

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3
4 VEGAS UNITED INVESTMENT
5 SERIES 105, INC., a Nevada
6 Domestic Corporation

7 Appellant,

8 v.
9

10 CELTIC BANK CORPORATION,
11 Successor-in-Interest to SILVER
12 STATE BANK by acquisition of assets
13 from the FDIC as Receiver for
14 SILVER STATE BANK, a Utah
15 Banking Corporation organized and in
16 good standing with the laws of the
17 State of Utah,

18 Respondent.

Electronically Filed
Supreme Court No. 74163 Nov 16 2017 02:08 p.m.
Elizabeth A. Brown
District Court Case No. 17-28299 Clerk of Supreme Court

**RESPONSE TO EMERGENCY
MOTION UNDER NRAP 27(e)
NRAP 8 MOTION FOR
INJUNCTION PENDING APPEAL**

*****ACTION REQUIRED BY
NOVEMBER 21, 2017*****

19 Respondent, CELTIC BANK CORPORATION, (“Respondent”), by and
20 through its attorney, Allyson R. Noto, Esq. of the law firm of Sylvester &
21 Polednak, Ltd., respectfully submits this Response to Emergency Motion Under
22 NRAP 27(e) NRAP 8 Motion for Injunction Pending Appeal.

23 **I. INTRODUCTION**

24
25 This case arises from Respondent’s exercise of its rights pursuant to its first
26 priority Deed of Trust recorded against a commercial property located at 181 N.
27

1 Gibson Road, Henderson, Nevada (the "Property"). Appellant purchased the
2 Property for \$30,000 at an Owner's Association foreclosure sale ("Association
3 Sale"). Contrary to Appellant's brief, it did not purchase the Property at a
4 "homeowner's association sale."
5

6
7 After trial, the court found in favor of Respondent and ordered that
8 Respondent could judicially foreclose upon the Property.

9
10 The trial court then denied Appellant's request for injunction finding that
11 Appellant failed to meet its burden regarding the requisite elements to obtain an
12 injunction pending appeal.
13

14 The trial court based its decision, in part, due to Appellant's continued lack
15 of interest in protecting the Property from third-party claims. The trial court
16 considered all the factors enumerated in *Mikohn Gaming Corp. v. McCrea*, 120
17 Nev. 248 (2004)(citing *Fritz Hansen A/S v. District Court*, 116 Nev. 650, 659
18 (2000)). The trial court was concerned about the irreparable harm to the
19 Respondent if Appellant's stay is granted. Further, the trial court found that
20 Appellant did not enjoy a likelihood of success on the merits. Thus, two of the
21 factors weighed heavily in favor of Respondent and the injunction was denied.
22
23
24

25 **A. The Association's Lien and Foreclosure Documents Reference**
26 **CC&Rs Which Do Not Incorporate NRS 116.**

27 1. On August 23, 2011, Red Rock Financial Services ("Red Rock")
28

1 recorded a Lien for Delinquent Assessments ("Assessment Lien").

2 2. The Assessment Lien referenced CC&Rs, recorded on 10/24/1994, in
3 Book Number, as Instrument Number 19940240000285.

4 3. There are no CC&Rs recorded with Instrument Number
5 19940240000285 in the Official Records of Clark County Nevada.

6 4. There is a First Amendment recorded in 1994 against the Property
7 which amends that certain document entitled Declaration of Protective Covenants,
8 Conditions and Restrictions ("1989 Master CC&Rs") which were recorded by
9 Declarant AmPac Development Company in 1989 as Instrument Number
10 198909110000173.
11

12 5. NRS 116 was enacted in 1991. The 1989 Master CC&Rs were
13 recorded prior to NRS 116 being enacted and as such, have no reference to NRS
14 116 nor any "super-priority" status of an HOA lien.
15

16 6. The First Amendment recorded in 1994 also has no reference to NRS
17 116.
18

19 7. On October 14, 2011, a Notice of Default ("NOD") was recorded by
20 Red Rock.

21 8. On December 21, 2011, Respondent received correspondence from
22 Red Rock, Trustee for the Association, advising "[t]he Association's Lien for
23 **Delinquent Assessment is Junior only to the Senior Lender/Mortgage**
24 **Holder.**" It is undisputed that the Respondent was the Senior Lender/Mortgage
25 Holder at the time of the Association Sale.
26

27 9. On February 26, 2014, Red Rock recorded a Notice of Foreclosure
28

1 Sale which again provides a reference to a document that does not exist in the
2 record of Clark County, Nevada.

3 10. Thereafter, the Association foreclosure sale took place and Appellant
4 purchased the Property.
5

6 11. After the foreclosure sale, Respondent redeemed the Property by
7 paying the past due property taxes.

