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10-29-2023

# BMO Harris Bank, N.A. v. Whittemore, 139 Nev. Adv. Op. 31 (Sep. 14, 2023)

Michelle Gordon

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Recommended Citation
Gordon, Michelle, "BMO Harris Bank, N.A. v. Whittemore, 139 Nev. Adv. Op. 31 (Sep. 14, 2023)" (2023). *Nevada Supreme Court Summaries*. 1594.
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*BMO Harris Bank, N.A. v. Whittemore*, 139 Nev. Adv. Op. 31 (Sep. 14, 2023)[1]

JUDGMENT CREDITORS SEEKING TO RENEW A JUDGMENT MUST STRICTLY COMPLY WITH NRS 17.214(3).

## Summary

The Court reviewed the procedure to renew a judgment under NRS 17.214 and considered whether a judgment creditor must strictly comply with NRS 17.214(3)'s certified mail method-of-notice requirement. The Court explains that NRS 17.214(3) requires a judgment creditor to notify a judgment debtor within three days of filing the affidavit to renew a judgment. Additionally, the Court reaffirmed *Leven*'s[2] holding that a judgment creditor must comply with NRS 17.214(3) to renew a judgment and found that the procedural requirement of the certified mail method-of-notice necessitates strict compliance. Accordingly, the Nevada Supreme Court affirms the district court's ruling that BMO did not strictly comply with NRS 17.214 and thus could not renew its judgment against the Whittemores.

## Background

Appellant BMO Harris Bank, N.A. (BMO) obtained a judgment against the respondents the Whittemores on November 18, 2015. BMO subsequently recorded the judgment. Later, BMO sued the Whittemores and their family entities in a separate suit alleging the Whittemores fraudulently transferred assets to avoid their liability in the 2015 judgment. Unable to collect on the 2015 judgment and with it set to expire soon on November 18, 2021, BMO filed an affidavit of renewal of judgment, recorded the affidavit, and electronically served the Whittemores' attorneys on November 10. After an inquiry by the Whittemores' counsel, BMO notified the Whittemores by certified mail of the affidavit of renewal of judgment on December 2. The Whittemores moved to vacate the affidavit of renewal and declare the judgment void. The district court granted the motion, finding that BMO did not strictly comply with the procedures set forth in NRS 17.214(3) when BMO failed to send notice of the affidavit of renewal to the Whittemores by certified mail within three days of filing it. BMO appealed.

## Discussion

### *NRS 17.214(3) must be met to renew a judgment under NRS 17.214*

BMO argues that the certified mail method-of-notice in NRS 17.214(3) is not required because the NRS 17.214(1) alone provides the procedure to renew a judgment, specifically, timely filing the affidavit of renewal and timely recording the affidavit. BMO asserts that because the notice requirement is not enumerated in NRS 17.214(1), it is not required to renew a judgment. Accordingly, BMO contends it renewed its judgment in compliance with NRS 17.214(1) by timely filing and recording the affidavit.

The Court rejected BMO's argument by looking to the precedent set in *Leven*.[3] In *Leven*, the Nevada Supreme Court held that NRS 17.214(3) contains a requirement that makes it "clear" that a creditor must notify a debtor within three days of filing the affidavit to renew a judgment.[4]

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[1] By Michelle Gordon.

[2] Leven v. Frey, 123 Nev. 399, 402–04, 409, 168 P.3d 712 (2007).

[3] *Id.*

[4] *Id.* at 402–03, 168 P.3d at 714–715.

This Court will not overturn precedent without compelling reasons for doing so.[5] The Court concluded that BMO failed to demonstrate a compelling reason to disturb *Leven*'s interpretation of NRS 17.214(3). Thus, it is reaffirmed that NRS 17.214(3) must be met to renew a judgment.

Additionally, the Court's conclusion is strengthened by the fact that the Legislature has amended NRS 17.214 twice since the *Leven* decision but has not amended NRS 17.214(3) or otherwise indicated that it disagreed with the court's interpretation. This suggests the Court's interpretation is aligned with the Legislature's intent.

***A creditor must strictly comply with NRS 17.214(3)'s certified mail method-of-notice requirement***

BMO argues that NRS 17.214(3)'s requirement of notice by certified mail may be satisfied by substantial compliance. It contends that requiring strict compliance of NRS 17.214(3) leads to an absurd result because it assumes that the Whittemores learned of the affidavit to renew through electronic service from their counsel.

The Court rejected BMO's argument and concluded that NRS 17.214 demands strict compliance of both the timing requirement and the certified mail method-of-notice requirement. The Court explains that when determining whether a statute requires strict or substantial compliance, the court must consider the statute's language, policy, and equity.[6] The inquiry here is whether the purpose of the statute can be served by substantial compliance, and the court will allow substantial compliance when requiring strict compliance leads to an absurd result.[7]

***The statutory language favors strict compliance***

Typically, if a statute's provision is a "[t]ime and manner" restriction, strict compliance is required.[8] However, if the provision concerns "form and content," substantial compliance may be sufficient.[9]

Here, the method-of-notice requirement refers to the manner in which the deadline must be met by providing that the judgment creditor must notify the judgment debtor by certified mail. Therefore, the certified mail method-of-notice requirement is a time and manner provision that weighs in favor of demanding strict compliance.

