IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCO SORO, an individual; MYRA TAIGMAN-FARRELL, an individual; ISAAC FARRELL, an individual; KATHY ARRINGTON, an individual; and AUDIE EMBESTRO, an individual; Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK and THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE, Respondents, and AMERICA FIRST FEDERAL CREDIT UNION, a federally charted credit union, Real Party in Interest.	Case No. 72086

FILED
FEB 06 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

MOTION TO EXCEED PAGE LIMIT FOR OPPOSITION TO MOTION TO STAY DISTRICT COURT PROCEEDINGS

Real party in interest America First Federal Credit Union ("AFCU") moves to exceed the page limit for its opposition to the Motion to Stay District Court Proceedings (the "Motion") filed by petitioners Franco Soro, Myra Taigman-

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Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro ("Borrowers"). In support of its motion, AFCU states as follows:

1. In an order dated January 23, 2017, the Nevada Supreme Court granted Borrowers leave to exceed the applicable 10-page limit for the Motion.

2. The filed Motion is 15 pages long, excluding the certificate of service.

3. Under NRAP 27(d)(2), AFCU's opposition to the motion is subject to a 10-page limit.

4. Because of the length of the Motion, AFCU needs an enlargement of the page limit for its opposition.

5. In particular, AFCU needs additional space to discuss whether Borrowers are likely to succeed on the merits of their petition. To fully address this issue, AFCU must discuss (a) whether writ relief is procedurally appropriate, and (b) whether Borrowers' statute of limitations argument is substantively correct.

6. Accordingly, good cause exists to extend the 10-page limit for AFCU's opposition.

[*Remainder of page intentionally left blank*]

7. Attached as Exhibit A is a copy of the proposed opposition, which is 14 pages.

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<u>**NRAP 26.1 DISCLOSURE STATEMENT**</u>

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.

Real party in interest AFCU is a federally regulated credit union. AFCU has no parent company and no stock.

BALLARD SPAHR LLP appeared on AFCU's behalf before the district court and is expected to appear on AFCU's behalf in this Court.

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CERTIFICATE OF SERVICE

I certify that on February 1, 2017, I filed the foregoing ***Motion to Exceed Page Limit for Opposition to Motion to Stay District Court Proceedings.***

The following participants will be served electronically:

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK and THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE,

Respondents,

and

AMERICA FIRST FEDERAL CREDIT UNION, a federally charted credit union,

Real Party in Interest.
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OPPOSITION TO MOTION TO STAY
DISTRICT COURT PROCEEDINGS

Real party in interest America First Federal Credit Union ("AFCU") hereby opposes the Motion to Stay District Court Proceedings (the "Motion") filed by

petitioners Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro ("Borrowers").

ARGUMENT

In 2002, Borrowers obtained a $2.9 million commercial loan from AFCU. The loan was secured by real property in Mesquite, Nevada. After Borrowers defaulted on the Loan, AFCU foreclosed and then brought a deficiency action. Borrowers contend AFCU's deficiency complaint is untimely because it is governed by Utah's three-month statute of limitations. AFCU contends it is governed by Nevada's six-month limitations period. Borrowers base their argument on a choice-of-law provision in the underlying loan agreement in favor of Utah law. This argument clearly fails under Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990). Key Bank holds that a choice-of-law provision does not incorporate another state's deficiency statutes with respect to a sale of Nevada property if the other state's statutes, by their own terms, do not apply extraterritorially.

Applying Key Bank, the district court rejected Borrowers' argument and denied their motion to dismiss. Borrowers responded by filing this writ petition and moving to stay litigation. The Motion fails under all four prongs of NRAP 8(c). First, the object of Borrowers' petition will not be defeated without a stay. Borrowers can present their statute of limitations argument, and this Court can

fully review the district court's holding, regardless of whether a stay is entered. Second, Borrowers will not suffer any irreparable or serious injury without a stay. Borrowers complain about further litigation expenses in the district court, but the Nevada Supreme Court has explicitly held that such expenses are neither irreparable nor serious. Third, AFCU will suffer serious injury if a stay is entered. Due to Borrowers' delay tactics, the district court action—which was filed in 2013—is only now entering discovery. Fourth, Borrowers are not likely to succeed on the merits because this Court generally does not entertain writ petitions regarding orders denying motions to dismiss. But even if the Court reaches the merits of the petition, Key Bank rejected the same argument that Borrowers now make.[1]

I. Denying a stay will not prevent the Court from considering and ruling upon Borrowers' petition.

The first NRAP 8(c) factor asks "whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied..." NRAP 8(c)(1). The object of Borrowers' petition—establishing that AFCU's complaint is untimely—will not be defeated if the Court denies a stay. The Court will still be able to hear

