

1 ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
2 TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
3 ROGER P. CROTEAU & ASSOCIATES, LTD.
9120 West Post Road, Suite 100
4 Las Vegas, Nevada 89148
(702) 254-7775
5 (702) 228-7719 (facsimile)
croteaulaw@croteaulaw.com
6 *Attorney for Appellant*
VEGAS UNITED INVESTMENT
7 SERIES 105, INC.

Electronically Filed
Nov 19 2018 08:17 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8
9 IN THE SUPREME COURT OF THE STATE OF NEVADA

10 ***

11 VEGAS UNITED INVESTMENT SERIES)
105, INC., A NEVADA DOMESTIC)
12 CORPORATION,)

13 Appellant,)

14 vs.)

15 CELTIC BANK CORPORATION,)
SUCCESSOR-IN-INTEREST TO SILVER)
16 STATE BANK BY ACQUISITION OF)
ASSETS FROM THE FDIC AS RECEIVER)
17 FOR SILVER STATE BANK, A UTAH)
BANKING CORPORATION ORGANIZED)
18 AND IN GOOD STANDING WITH THE)
LAWS OF THE STATE OF UTAH,)

19 Respondents.)
20 _____)

Supreme Court No. 74163

District Court Case No. A728233

21 **EMERGENCY MOTION UNDER NRAP 27(e)**
22 **NRAP 8 MOTION FOR INJUNCTION PENDING APPEAL**

23 * * * **ACTION REQUIRED BY NOVEMBER 21, 2018** * * *

24 COMES NOW, Appellant, VEGAS UNITED INVESTMENT SERIES 105, INC.
25 (“*Vegas United*”), by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD.,
26 and hereby petitions this Honorable Court, pursuant to NRAP 8(a), for an injunction pending
27 appeal to enjoin any further transfer or sale of that real property commonly known as 181 Gibson
28 Road, Henderson, Nevada (*the “Property”*) pending the final resolution of this appeal. The

1 Property was the subject of a sheriff's sale conducted on November 21, 2017. As noted by this
2 Court in its Order dated November 17, 2017, Vegas United possesses a right of redemption until
3 November 21, 2018, pursuant to NRS 21.200 and NRS 21.210. Upon expiration of this period,
4 on **November 21, 2018**, the Respondent could technically transfer or sell the Property. This
5 would defeat the object of the appeal and potentially result in the transfer of the Property, which
6 is unique, to an innocent third party. In the event that Vegas United ultimately prevails in this
7 appeal, such a transfer would necessarily be void and the innocent third party would likely suffer
8 harm. As a result, Vegas United respectfully prays that the Court grant this Emergency Motion
9 for an Injunction pending appeal, enjoining the Respondent from further transferring or selling
10 the Property pending the resolution of this appeal. This Motion is based upon the pleadings and
11 papers on file, the attached Memorandum of Points and Authorities and the Declaration of
12 Timothy E. Rhoda, Esq.

13 DATED this 16th day of November, 2018.

14 ROGER P. CROTEAU & ASSOCIATES, LTD.

15
16 /s/ Timothy E. Rhoda

17 ROGER P. CROTEAU, ESQ.

18 Nevada Bar No. 4958

19 TIMOTHY E. RHODA, ESQ.

20 Nevada Bar No. 7878

21 9120 West Post Road, Suite 100

22 Las Vegas, Nevada 89148

23 (702) 254-7775

24 *Attorney for Appellant*

25 **VEGAS UNITED INVESTMENT**

26 **SERIES 105, INC.**

NRAP 27(e) CERTIFICATE

TIMOTHY E. RHODA, ESQ. declares as follows:

1. Counsel for Respondent, Celtic Bank Corporation, is:

Allyson R. Noto, Esq.
Kelly A. Schmitt, Esq.
SYLVESTER & POLEDNAK, LTD.
1731 Village Center Circle
Las Vegas, Nevada 89134
allyson@sylvesterpolednak.com
kelly@sylvesterpolednak.com
(702) 952-5200

Facts regarding emergency as follows:

