

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOUR ENTERPRISES, LLC., A NEVADA
LIMITED LIABILITY COMPANY;
MULUGETA BOUR, AN INDIVIDUAL;
HILENA MENGESHA, AN INDIVIDUAL,

Appellants,

v.

4520 ARVILLE, A CALIFORNIA
GENERAL PARTNERSHIP; MCKINLEY
MANOR, AN IDAHO GENERAL
PARTNERSHIP,

Respondents.

Case No.: 82699

Electronically Filed
Apr 29 2021 01:36 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. Id. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth Department: 5
County: Clark Judge: The Honorable Veronica M. Barisich
District Ct. Case No.: A-19-794864-C

2. **Attorney filing this docketing statement:**

Attorney: Rusty Graf, Esq. **Telephone:** (702) 869-8801

Firm: Black & Wadhams

Address: 10777 W Twain Ave #300, Las Vegas, NV 89135

Client(s): Bour Enterprises, LLC.; Mulugeta Bour; Hilena Mengesha

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney: F. Thomas Edwards, Esq. **Telephone:** (702) 791-0308

Firm: Holley Driggs

Address: 400 S 4th St., Las Vegas, NV 89101

Client(s): 4520 Arville; McKinley Manor

Attorney: Jessica M. Lujan, Esq. **Telephone:** (702) 791-0308

Firm: Holley Driggs

Address: 400 S 4th St., Las Vegas, NV 89101

Client(s): 4520 Arville; McKinley Manor

4. **Nature of disposition below (check all that apply):**

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of Jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |

- | | |
|---|---|
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other Disposition (specify)___ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

No.

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number, and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

The underlying matter is a contractual dispute over two (2) lease agreements (hereinafter the "Leases") which were entered into on or about April 20, 2017 by Respondents 4520 Arville and McKinley Manor (hereinafter, collectively the "Respondents"), as the lessors, and Appellants Bour Enterprises, LLC, Mulgeta Bour and Hilena Mengesha (hereinafter, collectively the "Appellants"), as the lessees, for the lease of certain commercial properties commonly known as 4560 S. Arville St., C10, 23, 24 and 29, Las Vegas, NV 89103 (hereinafter the "Subject Properties"). At or around the time the Leases were signed, Respondents and Appellants also executed two (2) Lease Addendums (hereinafter the "Addendums") and Appellants also executed personal guaranties of the Leases (hereinafter the "Guaranties").

On or about April 17, 2018, Appellants notified Respondents that they were terminating the Leases because the unsanitary conditions of the Subject Properties had rendered them unfit, uninhabitable, unhealthy, and unsafe for both customers and employees. While the Addendums inconspicuously stated that the Subject Properties were being leased to Appellants "as-is", this clause was legally insufficient to waive certain duties and obligations of Respondents' towards the Subject Properties. Respondents subsequently filed a Complaint against Appellants on May 15, 2019, wherein they asserted claims of: (1) Breach of Leases against Lessee; (2) Breach

of Guaranties against the Guarantors; (3) Breach of Implied Covenant of Good Faith and Fair Dealing; (4) Unjust Enrichment; and (5) Declaratory Relief.

Appellants filed their Answer and Counterclaims on July 16, 2019, wherein they asserted Counterclaims for: (1) Constructive Eviction; (2) Breach of Contract; (3) Breach of the Covenant of Good Faith and Fair Dealing; and (4) Declaratory Relief. Appellants' also asserted affirmative defenses to Respondents' claims which included: (1) that the Respondents' actions were the proximate cause of their own damages; (2) that Respondents had failed to mitigate their damages; that any damages Respondents incurred were caused, in whole or in part, by their own negligence; and (4) that the doctrines of novation, accord and satisfaction, and recoupment either bar the Respondents from recovery or, in the alternative, require the amount of damages to be reduced accordingly.

Respondents then filed a Motion to Dismiss on August 1, 2019. Appellants filed an Opposition to that Motion to Dismiss and a Countermotion for Summary Judgment on their Counterclaims on August 12, 2019. A hearing was held on September 3, 2019 and the district court subsequently entered an Order on September 12, 2019 denying Respondents' Motion to Dismiss and denying Appellants' Countermotion for Summary Judgment. Respondents filed their Answer to Appellants' Counterclaims on October 14, 2019.