8 **II. LEGAL ARGUMENT**

9
10 Respondent agrees with the factors this Court must address in determining
11 whether an injunction pending appeal should be granted. Those factors are: (1)
12 whether the object of the appeal will be defeated if the stay is denied, (2) whether
13 appellant will suffer irreparable or serious injury if the stay is denied, (3) whether
14 respondent will suffer irreparable or serious injury if the stay is granted, and (4)
15 whether appellant is likely to prevail on the merits in the appeal. This Court has
16 not indicated that any one factor carries more weight than the others, although if
17 one or two factors are especially strong, they may counterbalance other weak
18 factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248 (2004)(citing *Fritz*
19 *Hansen A/S v. District Court*, 116 Nev. 650, 659 (2000)).
20

21 1. **An Injunction is Not Appropriate Based Upon the Relevant Factors.**

22 **A. Object of the Appeal.**

23
24 Respondent does not deny that should the judicial foreclosure sale move
25 forward, it will extinguish any interest Appellant has in the Property and defeat
26 the object of the appeal. The trial court agreed with Respondent that it holds a
27 first priority deed of trust on the property and that if Appellant purchased the
28

1 property at the Owner's Association foreclosure sale, it took it subject to
2 Respondent's first deed of trust. Respondent also agrees that if the appeal is
3 successful the award of costs will be reversed. Accordingly, Respondent agrees
4 that this factor weighs in favor of stay. However, this Court must consider all
5 factors and if a stay is granted, an appropriate amount of the bond must be set.
6

7 **B. Irreparable or Serious Harm.**

8 Respondent also agrees with Appellant that this Court has held that the loss
9 of a property right is generally irreparable. This is where the inquiry in this case
10 becomes particularly important as recognized by the trial court. This Court must
11 look to the serious injury to each side when determining whether to grant or deny
12 the relief requested. The trial court heard testimony at the time of trial from
13 Appellant's principal, Charles Schmidt, that Appellant has not paid any property
14 taxes on the Property nor has Appellant paid for garbage removal for the subject
15 Property. In fact, Republic Services has a current lien on the Property. Notably, it
16 was Respondent that paid to remove the tax lien and redeemed the Property even
17 after Appellant claimed to have purchased the property and own it free and clear
18 of Respondent's security interest. In addition, upon information and belief,
19 Appellant has failed and refused to pay a recent special assessment assessed by
20 the very same Owner's Association from which it claims to have purchased the
21 Property, thus exposing the Property to another assessment lien.
22
23
24

25 Accordingly, as recognized by the trial court in denying Appellant's request
26 for injunction, the actions of Appellant, if the judicial foreclosure sale is stayed,
27 are, in fact, exposing Respondent to additional expense and potential additional
28

1 encumbrances by way of tax liens or assessment liens. Importantly, Appellant has
2 created itself a situation where Respondent could lose its interest in the Property
3 due to Appellant's actions both past and present. Appellant has already
4 demonstrated to the trial court its unwillingness to take on the responsibilities of
5 its claimed ownership of the Property, but simply wants to enjoy all of the claimed
6 benefits leaving others (including Respondent) to protect the Property from third-
7 party claims. Certainly, this factor weighs in favor of the Respondent because it is
8 clear that Appellant is not interested in protecting its interest in the property. At
9 any moment Republic Services could begin foreclosure proceedings and
10 Appellant would be required to either pay the expenses or be subject to losing the
11 Property. On the other hand, Respondent has demonstrated it is committed to
12 protecting its interest in the property.

13
14
15 Should this Court stay the judicial foreclosure, Respondent would be
16 required to pay for the failure of Appellant to protect its own claimed property
17 interest by paying off the Republic Services lien and/or additional taxes or
18 assessments, Respondent could also lose its property interest which would be an
19 irreparable injury to Respondent. Accordingly, this factor weighs heavily in favor
20 of Respondent.

21
22 **C. Likelihood of Success on the Merits.**

23
24 Appellant does not have a likelihood of success on the merits of this case.
25 In order to prevail on appeal, this Court must find that the trial court abused its
26 discretion. Based upon all of the evidence, the trial court found:

27 NRS Chapter 116 codifies the Uniform Common-Interest Ownership
28

1 Act or UCIOA, and applies to all common-interest communities
2 created within the State of Nevada, subject to certain exceptions. *See*
3 NRS 116.1201(I). One of those exceptions is set forth in NRS
4 116.1201(2)(b). It states NRS Chapter 116 does not apply to “[a]
5 planned community in which all units are restricted exclusively to
6 nonresidential use unless the declaration provides that this chapter or
a part of this chapter does not apply to that planned community
pursuant to NRS 116.12075.”

