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APN# 1121-05-516-038



KAREN ELLISON, RECORDER

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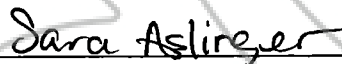
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Case No. 14-CV-0001/0002/0003

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OCT 06 2016

Douglas County
District Court Clerk

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE BANK OF NEW YORK MELLON
F/K/A THE BANK OF NEW YORK,
AS TRUSTEE FOR THE HOLDERS OF
THE CERTIFICATES, FIRST
HORIZON MORTGAGE PASS-THROUGH
CERTIFICATES SERIES FHAMS
2006-AA7, BY FIRST HORIZON
HOME LOANS, A DIVISION OF
FIRST TENNESSEE BANK NATIONAL
ASSOCIATION, MASTER SERVICER,
IN ITS CAPACITY AS AGENT FOR
THE TRUSTEE UNDER THE POOLING
AND SERVICING AGREEMENT,

ORDER

Plaintiffs,

vs.

KIRK A. JOHNSON; GINA L.
JOHNSON; DOES I-X; and
ROES 1-10 inclusive,

Defendants.

THIS MATTER comes before the Court on Plaintiffs' Motion to
Amend or Alter Judgment Pursuant to NRCP 59 filed August 1, 2016.
Defendants filed Opposing Points and Authorities to Plaintiffs'
Motion to Amend or Alter Judgment and Supplemental Opposing
Points and Authorities to Plaintiffs' Motion to Amend or Alter
Judgment, on August 17 and 18, 2016, respectively. Plaintiffs
filed a Reply in Support of Motion to Amend or Alter Judgment

THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

1 Pursuant to NRCP 59 on August 26, 2016.

2 Good cause appearing, the Court finds and orders as follows:

3 Procedural Background

4 On March 24, 2016, Defendants filed a *Motion to Dismiss for*
5 *Failure to Prosecute (NRCP 41(e))*. The motion came before the
6 Court for a hearing on June 22, 2016.

7 On July 14, 2016, the Court issued *Findings of Fact,*
8 *Conclusions of Law, and Judgment of Dismissal with Prejudice*. On
9 the same day, the Court issued a companion *Judgment of Dismissal*
10 *with Prejudice and Quieting Title to Real Property*.¹ Defendants'
11 *Notice of Entry of Judgment* reflects proof of service of both
12 orders on Plaintiffs by way of mail on Friday, July 15, 2016.

13 The *Findings of Fact, Conclusions of Law, and Judgment of*
14 *Dismissal with Prejudice* were premised upon the following:
15 Plaintiffs' unverified *Complaint* with 1 exhibit; Defendants'
16 *Motion to Dismiss for Failure to Prosecute (NRCP 41(e))* (7 pages),
17 accompanied by Affidavit of Kelly R. Chase, Esq. (4 pages),
18 Affidavit of Kirk Johnson (2 pages); Plaintiffs' *Opposition* (4
19 pages), accompanied by Affidavit of Amanda Hunt (2 pages), and
20 two exhibits; Defendant's *Reply* (11 pages), accompanied by
21 Supplemental Affidavit of Kelly R. Chase, Esq. (3 pages), and
22 twelve (12) exhibits; the hearing during which the arguments of
23 counsel lasted in excess of one hour.

24 Plaintiffs filed the pending *Motion to Amend or Alter*
25 *Judgment Pursuant to NRCP 59* on Monday, August 1, 2016.
26 Defendants contend Plaintiff's motion is untimely based upon
27

28 1 The creation of two judgments came at the suggestion of counsel
for Plaintiffs. Partial Transcript of Proceedings, p. 8.

1 *Stapp v. Hilton Hotels Corp.*, 108 Nev. 209, 212, 826 P.2d 954,
2 956 (1992), a case wherein a prior version of NRCP 59 was at
3 issue. Specifically, NRCP 59 previously required "service" of
4 said motion within 10 days of notice of entry of judgment. NRCP
5 59 now reads that said motion must be "filed" within 20 days of
6 notice. NRCP 59(e). The Court finds that Plaintiffs' motion was
7 timely filed. NRCP 59(e); NRCP 6.

8 Discussion

9 I. Dismissal with Prejudice

10 Plaintiffs begin by attempting to strike a sympathetic
11 chord, arguing that the dismissal penalized Plaintiffs for their
12 good deed, *i.e.*, giving Defendants' an open-ended extension of
13 time in which to file a answer. This arrangement, however, did
14 not require Defendants to take any action. *Hunter v. Gang*, 132
15 Nev.Adv.Op. 22, p. 20, footnote 11 (2016), citing *Thran v. First*
16 *Judicial District Court*, 79 Nev. 176, 181, 380 P.2d 297, 300
17 (1963) ("The defendant is required only to meet the plaintiff step
18 by step as the latter proceeds."). Plaintiffs' specific claims
19 are addressed below.

