



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ASHOK KAUSHAL,

Appellant-Petitioner/Cross-Respondent,

v.

No. S-1-SC-40119

SANTA FE COMMUNITY HOUSING
TRUST,

Appellee-Respondent/Cross-Petitioner.

PETITIONER-APPELLANT'S REPLY BRIEF

FERRANCE LAW, P.C.
David A. Ferrance
5203 Juan Tabo Blvd. NE, Ste. 2E
Albuquerque, NM 87111
(505) 273-9379
dave@ferrancepc.com

Attorney for Petitioner-Appellant

Oral Argument Requested

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STATEMENT OF COMPLIANCE

This brief complies with Rule 12-318(F)(3) NMRA because it uses a proportionally-spaced typeface and its body contains 1914 words. This word count was obtained with Microsoft Word for Mac version 16.80.

By: /s/ David A. Ferrance
David A. Ferrance

I. THE TRUST HAS FAILED TO REBUT KAUSHAL'S ARGUMENTS

The Answer Brief almost entirely ignores the issues in Kaushal's appeal, devoting its space instead to rehashing the Brief in Chief from its cross-appeal. The Trust effectively concedes the issues, leaving to the Court the work of determining whether Kaushal's arguments are correct.

At most, the Trust has responded that (1) *Kaushal I*¹ held that the Trust was entitled to redeem the Property as a tenant in common with Kaushal and (2) *TAL Realty*² supports the idea that, when less than all of the heirs redeem, a junior lienholder may redeem in the place of the non-redeeming heirs. For the reasons below, the Trust's arguments are without merit.

A. The Answer Brief is devoted almost entirely to the issues raised in the cross-petition

The Trust identifies the issue it responds to as “whether the Court of Appeal's Memorandum Opinion is a defective attempt to amend its own Opinion after all jurisdiction was lost, and whether the Judgment

¹ *Kaushal v. Santa Fe Cmty. Hous. Trust* (“*Kaushal I*”), 2020-NMCA-010, 484 P.3d 1020.

² *Kaushal v. TAL Realty, LLC*, No. A-1-CA-39459, mem. op. (N.M. Ct. App. May 31, 2022) (non-precedential)

on the Mandate properly reflects the holdings of [*Kaushal I*].”³ [AB 3]

But that is the issue raised in the Trust’s cross appeal. It is not one of the issues raised in Kaushal’s appeal.

Kaushal’s petition for certiorari raised three issues, all of which were accepted by this Court:

1. *Whether the Court of Appeals erred by holding that redemption by an heir creates a tenancy-in-common with non-redeeming heirs who were never cotenants or owners?*
2. *Whether the Court of Appeals erred by holding that contribution can only be sought by the redeemer and that Laura’s “reasonable time” to contribute does not begin until the redeemer demands contribution?*
3. *Whether the Court of Appeals erred by concluding that the redeemed property remained subject to junior liens that had already been foreclosed?*

The Trust almost entirely ignores these issues in its Answer Brief. Most of its answer rehashes the main argument from its Brief in Chief to the cross appeal: that *Kaushal I* gave it half of the Property.⁴ The Trust begins with cases relating to a district court’s jurisdiction after a

³ This framing, along with the paragraph that contains it, is taken word-for-word from the cross-appeal. [XBIC 8-9]

⁴ For example, the discussion of mandates in the Answer Brief is taken verbatim from the Cross Brief in Chief. [Compare AB 4-6 with XBIC 10-12] So too with its discussion of *Kaushal I* [Compare AB 7-8 with XBIC 6-7] and *Kaushal II*. [Compare AB 8-9 with XBIC 8]

mandate. **[AB 3-8]** It reiterates its argument that *Kaushal I* could not plausibly be interpreted any other way than that the Trust should get half of the Property. **[AB 8]** It then claims that *Kaushal II*⁵ impermissibly conflicted with *Kaushal I*. **[AB 12]** Finally, it devotes the last page and a half of its argument to Kaushal’s second issue, arguing that *TAL Realty* supports its view of *Kaushal I*. **[AB 13-14]** It concludes by arguing that “[t]he only jurisdiction that exists in this case”—presumably even here—is to “craft a judgment on the mandate which accurately reflects” the Trust’s flawed and self-serving reading of *Kaushal I*. **[AB 14]**