7 Clearly, as set forth in NRS 116.1201 and 116.12075, NRS Chapter 116
8 does not apply to non-residential common-interest communities *except* to the
9 extent set forth by their CC&Rs. In this case, there is no question the subject
10 property is non-residential and located within a business or industrial park. The
11 trial court considered the terms set forth in the CC&Rs in determining whether
12 exceptions exist for NRS Chapter 116 applied.
13

14 The trial court recognized that there are two separate declarations of
15 covenants, conditions and restrictions recorded against the property. The first
16 CC&Rs, referred to as the 1989 Master CC&Rs was recorded over two years
17 before NRS Chapter 116 was enacted on December 31, 1991. Neither the 1989
18 Master CC&Rs nor its 1994 First Amendment mentions NRS Chapter 116, much
19 less indicates this statutory scheme, or any part thereof, applies to the subject
20 property. Further, there is no language contained within the 1989 Master CC&Rs
21 and its First Amendment to suggest a lien for delinquent association assessments
22 has priority over first security interest. While the 2004 CC&Rs does mention
23 NRS Chapter 116, it also specifies “[t]he Real Property shall not be subject to the
24 provisions of the Uniform Common Interest Ownership Act, codified in Chapter
25 116 of the Nevada Revised Statutes (‘NRS’) except to the extent permitted under
26
27
28

1 NRS 278A.170.” (Emphasis added)

2 As argued by Respondent and adopted by the trial court, NRS 278A.170
3 outlines the *procedures* for enforcing assessment payments for the maintenance of
4 “common open space” provided in NRS 116.3116 to 116.31168, it does not state,
5 substantively, the priority of the encumbrances upon the property and the
6 exceptions thereto outlined in NRS 116.3116 are to be applied. NRS 278A.170
7 does not state the association’s assessments’ lien charged for the nine-month
8 period immediately preceding the action is prior to any first-security interest. The
9 trial court found that while NRS 278A.170 provides, procedurally, the
10 association’s assessments shall be enforced as provided in NRS 116.3116 to
11 116.31168, it does not state the assessments, or any part thereof, shall take priority
12 over any other liens.
13

14 In addition, the CC&Rs also contain clauses which protect certain
15 encumbrances, which include mortgages and deeds of trust. Specifically, “[n]o
16 violation of any provision of this Declaration, nor any remedy exercised
17 hereunder, shall defeat or render invalid the lien of any Mortgage made in good
18 faith and for failure upon any portion of the Project, nor shall any Lien created
19 hereunder be superior to any such Mortgage unless such Lien shall have been
20 recorded in the Public Records prior to the recordation... of such Mortgage.”
21 Further, “[n]o violation or breach of, or failure to comply with, any provision of
22 this Declaration, and no action to enforce any such provision, shall affect, defeat,
23 render invalid or impair the lien of any mortgage, deed of trust or other lien on
24 any Lot or part of the Premises taken in good faith and for value; nor shall any
25
26
27
28

1 violation, breach, failure to comply or action to enforce affect, defeat, render
2 invalid or impair the title or interest of the holder of any such mortgage, deed of
3 trust or other lien or title or any interest acquired by any purchaser upon
4 foreclosure of any such mortgage, deed of trust or other lien;...” In short, except
5 to the extent the Association can utilize the procedures set forth in NRS 116.3116
6 to 116.31168 for collecting its assessment lien against a delinquent property
7 owner, NRS Chapter 116 does not apply with respect to establishing the priority
8 of such debt, or any part thereof, over the first-security interest held by
9 Respondent. The trial court determined that as NRS Chapter 116 does not apply,
10 the statutory scheme does not render invalid any provision of the two governing
11 documents. *Cf.* NRS 116.2103(1).

14 After trial and reviewing all the evidence, the trial court held that the
15 Respondent is entitled to judicially foreclose given its first-security interest
16 recorded against the property. It is submitted that based upon the foregoing,
17 Appellant is not likely to prevail on the merits of its appeal.

19 2. If an Injunction is Granted Appellant Must Post an Appropriate
20 Bond.

21 District courts have the authority to stay judgment pending appeal. *See*
22 NRCP 62(d); NRAP 8(a)(1)(A). “The purpose of security for a stay pending
23 appeal is to protect the judgment creditor’s ability to collect the judgment if it is
24 affirmed by preserving the status quo and preventing prejudice to the creditor
25 arising from the stay.” *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254
26
27

1 (2005 See also; *Liu Jui-Kwa Chen v, Eighth Judicial District Court*, 390 P.3d 166
2 (2017).
3

4 In *Liu Jui-Kwa Chen*, this Court recognized that a bond is appropriate in
5 cases in which real property is at issue and no monetary damages have been
6 awarded. In the instant matter, the bond necessary to protect Respondent includes
7 the value of the property which it may lose if a stay is granted and other expenses
8 which may result in Respondent losing its property interest. If a stay is granted, in
9 order to preserve the status quo and prevent prejudice to Respondent arising from
10 the stay, Appellant must post bond in the amount of \$660,000 (which is the value
11 of the property) plus remove all encumbrances now existing on the property and
12 agree to pay all property taxes and assessments pending appeal.
13
14
15

16 DATED this 16th day of November, 2017.
17

18 **SYLVESTER & POLEDNAK, LTD.**

19
20 By 

21 Allyson R. Noto, Esq.
22 1731 Village Center Circle
23 Las Vegas, NV 89134
24 *Attorneys for Respondent*
25
26
27
28