IN THE SUPREME COURT OF THE STATE OF NEVADA

***

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.	)	Supreme Court No. 71875

APPEAL

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

APPELLANT'S REPLY BRIEF

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.

INTRODUCTION

At issue in this case is real property commonly known as 7639 Turquoise Stone Court, Las Vegas, Nevada 89113, Assessor Parcel No. 176-10-213-042 (*the "Property"*). The Property was the subject of a homeowners association lien foreclosure sale conducted pursuant to NRS 116.3116 *et seq*. dated April 12, 2011 (*"HOA Foreclosure Sale"*), which was carried out on behalf of Nevada Trails II Community Association (*the "HOA"*). The HOA Foreclosure Sale served to extinguish all subordinate liens, including the First Deed of Trust held by Defendant/Appellee, Bank of America, N.A. (*"BANA"*), as successor by merger to BAC Home Loans Servicing, LP, as a matter of law.

Notwithstanding the extinguishment of its security interest, on August 29, 2011, BANA and Recontrust Company, N.A. purported to conduct a foreclosure sale (*"Bank Foreclosure Sale"*) based upon the First Deed of Trust. The Property was purportedly purchased by Defendant, EZ Properties, LLC, which subsequently purportedly sold it to Defendant, James Blaha. Appellant asserts that the Bank Foreclosure Sale, which was based solely upon an invalid, extinguished and non-existent security interest, was necessarily void ab initio.

The primary question at hand in this appeal is whether the purported foreclosure of a void, extinguished, invalid and non-existent deed of trust can

effect a valid change of title and therefore divest the rightful owner of its ownership interest. 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 period set forth in N.R.S. 107.080(5)(b) or whether he or she is entitled to the 5 year period that is specifically and expressly granted by N.R.S. 11.080.

What is **not** at issue in this case is the validity of the HOA Foreclosure Sale at which the Plaintiff/Appellant 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/Appellant. 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 exists at this time 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. THE RESPONDENTS HAVE INCLUDED NUMEROUS IRRELEVANT FACTS IN THEIR BRIEF

As they have demonstrated themselves to be prone to doing, the Respondents have included a number of factual allegations in their brief that are completely irrelevant to the matter at hand. For example, the Respondents discuss correspondence that was allegedly transmitted between BAC Home Loans Servicing and Absolute Collection Services, LLC in advance of the HOA Foreclosure Sale. See Answering Brief, p. 3-4. While this correspondence certainly demonstrates without a shadow of a doubt that BANA possessed actual notice of the HOA's foreclosure proceedings well in advance of the HOA Foreclosure Sale, it has nothing to do with the timeliness of the Appellant's Complaint, which is the only issue in this appeal.

Similarly, the Respondents discuss a bankruptcy petition purportedly filed by the former owner of the Property, claiming that one of the Notices of Trustee's Sale related to the HOA Foreclosure Sale was filed in violation of the automatic stay. See Answering Brief, p. 4. The Respondents go on to allege that the Notice of Trustee's Sale failed to identify the amount of an alleged super-priority lien. *Id*. Again, these facts have absolutely nothing to do with the issue before this Court.

Finally, the Respondents assert that the Appellant spent no money improving the Property and little money maintaining the Property during the time that it held record title. See Answering Brief, p. 6. It can only be imagined what relevance the Respondents believe this to have to the issue at hand. Much like they included superfluous and irrelevant information in the Order appealed from, the Respondents simply could not refrain from doing so herein. These irrelevant factual allegations should be ignored by the Court.

2. THE PURPORTED BANK FORECLOSURE SALE WAS A FACTUAL AND LEGAL IMPOSSIBILITY

As set forth above, 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. Ironically, the first paragraph of the Respondents' argument confirms that the First Deed of Trust was extinguished as a matter of black letter lien law, citing *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 550 P.2d 413 (Nev. 1976) for the fact that a foreclosure sale terminates all other legal and equitable interests in the land. This is exactly what happened at the time of the HOA Foreclosure Sale – the First Deed of Trust was extinguished as a matter of black letter lien law and was thereafter invalid and ineffective for all purposes.

Because the district court never addressed in any manner the validity of the HOA Foreclosure Sale, the subsequent Bank Foreclosure Sale necessarily must be deemed to have been based upon a void, extinguished and non-existent security interest. All of the arguments of the Defendants/ Appellees suggest that the Bank Foreclosure Sale was somehow valid and effective although there existed no security interest upon which to foreclose at the time of the Bank Foreclosure Sale. These arguments quite simply make no sense.