2. That Affiant is an attorney for the Defendant/Counterclaimant, Vegas United, and has personal knowledge of the facts contained herein.
3. The Property was the subject of a sheriff's sale dated November 21, 2017.
4. Vegas United presently possesses a right of redemption that expires on November 21, 2018. Upon expiration of the right of redemption, Celtic Bank could technically transfer or sell the Property.
5. The district court previously denied a Motion for Injunction Pending Appeal prior to the sheriff's sale that took place on November 21, 2017. As a result, upon information and belief, it would be futile to request relief from the district court at this time. Moreover, there is not currently enough time to seek relief from the district court.
6. The instant Motion is being filed after 5:00 p.m. on Friday, November 16, 2018, but on Monday, November 19, 2018, I will call the Nevada Supreme Court Clerk's office and advise that this emergency motion has been filed.
7. Vegas United was the owner of record of the Property, having purchased all right, title and interest in it at a homeowners association lien foreclosure sale on or about March 21, 2014.
8. The Plaintiff filed the instant Complaint for Judicial Foreclosure on November 25, 2015.

9. Vegas United filed a Counterclaim asserting that the security interest upon which the Plaintiff sought to foreclose was extinguished as a result of an HOA Foreclosure Sale and that the Plaintiff lacked any valid basis upon which to foreclose the Property.
10. Specifically, Vegas United asserted that the secured interest which purportedly formed the basis for the judicial foreclosure sale was extinguished by operation of law upon foreclosure of the super-priority portion of the HOA lien.
11. The matter proceeded to trial and the district court found that the Plaintiff's security interest was not extinguished by the HOA Foreclosure Sale.
12. Vegas United timely filed a Notice of Appeal on September 28, 2017.
13. Subsequent to the filing of the Notice of Appeal, Plaintiff filed a Notice of Sheriff's Sale on October 12, 2017, scheduling a sheriff's sale to take place on November 21, 2017.
14. Vegas United sought an injunction pending appeal to enjoin the November 21, 2017, sheriff's sale which was denied by this Court pursuant to Order entered on November 17, 2017. Pursuant to this Order, this Court found that an injunction was not warranted at that time and noted that Vegas United likely possessed a right of redemption until November 21, 2017.
15. Vegas United's right of redemption expires on November 21, 2018. If Celtic Bank subsequently transfers or sells the Property, Vegas United will suffer irreparable damages for which there is no remedy at law. Furthermore, an innocent and unwitting third party may obtain disputed title to the Property and likewise suffer irreparable harm.
16. As a result, irreparable injury, loss or damage will be or may be suffered in the event that this Motion is not heard as soon as possible in advance of **November 21, 2018**.
17. Concurrently with filing this Motion with the Nevada Supreme Court, in addition to electronic service, counsel will provide courtesy copies to opposing counsel via

e-mail. Counsel will also hand-deliver the motion as soon as possible.

18. Because the right of redemption expires on **November 21, 2018**, there is insufficient time to hear this Motion in the normal course.

19. I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 16th day of November, 2018.

/s/ Timothy E. Rhoda
TIMOTHY E. RHODA

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

The Plaintiff, Celtic Bank, filed a Complaint for Judicial Foreclosure on November 25, 2015. Vegas United filed a Counterclaim asserting that the security interest upon which the Plaintiff sought to foreclose was extinguished as a result of an HOA Foreclosure Sale and that the Plaintiff lacked any valid basis upon which to foreclose the Property. Specifically, Vegas United asserted that the secured interest which purportedly formed the basis for the judicial foreclosure sale was extinguished by operation of law upon foreclosure of the super-priority portion of the HOA lien.

The matter proceeded to trial and the District Court found that the Plaintiff's security interest was not extinguished by the HOA Foreclosure Sale. Vegas United timely filed a Notice of Appeal on September 28, 2017, asserting that the Court erred. Subsequent to the filing of the Notice of Appeal, Plaintiff filed a Notice of Sheriff's Sale on October 12, 2017, scheduling a sheriff's sale to take place on November 21, 2017. The sheriff's sale took place and Celtic Bank acquired the Property via credit bid.

