

IN THE SUPREME COURT OF THE STATE OF NEVADA

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LAS VEGAS DEVELOPMENT GROUP, LLC, )  
a Nevada limited liability company, )  
)  
Appellant, )

vs. )

JAMES R. BLAHA, an individual; BANK OF )  
AMERICA, NA, a National Banking )  
Association, as successor by merger to BAC )  
HOME LOANS SERVICING, LP; )  
RECONTRUST COMPANY NA, a Texas )  
corporation; EZ PROPERTIES, LLC, a Nevada )  
limited liability company; K&L BAXTER )  
FAMILY LIMITED PARTNERSHIP, a Nevada )  
limited partnership; FCH FUNDING, INC, an )  
unknown corporate entity, )  
Respondents. )

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**APPEAL**

From the Eighth Judicial District Court,  
The Honorable Jerry A. Wiese II, District Judge  
District Court Case No. A-15-715532-C

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**APPELLANT'S OPENING BRIEF**

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Roger P. Croteau, Esq.  
Nevada Bar No. 4958  
Timothy E. Rhoda, Esq.  
Nevada Bar No. 7878  
ROGER P. CROTEAU AND ASSOCIATES, LTD  
9120 West Post Road, Suite 100  
Las Vegas, Nevada 89148  
Telephone: (702) 254-7775  
Facsimile: (702) 228-7719

*Attorneys for Plaintiff/Appellant Las Vegas Development Group, LLC*

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## **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Las Vegas Development Group, LLC is a private limited liability company with no publicly held corporation owning 10% or more of its stock.

Appellant, Las Vegas Development Group, LLC, is represented by Roger P. Croteau and Timothy E. Rhoda of Roger P. Croteau & Associates, Ltd.

## **JURISDICTIONAL STATEMENT**

This is an appeal from an Order dated October 5, 2016 granting Defendants, James Blaha and Noble Home Loans, Inc.’s, Motion for Summary Judgment and the remaining Defendants’ Joinders thereto. (“Order Granting MSJ”). Appendix (“App”), 543). Notice of entry of the Order Granting MSJ was filed on October 5, 2016 (App 557). Plaintiff thereafter timely filed a Motion to Alter or Amend Judgment; for Reconsideration; and for Clarification on October 11, 2016. Said Motion was denied by way of Order entered on or about November 28, 2016. (App 635). Notice of Entry of said Order was filed on December 1, 2016. (App 637). The Order Granting MSJ constituted a final judgment as to all parties below and was therefore appealable under NRAP 3A(b)(1). Appellant timely filed a Notice of Appeal on December 1, 2016 (App 642).

## **ROUTING STATEMENT**

The instant matter should presumptively be retained by the Nevada Supreme Court because this appeal raises as a principal issue a question of first impression involving the common law and statutory interpretation. NRAP 17(a)(13). Specifically, at issue is an important question of whether NRS 11.080 or NRS 107.080(5)-(6) sets forth the appropriate statute of limitations to be applied under the facts at hand. In addition, the matter raises a question of statewide public importance. NRAP 17(a)(14).



## **STATEMENT OF ISSUES FOR REVIEW**

1. Can the purported foreclosure of an extinguished and therefore non-existent security interest effect a valid and effective change of title?
2. What, if any, statute of limitations governs an action to recover real property that was the subject of an unauthorized and void foreclosure sale based upon an extinguished deed of trust?
3. Whether the district court's application of NRS 107.080(5)-(6) and granting of summary judgment was erroneous as a matter of law.
4. Whether the district court's subsequent refusal to alter or amend, reconsider and/or clarify the Order to comport with the court's findings constituted an abuse of discretion.

## **STATEMENT OF THE CASE**

The instant action is primarily a quiet title action related to real property that was the subject of a HOA lien foreclosure sale pursuant to NRS Chapter 116. Plaintiff purchased the property at the HOA lien foreclosure sale and asserts that said sale served to extinguish any and all deeds of trust previously secured by the property. Notwithstanding the extinguishment of the deed of trust, the applicable Defendants thereafter caused a foreclosure sale based upon the deed of trust to take place, purportedly selling the property to a third party and divesting the Plaintiff of ownership of the property. Plaintiff contends that because the deed of trust was extinguished as a matter of law, the bank's foreclosure sale and all transfers of the property that occurred thereafter were unauthorized, void and ineffective. As a result, Plaintiff asserts that it remains the owner of the property free and clear of any interests of the Defendants.