[1] Because NRAP 8(c) weighs so heavily against a stay, Borrowers try to distract the Court by citing orders which granted stays in other deficiency actions. Motion at 5-8. Unpublished orders of the Supreme Court issued before January 1, 2016 cannot be cited as either binding or persuasive authority. See NRAP 36(c)(3). Even if Borrowers could actually these orders, they would not help Borrowers' argument. The orders contain no substantive reasoning, and they are artifacts of the particular arguments that were raised (or not raised) in the earlier cases.

the merits of the petition, and will still be able to decide which jurisdiction's statute of limitations applies. Cf. State v. Robles-Nieves, 129 Nev. Adv. Rep. 55, 306 P.3d 399, 403 (2013) (object of appeal—availability of confession for trial—would be defeated without stay).

II. The cost of litigating in the district court does not constitute "irreparable or serious injury" to Borrowers.

The second NRAP 8(c) factor asks if Borrowers will suffer irreparable or serious injury absent a stay. NRAP 8(c)(2). Borrowers claim that without a stay, they will be "faced with having to expend enormous amounts of time, effort and legal expenses to defend themselves in the underlying litigation…" Motion at 13. But "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough to show irreparable harm." Fritz Hansen A/S v. Eighth Judicial Dist. Court, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000) (quoting Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985)). In Fritz Hansen, the movant requested a stay and argued that "it should not be required to participate needlessly in the expense of lengthy and time-consuming discovery, trial preparation, and trial." Id., 116 Nev. at 658, 6 P.3d at 986. The Supreme Court rejected this argument, noting that "[s]uch litigation expenses, while potentially substantial, are neither irreparable nor serious." Id., 116 Nev. at 658, 6 P.3d at 986-87.

Even if Borrowers' litigation costs were somehow relevant—and they are not—there are few remaining issues to litigate in the district court. The only meaningful task that remains for the court is to determine the subject property's fair market value and then determine the amount of the deficiency judgment. See NRS 40.457(1).

III. Given the age of the case and defendants' prior delay tactics, a stay will seriously injure AFCU.

The third NRAP 8(c) factor asks if AFCU will suffer irreparable or serious injury if a stay is granted. NRAP 8(c)(3). When AFCU filed its deficiency complaint in mid-2013, defendants moved to dismiss for lack of subject matter jurisdiction. They argued that consent-to-jurisdiction clauses in the underlying loan documents required AFCU to sue in Utah instead of Nevada. The district court granted the motion, a decision the Supreme Court unanimously reversed. Am. First Fed. Credit Union v. Soro, 131 Nev. Adv. Rep. 73, 359 P.3d 105 (2015). Resolving the initial appeal took more than two years.

For whatever reason, defendants did not include their statute of limitations argument in their first motion to dismiss.[2] They held this argument in reserve for roughly three years, and then used it on remand to subject AFCU and the district court to another motion to dismiss. They are now subjecting AFCU and this Court

[2] Borrowers specifically asked the Supreme Court not to address the statute of limitations issue in the earlier appeal. Respondent's Answering Brief at viii n.1, Soro, 359 P.3d 105 (No. 64130).

to another round of appellate litigation. Borrowers did not even file an answer until January 18, 2017. At some point, litigation in the district court must proceed. See Fritz Hansen, 116 Nev. at 658, 6 P.3d at 987 (denying stay where "the underlying proceedings could be unnecessarily delayed…").

IV. Borrowers are not likely to succeed on the merits.

A. The denial of Borrowers' motion to dismiss is not an appropriate basis for seeking writ relief.

The fourth NRAP 8(c) factor asks if Borrowers are likely to prevail on the merits of their writ petition. NRAP 8(c)(4). In Nevada, a writ of mandamus or prohibition may issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170 & 34.330. "[T]he right to appeal is generally an adequate legal remedy that precludes writ relief." Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (citations omitted). "[E]ven if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." Id., 120 Nev. at 225, 88 P.3d at 841 (citation omitted).

Therefore, the Supreme Court generally "will not exercise [its] discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment." Smith v. Eighth Jud. Dist. Ct., 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (citation omitted). The Supreme Court

"adopted this policy because very few writ petitions warrant extraordinary relief, and [the Supreme Court] expends an enormous amount of time and effort processing these petitions." Id. (citation omitted). The Supreme Court has "allowed a very few exceptions where considerations of sound judicial economy and administration militated in favor of granting such petitions." Id. (citation omitted). For example, the Supreme Court might exercise its discretion "with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." Id., 113 Nev. at 1345, 950 P.2d at 281. Additionally, it might exercise its discretion where "an important issue of law requires clarification." Id.

