

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF
NEW YORK MELLON, F/K/A THE BANK
OF NEW YORK MELLON AS TRUSTEE
FOR THE CERTIFICATEHOLDERS OF THE
CWABS, INC., ASSET-BACKED
CERTIFICATES, SERIES 2005-17; AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Appellant,

vs.

THOMAS JESSUP, LLC SERIES VII;
FOXFIELD COMMUNITY ASSOCIATION;
AND ABSOLUTE COLLECTION
SERVICES, LLC,

Respondent.

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May 16 2019 08:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 73785

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Linda M. Bell, District Judge
District Court Case No. A-13-693205-C

MOTION FOR LEAVE TO FILE AMICUS BRIEF

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

COMES NOW, Amici curiae, LAS VEGAS DEVELOPMENT GROUP, LLC; LVDG, LLC; AIRMOTIVE INVESTMENTS, LLC; and THUNDER PROPERTIES, INC. (*collectively*, “*Amici*”), by and through their attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby move this Honorable Court for leave to file an amicus brief in support of the Respondent’s Petition for En Banc Reconsideration herein. Pursuant to NRAP 29(c), a copy of the proposed amicus brief is being filed concurrently herewith.

Amici are collectively the owners of hundreds of parcels of real property that were the subject of homeowners association lien foreclosure sales conducted over the course of the past several years. Many of these homeowners association lien foreclosure sales were conducted by Absolute Collection Services, LLC (“*Absolute*”), a Respondent in this appeal and the party that carried out the homeowners association lien foreclosure sale at issue herein.

Amici are presently involved in hundreds of lawsuits related to the force and effect of homeowners association lien foreclosure sales upon security interests that were recorded against their various properties, including many in which Absolute was the foreclosing trustee. During the course of this litigation, Amici have become well acquainted with the policies and procedures of Absolute, as well as the testimony that has been proffered on its behalf. Absolute has repeatedly testified that its policy and practice was to accept checks that were tendered by Miles Bauer Bergstrom & Winters, LLP (“*Miles Bauer*”) on behalf of Bank of America, N.A. (“*BANA*”). As such, the Panel’s substitution of its own factual determination regarding the meaning of Absolute’s correspondence to Miles Bauer herein was not only procedurally improper, but it was also factually incorrect.

Pursuant to its proposed Amicus Brief, Amici can point this Court to numerous instances on which Absolute's principal and owner, Kelly Mitchell, testified under oath that Absolute, subject to very limited exceptions, would have accepted any check that Miles Bauer or BANA might have remitted in connection with real property that was the subject of homeowners association lien foreclosure sales that it was responsible for carrying out. Moreover, Ms. Mitchell has testified that Absolute *did* accept such checks on many occasions.

Amici have a significant interest in the issues addressed in the instant appeal. Since the entry of the *Jessup* decision, BANA and its counsel have sought to apply *Jessup*'s holding to virtually every lawsuit involving a homeowners association lien foreclosure sale carried out by Absolute. Moreover, many courts have treated the *Jessup* decision as a binding decision on matters of fact – specifically, for the purpose of determining whether it would have been futile for Miles Bauer or BANA to remit a check in satisfaction of the superpriority portion of the applicable homeowners association lien. This is very problematic given the fact that Ms. Mitchell's testimony generally contradicts such a finding.

Based upon the experience of Amici and their counsel in other litigation involving Absolute and BANA, Amici are aware that Absolute has frequently testified that it would have accepted any check that Miles Bauer might have remitted in an attempt to satisfy the superpriority portion of a homeowners association lien. Moreover, Absolute has testified that it would have accepted such a check even if it disagreed with the amount. Under such circumstances, it was quite simply not futile for BANA and Miles Bauer to remit a check to Absolute. Despite this fact, BANA and Miles Bauer sometimes remitted checks and sometimes did not. However, based upon Absolute's testimony, on those occasion on which Miles Bauer did not remit a check, it was not because

Absolute would have necessarily rejected it. For this reason, the Panel's opinion is erroneous and should be reconsidered. At the very least, the question of whether BANA should be excused from remitting a check should be a fact question to be determined on a case by case basis – not based upon a Panel opinion that substituted an incorrect factual finding in the place of that of the trial court.

Amici have personal knowledge regarding Absolute's testimony regarding its practices and procedures and are aware that Absolute's testimony simply does not comport with the Panel's finding in this matter. Amici have a significant interest in the issue addressed in the instant appeal and an amicus brief is desirable. See NRAP 29(c). Amici believe that the arguments contained in their proposed brief will be of aid to the Court and respectfully request leave to file the same.

DATED this 16th day of May, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Nevada Supreme Court on May 16, 2019. Electronic service shall be made in accordance with the Master Service List.

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