Plaintiff filed its complaint on March 19, 2015, primarily seeking to recover title and possession of its property and to quiet title to the property solely in its name. On August 9, 2016, Defendants, James Blaha and Noble Home Loans, Inc., filed a Motion for Summary Judgment, asserting that Plaintiff's claims were barred by the then-existing 90-day statute of limitations of NRS 107.080(5)-(6). The remaining Defendants joined in said Motion. Plaintiff asserted the statute of

limitations to be inapplicable because the bank's foreclosure sale was void ab initio and therefore could not have effected any valid change of title as a matter of law. To the extent that any statute of limitations is applicable, the proper statute of limitations is that of NRS 11.080, which specifically provides a property owner with a period of 5 years from the time that it last held possession in which to recover real property. The instant action was filed within 5 years after the date of the purported foreclosure of the extinguished deed of trust which ostensibly divested the Plaintiff of title.

The Motion for Summary Judgment and Joinders were granted by the district court by way of Order dated November 28, 2016, with the district court finding that NRS 107.080(5)-(6) is applicable to this action; that the Plaintiff was required to bring suit within 90 days after the bank's foreclosure sale; and that the Plaintiff's claims are therefore time-barred. This is the Order from which Plaintiff appeals. In addition, Appellant appeals from a subsequent Order denying Plaintiff's Motion to Alter or Amend Judgment; for Reconsideration; and for Clarification.

### **FACTUAL BACKGROUND**

1. On or about June 8, 2004, a Declaration was recorded in the Official Records of the Clark County Recorder as instrument number

200406080002308, thereby creating Nevada Trails II Community Association (*the "HOA"*) and perfecting a lien in favor of the HOA on all real property located within the common interest community it governed, including but not limited to that real property commonly known as 7639 Turquoise Stone Court, Las Vegas, Nevada 89113, Assessor Parcel No. 176-10-213-042 (*the "Property"*). App 004; Complaint, ¶11.

2. On or about March 23, 2006, Defendant, JOSE PEREZ, JR. (*"Former Owner"*), acquired title to and ownership of the Property. App 005; Complaint, ¶16.
3. Former Owner obtained one or more mortgages and/or lines of credit secured by the Property. App 005; Complaint, ¶18.
4. On or about March 28, 2007, Countrywide FSB recorded a deed of trust against the Property in the Official Records of the Clark County Recorder as Instrument No. 200703280002128 (*"First Deed of Trust"*). App 005; Complaint, ¶19. See also App 098.
5. Upon information and belief, BAC Home Loans subsequently became the holder and/or owner of the First Deed of Trust through an assignment recorded in the Official Records of the Clark County Recorder on or about April 4, 2011 as Instrument No. 201104040003342. App 005; Complaint,

- ¶20. See also App 150.
6. By virtue of his ownership of the Property, Former Owner was a member of the HOA and accordingly was obligated to pay assessments pursuant to the terms of the CC&Rs. App 005; Complaint, ¶22.
  7. At some point in time during his ownership of the Property, Former Owner failed to pay the assessments related to the Property to HOA. App 005; Complaint, ¶23.
  8. As a result of the failure of Former Owner to pay the assessments, HOA recorded a Notice of Delinquent Assessment Lien (“*HOA Lien*”) with the Office of the Recorder of Clark County, Nevada. App 005; Complaint, ¶24. See also App 124.
  9. Thereafter, HOA recorded a Notice of Default and Election to Sell with the Office of the Recorder of Clark County, Nevada. App 005; Complaint, ¶25. See also App 127.
  10. Upon information and belief, the Notice of Default and Election to Sell was served upon the Former Owner, as well as all interested parties holding a security interest in the Property. App 005-006; Complaint, ¶26.
  11. On or about November 16, 2010, BAC Home Loans, by and through MERS, contacted the HOA and/or its agent in response to the Notice of Default,

