

ALBERT ELLIS LINCICOME, JR. and
VICENTA LINCICOME,
Appellants,
v.
SABLES, LLC, A NEVADA LIMITED
LIABILITY COMPANY, AS TRUSTEE
OF THE DEED OF TRUST GIVEN BY
VICENTA LINCICOME AND DATED
5/23/2007; FAY SERVICING, LLC, A
DELAWARE LIMITED LIABILITY
COMPANY AND SUBSIDIARY OF
FAY FINANCIAL, LLC; PROF-2013-M4
LEGAL TITLE TRUST BY U.S. BANK,
N.A., AS LEGAL TITLE TRUSTEE;
BANK OF AMERICA, N.A.;
BRECKENRIDGE PROPERTY FUND
2016, A UTAH LIMITED LIABILITY
COMPANY; NEWREZ, LLC, D/B/A
SHELLPOINT MORTGAGE
SERVICING, LLC.; 1900 CAPITAL
TRUST II, BY U.S. BANK TRUST
NATIONAL ASSOCIATION; AND
MCM-2018-NPL2,
Respondents.

APPEAL FROM
THIRD JUDICIAL DISTRICT
COURT CASE NO.: 18-CV-01332

Docket 83261 Document 2022-12051

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons and entities as described in *NRAP 26.1(a)* that must be disclosed.

Millward Law, LTD is not owned by any parent corporation nor does any publicly held company own 10% or more of an interest in Millward Law, LTD. Justin Clouser of J.M. Clouser and Associates, and the undersigned are the only lawyers who have appeared in this matter on behalf of Appellants.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 15th day of April, 2022.

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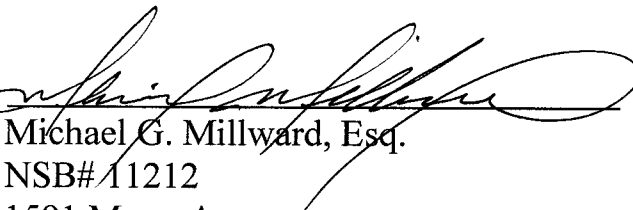
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I. QUESTION PRESENTED

This Reply Brief concerns the limited issue of whether the district court committed reversible error by determining that Appellants' objection to Respondent *Sables, LLC's Declaration of Nonmonetary Status* ("DNMS") was invalid.

II. SUMMARY OF ARGUMENT

Appellants argue that the district court committed reversible error when it entered its 5/30/2019 Order by determining that Appellants' objection to the DNMS filed by Respondent Sables, LLC, ("Sables") was invalid. By doing so the district court determined, pursuant to NRS 107.029(5), that Sables "is not required to participate any further in the action and is not subject to any money damages or attorney's fees or costs . . ." NRS 107.029(5).

The district court clearly erred in determining that Sables was named solely in its "capacity as trustee and not as a result of any wrongful act or omission made in the performance of [its] duties as trustee" when violations of NRS 107 can be ascertained out of the allegations of the Complaint and when after filing its DNMS, it wrongfully foreclosed upon Appellants' home in violation of the district court's standing order. *See* NRS 107.029(1)(b).

III. STANDARD OF REVIEW

The limited issue that is the subject of this Reply Brief pertains to whether Sables, LLC, should be afforded the equivalent of a dismissal by way of its declaration of nonmonetary status.

Likewise, a declaration of nonmonetary status is akin to a motion to dismiss for failure to state a claim pursuant to NRCP 12(b)(5), inasmuch as the defendant trustee is asking the court to determine whether sufficient factual allegations exist of a “wrongful act or omission made in the performance of [the trustee’s] duties” for the plaintiff to make out a claim for relief. *See* NRS 107.029(1)(b); NRS 12(b)(5).

The Nevada Supreme Court reviews orders granting a motion to dismiss under NRCP 12(b)(5) de novo. *Buzz Stew, LLC, v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *see also Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014).