20 A. Standard of Law

21 Plaintiffs argue that it was improper for the Court to
22 presume prejudice.² Plaintiffs maintain that prejudice is
23 rightly presumed only when the party causing delay has failed to
24 offer any reason for the delay thereby leaving the record silent
25 as to excuse.

26 _____
27 2 Plaintiffs are not in the best position to argue against
28 prejudice, presumed or actual. Plaintiffs did not address the
issue in their *Opposition to Motion to Dismiss for Failure to*
Prosecute (NRCP 41(e)) or during the hearing.

1 Based upon the great weight of authority, the Court
2 disagrees. Citing *Jackson v. DeBenedetti*, 39 Cal.App.2d 574, 103
3 P.2d 990 (1940), the Nevada Supreme Court ruled that it is not
4 incumbent upon a defendant to demonstrate prejudice where the
5 record is silent as to any excuse for the delay. *Northern Ill.
6 Corp. v. Miller*, 78 Nev. 213, 217 370 P.2d 955 (1962). In
7 *Jackson*, the court held, "The law will presume injury from
8 unreasonable delay." *Jackson*, 39 Cal.App.2d at 577, quoting *Gray
9 v. Times-Mirror Co.*, 11 Cal.App. 155. Further, "Even if it be
10 assumed that the delay here did not injure the defendants, it is
11 no excuse in itself for the tardy service, and this fact in no
12 manner controlled the action of the court in the exercise of its
13 discretion." *Id.* at 578.

14 The Nevada Supreme Court revisited the issue in *Thran v.
15 District Court*, 79 Nev. 176, 380 P.2d 297 (1963). The plaintiff
16 in the action argued that the defendant has a burden of
17 demonstrating prejudice. *Id.* at 181. The Court disagreed,
18 stating, "Nor is it incumbent on the defendant to show prejudice
19 resulting from the delay. Prejudice is presumed." *Id.* at 182,
20 citing *Northern Ill. Corp.*, *Jackson*, and *State v. Superior Court*,
21 3 Wash.2d 702, 102 P.2d 246 (1940). In the latter case, the
22 Washington Court held that, "Whether defendant (relator) suffered
23 any hardship by reason of the delay, is not a proper subject of
24 inquiry, since the law presumes injury from unreasonable
25 delay..." *State v. Superior Court*, 3 Wash.2d at 707.

26 The Nevada Supreme Court weighed in on the issue once again
27 in *Erickson v. One Thirty-Three, Inc.*, 104 Nev. 755, 766 P.2d 898
28 (1988). "When no adequate excuse is offered for a lengthy delay;

1 injury to the defendant is presumed, and the court may infer that
2 the case lacks merit." *Id.* at 758, citing *Northern Ill. Corp.*,
3 78 Nev. 213.

4 It appears clearly from these authorities that when a
5 plaintiff provides either no excuse or an inadequate excuse for
6 delay, prejudice is presumed. Ironically, a case heavily cited
7 by Plaintiffs for other reasons, *Hunter v. Gang*, 132 Nev. Adv. Op.
8 22 (Nev. App. 2016), makes this point. In that case, the Nevada
9 Court of Appeals went to great lengths to outline the framework
10 for deciding such issues and the factors to be considered.
11 Notably missing from the Court's analysis is any discussion or
12 consideration of prejudice to the defendants, actual or implied.
13 *Id.* As indicated by the Court of Appeals, "The element necessary
14 to justify dismissal for failure to prosecute is lack of
15 diligence on the part of the plaintiff, whether individually or
16 through counsel." *Id.* at page 13.

17 In the present case, Defendants made out a *prima facie* case
18 of unreasonable delay, approximately 870 days between the filing
19 of the *Complaint* and the hearing. *Hassett v. St. Mary's Hosp.*
20 *Ass'n*, 86 Nev. 900, 904, 478 P.2d 154 (1970). The only excuse
21 offered by Plaintiffs for their delay is contained in a singular
22 sentence in the affidavit of Plaintiff's counsel attached to the
23 *Opposition to Motion to Dismiss for Failure to Prosecute (NRCP*
24 *41(e))*: "Pursuant to the notes in the file, this file was on
25 loss mitigation hold for 392 days starting April 10, 2014 and
26 ending May 7, 2015." Affidavit of Amanda Hunt. Plaintiffs
27 offered no excuse outside of the 392 day period, leaving the
28 record silent of excuse as to the remaining 478 days of delay.