- thereby acknowledging actual receipt of the Notice of Default. App 131.
12. After the expiration of 90 days from the recording and mailing of the Notice of Default, HOA caused a Notice of Trustee's Sale to be recorded with the Office of the Recorder of Clark County, Nevada. App 006; Complaint, ¶27. See also App 142.
  13. Upon information and belief, the Notice of Trustee's Sale was served upon the Former Owner, as well as all interested parties holding a security interest in the Property. App 006; Complaint, ¶28.
  14. On or about April 12, 2011, HOA caused a foreclosure sale ("*HOA Foreclosure Sale*") to be conducted pursuant to the powers conferred by the Nevada Revised Statutes 116.3116, 116.31162, 116.31163 and 116.31164; the CC&Rs; the Notice of Delinquent Assessment Lien; and the Notice of Default and Election to Sell. App 006; Complaint, ¶29.
  15. Plaintiff, Las Vegas Development Group, LLC ("*LVDG*") purchased the Property by successfully bidding at the HOA Foreclosure Sale in accordance with N.R.S. 116.3116, *et seq.* App 006; Complaint, ¶30.
  16. On or about April 13, 2011, a Trustee's Deed Upon Sale ("*HOA Foreclosure Deed*") was recorded in the Official Records of the Clark County Recorder as Instrument No. 201104130000979, vesting title to the

- Property in the Plaintiff. App 006; Complaint, ¶31. See also App 145.
17. The HOA Foreclosure Sale complied with all requirements of law, including but not limited to, the recording and mailing of copies of the Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale. App 006; Complaint, ¶32. See also App 145.
  18. In the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. \_\_\_, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014), this Court resolved a split that previously existed in the state and federal courts of the State of Nevada regarding the force, effect and interpretation of N.R.S. §116.3116, finding that the statute provides a homeowners association a true super-priority lien over real property that can and does extinguish a first deed of trust when non-judicially foreclosed. *Id.*
  19. BAC Home Loan's security interest in the Property, if any, was extinguished by the foreclosure of the HOA Lien and the First Deed of Trust was rendered null, void and unenforceable. Complaint, ¶50.
  20. On or about April 14, 2011, BANA and/or Recontrust caused a Notice of Default and Election to Sell to be recorded in the Official Records of the Clark County Recorder as Instrument No. 201104140003343. App 008;

Complaint, ¶53. See also App 152.

21. On or about August 9, 2011, BANA and/or Recontrust caused a Notice of Trustee's Sale to be recorded in the Official Records of the Clark County Recorder as Instrument No. 201108090003456. App 008-009; Complaint, ¶54. See also App 159.
22. On or about August 29, 2011, Recontrust purported to conduct a foreclosure sale ("*Bank Foreclosure Sale*") based upon the First Deed of Trust. App 009; Complaint, ¶55.
23. EZ Properties purported to purchase the Property at the Bank Foreclosure Sale and on September 19, 2011, a Trustee's Deed Upon Sale Nevada to be recorded in the Official Records of the Clark County Recorder as Instrument No.201109190002647. App 009; Complaint, ¶56. See also App 162.
24. Upon information and belief, EZ Properties purchased the Property at the alleged September 19, 2011 Bank Foreclosure Sale with the aid of a mortgage from the Baxter Family Partnership. App 009; Complaint, ¶57.
25. On or about September 30, 2011, EZ Properties purported to transfer the Property to James R. Blaha by deed recorded in the Official Records of the Clark County Recorder as Instrument No. 201109300001615. App 009; Complaint, ¶59. See also App 168.



26. Upon information and belief, James R. Blaha purchased the Property from EZ Properties with the aid of a mortgage loan from FCH Funding n/k/a Noble Home Loans. App 009; Complaint, ¶60. See also App 173.

