

Electronically Filed
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No. A-16-74123-1
Elizabeth A. Brown
Clerk of Supreme Court

Appellant,

BAYVIEW LOAN SERVICING, LLC;)
SEASIDE TRUSTEE, INC.; BANK OF)
NEW YORK MELLON; MEDIATION)
ADMINISTRATOR.)

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Motion, the Court should require Appellant to post a bond or provide some other security.

MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTUAL AND PROCEDURAL HISTORY

The Loan

1. On or about December 29, 2005, Myrna Pascua obtained a \$345,500.00 loan for the purchase of the Property and executed an Interest Only

1 Fixed Rate Note (“Note”) for the loan. *See* Note annexed as Exhibit A to
2 Response to Order to Show Cause and to Petition for Judicial Review, in Record
3 on Appeal (“PJR Response”).
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5 2. On or about December 29, 2005, Myrna Pascua executed a deed of
6 trust (“Trust Deed”) to secure the Note. *See* Trust Deed annexed as Exhibit B to
7 PJR Response.
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9 3. The Trust Deed was recorded against the Property on or about
10 January 6, 2006. *See id.*
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12 4. The Note is endorsed in blank. *See* Exhibit A.
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14 5. The Trust Deed was assigned to The Bank of New York Mellon
15 FKA The Bank of New York, as Trustee for the Certificateholders CWALT, Inc.,
16 Alternative Loan Trust 2006-7CB, Mortgage Pass-Through Certificates, Series
17 2006-7CB (“Beneficiary”). *See* Corporate Assignment of Deed of Trust Nevada
18 (“Assignment”) annexed as Exhibit C to PJR Response.
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20 6. Respondent Bayview services the loan for the Beneficiary.
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22 7. Bayview holds the original Note as the custodian of records for
23 Beneficiary.
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25 8. Appellant is not a title owner of the Property. *See* Grant Bargain
26 Sale Deed annexed as Exhibit D, and Assessor Printout annexed as Exhibit E, to
27 PJR Response.
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1 **The Probate**

2 9. On or about February 16, 2011, a Petition for Special Letters of
3 Administration was filed in the Eight District Court, Clark County, Nevada, Case
4 P-11-070593 (“Probate”), regarding the estate of Myrna Pascua. *See* Probate
5 docket annexed hereto as Exhibit F and Petition annexed as Exhibit G to PJR
6 Response.
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8 10. On or about February 18, 2011, Appellant filed an Amended Petition
9 for Special Letters of Administration in the Probate. *See* Amended Probate
10 Petition annexed as Exhibit H to PJR Response.
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12 11. On or about February 18, 2011, the court in the Probate entered the
13 Order Appointing Special Administrator (“Probate Order”). *See* Probate Order
14 annexed as Exhibit I to PJR Response.
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16 12. The Probate Order appointed Appellant to be a special administrator
17 of Myrna Pascua’s estate. *See id.*
18

19 13. The Probate Order states that Appellant must “administer the estate
20 in accordance with Nevada Revised Statute Chapter 104.040.” *See id.*
21

22 14. A copy of NRS 104.040 was attached to the Probate Order. *See id.*
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24 15. The Probate Order also states that “proof of the blocked account
25 shall be filed with the court within thirty (30) days from the date of entry of this
26 court order. *See id.*
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1 16. After the Probate Order was entered in the Probate, five creditor's
2 claims were filed in the Probate. *See* Exhibit J to PJR Response.

3 17. Plaintiff also filed a notice of lis pendens regarding the Property in
4 the Probate. *See* notice of lis pendens annexed as Exhibit K to PJR Response.

5 18. Appellant did not file proof of a blocked account or anything else in
6 the Probate Case. *See* Exhibit F to PJR Response.

7 19. The Property was not distributed or otherwise conveyed to Appellant
8 by Myrna Pascua or as part of the Probate.

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11 **The Foreclosure Mediation**
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13 20. On or about February 9, 2016, Beneficiary commenced a foreclosure
14 of the Property, with Seaside as foreclosure trustee.

15 21. According to the notice of default, as of February 5, 2016, the loan
16 arrears were \$257,786.36.

17 22. Appellant requested foreclosure mediation.

18 23. John Boyer was appointed the mediator.

19 24. The Mediator issued the Notice to Appear on April 26, 2016, which
20 scheduled the mediation for June 22, 2016.

21 25. On May 3, 2016, counsel for Bayview sent Bayview's initial
22 document requests to Appellant via email.

1 26. When the email to Appellant was returned undelivered, counsel for
2 Bayview mailed the initial document requests to Appellant on May 10, 2016.