Subsequently, Respondents filed a Motion for Summary Judgment regarding Counterclaim damages on November 10, 2020 and a Motion for Summary Judgment regarding the Respondents' Breach of Contract Claims on December 1, 2020. Appellants filed their Opposition to the Motion for Summary Judgment regarding Counterclaim damages on November 25, 2020 and filed their Opposition to the Motion for Summary Judgment regarding Breach of Contract Claims on December 17, 2020. A hearing was held on Respondents' Motion for Summary Judgment regarding Counterclaim damages on December 15, 2020, with the Appellants' Counterclaims ultimately being dismissed. A hearing was held on Respondents' Motion for Summary Judgment regarding Breach of Contract Claims on January 12, 2021 and the district court entered an Order granting Respondents' Motion for Summary Judgement on January 28, 2021.

The district court's January 28, 2021 Order contained the Conclusions of Law which included the following: (1) "[a]lthough the Nevada Supreme Court has not squarely addressed the issue, the weight of authority on the issue leads this Court to conclude that Nevada does not recognize an implied warranty of habitability in commercial leases"; (2) "[e]ven if Nevada did recognize an implied warranty of habitability in commercial leases, any implied warranty of habitability was waived by the 'as-is' clauses in the Leases"; and (3) "because the implied warranty of habitability is not recognized in commercial leases in Nevada, Defendants cannot prevail and Plaintiffs are entitled to judgment as a matter of law."

After Summary Judgment was granted, the Respondents' filed a Motion for Entry of Judgment on February 10, 2021. Appellants filed an Opposition to the Motion for Entry of Judgment on February 24, 2021, arguing, in pertinent part, that a judgment should not be entered because Appellants' affirmative defenses had not been adjudicated and the determination of the validity of those defenses would impact the sum to be entered as a judgment against Appellants. A hearing was held on March 2, 2021 and the district court entered an Order granting the Motion on March 9, 2021. That Order stated, in pertinent part, that "[i]n response to Plaintiffs' Motion For Summary Judgment Regarding Their Breach of Contract Claims, Defendants did not challenge the appropriateness of the amounts and did not raise the applicable affirmative defenses with regard to the damages sought.... arguments that were not raised in response to the original motion must be deemed to have been waived and cannot be subsequently considered."

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

(1) Did the district court err in holding that the Appellants had not raised the issue of Affirmative Defenses.

(2) Did the district court err in granting Respondents' Motion for Entry of Judgement without first adjudicating Appellants' Affirmative Defenses as asserted in its Answer(s), Affirmative Defense(s) and Counterclaim(s).

(3) Did the district court err in holding that the implied warranty of habitability does not apply to commercial leases in Nevada.

(4) Did the district court err in holding that even if an implied warranty of habitability existed in commercial leases, any implied warranty of habitability was waived by the "as-is" clause in these Leases.

(5) Did the district court err in holding that there was no set of facts supporting a claim for constructive eviction or that could not have occurred given the facts of this case.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers, and identify the same or similar issue raised:

Appellants are not aware of any such proceedings.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

- ☒ A substantial issue of first impression
- ☒ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain:

Whether an implied warranty of habitability exists for commercial properties in Nevada is a substantial issue of first impression and is also a public policy issue of substantial importance.

13. Trial. If this action proceeded to trial, how many days did the trial last?

N/A

Was it a bench or jury trial?

N/A

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

Appellants do not intend to file such a motion.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from:

March 9, 2021.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

16. Date written notice of entry of judgment or order was served:

March 9, 2021.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

NRCP 50(b) Date of filing: _____

NRCP 52(b) Date of filing: _____

NRCP 59 Date of filing: _____

N/A

18. Date notice of appeal filed:

March 24, 2021.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other.

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or

order:

NRAP 3A(b)(1) permits an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. Appellants' action was commenced in the court in which Respondents' Motion for Summary Judgment and Motion for Entry of Judgment were granted. The district court's entry of judgment was a final judgment.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Appellants/Plaintiffs: Bour Enterprises, LLC; Mulugeta Bour; Hilena Mengesha.

Respondents/Defendants: 4520 Arville; McKinely Manor.

(b) If all the parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

All parties are involved in this appeal.

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

(1) Breach of Leases against Lessee – Summary Judgment granted January 28, 2021.