Here, Borrowers challenge the denial of a motion to dismiss. This is a presumptively invalid basis for a writ petition. See id., 113 Nev. at 1344, 950 P.2d at 281. Defendants' proper remedy is to appeal from any adverse final judgment which the district court may enter. In addition, neither of the exceptions from Smith applies here. There is no "clear authority under a statute or rule" which required the district court to grant the motion to dismiss. The question of whether Nevada's statute of limitations or Utah's statute of limitations governs AFCU's complaint turns on common law choice-of-law principles, not on any statute or rule. Cf. Badger v. Eighth Judicial Dist. Court, 132 Nev. Adv. Rep. 39, 373 P.3d 89, 93 (2016) (considering petition because "the district court failed to grant

summary judgment where a Nevada statute required it.").[3] Further, the issue does not have any particular statewide importance or require any clarification. As explained infra, the Supreme Court has never revisited the central holding of Key Bank. Defendants' esoteric statute of limitations argument has not required any further repudiation since 1990 and does not require any further repudiation now.

B. Even if the Court entertains the merits of Borrowers' petition, the petition will likely fail.

Defendants claim the choice-of-law provision in the parties' loan agreement incorporates Utah's three-month statute of limitations. However, the Supreme Court's opinion in Key Bank easily disposes of Borrowers' argument. In that case, lender Key Bank made a commercial loan to a corporate borrower. The loan was secured by real property in Reno and two guaranties. 106 Nev. at 51, 787 P.2d at 383. The note and guaranties contained choice of law provisions in favor of Alaska law. Id. When the borrower defaulted, Key Bank foreclosed against the Reno property and later brought a deficiency action. Id.

Alaska law prohibits a lender from recovering a deficiency judgment after a trustee's sale. See id., 106 Nev. at 51-52, 787 P.2d at 384 (citing Alaska Stat. §

[3] As noted above, Borrowers asked the Supreme Court not to address the statute of limitations in the previous appeal. While doing so, they described this as a "complex, fact-intensive statute of limitations/choice of law argument" and a "nuanced issue." Respondent's Answering Brief at viii n.1, Soro, 359 P.3d 105 (No. 64130) (emphasis in original). Borrowers cannot now claim that "clear authority under a statute or rule" dictates their preferred outcome.

34.20.100). The guarantors in Key Bank argued that Key Bank's deficiency action was barred by this statute. See id. The Supreme Court noted that, as a general matter, a choice of law provision in a note will govern a subsequent deficiency action by the lender. See id., 106 Nev. at 52, 787 P.2d at 384. However, the court explicitly rejected the guarantors' argument that Alaska's deficiency statutes applied to Key Bank's complaint. The court explained that Alaska's statute, by its own terms, did not apply extraterritorially to a trustee's sale in another state. See id. The statute only applied to trustee's sales "as authorized by [Alaska Stat. §§] 34.20.070-34.20.130." Id., 106 Nev. at 52 n.1, 787 P.2d at 384. Therefore, the statute did not apply extraterritorially to the sale of the property in Reno.

Under Key Bank, Utah's statute of limitations does not govern this case if, by its own terms, the Utah statute does not apply extraterritorially to a Nevada sale. It does not. The Utah statute only applies after a "sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27..." Utah Code § 57-1-32. It is undisputed that the property in this case is located in Nevada and that the sale was conducted pursuant to NRS 107.080—not Utah Code §§ 57-1-23, 57-1-24, and 57-1-27. Like the Alaska statute in Key Bank, Utah Code § 57-1-32 does not claim to apply extraterritorially. Therefore, it does not govern AFCU's deficiency complaint. The complaint is subject to Nevada's 6-month statute of limitations and is timely.

Borrowers' Motion fails to discuss the central and dispositive holding of Key Bank. Instead, it relies on Mardian v. Michael & Wendy Greenberg Family Trust, 131 Nev. Adv. Rep. 72, 359 P.3d 109 (2015). In Mardian, a borrower entity executed a note in favor of the Michael and Wendy Greenberg Family Trust (the "Trust"). 359 P.3d at 110. The note was secured by real property in Arizona and two guaranties. Id. The guaranties stated they were governed by Nevada law. Id. After the loan fell into default, the Trust sued the guarantors to recover the amounts due under the loan. Id. Thereafter, the Arizona property was sold at a foreclosure sale. Id.