3 27. On June 10, 2016, Bayview sent its disclosure of documents to the
4 Appellant and mediator.
5

6 28. Bayview's disclosure included the Note, all three allonges to the
7 Note, the Trust Deed, the Assignment, an appraisal dated May 23, 2016, a power
8 of attorney from BNYM to Bayview, and an authorization from Bayview to its
9 counsel.
10

11 29. On June 22, 2016, Bayview and its counsel participated in the
12 foreclosure mediation, and brought to the mediation certified copies of the Note,
13 all three allonges to the Note, the Trust Deed, and the Assignment, together with
14 copies of the May 23, 2016, appraisal, power of attorney from BNYM to
15 Bayview, and authorization from Bayview to its counsel.
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18 30. Appellant appeared at the mediation with a realtor.

19 31. Appellant presented the Probate Order to the mediator.
20

21 32. The mediator found that the Property was not eligible for mediation
22 because the borrower is deceased, that the Probate Order did not appoint
23 Appellant as special administrator for the mediation (among other things), and
24 recommended that a certificate issue to Bayview. *See* Mediator Statement
25 annexed as Exhibit L to PJR Response.
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1 33. On July 7, 2016, the Foreclosure Mediation Program issued a notice
2 that a certificate would issue to Bayview. *See* Mediator Statement annexed as
3 Exhibit M to PJR Response.
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5 **Petition for Judicial Review**

6 34. On August 5, 2016, Appellant filed his Petition for Judicial Review.

7 35. On August 31, 2016, Respondents filed a Response to Order to Show
8 Cause and to the Petition for Judicial Review.
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10 36. On September 22, 2016, the District Court held a hearing on
11 Appellant's Petition.
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13 37. Appellant did not appear at the hearing.

14 38. The District Court denied the Petition.

15 39. On October 24, 2016, the District Court entered the Order on
16 Petition for Judicial Review, denying Appellant's Petition and concluding that
17 Appellant is not the owner of the Property.
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19 40. Appellant did not file a motion to stay the foreclosure with the
20 District Court.
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22 **Appeal**

23 41. On November 15, 2016, Appellant filed his Notice of Appeal.
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1 42. On December 7, 2016, Appellant filed a letter with a subject line
2 stating “Wrongful Issuance of Certificate of Foreclosure Mediation on property at
3 560 Haunts Walk Ave., Las Vegas, Nevada 89178.”
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5 43. On December 14, 2016, the Court here issued an Order Denying
6 Motion and Directing Transmission of Record. In this order, the Court deemed
7 the letter to be a motion to stay, and denied the stay.
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9 **Bankruptcy**

10 44. On December 12, 2016, Appellant filed a pro se bankruptcy in the
11 Bankruptcy Court for the District of Nevada (“Bankruptcy Court”), Case No. 16-
12 16566 (“Bankruptcy”).
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14 45. Respondents filed a motion for relief from the automatic stay in the
15 Bankruptcy.
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17 46. On March 9, 2017, the Bankruptcy Court entered the Order Granting
18 Motion for Relief from the Automatic Stay in the Bankruptcy.
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20 **B. ARGUMENT**

21 The Court should deny the Motion because Appellant is not likely to
22 prevail on the merits. If the Court is inclined to grant the Motion, it should
23 require appellant to post a bond. Pursuant to Rule 8 of the Nevada Rules of
24 Appellate Procedure, the Court can consider the following factors in deciding the
25 Motion:
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1 (1) whether the object of the appeal or writ petition will be defeated
2 if the stay or injunction is denied; (2) whether appellant/petitioner
3 will suffer irreparable or serious injury if the stay or injunction is
4 denied; (3) whether respondent/real party in interest will suffer
5 irreparable or serious injury if the stay or injunction is granted; and
6 (4) whether appellant/petitioner is likely to prevail on the merits in
7 the appeal or writ petition.

8 NRAP 8(c).

9 If the Court grants the Motion, the Court should require Appellant to post a
10 bond. The Court can require Appellant to post a supersedeas bond. *See* NRAP
11 8(a)(2)(E) and *State ex rel. Public Serv. Comm'n v. First Judicial Dist. Court*, 94
12 Nev. 42, 44, 574 P.2d 272, 273 (Nev. 1978). While the Court has discretion as to
13 the bond amount or other security to be provided, *see Nelson v. Heer*, 121 Nev.
14 832, 122 P.3d 1252 (Nev. 2005), the Court should require that Appellant provide
15 some security. While a bond for the entire loan arrears should be required, the
16 Court should at least require Appellant to deposit a monthly fair rental value into
17 his counsel's trust account.