### **PROCEDURAL HISTORY**

1. On March 19, 2015, LVDG filed the complaint. App 001.
2. On August 9, 2016, Blaha and Noble Home Loans filed their Motion for Summary Judgment. App 073.
3. On August 16, 2016, EZ Properties and K&L Baxter filed their Joinder to the Motion for Summary Judgment. App 420.
4. On August 26, 2016, BANA filed its Joinder to the Motion for Summary Judgment. App 426.
5. On August 26, 2016, LVDG filed its Opposition to the Motion for Summary Judgment. App 429.
6. On September 6, 2016, Blaha and Noble Home Loans filed their Reply in Support of Motion for Summary Judgment. App 464.
7. On September 13, 2016, the District Court heard oral argument related to the Motion for Summary Judgment. App 487.
8. On September 30, 2016, LVDG's counsel transmitted a letter to the district court regarding a dispute between the parties regarding the form of the

- order. App 592.
9. On October 5, 2016, the District Court entered the Order Granting Motion for Summary Judgment in the form offered by Blaha and Noble. App 543.
  10. On October 5, 2016, the Order Granting MSJ was filed. *Id.*
  11. On October 5, 2016, Notice of Entry of the Order granting Motion to MSJ was filed. App 557.
  12. On October 11, 2016, LVDG filed its Motion to Alter or Amend Judgment; for Reconsideration; and for Clarification. App 574.
  13. On October 31, 2016, BANA filed its Opposition to the Motion for Reconsideration. App 595.
  14. On October 31, 2016, Blaha and Noble filed their Opposition to the Motion for Reconsideration. App 603.
  15. On November 1, 2016, Blaha and Noble filed their Joinder to BANA's Opposition to the Motion for Reconsideration. App 614.
  16. On November 1, 2016, EZ and K&L Baxter filed their Joinder to Blaha and Noble's Opposition to the Motion for Reconsideration. App 617.
  17. On November 2, 2016, EZ and K&L Baxter filed their Joinder to BANA's Opposition to the Motion for Reconsideration. App 620.
  18. On November 15, 2016, the District Court heard oral argument related to

the Motion for Reconsideration. App 623.

19. On November 28, 2016, the District Court entered the Order Denying Motion for Reconsideration. App 635.
20. On November 30, 2016, the Order Denying Motion for Reconsideration was filed. *Id.*
21. On December 1, 2016, Notice of Entry of the Order Denying Motion for Reconsideration was filed. App 637.
22. On December 1, 2016, LVDG filed its Notice of Appeal. App 642.

## SUMMARY OF THE ARGUMENTS

The issue at hand is quite straightforward. Specifically, at issue is whether the purported foreclosure of a void, extinguished and invalid deed of trust can effect a valid change of title and therefore divest the rightful owner of the subject property of title. If so, further at issue is whether the property owner that was wrongfully foreclosed upon is required to bring suit to recover the property within the then-existing 90 day period of N.R.S. 107.080(5)(b) or whether he or she is entitled to the 5 year period that is expressly granted by N.R.S. 11.080.

What is not at issue herein is the validity of the HOA Foreclosure Sale at which the Plaintiff purchased the Property. For purposes of the Motion for Summary Judgment, the Court was required to view the evidence in the light of most favorable to the non-moving party. *Lipps v. Southern Nevada Paving*, 116 Nev. 497, 498 (2000). Thus, the Court was required to view the evidence in the light most favorable to the Plaintiff. The Motion for Summary Judgment expressly did not argue any issue other than the statute of limitations. This required that the Court assume that the HOA Foreclosure Sale was properly conducted and that it thus extinguished the First Deed of Trust as a matter of law. Under such circumstances, no question existed regarding the fact that the First Deed of Trust was rendered null and void by the HOA Foreclosure Sale and that it

was therefore not a valid security interest at the time that the Bank Foreclosure Sale took place.

## **ARGUMENT**

### **1. STANDARD OF REVIEW**

When the issue at hand is purely a question of law, such as in cases where statutory construction is at issue, review is *de novo*. *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31, 125 Nev. Adv. Rep. 33 (Nev. 2009). Because the Motion for Reconsideration was filed and decided prior to the notice of appeal, the court may consider arguments within the Motion for Reconsideration. *See, e.g., Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054, 2007 Nev. LEXIS 52, 12, 123 Nev. Adv. Rep. 41 (Nev. 2007) (Supreme Court considered arguments raised in a motion for reconsideration while deciding an appeal).