Except for the Trust’s argument about *TAL Realty*, all these arguments pertain to its cross-appeal, not to Kaushal’s appeal. The Trust made these arguments in its Brief in Chief for the Cross-Appeal, and Kaushal responded to them in his Answer Brief for the Cross-Appeal. Rather than repeat his Answer Brief to the Cross Appeal here, Kaushal cites to it as necessary. In short, however, Kaushal agrees with the Court of Appeals, which dismissed the Trust’s argument as a “misunderstanding [that] pervaded the proceeding on remand.” *Kaushal*

⁵ *Kaushal v. Santa Fe Cmty. Hous. Trust* (“*Kaushal II*”), No. A-1-CA-39814 (May 16, 2023) (non-precedential).

II, A-1-CA-39814, mem. op. ¶ 3. That misunderstanding continues to pervade the proceedings even here.

Should this Court, like the Court of Appeals, disagree with the Trust's interpretation of *Kaushal I*, then it will have to decide Kaushal's appeal without the benefit of hearing from both sides. It is not the Court's burden to make the Trust's arguments for it. *See, e.g., Pirtle v. Legislative Council Comm. of N.M. Legislature*, 2021-NMSC-026, ¶ 58, 492 P.3d 586 ("As a general rule, appellate courts rely on adversarial briefing to decide legal issues and avoid reaching out to construct legal arguments that the parties, intentionally or otherwise, have not presented."). The Court can and should treat the failure to respond to the issues Kaushal raised as a concession of those issues. *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717 (holding that an appellant conceded arguments made in an answer brief by not responding to them in the reply).

B. *Kaushal I* did not hold that a redeemer holding the rights of less than all of the heirs becomes a tenant in common with the junior lienholders

The Trust raises two issues that are not taken from its cross-appeal. The first of these is in a section titled "Statutory Ambiguity and its

Judicial Resolution.” **[AB 9-12]** This argument appears to be a new way to rehash the Trust’s misunderstanding that *Kaushal I* held that a redeemer holding the rights of less than all of the heirs must take as a tenant in common with any redeeming junior lienholders. *Kaushal* explained why that view is mistaken in his Answer Brief to the cross appeal, and the *Kaushal II* court rejected that view as well. **[See XAB 15-21 (explaining why *Kaushal I* cannot be read as the Trust suggests), XAB 24-26 (explaining how the redemption statute only gives junior lienholders rights if no former defendant owner redeems)]**

Nevertheless, it is possible to view this argument as related to *Kaushal*’s first issue: that by redeeming, he took title free and clear from Trust’s junior lien. **[See BIC 11-19]** The Trust maintains that *Kaushal I* gave it 50% of the Property, or that the court at least limited *Kaushal*’s interest to 50%. **[E.g., AB 8 (explaining what the Trust believes to be “[t]he only plausible interpretation” of *Kaushal D*)]** The *Kaushal II* court rejected that reading of *Kaushal I*, explaining that as a junior lienholder the Trust had no right to redeem. *See Kaushal II*, A-1-CA-39814, mem. op. ¶ 1-3.

Here, the Trust cites no authority to the contrary to *Kaushal II*'s holding or to Kaushal's argument in his Brief in Chief. Instead, it describes how it believes the redemption statute is ambiguous and asserts that *Kaushal I* resolved the ambiguity in its favor. **[AB 9-12]** This is simply another way of restating its argument from the cross appeal: that the only plausible reading of *Kaushal I* is the reading that gives the Trust an interest in the Property.