In consideration of a decision to dismiss claims under NRCP 12(b)(5), all alleged facts are presumed true with all inferences drawn in favor of plaintiff. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Under NRCP 12(b)(5), a decision to dismiss a complaint is appropriate “only where it appears beyond a doubt” that the plaintiff could not prove sufficient

facts to establish that the plaintiff is entitled to the relief sought. *Id.* at 228, 181 P.3d at 672.

Under NRS 107.029, in light of NRCP 12(b)(5), once a timely objection to a declaration of nonmonetary status is received, the district court is simply tasked with determining the “validity of the objection,” or, in other words, whether the plaintiff’s claims are based upon sufficient factual allegations of wrongful act or omission to support plaintiff’s claim for relief. *See id*; *NRCP 12(b)(5)*.

IV. ARGUMENT

A. District Court Erred in Determining Appellants’ Objection to Sables’ Declaration of Nonmonetary Status to be Invalid

In Sables’ Answering Brief its primary argument is that Appellants failed to present a factual basis for Sables’ liability. Sables Ans. Br., pp.2-12

The threshold question before a district court upon an objection to a declaration of nonmonetary status under NRS 107.029, is whether the objection is valid; i.e., whether pursuant to NRS 107.029(1) the trustee’s belief that it was named in the action solely in its capacity as trustee is correct, or whether the plaintiff named the trustee in its complaint because the trustee is alleged to have committed a “wrongful act or omission made in the performance of [its] duties as trustee ...”

In this matter, Sables filed its DNMS on December 24, 2018, three days after the district court clerk had entered its default. AA 00805; AA00817, Vol. IV.

In its DNMS, counsel for Sables stated:

. . . it is my reasonable belief that Sables, LLC was named solely in its capacity as trustee conducting non-judicial foreclosure, and not as a result of any wrongful act or omission made on the performance of Sables duties as trustee under the deed of trust.

AA00806, Vol. IV.

Pursuant to NRS 107.029(3), when making an objection to a declaration of nonmonetary status, the objecting party must “set forth the factual basis on which the objection is based.” NRS 107.029(3).

Appellants did this clearly and concisely. Appellants alleged as follows:

In their Complaint, Plaintiffs allege that Sables materially violated the Homeowners Bill of Rights, codified as NRS 107.400 to NRS 107.560, by causing to be recorded a Notice of Default with an Affidavit that does not comply with NRS 107.0805 in violation of NRS 107.510(1).

AA00817 Vol. IV.

At the hearing to determine the validity of Appellants’ objection to Sables’ DNMS, Appellants also argued pursuant to NRS 107.028(6) that liability extends to Sables for failing to correct its 11/3/2017 *Notice of Breach and Default and of Election to Sell the Real Property Under Deed of Trust* (“Notice of Default”)

within 20 days of notice of the inaccuracies contained in them. AA04182 Vol. XVII.

Appellants argued that Sables was placed on notice of the inaccuracies in the Notice of Default by their Complaint and by Appellants *Application for Ex Parte Restraining Order, Preliminary Injunction and Permanent Injunction* (“Application for Preliminary Injunction”), filed and served on November 7, 2018. *Id.*

Sables attempts to minimize its duties and shift “any” blame or “liability” for its actions entirely to the beneficiary of the deed of trust. Sables Ans.Br., p.2.

For the purposes of the acts of a trustee, a wrongful act or omission under Nevada law would be any act or omission that is a failure in the performance of its duties. *See* NRS 107.029(1)(b).

Sables most important duty is to not exercise the “power of sale” until “the grantor . . . has, for a period of 35 days ... failed to make good the deficiency in performance or payment.” NRS 107.080(2)(a)(2).

Before exercising the power of sale, Sables was required to record a Notice of Default which “must describe the deficiency in performance or payment . . .” NRS 107.080(3).