The United States District Court for the District of Nevada has addressed factual circumstances that were substantially identical to those at issue herein in the matter of *Las Vegas Development Group, LLC v. Yfantis*. In that case, Judge Andrew Gordon stated as follows:

> Wells Fargo contends that this claim is time-barred under NRS § 107.080(5). LVDG responds that its claim is not time-barred because Wells Fargo's foreclosure sale was void ab initio. Additionally, LVDG argues that the applicable statute of limitations is five years from the last time it held title to or possessed the property under NRS § 11.080.
>
> **LVDG's wrongful foreclosure claim is not based on a violation of §107.080's procedural aspects of foreclosure, and thus §107.080(5)'s limitation period does not apply.** Rather, LVDG contends Wells Fargo had no authority to conduct the foreclosure sale because its security interest in the property had been extinguished.
>
> LVDG's claim is akin to a tortious wrongful foreclosure claim, which "challenges the authority behind the foreclosure, not the foreclosure

> act itself." *McKnight Family, L.L.P. v. Adept Mgmt. Servs., Inc.*, 310 P.3d 555, 559 (Nev. 2013) (en banc). LVDG's complaint refers to this claim as "equitable relief," which it seeks based on its position that the deed of trust was void by the time Wells Fargo attempted to exercise the power of sale. For relief on this claim, LVDG seeks a declaration that Wells Fargo's sale of the property is void. This claim is duplicative of LVDG's quiet title claim and I therefore dismiss it as redundant.

Las Vegas Dev. Grp., LLC v. Yfantis, 173 F. Supp. 3d 1046, 1060-1061 (D. Nev. Mar. 24, 2016)(Emphasis added). Although Judge Gordon found the wrongful foreclosure claim to be duplicative of the quiet title claim, and therefore dismissed it, he allowed the quiet title claim itself to stand. Judge Robert C. Jones has ruled in an identical manner:

> Defendants argue this claim is time-barred under Nev. Rev. Stat. § 107.080(5) because LVDG failed to file its Complaint within ninety days of the date of the foreclosure sale. LVDG argues that its claim is not time-barred because the foreclosure sale was void ab initio. **Section 107.080(5) does not apply to LVDG's wrongful foreclosure claim because the claim is not based on the procedural requirements of that section.** Instead, LVDG "challenges the authority behind the foreclosure, not the foreclosure act itself." *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev. 2013) (en banc). LVDG argues that Defendants had no authority to foreclose because its security interest in the Property was extinguished by the HOA foreclosure sale. This claim is duplicative of LVDG's quiet title claim. With both claims, LVDG seeks a declaration that the foreclosure sale is void because Defendants had no authority to foreclose. (See Compl. ¶¶ 75-77, 85; 133-135). The Court dismisses the claim, with leave to amend.

Las Vegas Dev. Grp., LLC v. Steven, 2016 U.S. Dist. LEXIS 77172, 16-17 (D.

Nev. June 14, 2016)(Emphasis added).

Judge Gordon and Judge Jones of the United States District Court for the District of Nevada have addressed factual circumstances substantially identical to those at issue herein and both have ruled that the time limitation of NRS 107.080(5) does not apply to the facts at hand. This Court should rule in an identical manner in this case, where the Appellant has brought substantially identical claims.

Defendants cite the matter of *Bldg. Energetix Corp. V. EHE*, 129 Nev. Adv. Op. 6, 294 P.3d 1228 (2013) for its proposition that "NRS 107.080(5)(a) - (c) and NRS 107.080(6) enumerate the limited instances in which a nonjudicial foreclosure sale may be made void." On multiple occasions, the Respondents assert that "**all**" claims challenging a Chapter 107 foreclosure sale as void must be brought within the limitations period imposed by NRS 107.080(5) - (6). See Answering Brief, p. 19, 20, 21, 23, 29. This repeated claim demonstrates a fundamental lack of understanding of the law.

The Defendants seem to assert that the circumstances set forth in the statute are the *only* circumstances under which a foreclosure sale may be void. This is simply not the case. For example, NRS 107.080(5) - (6) makes no mention of circumstances such as those involving a forged deed of trust. Such a fraudulent

deed of trust could never form the basis for a valid foreclosure sale. As such, it is readily apparent that NRS 107.080(5) - (6) does not cover "all" challenges that might be made to a foreclosure sale.

> When a sale is void, it is "ineffectual." *Deep v. Rose*, 234 Va. 631, 364 S.E.2d 228, 232, 4 Va. Law Rep. 1601 (Va. 1988). "No title, legal or equitable, passes to the purchaser." *Id.*; see, e.g., *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544, 554 (Neb. 2003) (stating "when a sale is void, 'no title, legal or equitable, passes to the sale purchaser or subsequent grantees'" even if the property is bought by a bona fide purchaser (quoting 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.20 (3d ed. 1993) & citing 12 Thompson on Real Property, supra, § 101.04(c)(2)(ii) at 403 (David A. Thomas ed.1994)).