Furthermore, NRS 17.214(3) uses mandatory language that a judgment creditor "shall notify the judgment debtor of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail."[10] "'Shall' imposes a duty to act."[11] The mandatory languages of NRS 17.214 supports that the provision requires strict compliance. Thus, the statutory language weighs in favoring of requiring strict compliance.

***The purpose of NRS 17.214(3) favors substantial compliance but is not dispositive***

When determining whether substantial compliance will suffice, the court examines whether the purpose of the statute can be achieved in a manner other than by "technical compliance."[12] The Court reasoned that the certified mail method-of-notice requirement in NRS

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[5] Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008).
[6] Leyva v. Nat'l Default Servicing Corp., 127 Nev. 470, 475–76, 255 P.3d 1275, 1278 (2011).
[7] Einhorn v. BAC Home Loans Servicing, 128 Nev. 689, 697, 290 P.3d 249, 254 (2012).
[8] *Leven*, 123 Nev. At 408, 168 P.3d at 718.
[9] *Id.*
[10] NEV. REV. STAT 17.214(3).
[11] NEV. REV. STAT 0.025(1)(d).
[12] *Leyva*, 127 Nev. at 476, 255 P.3d at 1278.

17.214(3) serves to protect a debtor's due process rights.[13] This Court recognizes that the purpose of notifying the debtor of the renewal is accomplished if the debtor has actual knowledge of the renewal regardless of how the debtor came to learn of it. Thus, the purpose of the certified mail method-of-notice requirement weighs in favor of permitting substantial compliance. However, the Court is not convinced that the purpose of NRS 17.214 outweighs the statutory language favoring strict compliance. Ultimately, the Court finds that "because judgment renewal proceedings are purely statutory in nature and are a measure of rights, a court cannot deviate from those judgment renewal conditions."[14]

**Conclusion**

For a judgment creditor to renew a judgment, the judgment creditor must strictly comply with the certified mail method-of-notice requirement outlined in NRS 17.214(3). Here, BMO failed to strictly comply with NRS 17.214(3)'s certified mail method-of-notice requirement when it did not notify the Whittemores through certified mail within three days of filing the affidavit to renew a judgment. Thus, the district court's judgment was affirmed.

**Dissent**

***Mandating strict compliance under NRS 17.214(3) would lead to an absurd result under the facts of this case***

This court has previously held that substantial compliance is sufficient in fulfilling service and notice requirements where a party has actual notice.[15] In this case, BMO complied with all renewal and service requirements under NRS 17.214 prior to the expiration of the 2015 judgment, except for the way in which it served its notice on the Whittemores. BMO did not strictly comply but did electronically serve the Whittemores' counsel and subsequently notified the Whittemores via certified mail. Although there was a two-week delay, this does not subvert the purpose of the statute. Under the facts of this case, substantial compliance does not impinge on a judgment debtor's due process rights, entirely fulfills the purpose of the statute, and gives judgment creditors an opportunity to avoid an absurd outcome. Therefore, an application of substantial compliance of NRS 17.214 would be more appropriate.

***A plain reading of the statute indicates that service is not a prerequisite to renewal under NRS 17.214***

NRS 17.214(2)-(4) are enumerated separately and does not state that they are part of the renewal process. This is a clear distinction between renewal requirements under NRS 17.214(1) and the remaining provisions of the statute. If it were the Legislature's intention for service to be a prerequisite of renewal, NRS 17.214 could have instead required the creditor to send notice of the intent to renew or of the filing of the affidavit. Given that the Legislature did not do so, the only reasonable interpretation of NRS 17.214(3)'s plain language is that renewal occurs prior to

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[13] *Leven*, 123 Nev. at 409, 168 P.3d at 719.
[14] *Id.*
[15] *See* Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010).

notice and that notice requirement only serves to make the debtor aware that the judgment is renewed.[16]

Furthermore, the legislative history and public policy behind NRS 17.214 bolsters the dissents interpretation. NRS 17.214 was enacted in 1985 and amended in 1995. The 1995 amendment added NRS 17.214(1)(b) as a housekeeping attempt meant to provide the public with easier access to information on hens and to facilitate reconveyances of real property where appropriate, not to alter the standard means to renew a judgment.[17] By separating the service requirement from the renewal requirements, the reading of the statute is that each section serves a distinct purpose.

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[16] *See* State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

[17] *See Hearing on S.B. 455 Before the S. Judiciary Comm.*, 68th Leg., at 10 (Nev., May 23, 1995).