In addition to the requirements of NRS 107.080, NRS 107.028(6) establishes the duties of a trustee of a deed of trust as follows:

(a) To “act impartially and in good faith with respect to the deed of trust;”

(b) To “act in accordance with the laws of this State;” and

(c) To correct “good faith error[s] not later than 20 days after discovering the error.”

The record before this Court establishes that the following has occurred which in which Sables has incurred liability for violating its duties:

1. 11/3/2017: Sables recorded its Notice of Default therein recognizing that the “Deed of Trust was modified by Loan Modification Agreement” but had not “accurately reported the total balance owed[,] . . . the principal obligation owed[,] . . . the date through which [the] 2007 DOT as modified under [the] LMA has been paid[, or] . . . the current interest rate effective under the 2007 DOT as modified under the LMA.” AA00812-00813 Vol. IV.

Sables has a duty to correct its errors. Pursuant to NRS 107.080(3), Sables had a duty to describe the “deficiency or payment.” As well NRS 107.028(6) requires Sables to correct a good faith error within 20 days. Sables response, is the old “we don’t get paid to think” excuse. *See* Sables Ans. Br., p.3.

Sables informs the Court that it “is entitled to rely on information provided by the beneficiary [even when any reasonable person comparing the 2009 Loan

Modification Agreement and the terms in its Notice of Default would realize that they do not match up].” *Id.* ¹

2. 11/7/2018: Appellants filed their Complaint and Application for Preliminary Injunction therein alleging that the 11/3/2017 Notice of Default and 10/12/2018 Notice of Trustee’s Sale (hereinafter “Notice of Sale”) are inaccurate and do not reflect the terms of the Loan Modification Agreement; Sables was served by mail. AA0043 Vol. XVIII. ²

Sables received Appellants’ Complaint and Application for Preliminary Injunction placing it on notice that Notice of Default was wholly inaccurate because it reflected the terms of the 2007 Deed of Trust and not the terms of the 2009 Loan Modification Agreement, and made no corrections or changes to the recorded documents as required by NRS 107.028(6).

Sables response is that the “errors alleged by Lincicomes remain merely allegations in a litigated case [even though we can pull up the recording of the

¹ The portion of quote in brackets is only suggested by Appellants to be implied, but not overtly stated by Sables.

² Appellants Complaint also alleges that the last payment attempted pursuant to the terms of the 2009 Loan Modification agreement was made on October 1, 2009, and that BANA rejected the payment, and indicated to Appellants the loan modification agreement could not be found in BANA’s computer system. AA00004 Vol. I.

Notice of Default and the 2009 Loan Modification Agreement and verify that truthfulness of the allegations ourselves].” Sables Ans. Br., p.6.³

3. 11/8/2018: Notice of district court’s 11/8/2018 Order restraining and temporarily enjoining Sables “from selling at public auction the real property identified in the Notice of Trustee’s Sale recorded with the Office of the Lyon County Recorder as Document No. 587470, at public auction until further order of the Court.” AA00259 Vol. II.

Sables was personally served with the Summons and Complaint on 11/19/2018 and was subject to the jurisdiction of the Court. *See* AA00818, Vol. IV. Accordingly, Sables had a duty to abide by the district court’s orders including the district court’s 11/8/2018 Order and the district court’s 12/31/2018 Order prohibiting the foreclosure sale of Appellants’ home.⁴

Sables was personally served with a Summons and Complaint. *See* AA00817 Vol. IV. Even though Sables was not in attendance at the hearing upon Appellants’ Application for Preliminary Injunction, counsel for the beneficiary of the modified Deed of Trust, Prof-2013-M4 Legal Title Trust by U.S. Bank, N.A., as Legal Title Trustee (“US BANK”) was present. AA03981, Vol. XVII.

³ Appellants believe the portion in brackets is implied but not overtly stated.

⁴ *See* NRS 22.010 (defining acts and omissions deemed to be contempt of court).

It is important to note that while the district court did not agree with all of Appellants' arguments, it did agree that, if "the Court find[s] that they are under the 2009 [modification], then isn't the information in the notices that you sent in, ... incorrect, I can't allow the foreclosure to go forward." AA04076.