18 Appellant will not suffer irreparable harm. Appellant does not own the
19 Property. Appellant has not paid to occupy the Property for years. Appellant
20 having to move from essentially a rental property, for which he does not pay rent,
21 is not an irreparable harm. Additionally, Appellant previously requested a stay,
22 and this Court denied it.

23 Appellant is not likely to prevail on the merits. Foreclosure mediation is
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1 available to the “grantor or the person who holds the title of record.” *See* NRS
2 107.086(2), and Rule 7 of the Foreclosure Mediation Rules. Appellant does not
3 have standing to seek a foreclosure mediation or to pursue this Petition because
4 he is not on title to the Property, and he is not the borrower. Appellant does not
5 own the Property. The Probate Order neither subrogated Appellant to the rights
6 of Myrna Pascua under the Note and Trust Deed, nor authorized Appellant to
7 modify the loan, nor otherwise made Appellant the owner of the Property.
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10 NRS Chapter 140 regards special administrators in probate actions. The
11 first statute in that chapter states a special administrator is appointed “to collect
12 and take charge of the estate of the decedent, in whatever county or counties the
13 estate may be found, and to exercise such other powers as may be necessary to
14 preserve the estate.” NRS 140.010. The Probate Order here charges the
15 Appellant to specially administer the Myrna Pascua estate “in accordance with
16 Nevada Revised Statute Chapter 104.040.”
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19 “A special administrator is not a general representative of the estate. He is
20 an emergency officer with limited authority to care for and preserve the estate
21 until an executor or general administrator is ascertained or appointed as its proper
22 legal representative.” *Bodine v Stinson*, 85 Nev. 657, 660, 461 P.2d 868, 871
23 (1969) (citing *Rich v. Dixon*, 153 Conn. 52, 212 A.2d 421 (1965), and NRS
24 140.070) (superseded in part by statute, see *Jacobson v. Estate of Clayton*, 121
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1 Nev. 518, 119 P.3d 132 (2005)). “[A special administrator] is not to conduct the
2 administration of the estate.” *Bodine v Stinson*, 85 Nev. 657, 660, 461 P.2d 868,
3 871 (1969).

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5 The Probate Order does not authorize Appellant to assume ownership of
6 the Property. Appellant is not and never was on title to the Property. Appellant
7 does not “automatically become[] the owner or co-owner of the subject property
8 upon the death of her spouse.” *See* Petition at p. 4, ¶ 20. The Probate Order does
9 not substitute Appellant in as the borrower, subrogate Appellant to Myrna
10 Pascua’s position, or result in Appellant assuming the loan. There is nothing in
11 Chapter 140, or the Probate Order, that supports Appellant’s petition. The
12 Probate Order does not authorize Appellant to negotiate a loan modification for
13 the state of Myrna Pascua. In fact, the Probate Order is silent regarding the
14 Property, Note, and Trust Deed. Appellant would have been required to file a
15 separate motion and seek specific permission in this regard. NRS 140.050. The
16 Probate Order, together with the version of NRS 140.040 that is attached to the
17 Probate Order, clearly states that Appellant could “collect and preserve” the
18 assets of Myrna Pascua’s estate. The Probate Order charges Appellant with
19 collecting, taking charge of, and protecting the assets of Myrna Pascua’s estate.
20 There is no indication that he has done so. The documents filed in the Probate
21 indicate that Appellant only filed a lis pendens in the Probate after the Probate
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1 Order was entered. Appellant did not file proof of a blocked account, information
2 regarding the litigation referenced in the Probate Order, or anything else. No
3 general administration was opened, and no letters testamentary were issued. The
4 Probate Order does not apply or bind the Court or the mediator here.
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6 **C. CONCLUSION**

7 The Court should deny the Motion because Appellant is not likely to
8 prevail on the merits and will not suffer irreparable harm. If the Court grants the
9 Motion, the Court should require Appellant to post a bond or provide some
10 security.
11

12 DATED this 29th day of January 2018.
13

14 WEINSTEIN & RILEY, P.S.

15 /s/ Aaron Waite, Esq.

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21 *Attorneys for Respondents*
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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2018, I served a true and correct copy of the foregoing OPPOSITION TO MOTION FOR STAY PENDING APPEAL via the electronic filing system and First Class Mail, postage prepaid, to the following party:

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Attorneys for Appellant

/s/ Aaron Waite, Esq.
An Employee of
WEINSTEIN & RILEY, P.S.