(2) Breach of Guaranties against the Guarantors - Summary Judgment granted January 28, 2021.

(3) Breach of Implied Covenant of Good Faith and Fair Dealing - Summary Judgment granted January 28, 2021.

(4) Unjust Enrichment - Summary Judgment granted January 28, 2021.

(5) Declaratory Relief - Summary Judgment granted January 28, 2021.

Appellants asserted counterclaims against Respondents for:

(1) Constructive Eviction – Dismissed with Prejudice January 28, 2021.

(2) Breach of Contract – Dismissed with Prejudice January 28, 2021.

(3) Breach of the Implied Covenant of Good Faith and Fair Dealing – Dismissed with Prejudice January 28, 2021.

(4) Declaratory Relief – Dismissed with Prejudice January 28, 2021.

- 23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes ☐ No

- 24. If you answered "No" to question 23, complete the following:**

N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes ☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes ☐ No

- 25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

N/A

- 26. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, crossclaims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, crossclaims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

Attached hereto as Exhibits are the following:

Exhibit	Description
1	Respondents' Complaint
2	Appellants' Answer & Counterclaims
3	Motion for Summary Judgment Regarding Counterclaim Damages
4	Opposition to Motion for Summary Judgment Regarding Counterclaim Damages
5	Motion for Summary Judgment on Breach of Contract Claims
6	Reply in Support Of Motion For Summary Judgment Regarding Counterclaim Damages
7	Opposition to Motion for Summary Judgment on Breach of Contract Claims
8	Reply in Support of Motion for Summary Judgment on Breach of Contract Claims
9	Order Granting Plaintiffs' Motion for Summary Judgment on Breach of Contract Claims
10	Notice of Entry of Order Granting Plaintiffs' Motion for Summary Judgment on Breach of Contract Claims
11	Motion for Entry of Judgment
12	Opposition to Motion for Entry of Judgment
13	Reply in Support of Motion for Entry of Judgment
14	Minute Order Granting Motion for Entry of Judgment – March 3, 2021
15	Order Granting Motion for Entry of Judgment – March 9, 2021
16	Judgment Against Defendants – March 9, 2021
17	Notice of Entry of Order – March 9, 2021
18	Notice of Entry of Judgment – March 9, 2021

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VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Bour Enterprises, LLC

/s/ Mulugeta Bour, Manager
Name of Appellant

Rusty Graf, Esq.
Counsel of Record

Mulugeta Bour

/s/Mulugeta Bour
Name of Appellant

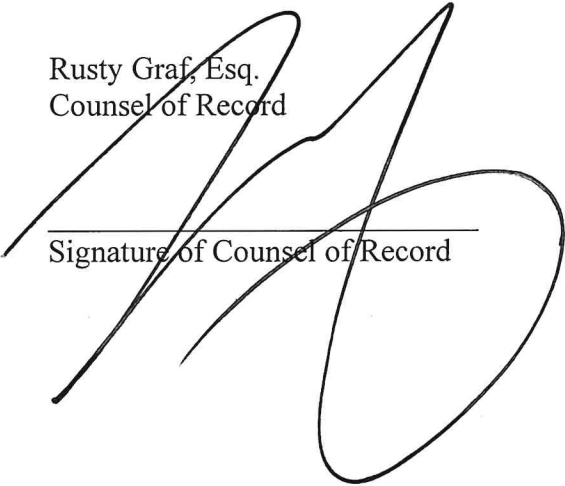
Rusty Graf, Esq.
Counsel of Record

Hilena Mengesha

/s/ Hilena Mengesha
Name of Appellant

Rusty Graf, Esq.
Counsel of Record

4/29/21
Date


Signature of Counsel of Record

Clark County, Nevada
State and County where signed

CERTIFICATE OF SERVICE

I certify that I am an employee of BLACK & WADHAMS and that on the 29th day of April 2021, I caused the above and foregoing document entitled **APPELLANTS' COMPLETED DOCKETING STATEMENT** to be served as follows:

- ☐ [] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ [X] by electronic service through E-Flex of the Nevada Supreme Court's electronic filing/service system;
- ☐ [] pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ [] hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.
HOLLEY DRIGGS WALCH FINE
PUZEY STEIN & THOMPSON
40 South Fourth Street, Third Floor
Las Vegas, NV 89101

/s/ Diane Meeter
An Employee of Black & Wadhams