The Court continued "fine, even if you're correct in trying to foreclose, you still have to use the right numbers." AA04078 Vol. XVII. US Bank's counsel agreed stating "[t]hat's true." *Id.*

The district court thereafter found that there is a "likelihood of success proving that the 2009 agreement modified the 2007 and that those are the terms." AA04085 Vol. XVII. The Court also stated that it did not have any evidence that the deed-in-lieu of foreclosure mediation agreement "would satisfy the statute of frauds." AA04089 Vol. XVII. The Court also reemphasized the point that if "they, [Sables, US Bank, Fay Servicing] seek to use a . . . non-judicial foreclosure, [the terms] would have to be based on the 2009 [Loan Modification Agreement]. AA04089-4090 Vol. XVII.

The district court's 12/31/2018 Order after hearing provided that "Sables, LLC, is hereby enjoined from selling at public auction the real property . . . until

further order of the Court.” AA00814 Vol. IV.⁵ The notice of entry of the 12/31/2018 Order was served upon Sables on 1/4/2019. *See* AA0841 Vol. IV.

Based upon the district court’s own comments prior to the January 4, 2019, foreclosure sale, no foreclosure should have occurred unless the Notice of Default had been corrected to reflect the terms of the 2009 Loan Modification Agreement. *See* AA04076, AA04078, AA04085, AA4089-90 (Vol. XVII).

Sables response is that it “has complied with all orders of the district court, including the injunction [and, even though the court said no foreclosure should be had without using the ‘right numbers,’ no court order required us to refile the Notice of Default and Notice of Sale describing the deficiency in payment owed under the 2009 Loan Modification Agreement]. Sables Ans. Br., p.6-7.”⁶

4. 1/4/2019: Sables conducts foreclosure sale in violation of the district court’s 11/8/2018 Order, which was superseded by the 12/31/2018 Order also

⁵ In the district court’s order entered on 2/11/2020, in response to the argument made by Appellants that Appellants’ home was sold at foreclosure sale in violation of the 12/31/2018 order, the district court found that no bond was posted by Appellants and “and thus the injunction did not remain in effect.” However, NRS 107.560(1) provides that Appellants were entitled to an injunction upon “a material violation of the of NRS 107.400 to NRS 107.560.” Appellants did not anticipate the district court would condone and excuse Sables overt violation of its 12/31/2018 order at the 4/15/2019 hearing upon pending motions, which was well beyond Appellants’ window to appeal the 12/31/2018 order. (See AA04137-04138 Vol. XXXVII.)

⁶ Appellants believe the portion in brackets is implied but not overtly stated.

enjoining Sables upon further order of the Court. AA00884 Vol. IV. Sables was provided with a notice of entry of order by mail on 1/4/2019. AA00884 Vol. IV.

While it is true that the district court has chosen to look past this contemptuous violation of the district court's orders, and also not set aside the Trustee's sale in accord with its comments at the 11/20/2018 hearing, Sables acted in direct contradiction to the district court's standing orders. *See* AA00884 Vol. IV.

Sables, however, alleges that it is ready and willing to make any error right. Sables Ans. Br., p.7. Sables states that if the Court should "find that there was an error requiring rescission of the foreclosure notices, Sables would immediately comply with the Court's order to correct any errors, in compliance with NRS 107.028(6) [even though Sables ignored the following paragraphs of the district courts 12/31/2018 Order:]⁷

2. That on or about July 11, 2009, Bank of America offered Vicenta a Loan Modification Agreement (hereinafter "LMA") which modified and extended the maturity date of the 2007 DOT from June 1, 2037, to August 1, 2049 and further modified the interest rate applicable to the 2007 DOT by reducing the same from 6.875% to 4.875%;

3. That the LMA provided that on September 1, 2014, the interest rate applicable to the 2007 DOT would increase from 4.875% to 5.375%;

⁷ Appellants believe the portion in brackets is implied but not overtly stated.