### **2. THE FORECLOSURE OF A VOID AND INVALID SECURITY INTEREST CANNOT EFFECT A VALID AND EFFECTIVE CHANGE OF TITLE**

As discussed above, the Motion for Summary Judgment upon which the Order appealed from is founded was based upon a single issue – the timeliness of Plaintiff’s Complaint. Although the Motion for Summary Judgment seemed to

assert that the Defendants believe that defects existed in the HOA Foreclosure Sale, and although the Defendants recited certain factual allegations and attached certain exhibits that appear to be directed towards such arguments, they expressly stated that their Motion was limited to the issue of the purported untimeliness of the Plaintiff's Complaint. See App 076. Thus, no arguments nor rulings were made regarding the validity of the HOA Foreclosure Sale or any associated claims.

For purposes of the Motion for Summary Judgment, the district court was required to assume that the HOA Foreclosure Sale was properly conducted, valid and effective and that it thus extinguished the First Deed of Trust as a matter of law. As a result, the subsequent Bank Foreclosure Sale necessarily must be deemed to have been based upon a void, extinguished and non-existent security interest.

A void real estate transaction is one where the law deems that no transfer actually occurred. An example of this is a deed from a party who does not own the real property that is purported to be the subject of the deed. Such a transfer is ineffective for any and all purposes. This is exactly the situation at hand where BANA purports to have foreclosed upon and sold the Property based upon an invalid, extinguished deed of trust.

An absolute nullity such as a void deed will not constitute color of title, and

the Statute of Limitations will not run in favor of a person under it. *Nesbitt v. De Lamar's Nev. Gold Mining Co.*, 24 Nev. 273 (Nev. 1898)(Citations omitted).

Furthermore, a void deed will not connect a grantee with grantor's possession, nor will it constitute the basis of an action. *Id.* There can be no valid correction or confirmation of a void deed. 23 Am. Jur. 2d, Deeds, §287 (1965); 26 C.J.S., Deeds, §31 (1956). A void deed is invalid in law for any purpose whatsoever, such as a deed to effectuate a prohibited transaction" 23 Am. Jur.2d, Deeds, §137.

A void deed cannot be the foundation of a good title and a bona fide purchaser for value acquires no rights under it. *Marlenee v. Brown*, 21 Cal. 2d 668, 677 (Cal. 1943). A void deed cannot pass title even in favor of an innocent purchaser or a bona fide encumbrancer for value. *First Interstate Bank v. First Wyoming Bank*, 762 P.2d 379, 382 (Wyo. 1988). It is clearly well established law that a void deed grants no rights to the grantee. The deed to EZ Properties that resulted from the Bank Foreclosure Sale was exactly such a void deed.

The district court's Order Granting MSJ effectively finds that a party may fraudulently record an invalid security interest against another's real property and then proceed to foreclosure. If the property owner does not immediately complain of the invalid and fraudulent foreclosure, the district court has found that the foreclosure sale based upon the fraudulent security interest shall nevertheless be

valid and binding against this innocent party. This constitutes a clear error of law. The Bank Foreclosure Sale based upon the extinguished First Deed of Trust could not effect any change of title. LVDG remained the owner of the Property after the Bank Foreclosure Sale and at all times since.

3. **NRS 107.080(5)-(6) IS INAPPLICABLE WHERE BANA POSSESSED  
NO VALID SECURITY INTEREST UPON WHICH TO FORECLOSE  
AND THE BANK FORECLOSURE SALE WAS THUS VOID FROM  
THE OUTSET**

Pursuant to the Order Granting MSJ, the district court held that Plaintiff's claims are barred by the then-existing 90-day time limitation of N.R.S. 107.080(5)(b). However, by way of its Complaint, the Plaintiff does not contest the manner in which the Bank Foreclosure Sale was carried out or the noticing of the Bank Foreclosure Sale, but rather the authority behind the Bank Foreclosure Sale. A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself. *McKnight Family, LLP v. Adept Mgmt. Servs.*, 310 P.3d 555, 559 (Nev. 2013)