As this Court noted in its prior Order, Vegas United likely possesses a right of redemption until November 21, 2018. Upon expiration of this right of redemption, Celtic Bank could market and sell the Property to an unwitting third party. However, in the event that Vegas

United ultimately prevails in this appeal and the deed of trust upon which Celtic Bank based its judicial foreclosure sale is deemed to have been previously extinguished at the time of the association foreclosure sale at which Vegas United purchased the Property, then the sheriff's sale and any subsequent transfer of the Property would necessarily be void. In such event, an innocent and unwitting third party may obtain disputed title to the Property and likewise suffer significant irreparable harm.

Because the expiration of the right of redemption is imminent, and the appeal will not be resolved prior to said expiration, Vegas United brings the instant Motion pursuant to NRAP 8(a)(1).

II.

LEGAL ARGUMENT

A. STATEMENT OF THE LAW

NRAP8(a)(1)(C) provides in pertinent part as follows:

(a) Motion for Stay.

(1) Initial Motion in the District Court. A party must ordinarily move first in the district court for the following relief:

- (A) a stay of the judgment or order of, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ;
- (B) approval of a supersedeas bond; or
- (C) an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending.

(2) Motion in the Court; Conditions on Relief. A motion for the relief mentioned in Rule 8(a)(1) may be made to the Supreme Court or the Court of Appeals or to one of its justices or judges.

(A) The motion shall:

- (i) show that moving first in the district court would be impracticable; or
- (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion shall also include:

- (i) the reasons for granting the relief requested and the facts relied on;
- (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
- (iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) In an exceptional case in which time constraints make consideration by a panel impracticable, the motion may be considered by a single justice or judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

...
(c) Stays in Civil Cases Not Involving Child Custody. In deciding whether to issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Because the district court is more familiar with the facts of the case, a request for relief under NRAP 8 should first be made to the district court, *See Nelson v. Heer*, 121 Nev. 832, 836 (2005). A similar request was previously made and denied by the district court. At this point in time, seeking relief from the district court is not practicable. Nor would it likely be granted.

The factors considered for an injunction during an appeal are different than those required for a the granting of an injunction under NRCP 65 and NRS 33.010. The NRAP 8 factors to be considered by the Court are: (1) whether the object of the appeal will be defeated if the injunction is denied, (2) whether the appellant will suffer irreparable or serious injury if the injunction is denied, (3) whether respondent will suffer irreparable or serious injury if the injunction is granted, and (4) whether appellant is likely to prevail on the merits of the appeal. NRAP 8(c); *Mikohn Gaming Corp. V. McCrea*, 120 Nev. 248, 251 (2004). The factors are not equally weighted: "if one or two factors are especially strong, they by counterbalance other weak factors. *Id.*

B. EACH OF THE NRAP 8 FACTORS FAVOR AN INJUNCTION DURING THIS APPEAL

The district court should grant Vegas United's request for an injunction because each of the four NRAP 8(c) factors weigh in favor an injunction.

1. Whether the object of the appeal will be defeated

Pursuant to the instant action, the Plaintiff sought to foreclose upon a deed of trust recorded against the Property. By way of its Counterclaim, Vegas United asserted that the deed of trust was extinguished as a matter of law at the time of the HOA Foreclosure Sale at which

1 Vegas United purchased the Property. As a result, Vegas United asserted that there was no
2 legitimate basis for a judicial foreclosure because no security interest any longer existed.

3 Celtic Bank was ultimately allowed to judicially foreclose upon the Property. Pursuant to
4 the sheriff's sale dated November 21, 2017, Celtic Bank purchased the Property via credit bid
5 and purported to divest Vegas United of title. Subsequent to its purported purchase of the
6 Property, Celtic Bank took possession of the Property.

7 As set forth above, in the event that Vegas United ultimately prevails in this appeal and
8 Celtic Bank's security interest in the Property is deemed to have been extinguished at the time of
9 the association foreclosure sale at which Vegas United purchased the Property, the subsequent
10 sheriff's sale must necessarily be deemed to be void ab initio and title to the Property would be
11 returned to Vegas United. In the event that the Property were transferred to a third party in the
12 meantime, that innocent party could suffer significant harm.

