8th day of April 2021.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/ Brian J. Pezzillo*
BRIAN J. PEZZILLO, ESQ.
Nevada Bar No. 007136
ROBERT HERNQUIST, ESQ.
Nevada Bar No. 010616
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, Nevada 89169

Attorneys for Appellant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2021, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was served by the following method(s):

_____**VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail in Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage fully prepaid in Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

_____**VIA FACSIMILE:** by transmitting to a facsimile machine maintained by the attorney or the party who has filed a written consent for such manner of service.

_____**BY PERSONAL SERVICE:** by personally hand-delivering or causing to be hand delivered by such designed individual whose particular duties include delivery of such on behalf of the firm, addressed to the individual(s) listed, signed by such individual or his/her representative accepting on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery of the document will be maintained with the document and is attached.

_____**BY E-MAIL:** by transmitting a courtesy copy of the document in the format to be used for attachments to the electronic-mail address designated by the attorney or the party who has filed a written consent for such manner of service.

XXX BY ELECTRONIC MEANS: by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

/s/ Anya Ruiz

_____

An employee of Howard & Howard Attorneys PLLC

SERVICE LIST

Bart K. Larsen, Esq.
SHEA & LARSEN
1731 Village Center Circle, Suite 150
Las Vegas, NV 89134
Attorneys for Kal-Mor-USA, LLC

Danielle J. Barraza, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Attorneys for First 100, LLC

4849-2546-5516, v. 3