4. That the LMA capitalized existing arrears of September 1, 2009, and modified the principal balance owed under the 2007 DOT from \$381,150 to \$417,196.58;
5. That on July 31, 2009, Vicenta accepted Bank of America's offer to modify the 2007 DOT, and executed the LMA and sent the document to Bank of America;
8. That on October 1, 2009, Bank of America refused payment from the Lincicomes, because it did not have a record that the 2007 DOT had been modified by the LMA;
9. That the Lincicomes' requests to make payment on the 2007 DOT as modified by the LMA between October 1, 2009 and December 2011, were refused by Bank of America;
22. That the NOD provides that the "subject Deed of Trust was modified by Loan Modification Agreement recorded as Instrument 475808 . . . on 5/4/2011;"
23. That the NOD provides that all monthly installments from "9/1/2008" forward are due, instead of 9/1/2009 as required by the LMA;
24. That the NOD provides that the principal balance owed is \$381,150.00, instead of \$417,196.58 as provided in the LMA;
28. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the total balance owed [by] Vicenta Lincicome under the 2007 DOT as modified by the LMA;
29. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately

reported the total principal obligation owed by Vicenta Lincicome under the 2007 DOT as modified by the LMA;

30. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the date through which 2007 DOT as modified under LMA is paid; and

31. That based on the record before the Court at the hearing neither Fay Servicing nor Sables has accurately reported the current interest rate effective under the 2007 DOT as modified under the LMA.

AA00809 Vol. IV.

The foregoing establishes not only that Appellants' had a factual basis to object to Sables' DNMS, but also establishes that Appellants' claims are based upon sufficient factual allegations of Sables' wrongful acts and omissions to support Appellants' claims as pleaded in their Second Amended Complaint.

This Court should conclude that the district court clearly erred in determining that Appellants' objection to Sables' DNMS was invalid and that Sables was only named by Appellants in the action in its "capacity as trustee and not as a result of any wrongful act or omission made in the performance of [its] duties." *See* NRS 107.029(1)(b).

B. Allowing for Theft is Not Substantial Compliance

In Sables Answering Brief it alleges that it has substantially complied with NRS 107.080. Sables Ans. Br., p.7. In so doing it states that "substantial

compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice.” *Id.* (quoting *Schleining v. Cap One, Inc.*, 326 P.3d 4, 10-11 (Nev. 2014)).

Sables concludes that because “Lincicomes claims in their complaint against Sables are centered on nothing more than Sables’ act of recording the NOD as required of a trustee by NRS 107.080, the DNMS must stand. Sables Ans. Br., p.9.

Appellants have been prejudiced by nearly everything Sables has done concerning their home. Sables could not have substantially complied with NRS 107.080, when NRS 107.080 precludes authority where the “grantor” is not deficient in its payments. In this case, it is alleged most recently in *Appellants’ Second Amended Complaint* that BANA breached the 2009 Loan Modification Agreement by refusing Appellants’ payments thereon, and thereafter concealing the existence of the Loan Modification Agreement from Appellants. AA01565-1566 Vol. VII.

These allegations were made in Appellants’ initial complaint without the legal analysis (Sables had not yet foreclosed upon Appellants’ home). *See* AA00005-6 Vol. I. Yet even though NRS 107.080 is incredibly clear that a trustee must not exercise the power of sale when the grantor is not deficient, that is exactly what Sables has done.

Accordingly, Sables argument that it has substantially complied with NRS 107.080 because it sent out and recorded wholly incorrect and false documents, is a farse. Sables, Fay Servicing, U.S. Bank, and BANA know that they failed the Appellants by covering up the existence of the 2009 Loan Modification Agreement, and then each had the gall to help, or condone, Sables' sale of the same under false pretenses.