1 During the hearing, counsel for Plaintiffs lent further
2 explanation for the 392-day delay. Specifically, once Defendants
3 posed loss mitigation options, such a deed in lieu of trust,
4 Plaintiffs delayed pursuit of foreclosure for 392 days in accord
5 with their internal policies and best practices.³

6 Plaintiffs' counsel did not offer any explanation for the
7 remaining 478 days of delay other than to state, generally, that
8 the parties continued to negotiate. Plaintiffs' counsel
9 conceded, however, that Plaintiffs remained silent and did not
10 respond to Defendants repeated efforts resolve the case beyond
11 September 2014.

12 During the course of the hearing, both counsel brought to
13 the Court's attention the pendency of complex litigation
14 concerning all of the property contained within the subdivision,
15 including the subject properties. Plaintiff's counsel
16 specifically represented that she is aware of no lenders that
17 have moved on any of the properties in the subdivision given the
18 litigation.

19 The Court confirms that Plaintiffs failed to carry their
20 burden of establishing the reasonableness of their delay. The
21 Court further confirms that Plaintiffs did not diligently pursue
22 their case and that their excuse for delay was not adequate.
23 Prejudice is correctly presumed.

24

25 3 In their *Opposition to Motion to Dismiss for Failure to*
26 *Prosecute (NRCP 41(e))*, Plaintiffs represented that "both state
27 and federal law require servicers to stop any foreclosure
28 proceedings if the borrowers apply for a foreclosure prevention
alternative." *Opposition*, p. 3. Plaintiffs cited 12 CFR
1024.41(g) and NRS 107.530. At the hearing however, Plaintiffs
conceded that these authorities only apply to owner-occupied
residences and have no applicability to the facts of this case.

1 The Court could have stopped there in the initial order but
2 chose to point out the existence of actual prejudice. Plaintiffs
3 argue that the Court's findings of actual prejudice were not
4 supported by evidence. The Court, however, relied upon the
5 affidavits and exhibits supplied by Defendants and factual
6 concessions offered by Plaintiffs' counsel.

7 Plaintiffs challenge the Court's findings regarding
8 diminution in the value of the three properties occasioned by
9 Plaintiffs' delay. But the Defendants' claim was supported by
10 the affidavit of their counsel attached to their motion. At the
11 hearing, Plaintiffs conceded that while the properties had
12 significant value in 2011, at the time of the hearing the
13 properties had absolutely no value.⁴

14 Plaintiffs also challenge the Court's finding that the delay
15 caused potential liability issues for Defendants. The Court
16 relied upon the affidavits and exhibits provided by Defendants
17 indicating that Plaintiffs padlocked the three residences, the
18 residences remained vacant and Defendants encountered difficulty
19 insuring the homes. Plaintiffs agree they padlocked the
20 residences and that the residences remained vacant thereafter.
21 Plaintiffs' new argument, *i.e.*, that Defendants can simply cut
22 the padlocks whenever they desire, rings hollow.

23 /////
24

25 4 Plaintiffs ask the Court to consider contrary evidence of
26 valuation attached in exhibits to the pending motion. While
27 the evidence is new in the sense that it was not produced by
28 Plaintiffs for consideration prior to the dismissal, it was
either known by Plaintiffs or available to Plaintiffs through
ordinary diligence prior to the hearing. It is also contrary
to the representations made by Plaintiffs' counsel during the
hearing. The Court does not now consider this evidence.

1 B. Factors Bearing on Dismissal with Prejudice

2 Plaintiffs claim the Court did not weigh appropriate factors
3 in deciding to dismiss the case with prejudice. Specifically,
4 Plaintiffs direct the Court to *Hunter v. Gang*, 132 Nev. Adv. Op. 22
5 (2016). *Hunter* was decided after the briefing was completed in
6 this matter but prior to oral argument. Neither party cited
7 *Hunter* during oral argument.

8 At issue in *Hunter* was review of a district court's order
9 dismissing a case with prejudice pursuant to the court's inherent
10 authority as opposed to NRCP 41. Nonetheless, the opinion
11 provides factors to be considered when deciding whether a
12 dismissal should be with or without prejudice under either a
13 court's inherent authority or under NRCP 41. As it regards the
14 latter, the factors were already part of Nevada caselaw prior to
15 *Hunter* and were cited by the parties and considered by the Court.
16 See, e.g., *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1020
17 (1974); *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558,
18 563, 854 P.2d 851, 854 (1993); *Harris v. Harris*, 65 Nev. 342,
19 345-50, 196 P.2d 402, 403-06 (1949); *Volpert v. Papagna*, 85 Nev.
20 437, 440, 456 P.2d 848, 850 (1969).