7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS 116223, 11-12 (D. Nev. Aug. 31, 2015)

A void sale means that there was no sale and that legal title never passed to the purported purchaser. Although "void," "voidable," and "invalid" are often used interchangeably, the "general rule" is that defects and irregularities in a sale render it merely voidable and not void. However, substantially defective sales have been held to be void. *Cedano v. Aurora Loan Servs. (In re Cedano)*, 470 B.R. 522, 529-530 (B.A.P. 9th Cir. Apr. 9, 2012)(citations omitted). As this Court has very recently held, "the difference between a void and a voidable transaction is that the former 'can never become valid,' and the latter 'can be made valid by

subsequent judicial decision.'" *LN Mgmt. LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC*, 2017 Nev. LEXIS 71 (Nev. Aug. 3, 2017)

It is difficult to conceive of a more substantially defective foreclosure sale than one where the entire sale is based upon a void, extinguished, non-existent and therefore unenforceable security instrument. Indeed, where a deed of trust has been extinguished as a matter of law, "[g]iven that title to property is held by the trustee under a deed of trust, it is difficult to accept the notion that one who no longer has title could nonetheless convey effective title." *Dimock v. Emerald Properties*, 81 Cal. App. 4th 868, 877 (Cal. App. 4th Dist. June 21, 2000).

The Respondents cite the matter of *Michniak v. Argent Mortg. Co., LLC*, 2012 Nev. Unpub. LEXIS 1776 (Nev. Dec. 14, 2012) in support of its ludicrous position that a Chapter 107 foreclosure sale is unassailable no matter whether or not a valid security interest existed at the time of the sale. However, in *Michniak*, this Court stated that the appellant's only basis for asserting quiet title was through a challenge to the foreclosure sale. *Id*. As recognized by Judges Gordon and Jones, the Appellant's claims herein are directed not towards the procedural requirements of Chapter 107 but towards the authority (or lack thereof) behind the Bank Foreclosure Sale. Under such circumstances, *Michniak* is highly distinguishable from the instant case.

It is both legally and factually impossible for a foreclosure sale based upon an extinguished deed of trust to effect a valid change of title. Because there was no authority whatsoever for the underlying transaction, it was and is void ab initio. Even a bona fide purchaser cannot acquire an interest in property when the grantor's underlying deed is void. See generally Caryl A. Yzenbaard, Residential Real Estate Transactions § 6:25 n. 47 (2005) (explaining that a void deed represents "one of the 'hidden risks' of the recording system").

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. Appellant remained the owner of the Property after the Bank Foreclosure Sale and at all times since.

3. BANA COULD TRANSFER ONLY THAT TITLE THAT IT POSSESSED TO GIVE

The Defendants rely primarily upon NRS 107.080(5) - (6), which provides

as follows:

> 5. Every 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. A sale made pursuant to this section must be declared void by any court of competent jurisdiction in the county where the sale took place if:
> (a) The trustee or other person authorized to make the sale does not substantially comply with the provisions of this section or any applicable provision of NRS 107.086 and 107.087;
> (b) Except as otherwise provided in subsection 6, an action is commenced in the county where the sale took place within 90 days after the date of the sale; and
> (c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 30 days after commencement of the action.
> 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.

Noticeably absent from the Appellees' argument is any mention of the fact that the Bank Foreclosure Sale transferred to the purchaser only the "title of the grantor" pursuant to NRS 107.080.

As discussed in *Dimock v. Emerald Properties*, 81 Cal. App. 4th 868 (Cal. App. 4th Dist. June 21, 2000), "[g]iven that title to property is held by the trustee under a deed of trust, it is difficult to accept the notion that one who no longer has

title could nonetheless convey effective title." Because the First Deed of Trust was extinguished as a matter of law, the trustee under the First Deed of Trust possessed no title nor right to convey title. The First Deed of Trust was a nullity at the time of the Bank Foreclosure Sale. Because BANA possessed no title nor authority to transfer title, the transferee at the Bank Foreclosure Sale, EZ Properties, did not receive valid title. Naturally, EZ Properties thereafter was unable to transfer valid title to Blaha. Appellant has remained the owner of the Property at all times since the fraudulent Bank Foreclosure Sale.

4. 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

As set forth in the Opening Brief, the Order appealed from, which was drafted by the Respondents and submitted to the Court over Appellant's objection, includes numerous factual findings that relate to issues that the Court expressly stated that it was not ruling upon. See App 519. Much like the Respondents included irrelevancies in its brief filed herein, they could not refrain from including this information in the Order that they unilaterally submitted to the district court. Indeed, the Respondents went so far as to grant themselves relief expunging the Appellant's Lis Pendens although this relief was neither requested

in the written pleadings before the district court nor discussed in any manner at the hearing of the Motion – the Respondents simply deemed themselves worthy of such relief. The Appellant was not given the opportunity to even argue the issue.

The Court erred by simply signing the Order that was submitted by the Defendants' counsel over the Plaintiff's objection. Upon remand, the Respondents will almost certainly seek to rely upon the factual findings that were erroneously included in the Order. 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. In the alternative, the Order should simply be vacated in its entirety.

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 Order Granting MSJ must be reversed and the instant matter must be remanded with clear instructions to the district court regarding the effect of a void deed. 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 14h day of August, 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 3305 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 14th day of August, 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 14th day of August, 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 eflex e-file 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.