One of the issues in Mardian was whether the deficiency action should be governed by (a) Arizona's three-month statute of limitations, (b) Nevada's six-month statute of limitations, or (c) neither statute of limitations. The district court held that neither statute applied. Id. The Supreme Court reversed. It held that "because of the choice-of-law provision, Nevada law—particularly Nevada's limitations period—applies in this case." Id. at 111 (citation omitted). In reaching this holding, the court cited a portion of Key Bank discussing the general rule that choice-of-law provisions are enforceable in Nevada. Id. However, the court never cited or discussed the central holding of Key Bank—that a choice-of-law clause does not incorporate a foreign jurisdiction's deficiency statutes where the property

is located in Nevada and where the foreign jurisdiction's statutes do not purport to govern in this state.

The Mardian Court then addressed whether, under Nevada's statute of limitations, the Trust had to file a new "application" for a deficiency judgment within six months after the foreclosure sale. Since the Trust did not file an amended complaint, motion for summary judgment, or any other document that could be construed as an "application" within six months of the sale, the Trust was not entitled to a deficiency judgment. Id. at 112-13.

Mardian clearly does not overrule the central holding of Key Bank for three reasons. First, Nevada courts adhere to the doctrine of stare decisis. See, e.g., Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). If the Mardian court had meant to overrule the central holding of Key Bank, it would have said so, and would have provided specific reasons for doing so. Mardian does not even mention the central holding of Key Bank, much less overrule it. Further, the parties in Mardian never discussed Key Bank in their briefs.

Second, the facts and holdings of Key Bank and Mardian are distinguishable. Key Bank held that a choice of law clause did not incorporate a foreign jurisdiction's deficiency statutes to govern a Nevada sale. In contrast, Mardian held that a choice of law clause did incorporate Nevada's deficiency statutes to govern a sale in a foreign jurisdiction. Thus, Key Bank involved a

choice of law clause that tried to "import" another state's deficiency statutes into Nevada, whereas Mardian involved a clause that tried to "export" Nevada's deficiency statutes to another state. Like Key Bank, this case involves an obligor's attempt to "import" another state's deficiency statutes to govern a Nevada sale. Therefore, this case falls within the rule from Key Bank.

Third, Mardian's holding on the applicable statute of limitations is dicta. The Mardian Court held that the Trust's deficiency action was time-barred because the Trust did not file an "application" within six months of the foreclosure sale, as required by Nevada law. By definition, the Trust also did not file any "application" within Arizona's three-month limitation period. Thus, the deficiency action would have been time-barred under either jurisdiction's statute of limitations. To reach its decision, the Supreme Court only needed to reject the district court's esoteric conclusion that neither limitations period applied. It did not need to choose between the Nevada statute, on one hand, and the Arizona statute, on the other. Since this portion of Mardian is dicta, Mardian would not overrule the central holding of Key Bank even if it claimed to do so.

Borrowers also try to evade Key Bank by citing Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC, 131 Nev. Adv. Rep. 20, 347 P.3d 1038 (2015). Borrowers did not cite Windhaven in their motion to dismiss in the district court; they raised it for the first time in a reply in support of their motion. Therefore,

Borrowers have waived any arguments under Windhaven. But in any case, Windhaven does not change the analysis. The central issue in Windhaven was whether a lender could file a deficiency action in Nevada after a sale of property in Texas. Under the version of NRS 40.455(1) that was then in effect, a lender could seek a deficiency judgment after a "trustee's sale held pursuant to NRS 107.080." 347 P.3d at 1039. The obligors in Windhaven moved for summary judgment on the ground that the sale was held in Texas pursuant to Texas law, and therefore not "pursuant to NRS 107.080." The Supreme Court rejected this argument, noting the statute "does not indicate that it precludes deficiency judgments arising from non judicial foreclosure sales held in another state." Id. at 1041. The Supreme Court reversed the district court's judgment against the lender and remanded for further proceedings.

Critically, the Windhaven Court did not rule on whether Nevada's deficiency statutes or Texas's deficiency statutes would govern the case on remand. Id. at 1042 n.8 ("The question of whether a court should, in such situations, apply Nevada law or the law of the state where the foreclosure was held is a conflict-of-laws question that will depend upon the particular facts of the case."). The loan documents in Windhaven allowed the parties to litigate future disputes under either Texas or Nevada law. Id. In Windhaven, as in Mardian,

there was no need for the Supreme Court to decide which state's limitation period governed.

CONCLUSION

Borrowers are trying to avoid their straightforward liability for a $2.4 million debt through delay tactics and through arcane arguments the Supreme Court has previously rejected. AFCU respectfully requests that the Court deny the Motion.

Dated: February 1, 2017.

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