21 The *Hunter* factors are not exhaustive. *Hunter*, 132
22 Nev. Adv. Op. 22, p. 16, citing *Monroe v. Columbia Sunrise Hosp. &*
23 *Med. Ctr.*, 123 Nev. 96, 103, 158 P.3d 1008, 1012 (2007); *Home*
24 *Sav. Ass'n*, 109 Nev. at 564. Not all factors may be pertinent to
25 every decision. *Id.* The determination requires case-by-case
26 examination of the appropriate factors. *Id.*

27 While the Court did not cite *Hunter* in the *Findings of Fact,*
28 *Conclusions of Law, and Judgment of Dismissal with Prejudice,* it

1 is clear from the order that the Court considered and weighed
2 appropriate factors. *Id.* p. 19, footnote 10. The Court welcomes
3 the opportunity, however, to specifically address how
4 consideration of the *Hunter* factors contributed to the Court's
5 decision based upon evidence presented.

6 First, it bears noting that *Hunter* is factually
7 distinguishable from the present case. Critically, the reason
8 that NRCP 41 did not apply in *Hunter* was due to the action being
9 less than two years old. Here, Plaintiffs undisputedly tripped
10 the NRCP 41 wire. Second, the Court of Appeals found that the
11 behavior of both parties in *Hunter* suggested that settlement
12 negotiations were ongoing. *Id.* at p. 20. Here, Plaintiffs quit
13 responding to settlement proposals in September 2014. Third, in
14 *Hunter* there was no evidence supporting the district court's
15 order as the motion to dismiss was two pages in length and was
16 unsupported by exhibits or affidavits. *Id.* at 4-5. The hearing
17 lasted 9 minutes. *Id.* at 6. As articulated above in the
18 *Procedural Background*, significantly more information was
19 presented to this Court. Fourth, the conduct of the defendant in
20 *Hunter* was "confusing" to the Court of Appeals because if
21 settlement had deteriorated, as the defendant suggested, the
22 defendant should have been motivated to move the case forward
23 because the subject encroachment remained on his property. *Id.*
24 at p. 20. In the present case, once settlement stalled,
25 Defendants had no motivation or obligation to push the
26 foreclosure/deficiency proceedings forward.

27 (1) Underlying Conduct of the Parties

28 The Court absolutely considered the underlying conduct of

1 the parties when dismissing the action with prejudice. Down the
2 stretch, Defendants' attempts to negotiate were met with a
3 silence perceived by the Court to be disinterest by Plaintiffs in
4 settling. Yet, Plaintiffs were also doing nothing to push the
5 case forward, seemingly content with further delaying the case.
6 Recall, Plaintiffs did not file the action for three years post-
7 default and then sat on the case for an additional two-plus years
8 prior to the order of dismissal. Plaintiffs conduct demonstrated
9 an intent to delay. This conclusion is bolstered by Plaintiffs'
10 counsel's representations that the properties currently have no
11 value and that lenders are not motivated to move on properties in
12 the subdivision given other pending litigation. The Court finds
13 that this factor weighs strongly against Plaintiffs.

14 (2) Adequacy of the Excuse

15 As already stated above and in the *Findings of Fact*,
16 *Conclusions of Law*, and *Judgment of Dismissal with Prejudice*, the
17 Court finds Plaintiffs' excuse to be inadequate. The Court finds
18 this factor weighs strongly against Plaintiffs.

19 (3) Merit of the Claims

20 Since all that Plaintiffs accomplished in over two years was
21 the filing of an unverified *Complaint*, the Court is ill-suited to
22 analyze the merits of Plaintiffs' action. Further, the Nevada
23 Supreme Court has held that where a party's excuse for delay is
24 inadequate, as here, an inference arises that the case lacks
25 merit. *Northern Ill. Corp.*, 78 Nev. at 217; *Erickson*, 104 Nev.
26 at 758.

27 (4) Statutes of Limitation

28 Plaintiffs did not provide evidence or argument regarding

1 statutes of limitation during the course of briefing or at the
2 hearing. Neither did Defendants. Accordingly, the Court did not
3 assess this factor when deciding the motion to dismiss. *Hunter*,
4 at p. 27.

