

APN# 1318-25-111-017



KAREN ELLISON, RECORDER

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Name: Lemons, Grundy & Eisenberg

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City/State/Zip: Reno, Nevada 89523

Mail Tax Statements to:

Name: Athena Retirement Trust #3

Address: 990 Ironwood Drive #300

City/State/Zip: Minden, Nevada 89423

Order Granting Motion to Dismiss Complaint

Title of Document (required)

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DEPUTY

1 Case No.: 19-CV-0299

2 Dept. No.: II

5 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF DOUGLAS

7 ***

9 LEVERTY & ASSOCIATES LAW
10 CHARTERED, a Nevada corporate entity,

11 Plaintiff,

12 vs.

~~PROPOSED~~ ORDER GRANTING
MOTION TO DISMISS COMPLAINT

13 RAY WARREN EXLEY, an individual and
14 judgment debtor, also known as Ray Warren
15 Exley, M.D.; THE RAY WARREN
16 EXLEY, M.D. NEVADA FAMILY
17 TRUST, Ray Warren Exley, Trustee; THE
18 NOVASEL & SCHWARTE
19 INVESTMENTS, INC. PROFIT SHARING
20 PLAN, ROBERT I. NOVASEL and
21 RICHARD W. SCHWARTE, CO-
22 TRUSTEES; ATHENA MEDICAL
23 GROUP INC., E.R.I.S.A. RETIREMENT
24 TRUST; ATHENA MEDICAL GROUP
25 INC. DEFINED BENEFIT PENSION
26 PLAN CHTD; ATHENA MEDICAL
27 GROUP DEFINED CONTRIBUTION
28 PENSION PLAN AND TRUST NUMBER
THREE; ATHENA MEDICAL GROUP
DEFINED CONTRIBUTION PENSION
PLAN AND TRUST NUMBER 3;
DOUGLAS COUNTY TREASURER;
KINGSBURY GENERAL
IMPROVEMENT DISTRICT; GREGORY
OCHOA, an individual; and DOES 1-10,
inclusive,

Defendants.

1 Before this Court is a *Motion to Dismiss Complaint* filed on December 30, 2019 by
2 Defendants RAY WARREN EXLEY, RAY WARREN EXLEY as Trustee of the RAY
3 WARREN EXLEY, M.D. NEVADA FAMILY TRUST, ATHENA MEDICAL GROUP,
4 INC., ERISA RETIREMENT TRUST, ATHENA MEDICAL GROUP INC. DEFINED
5 BENEFIT PENSION PLAN CHTD., ATHENA MEDICAL GROUP DEFINED
6 CONTRIBUTION PENSION PLAN AND TRUST NUMBER THREE, and ATHENA
7 MEDICAL GROUP DEFINED CONTRIBUTION PENSION PLAN AND TRUST
8 NUMBER 3 (collectively "Exley") through their counsel, Todd R. Alexander and Sarah M.
9 Molleck of Lemons, Grundy & Eisenberg. On January 2, 2020, Plaintiff Leverty &
10 Associates, Chtd. ("Leverty") filed its *Opposition to Exley and Athena Motion to Dismiss*
11 *Complaint; Points and Authorities in Support of Opposition Motion*. On January 21, 2020,
12 Exley filed its *Reply in Support of Motion to Dismiss Complaint*.

13 This action is a judicial foreclosure action that seeks to enforce a judgment lien
14 Leverty obtained against Ray Warren Exley in case no. 14-CV-0130 on May 24, 2017.
15 Leverty filed this action on October 24, 2019, seeking judicial foreclosure upon the judgment
16 lien that secures real property commonly known as 429 Panorama Drive, Stateline, Nevada.

17 Having reviewed the moving papers, points and authorities, and exhibits attached
18 thereto, and for the foregoing reasons, the Court finds that the Motion to Dismiss should be
19 granted and enters the following findings, conclusions, and order.

20 FINDINGS OF FACT

21 1. On January 31, 2017, Leverty served a Notice of Attorney Lien in 14-CV-
22 0130, *Ray Warran Exley v. Lois O'Brien* (the "O'Brien matter"). Leverty's lien sought the
23 amount of \$151,226.76 for its fees and costs.