It is clear that NRS 107.080(5) does not impact the Plaintiff's ability and right to attack the validity of the Bank Foreclosure Sale. In fact, NRS 107.080(5) does exactly the opposite. NRS 107.080(5) specifically provides that "[e]very



sale made under the provisions of this section and other sections of this chapter vests in the purchaser **the title of the grantor** and any successors in interest without equity or right of redemption.” NRS 107.080(5) (Emphasis added). Thus, the statute explicitly provides that a purchaser such as EZ Properties receives only that title that the grantor possesses to give. In this case, BANA possessed no title to give at the time of the Bank Foreclosure Sale because the First Deed of Trust was extinguished at the time of the HOA Foreclosure Sale. There was no valid basis for the Bank’s Foreclosure Sale and BANA could thus convey nothing. Under these circumstances, NRS 107.080(5) is not of assistance to the Defendants. In fact, it conclusively proves that EZ Properties acquired no interest in the Property at the time of the void Bank Foreclosure Sale. Like BANA, EZ Properties could convey nothing to Blaha because its title was invalid. Likewise, NRS 107.080(6) is inapplicable to the facts at hand.

At the time of the fraudulent Bank Foreclosure Sale, NRS 107.080(6) provided as follows:

6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of subsection 4 to the grantor, to the person who holds the title of record on the date the notice of default and election to sell is recorded, to each trustor or to any other person entitled to such notice, the person who did not receive such proper notice may commence an action pursuant to subsection 5 within 120 days after the date on which the person received actual notice of the sale.

NRS 107.080(6) pertains to factual situations where a foreclosing entity fails to provide notice as required by NRS 107.080(3) and 107.080(4). The Plaintiff did not make any allegations regarding when or if it received notice of the Bank Foreclosure Sale and such notice or lack thereof is not a basis for this action. On the contrary, the Plaintiff asserts that because the Bank Foreclosure Sale was void, the Plaintiff was never divested of title.

**4. THE STATUTE OF LIMITATIONS HAS NOT EXPIRED WHERE  
THE BANK FORECLOSURE SALE WAS VOID FROM THE  
OUTSET**

N.R.S. §107.080 governs non-judicial foreclosure sales of real property pursuant to deeds of trust. However, such statute obviously presupposes that a valid deed of trust exists. In this case, no valid deed of trust existed at the time of the Bank Foreclosure Sale and such sale was thus void ab initio. Under these circumstances, as stated above, N.R.S. §107.080 is inapplicable to the facts at hand.

Because BANA possessed no security interest upon which to foreclose, it is completely irrelevant whether notices were mailed to or received by the Plaintiff. It is likely irrelevant what, if anything, the Plaintiff may have done in response. The fact that the unauthorized Bank Foreclosure Sale may have been carried out in

the “proper” manner cannot in any way validate the void proceeding.

N.R.S. §107.080(4) provides as follows:

4. The trustee, **or other person authorized to make the sale under the terms of the trust deed or transfer in trust**, shall, after expiration of the applicable period specified in paragraph (d) of subsection 2 following the recording of the notice of breach and election to sell, and before the making of the sale, give notice of the time and place thereof . . .

Thus, although it goes without saying, the foreclosure of a deed of trust may only be commenced and carried out where an entity is **authorized** to make the sale.

This can never be the case where a deed of trust has been previously extinguished as a matter of law such as is the case herein.

The Plaintiff is not bound by law to complain of a foreclosure sale that was void ab initio within the time period set forth in N.R.S. §107.080. On the contrary, because the sale was void at the outset, it is as though it never occurred.

One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. . . . If he desires to have the cloud removed the law affords a remedy, but he is not compelled to go to that expense, and his failure to do so cannot be considered laches, nor will it operate as an estoppel against him. A mere claim of title even of record, unaccompanied by adverse holding, will not start the statute.

*Secret Valley Land Co. v. Perry*, 187 Cal. 420, 425-426 (Cal. 1921). In this case, an adverse holding did exist; however, as discussed further below, the Plaintiff timely filed suit in order to recover its Property.