5 The Court having weighed the *Hunter* factors, the length and
6 unreasonableness of the delay and the actual prejudice suffered
7 by Defendants, confirms that dismissal with prejudice is an
8 appropriate remedy and exercises its discretion accordingly.

9 II. Quiet Title and Expunction of Liens

10 In addition to ordering dismissal of Plaintiffs' action with
11 prejudice, the *Findings of Fact, Conclusions of Law, and Judgment*
12 *of Dismissal with Prejudice* and the *Judgment of Dismissal with*
13 *Prejudice and Quieting Title to Real Property* also quieted title
14 in favor of Defendants and ordered expunction of the liens.

15 Plaintiffs request amendment of that action pursuant to NRCP
16 59(e). Plaintiffs contend that because Defendants did not
17 request this relief as part of their motion to dismiss,
18 Plaintiffs were left without notice and an opportunity to be
19 heard. Plaintiffs also contend the dismissal with prejudice does
20 not preclude Plaintiffs from pursuing other claims and remedies
21 and that by quieting title and expunging the lien the Court
22 adversely and improperly impacted their ability to do so.
23 Defendants posit that the practical effect of the dismissal with
24 prejudice was discharge of the debt from which naturally flows
25 the quieting of title and lien expunction.

26 The Court agrees with Plaintiffs. Through their complaint,
27 Plaintiffs sought judicial foreclosure and a deficiency judgment.
28 Defendants did not answer or counterclaim. Defendant's motion to

1 dismiss, premised solely upon procedural dereliction, did not
2 request substantive relief such as lien expunction or a
3 declaration quieting title. Plaintiffs correctly point out that
4 Defendants made those requests for the first time during the
5 course of the hearing on the motion to dismiss.

6 Squarely before the Court on Defendants' motion to dismiss
7 was the decision whether to dismiss the action and, if so,
8 whether to do so with or without prejudice. NRCP 41(e).
9 Following the decision to dismiss with prejudice, it was not then
10 incumbent upon the Court to decide the impact of the decision on
11 the underlying contract and the parties rights, obligations and
12 remedies thereto.

13 Plaintiffs cite plenty of authority, including NRS 40.430,
14 suggesting that Plaintiffs may still have viable legal claims and
15 remedies against Defendants. Defendants do not address these
16 authorities or cite authorities to the contrary. Defendants
17 argue, without authority, that their debt has been discharged and
18 they now hold title free and clear of any obligations to
19 Plaintiffs.

20 Whether Defendants' debt has been discharged and title
21 cleared, however, was not a decision for the Court to make at the
22 time of the hearing anymore than was a decision regarding the
23 viability of claims yet to be raised by Plaintiffs. This is
24 particularly so given that Defendants did not properly bring the
25 issue before the Court. There was no notice to Plaintiffs, no
26 authorities offered and the Court was not fully informed. In
27 this respect, the judgment goes well beyond the scope of the
28 Defendants' NRCP 41(e) motion and must be amended accordingly.

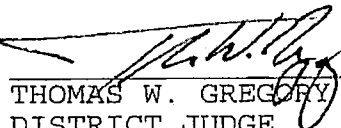
1 IT IS HEREBY ORDERED that Plaintiffs' Motion to Amend or
2 Alter Judgment Pursuant to NRCP 59 is GRANTED, in part, and
3 DENIED, in part.

4 Based upon the July 14, 2016 Findings of Fact and
5 Conclusions of Law, and the findings and conclusions contained
6 herein, the Court will prepare and file a singular Amended
7 Judgment of Dismissal with Prejudice that will not declare quiet
8 title or require lien expunction. The Amended Judgment of
9 Dismissal with Prejudice will take the place of both the July 14,
10 2016 Judgment of Dismissal with Prejudice and the July 14, 2016
11 Judgment of Dismissal with Prejudice and Quieting Title to Real
12 Property.

13 This order does not constitute a decision on the merits
14 regarding either Defendants' request to quiet title and expunge
15 the lien or Plaintiffs' ability to pursue other claims. NRCP
16 41(b) and (e).

17 IT IS FURTHER ORDERED that Plaintiffs' Motion to Stay
18 Judgment Pending Post Judgment Proceedings is DENIED as being
19 moot.

20 Dated this 6th day of October, 2016.

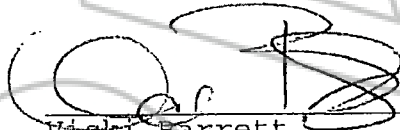
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THOMAS W. GREGORY
DISTRICT JUDGE

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DATE 1-9-17

BOBBIE R. WILLIAMS Clerk of Court
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By  Deputy