

IN THE SUPREME COURT OF THE STATE OF NEVADA

OMNI FINANCIAL, LLC, a foreign
limited liability company,

Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada
limited liability company; and FIRST
100, LLC, a Nevada Limited Liability
Company,

Respondents.

Case No.: 82028

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APPEAL

from an order in favor of Respondent Kal-Mor-USA, LLC
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Richard Scotti, District Court Judge
District Court Case No. A-17-757061-C

FIRST 100, LLC'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURES

Respondent First 100 (“First 100”) is a limited liability company organized under the laws of the State of Nevada. There exist no parent corporations or publicly held companies that own 10% or more of First 100’s stock. First 100 has been represented throughout the litigation and appeal by Joseph A. Gutierrez and Danielle J. Barraza of Maier Gutierrez PLLC d/b/a Maier Gutierrez & Associates.

DATED this 29th day of June, 2021.

MAIER GUTIERREZ & ASSOCIATES

/s/ Danielle J. Barraza_____

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ROUTING STATEMENT

First 100, LLC (“First 100”) concurs with respondent Kal-Mor-USA, LLC’s (“Kal-Mor”) classification of the district court’s summary judgment order. Specifically, the district court did grant partial summary judgment in favor of Kal-Mor based on its finding that the First 100 Settlement was a novation of the Omni Loan that extinguished any security interest Omni could claim in the real properties at issue as collateral for the Omni Loan. As such, First 100 agrees that because the issue of novation is not one of first impression for Nevada, nor are the effects of novation on the underlying security of the original agreement, this appeal should not be presumptively retained by the Nevada Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- A. Whether the district court properly granted partial summary judgment in favor of Kal-Mor on Kal-Mor’s fourth cause of action for declaratory relief and fifth cause of action for quiet title;
- B. Whether the district court properly denied Omni’s request to conduct discovery pursuant to NRCP 56(d).

STATEMENT OF THE CASE

This matter arises from various residential properties that First 100 purchased and then later sold to Kal-Mor (the “Kal-Mor Properties”).

Separately, First 100 entered into a loan agreement with Omni in 2014. JA

000819. After Omni claimed that First 100 breached its obligations under the Omni Loan, Omni noticed a UCC sale, which led to First 100 filing suit in a matter that was removed to the U.S. District Court for Nevada, seeking a TRO to stop the sale. JA 000792. The TRO was granted, and Omni's foreclosure sale was postponed. JA 000792. Thereafter, following evidentiary hearings, Omni was granted permission to proceed with the foreclosure sale. JA 001171-1197.

On or around January 16, 2017, Omni and First 100 entered into a Settlement Agreement and Mutual Release. JA 000978-001024.

Thereafter, Omni attempted to foreclose on various Kal-Mor Properties pursuant to the Omni Loan Agreement. JA 000824. As a result, Kal-Mor filed the instant litigation asserting that it had an ownership in the Kal-Mor Properties interest superior to that of Omni.

As set forth in underlying briefing, First 100 disputes that it concealed from Kal-Mor that it had previously pledged the Kal-Mor Properties as collateral for the Omni Loan. *See* JA 001690.

Notwithstanding that, First 100, LLC acknowledges the district court's Findings of Fact and Conclusions of Law and takes no position disputing the conclusion that that the Settlement Agreement between Omni and First 100 operated as a novation of the prior Omni Loan agreement. JA 001307-001317.

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STATEMENT OF FACTS

With the exception of any contention that First 100 failed to make material disclosures to Kal-Mor regarding the Kal-Mor Properties, First 100 does not dispute the district court's findings of fact, conclusions of law, and order. JA 001320-1330.

First 100 does not dispute the district court's findings that Omni's security interest was discharged through novation of the Omni Loan agreement. JA 001328-001329.

SUMMARY OF ARGUMENT

In its Opening Brief, Omni argues that the Court abused its discretion in failing to grant NRCP 56(d) relief for additional discovery. First 100 does not have any arguments as to what additional discovery would have been necessary.

Omni also argues that material issues of fact exist as to the intent of the parties regarding the First 100 Settlement Agreement. First 100's position on this issue is that the agreements speak for themselves and are unambiguous.

Omni also argues that the First 100 Settlement Agreement is not a novation. First 100 takes no position disputing the district court's findings on this issue.

LEGAL ARGUMENT

I. FIRST 100 TAKES NO POSITION ON THE DISTRICT COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO KAL-MOR

Entry of summary judgment pursuant to Rule 56 is appropriate "when the

pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

A “material fact” is a fact “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Valley Bank of Nevada v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989) (citing *Liberty Lobby*, 477 U.S. at 248).

Here, First 100 does not have any arguments to dispute the district court’s Findings of Fact, Conclusions of Law, and Order granting Kal-Mor’s motion for partial summary judgment. First 100 contends that the underlying Omni Loan and First 100 Settlement Agreement speak for themselves, and First 100 does not have any arguments disputing the district court’s conclusion that the First 100 Settlement Agreement served as a novation to the Omni Loan.

II. FIRST 100 TAKES NO POSITION AS TO WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT RULE 56(D) RELIEF

Upon considering a motion for summary judgment, Rule 56(d) of the Nevada Rules of Civil Procedure states that the court may defer considering the motion “if a

nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.” Nev. R. Civ. P. 56(d).

A district court has wide discretion in controlling pretrial discovery. *MGM Grand, Inc. v. Eighth Judicial Dist. Court of State In & For County of Clark*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991). Therefore, this Court reviews a lower court’s denial of a Rule 56(d) continuance for abuse of discretion. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

Here, First 100 does not have any arguments as to any additional discovery which would produce a genuine issue of material fact. With respect to any argument that First 100’s “intent” in executing the First 100 Settlement Agreement needs to be determined, First 100 responds that its intent is set forth on the Settlement Agreement itself.

Therefore, First 100 does not have any arguments as to how additional discovery was warranted.

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CONCLUSION

First 100 respectfully asks that the Court defer to the underlying unambiguous documents (the Omni Loan and the First 100 Settlement Agreement) in determining whether or not the district court properly issued partial summary judgment in favor of Kal-Mor.

DATED this 29th day of June, 2021.

Respectfully submitted,

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/s/ Danielle J. Barraza

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this respondent's answering 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, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(A)(ii) in that it contains 1,828 words. 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 29th day of June, 2021.

Respectfully submitted,

MAIER GUTIERREZ & ASSOCIATES

/s/ Danielle J. Barraza

DANIELLE J. BARRAZA, ESQ.
Counsel for First 100, LLC

CERTIFICATE OF SERVICE

I certify that on the 29th day of June, 2021, the following **FIRST 100, LLC'S ANSWERING BRIEF** was electronically filed with the Nevada Supreme Court and electronic service of the foregoing documents shall be made in accordance with the Master Service List as follows:

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DATED this 29th day of June, 2021.

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