The Plaintiff was the rightful owner of the Property at the time of the Bank Foreclosure Sale, the Plaintiff was the rightful owner of the Property after the Bank Foreclosure Sale, and the Plaintiff remains the rightful owner of the Property to this date. BANA's unauthorized, void and ineffective Bank Foreclosure Sale did nothing to change this fact. Indeed, after the First Deed of Trust was extinguished as a matter of law by the HOA Foreclosure Sale, there was no act that BANA could have taken which could have conceivably impacted the ownership of the Property. The Plaintiff is not complaining of a procedural defect that may have occurred during the course of the bank's foreclosure proceedings. On the contrary, the Plaintiff asserts that the Bank Foreclosure Sale was wrongful and void ab initio from the outset.

While the statute of limitations is not an unconscionable defense, it is not such a meritorious defense that either the law or the fact should be strained in aid of it, nor should this court indulge in any presumptions in its favor. *Howard v. Waale-Camplan & Tiberti, Inc.*, 67 Nev. 304, 217 P.2d 872 (1950). Defendants' efforts to impose the 90-day limitation of N.R.S. §107.080(5) to the facts at hand

are strained to say the least. Pursuant to law, the Plaintiff is entitled to bring an action for quiet title within 5 years after the time that it held title and possession.

**5. THE APPLICABLE PERIOD OF LIMITATIONS TO THIS ACTION**  
**IS THE FIVE YEAR STATUTE OF NRS §11.080**

The statute of limitations applicable to this action is five years. This period of limitations is set forth in NRS 11.080, which very specifically provides as follows:

**Seisin within 5 years; when necessary in action for real property.**  
No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

In this case, there is no dispute that the Plaintiff held title to the Property within the 5 years prior to the filing of this action. Plaintiff held record title and possession of the Property from no later than the recording of the HOA Foreclosure Deed in its favor on April 13, 2011, until at least August 29, 2011, the date on which the Bank Foreclosure Sale took place. This action was filed on March 19, 2015, well within the 5 year time period in which the Plaintiff has a right to file an action for the recovery of real property. As a result, the instant action has been timely brought and the instant Motion is without merit.

**6. THE ORDER GRANTING MSJ SETS FORTH VARIOUS FINDINGS THAT WERE NOT ADDRESSED AT THE TIME OF THE HEARING AND GRANTED RELIEF THAT WAS NOT REQUESTED**

Pursuant to its terms, the Motion for Summary Judgment at issue herein was limited in scope to the untimeliness of Plaintiff's Complaint. The Motion itself stated as much and the Plaintiff relied upon this statement in preparing its Opposition, specifically not addressing various issues. At the hearing of the matter, the Court expressly stated that it was not ruling upon the issues other than the statute of limitations. See App 519. This included the issues of laches and equitable estoppel. Nonetheless, the Order drafted by the Defendants and submitted to the Court over the Plaintiff's objection included numerous findings of fact and conclusions of law which were not addressed and which are irrelevant.

As set forth in the Plaintiff's Motion for Reconsideration, and as demonstrated by the transcript of the hearing of the Motion for Summary Judgment, numerous factual findings and conclusions of law set forth in the Order Granting MSJ were not made by the court nor even argued by the parties at the time of the hearing. Nor were these findings relevant to the court's limited determination that the Plaintiff's Complaint was barred by the time limitation of N.R.S. 107.080. The Court erred by simply signing the Order that was submitted

by the Defendants' counsel over the Plaintiff's objection. Moreover, in addition to improperly citing findings of fact and conclusions of law, the Order Granting MSJ purported to expunge the Plaintiff's Lis Pendens – something that was neither requested in the subject Motion nor at the hearing. On the contrary, as an after thought, the Defendants simply granted themselves such relief in the Order.

Upon remand, the Defendants will almost certainly argue that the factual findings that are set forth in the Order Granting MSJ constitute the law of the case. Because these findings were never addressed, this is wholly inappropriate. The district court should be directed to appropriately amend its Order Granting MSJ to limit it to the issue that was incorrectly ruled up: that a party who is wrongfully foreclosed upon by the holder of an extinguished and void security interest must file suit within 90 days thereafter or be forever divested of its real property.