13 **2. Whether serious harm will be suffered by Appellant if an injunction is**
14 **denied**

15 The second factor also weighs heaving in favor of the granting of an injunction. The
16 Nevada Supreme Court has held that the loss of a property right is generally irreparable. *See*
17 *Dixon v. Thatcher*, 103 Nev. 414, 416 (1987). It is the position of Vegas United that if it
18 ultimately prevails, then the sheriff's sale dated November 21, 2017, which would have
19 necessarily been based upon an extinguished deed of trust, must be deemed void ab initio. Under
20 such circumstances, Vegas United believes that Celtic Bank would be incapable of transferring
21 valid title to any third party and that any purchaser would not qualify as a bona fide purchaser
22 due to the fact that Celtic Bank's title was be void. However, any third party purchaser could
23 nonetheless suffer very significant harm.

24 In the event that the authority for the sheriff's sale is deemed to have been void and non-
25 existent, Vegas United will possess a five year period from the date of the sheriff's sale in which
26 it may file suit to recover its Property. *See* NRS 11.080. *See also Las Vegas Dev. Grp., LLC v.*
27 *Blaha*, 416 P.3d 233, 2018 Nev. LEXIS 30, 134 Nev. Adv. Rep. 33, 2018 WL 2090812. While
28 Vegas United may not ultimately suffer great harm because it will be entitled to recover the

1 Property in any event, any innocent third party purchaser could suffer very substantial harm.

2 Under these circumstances, the second factor also weighs in favor of any injunction.

3 **3. Whether Respondent will suffer irreparable or serious injury if the**
4 **injunction is granted**

5 The third factor also weighs in favor of an injunction. The purpose of the deed of trust is
6 to secure a loan of money while a borrower pays back a loan; the purpose of a foreclosure sale is
7 to obtain money that was not paid back by the borrower. It is axiomatic (though not absolute)
8 that money is an adequate legal remedy for the loss of money. *See Chaffeurs, Teamsters &*
9 *Helper, Local No. 391 v. Terry*, 494 U.S. 558, 570 (U.S. 1990) (holding that money damages are
10 generally a legal remedy rather than an equitable remedy).

11 Enjoining the Plaintiff from transferring or selling the Property pending the appeal will
12 not cause irreparable injury to the Plaintiff because the injury, if any, can be fully compensated
13 by an award of money damages if necessary. Celtic Bank has already taken title and possession
14 of the Property. It has held the Property for nearly the past year. Continuing to hold the
15 Property will not result in serious injury to Celtic Bank. On the contrary, in the event that the
16 sheriff's sale is deemed to be void, it will protect Celtic Bank from liability that it may incur to
17 any innocent third party purchaser to which it may attempt to sell the Property.

18 **4. Whether appellant is likely to prevail on the merits of the appeal**

19 The fourth factor, likelihood of success on the merits, also weighs in favor of Vegas
20 United. For the past several years, the purchasers of real properties at homeowners association
21 lien foreclosure sales have been embroiled in litigation with purportedly secured deed of trust
22 holders such as the Plaintiff herein regarding the force and effect of NRS §116.3116, which
23 provides an HOA with a superpriority lien on an individual homeowner's property for up to nine
24 months of unpaid HOA dues. In a nutshell, the purchasers of these properties have always
25 asserted that HOA lien foreclosure sales served to extinguish all junior liens, including a first
26 position deed of trust, pursuant to black letter lien law. Deed of Trust holders such as the
27 Plaintiff incorrectly asserted that their security interests survived the HOA lien foreclosure sales.

28 The conflicting positions of the purchasers and the purportedly secured deed of trust

1 holders were the subject of significant dispute for a lengthy period of time. However, on
2 September 18, 2014, this Court, in the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*,
3 130 Nev. ___, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014), definitively
4 determined that the foreclosure of a HOA's superpriority lien does indeed extinguish a first deed
5 of trust, stating as follows:

6 We must decide whether this is a true priority lien such that its foreclosure
7 extinguishes a first deed of trust on the property and, if so, whether it can be
8 foreclosed nonjudicially. We answer both questions in the affirmative and
9 therefore reverse.