In any event, *Kaushal II* correctly held that the Trust could not redeem. As the Brief in Chief describes, this result flows from a hundred years of this Court's precedent. **[BIC 11-19]** Furthermore, the redemption statute makes it clear that a junior lienholder such as the Trust has no right to redeem unless no former defendant owner redeems. **[XAB 24-26]** *Kaushal I* did not hold to the contrary—it simply held that Kaushal did not need to possess 100% of the possible redemption interests in order to redeem.

The Trust complains that, under this reading of *Kaushal I* and the redemption statute, “no redemption efforts of any second mortgage holders who lost real money in the foreclosure would succeed.” **[AB 11]** That is true, and it is the correct legal result. Junior lienholders are

always at greater risk because, after a foreclosure, their only claim is to any excess funds. *See, e.g., Bank of Am., N.A. v. BA Mortg., LLC*, 2005-NMCA-037, ¶¶ 8-12, 137 N.M. 368 (describing a junior lienholder’s rights after a foreclosure). Here, its lien was foreclosed, the Property sold for less than the amount of the senior lien, and the former defendant owner redeemed, leaving the Trust with nothing. **[RP 280, 302, 307]** That is the worst case for a junior lienholder, but it is the correct result, and one the Trust did or should have considered when it gave a loan secured by a second position mortgage.

C. TAL Realty correctly interpreted the redemption statute and the doctrine of equitable contribution

The only portion of the Trust’s answer that relates to the issues in Kaushal’s appeal is the final section. There, the Trust argues that *TAL Realty* supports its view that when a former defendant owner redeems with less than all the rights of the heirs, the junior lienholders may redeem in place of the non-redeeming heirs. **[AB 13-14]**

This argument fails for three reasons. First, the statute is clear that a junior lienholder may redeem only “[i]f the former defendant owner does not redeem” NMSA 1978, § 39-5-18(A)(3) (2007). That is why *Kaushal II* held that the Trust could not redeem. *See Kaushal II*, A-1-CA-

39814, mem. op. ¶ 1; see also *Nationstar Mortg. LLC v. Chenoweth*, No. A-1-CA-35696, mem. op. ¶ 4 (N.M. Ct. App. Apr. 2, 2018) (nonprecedential).

Second, *TAL Realty* did not address junior lienholders or even redemption. In *TAL Realty*, Kaushal had been assigned the rights of an heir, including both the right to redeem and the right to contribute. See *TAL Realty*, A-1-CA-, mem. op. ¶ 1. Because the assignment took place after the redemption period had passed, Kaushal sought to exercise the right to contribute. See *id.* The court rejected his efforts, holding that the right to contribute expires if the heir does not timely seek to redeem. *Id.* ¶ 4. The case involved no junior lienholders and did not even involve redemption. It does not support or even suggest that a junior lienholder can take the place of a non-redeeming heir.

Finally, the Trust's argument is based on a false premise. The Trust contends that "if one tenant in common or his assignee exercises a redemption right, that does not foreclose the redemption rights of the other tenants in common." [AB 14] But neither the heirs nor the Trust ever owned the Property as a tenant in common. The Trust had a junior

lien, which was extinguished in the foreclosure, and because a former defendant owner redeemed the Trust never had a right to redeem.

II. CONCLUSION

Where, as here, a single former defendant owner redeems and the property was not previously owned by cotenants, the redeemer takes title in fee simple. The redeemed property is not subject to the foreclosed liens, and neither the junior lienholders nor the non-redeeming heirs become cotenants with the redeemer. Because the Court of Appeals concluded otherwise, Kaushal respectfully asks this Court to reverse that portion of *Kaushal II*.

Respectfully submitted,

FERRANCE LAW, P.C.

By: /s/ David A. Ferrance

David A. Ferrance
5203 Juan Tabo Blvd. NE, Ste. 2E
Albuquerque, NM 87111
(505) 273-9379
dave@ferrancepc.com

CERTIFICATE OF SERVICE

I certify that on February 5, 2024, a true copy of this Reply Brief was delivered via the Court’s electronic filing and service system to opposing counsel of record.

By: /s/ David A. Ferrance
David A. Ferrance