### **III.**

#### **CONCLUSION**

For the reasons set forth herein, the district court erred. The Order Granting MSJ is premised upon a lack of understanding of real property law and the effect – or lack thereof – of a void deed. Because BANA's First Deed of Trust was extinguished as a matter of law pursuant to NRS Chapter 116 at the time of the HOA Foreclosure Sale, BANA possessed no right nor basis to conduct the Bank

Foreclosure Sale and such sale was void ab initio. As a result, neither EZ Properties nor Blaha received valid title to the Property. The Property continued to belong to the Plaintiff and, in fact, there has never been a point in time since the HOA Foreclosure Sale when the Property did not belong to the Plaintiff.

The district court's judgment effectively approves of the foreclosure of an extinguished security interest, holding that it mattered not that BANA's First Deed of Trust was extinguished as a matter of law at the time of the Bank Foreclosure Sale and that it was nonetheless somehow entitled to foreclose. Indeed, the district court's order suggests that the holder of an extinguished security interest should simply foreclose upon its invalid interest anyway and hope that the property owner does not timely complain. In such a manner, the holder of the extinguished security interest may nonetheless recover the security that it may have lost through its own misfeasance at the expense of the unwary property owner. This is a slippery slope to say the least.

The district court's order is contrary to the law. This Court should thus reverse the district court's order and remand with clear instructions to the district court that the purported foreclosure of a void and extinguished deed of trust cannot effect a valid transfer of title. In addition, the district court should be directed to limit the findings of fact, conclusions of law and relief granted



pursuant to the Order Granting MSJ to those matters that were actually argued and ruled upon at the time of the hearing.

DATED this 15<sup>th</sup> day of May, 2017.

ROGER P. CROTEAU & ASSOCIATES, LTD.

*/s/ Timothy E. Rhoda* \_\_\_\_\_

ROGER P. CROTEAU, ESQ.

Nevada Bar No. 4958

TIMOTHY E. RHODA, ESQ.

Nevada Bar No. 7878

9120 West Post Road, Suite 100

Las Vegas, Nevada 89148

(702) 254-7775

*Attorney for Appellant*

**LAS VEGAS DEVELOPMENT GROUP, LLC**

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X6 with 14 point, double spaced Times New Roman font.
2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 5102 words. Counsel has relied upon the word count application of the word processing program in this regard.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the  
Nevada Rules of Appellate Procedure

DATED this 15<sup>th</sup> day of May, 2017.

ROGER P. CROTEAU & ASSOCIATES, LTD.

*/s/ Timothy E. Rhoda* \_\_\_\_\_

ROGER P. CROTEAU, ESQ.

Nevada Bar No. 4958

TIMOTHY E. RHODA, ESQ.

Nevada Bar No. 7878

9120 West Post Road, Suite 100

Las Vegas, Nevada 89148

(702) 254-7775

*Attorney for Appellant*

**LAS VEGAS DEVELOPMENT GROUP, LLC**

## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 15<sup>th</sup> day of May, 2017, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's efile and serve system.

Kevin R. Hansen, Esq.  
Amy M. Wilson, Esq.  
LAW OFFICES OF KEVIN R. HANSEN  
5440 West Sahara Avenue, Suite 206  
Las Vegas, Nevada 89146  
*Attorney for Respondents  
EZ Properties, LLC and K&L Baxter  
Family Partnership*

Aaron R. Maurice, Esq.  
Brittany Wood, Esq.  
KOLESAR & LEATHAM  
400 South Rampart Boulevard  
Suite 400  
Las Vegas, Nevada 89145  
*Attorney for Respondents  
James R. Blaha and Noble Home  
Loans formerly known as FCH  
Funding, Inc.*

Darren T. Brenner, Esq.  
William S. Habdas, Esq.  
AKERMAN, LLP  
1160 Town Center Drive, Suite 330  
Las Vegas, Nevada 89144  
*Attorney for Respondents  
Bank of America, N.A. and  
Recontrust Company*

       VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

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/s/ Timothy E. Rhoda  
An employee of ROGER P. CROTEAU &  
ASSOCIATES, LTD.