10 "The SFR decision made winners out of the investors who purchased foreclosure properties in
11 HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the
12 HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often
13 yielded a small fraction of the loan balance." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp.,*
14 *LLC*, 2015 U.S. Dist. LEXIS 66249, 1-2 (D. Nev. May 19, 2015) (Dorsey, J.).

15 In this particular case, the district court's decision was primarily driven by the its
16 interpretation of the CC&Rs related to the Property as they relate to N.R.S. 278A.170. Based
17 upon its interpretation of the CC&Rs, including a so-called "mortgage protection clause"
18 included therein, and application of N.R.S. 278A.170, the Court found that N.R.S. Chapter 116
19 did not apply to the Property or the First Deed of Trust "with respect to establishing the priority
20 of such debt, or any part thereof, over the first-security interest held by CELTIC BANK
21 CORPORATION." Vegas United contends that the Court erred. Indeed, as set forth in the
22 Appellant's Opening Brief filed herein, the district court considered CC&Rs that did not even
23 relate to the association that actually conducted the association foreclosure sale at which Vegas
24 United purchased the Property. Instead, they related to a wholly different association.

25 When the Nevada Supreme Court is unable to determine the likelihood of success,
26 without a full review of the appellate record, it has granted NRAP 8 relief. *See Mikohn Gaming*
27 *Corp. V. McCrea*, 120 Nev. 248, 354 (granting stay even without ability to determine likelihood
28 of success). In this case, the fourth factor is the only factor which does not completely favor the
granting of an injunction pending appeal. However, as noted above, the factors can carry

1 different weights and “if one or two factors are especially strong, they may counterbalance other
2 weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004).

3 Considering all the factors together provides a basis under NRAP 8 to enjoin further
4 transfer or sale of the Property while the appeal is pending. The first three factors weigh heavily
5 in favor of the granting of an injunction, and the fourth factors is, at its worst, merely neutral as
6 between the parties. This Court should grant an injunction preventing the Plaintiff or its agents
7 from transferring or selling the Property while the appeal is pending pursuant to NRAP 8.

8 **III.**

9 **CONCLUSION**

10 The Property is unique and Vegas United will suffer irreparable harm if it prevails on
11 appeal and is nonetheless somehow divested of title to the Property, which is unique. While it is
12 the position of Vegas United that it can never be divested of title as a result of the foreclosure of
13 a void and extinguished deed of trust, any purported purchaser that Celtic Bank might attempt to
14 sell the Property to could suffer great harm if IT was thereafter divested of the Property. Because
15 Celtic Bank’s interest in the Property would be void, so would any interest that it might purport
16 to convey. It is far better to maintain the status quo until a final resolution of the appeal is had.
17 In balancing the NRAP 8 factors, the scales definitively tip in favor of Vegas United. Because
18 no significant harm will result from a stay, any bond required should be minimal. In light of the
19 circumstances, Vegas United suggests that a bond in the amount of \$500.00 would be
20 appropriate.

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 For the reasons set forth herein, Vegas United respectfully requests the entry of a
2 Preliminary Injunction enjoining the Plaintiff and any other party from further selling or
3 transferring the Property pending the resolution of this appeal.

4 DATED this 16th day of November, 2018.

5 ROGER P. CROTEAU & ASSOCIATES, LTD.

6
7 /s/ Timothy E. Rhoda
8 ROGER P. CROTEAU, ESQ.

9 Nevada Bar No. 4958

10 TIMOTHY E. RHODA, ESQ.

11 Nevada Bar No. 7878

12 9120 West Post Road, Suite 100

13 Las Vegas, Nevada 89148

14 (702) 254-7775

15 *Attorney for Appellant*

16 **VEGAS UNITED INVESTMENT**
17 **SERIES 105, INC.**
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD.
and that on the 16th day of November, 2018, 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 e-file and
serve system and to the following email addresses.

Sylvester & Polednak, Ltd.

Contact

Kelly L. Schmitt

Allyson Noto

Email

kelly@sylvesterpolednak.com

allyson@sylvesterpolednak.com

____ 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.

____ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated
on the service list below.

____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this
date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda

An employee of ROGER P. CROTEAU &
ASSOCIATES, LTD.