The false pretenses are: that Appellants had not made their mortgage payments and were in default. The undisputed truth of the matter is that no defendant in this case has ever once asked Appellants for money under the terms of their 2009 Loan Modification Agreement. It is shameful that Sables wastes its time informing this Court that it sent incorrect notices that were meaningless except as to the date and time Sables would assist with the outright theft of the Appellants' home.

Sables has not substantially complied with NRS 107.080, but rather assisted with the commission of a fraud under the guise that the law allows them to do so.

Appellants respectfully requests that this Court reverse the district court's order determining that Appellants' objection to Sables' DNMS was invalid.

V. CONCLUSION

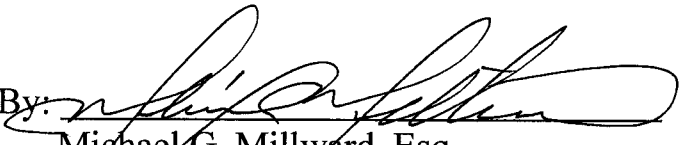
This Court should conclude that the district court clearly erred in determining that Appellants' objection to Sables' DNMS was invalid.

Furthermore, Appellants have alleged sufficient facts that, if presumed true, would entitle them to the recovery of damages from Sables in this matter pursuant to NRS 107.028(7) and NRS 107.080(8).

Under the circumstances, it should be concluded that the district court committed reversible error in determining that Sables' dismissal by way of its DNMS in light of substantial evidence of wrongful acts and omissions.

Dated this 15th day of April, 2022.

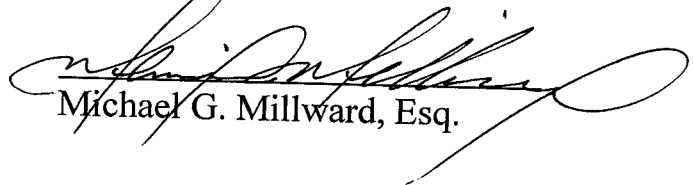
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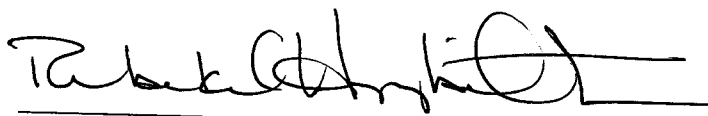
CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
)ss.:
COUNTY OF DOUGLAS)

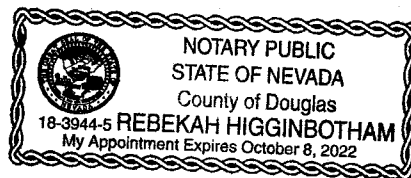
I, Michael G. Millward, Esq., hereby certify that this reply brief is filed in compliance with the formatting requirements of NRAP 32. The opening brief is prepared for 8 ½ by 11 inch paper, and the text is double spaced in compliance with NRAP 32(a)(4). The brief is written in 14-point Times New Roman font in the body and footnotes, and it fully complies with the formatting and style requirements of NRAP 32(a)(5) and NRAP 32(a)(6). While the brief exceeds 15 pages, it is filed in compliance with the requirements of NRAP 32(a)(7)(A)(ii) and contains exactly 4216 words. I further hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed of any improper purpose. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.


Michael G. Millward, Esq.

SUBSCRIBED and SWORN to before
me this 15th day of April, 2022.



NOTARY PUBIC in and for said
COUNTY AND STATE



CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2022, I filed the foregoing
APPELLANTS' REPLY BRIEF TO SABLES, LLS ANSWERING BRIEF,
which shall be served via electronic service from the Court's eFlex system to:

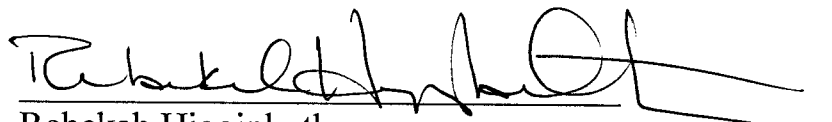
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