24 2. Leverty filed this lien on real property commonly known as 429 Panorama
25 Drive, Stateline, Nevada (the "Panorama Property") and retained possession of a Quitclaim
26 Deed to the Panorama Property executed by Lois O'Brien as part of its lien. (See *Motion to*
27 *Dismiss*, "Exhibit 2," *Complaint* filed in CV17-00311, ¶¶ 46-47).

28 ///

1 3. On February 14, 2017, while still counsel for Exley, Leverty filed a Complaint
2 in the Second Judicial District Court (the “CV17-00311 action”) for breach of contract, unjust
3 enrichment/quantum meruit/account stated, interpleader of Panorama Property Quitclaim
4 Deed, and declaratory relief. (*Id.*).

5 4. On March 22, 2017, Exley removed the CV17-00311 action to Federal Court
6 on the basis of diversity (the “Federal Court Action”). No further litigation occurred in
7 CV17-00311 because of the removal, and all subsequent litigation took place in federal court.
8 (See Motion to Dismiss, “Exhibit 2,” *Notice of Removal*).

9 5. On May 3, 2017, in the O’Brien matter in state court, Leverty filed its “Motion
10 to Adjudicate Leverty’s Rights and to Enforce a Lien for Attorney’s Fees,” against Exley.
11 (See Motion to Dismiss, “Exhibit 3”).

12 6. Leverty obtained a Judgment Lien on the Panorama Property in the amount of
13 \$150,780.76 on May 24, 2017 in the O’Brien matter. (See Motion to Dismiss, “Exhibit 4”).

14 7. Leverty did not take any enforcement action on this Judgment Lien after
15 obtaining it.

16 8. Instead, Leverty litigated the Federal Court Action against Exley, seeking its
17 attorney’s fees arising from the O’Brien matter. (See Motion to Dismiss, “Exhibit 2” and
18 *Reply in Support of Motion to Dismiss*, “Exhibit 1,” federal court docket for case no. 3:17-cv-
19 00175).

20 9. In the Federal Court Action, the parties engaged in settlement negotiations and
21 on November 9, 2017, Leverty filed a Motion to Enforce Settlement Agreement. (See Reply in
22 *Support of Motion to Dismiss*, Federal Court Action docket, case no. 3:17-cv-00175 [ECF 53,
23 54, 55, and 102]).

24 10. On May 11, 2018, the Federal Court entered its Order granting Leverty’s
25 Motion to Enforce Settlement Agreement. (See Reply in Support of Motion to Dismiss,
26 “Exhibit 2” [ECF 102]).

27 11. On January 14, 2019, Leverty moved for a judgment on the settlement
28 agreement, seeking a “single non-confidential document to allow Leverty to begin to execute

1 the judgment against Exley.” (See Reply in Support of Motion to Dismiss, “Exhibit 3,”
2 Judgment in a Civil Case [ECF 141] and Reply in Support of Issuance of a Judgment in a
3 Civil Case [ECF 143]).

4 12. On February 22, 2019, the Federal Court granted Leverty’s motion for
5 judgment and on February 25, 2019, entered Judgment in favor of Leverty on the settlement
6 amount of \$161,000. (See Motion to Dismiss, “Exhibit 5” and “Exhibit 6”).

7 13. Eight months after Leverty obtained a personal judgment against Exley in the
8 Federal Court Action, Leverty filed this Complaint for Judicial Foreclosure on October 24,
9 2019, seeking to foreclose upon the Panorama Property that secured its judgment lien.

10 CONCLUSIONS OF LAW

11 To the extent any of the foregoing findings of fact constitute conclusions of law, they
12 are incorporated herein.

13 1. Nevada’s one-action rule, NRS 40.430, “requires that creditors seeking to
14 enforce obligations secured by real property do so in a single action.” *Bonicamp v. Vazquez*,
120 Nev. 377, 379, 91 P.3d 584, 585 (2004).

15 2. The one-action rule reads, in pertinent part, as follows:

16 [T]here may be but one action for the recovery of any debt, or for the
17 enforcement of any right secured by a mortgage or other lien upon real
18 estate.... In that action, the judgment must be rendered for the amount found
19 due the plaintiff, and the court, by its decree or judgment, may direct a sale of
the encumbered property, or such part thereof as is necessary, and apply the
proceeds of the sale as provided in NRS 40.462.

20 NRS 40.430(1).

21 3. “As a general matter, should the creditor fail to follow the single action
22 procedure by bringing a separate action directly on the obligation, the one-action rule dictates
23 the creditor’s loss of rights in the real estate collateral securing the debt in question.”
24 *Bonicamp*, 120 Nev. at 380, 91 P.3d at 586; see also *Nevada Wholesale Lumber Co. v. Myers*
25 *Realty, Inc.*, 92 Nev. 24, 30, 544 P.2d 1204, 1208 (1976) (superseded by statute) (creditor's
26 failure to exhaust its security before bringing action on underlying debt placed into operation
27 the sanctions aspect of the one-action rule so that creditor lost all security rights in the real
28 property regarding the debt in question).

1 4. The one-action rule is an affirmative defense that must be made or it is waived.
2 NRS 40.435(3); *Hefetz v. Beavor*, 133 Nev. 323, 330, 397 P.3d 472, 478 (2017) (discussing
3 waiver of the one-action rule). The Exley defendants' *Motion to Dismiss* as a responsive
4 pleading to Levery's Complaint for Judicial Foreclosure is proper.

5 5. This action violates NRS 40.430 because Levery seeks to enforce by judicial
6 foreclosure the same underlying debt upon which it has obtained a personal judgment against
7 Exley in the Federal Court Action – payment of its attorney's fees arising from the O'Brien
8 matter.

9 6. This action to foreclose upon the Panorama Property is untimely and violates
10 the one-action rule because Levery has already obtained a personal judgment against Exley in
11 the Federal Court Action well before seeking to foreclose upon the collateral securing the
12 underlying debt.

13 7. NRS 40.435(1) does not apply because this case (19-CV-0299) was not "stayed
14 or dismissed" before entry of final judgment in Federal Court.

15 8. This Court also cannot convert this action into "an action which does not
16 violate NRS 40.430," as Levery's remedy against Exley in state court for enforcement of its
17 Judgment Lien can only be a judicial foreclosure action because the Judgment Lien is secured
18 by real property – not personal collateral. Levery cannot transfer or transmute its Judgment
19 Lien against the Panorama Property into a personal judgment against Exley. Similarly,
20 Levery cannot execute or enforce its personal Judgment in Federal Court against Exley in
21 this case. Enforcement proceedings on the federal Judgment must take place in federal court.
22 Thus, this action cannot be converted under 40.435(1)(b).

23 9. Instead, the Court finds that NRS 40.430 and NRS 40.435 apply to waive
24 Levery's rights in the security and deprive Levery of its ability to proceed against the
25 security in this case, the Panorama Property. See *Hefetz v. Beavor*, 133 Nev. 323, 328, 397
26 P.3d 472, 476 (2017) (discussing the sanctions of the one-action rule).

27 10. That the Athena entities were not parties to the Federal Court Action is not a
28 bar to dismissal, as set forth in *Bonicamp* because the Athena entities are merely in the chain

1 of title for purposes of this Judicial Foreclosure Action as the Vasquez defendants were in
2 *Bonicamp*. 120 Nev. at 379, 91 P.3d at 585.

3 11. Instead, the Court concludes this action must be dismissed as to all defendants
4 because Levery's attempt to foreclose on the Panorama Property violates Nevada's one-action
5 rule.

6 Good cause appearing therefor,

7 **IT IS HEREBY ORDERED** that Levery has legally forfeited its security in the
8 Panorama Property and its right to judicially foreclose against the Panorama Property.

9 **IT IS FURTHER ORDERED** that this case is dismissed with prejudice as to all
10 defendants.

11 Dated this 27th day of January, 2020.


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15 _____
16 DISTRICT COURT JUDGE
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22

23 Submitted By:
24 Todd R. Alexander, Esq. (SBN 10846)
25 Sarah M. Molleck, Esq. (SBN 13830)
26 6005 Plumas Street, Third Floor
27 Reno, Nevada 89519
28 (775) 786-6868
Attorneys for Exley and Athena Trusts

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original in file and of record in my office.

DATE February 19, 2020
BOBBIE R. WILLIAMS Clerk of Court
of the State of Nevada, in and for the County of Douglas,

6 By  Deputy