IN THE SUPREME COURT OF THE STATE OF NEVADA

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LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Appellant/Cross-Respondent,

vs.

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; DOE individuals I through XX; and ROE CORPORATIONS I through XX,

Respondents.

and

JAMES R. BLAHA, an individual; and NOBLE HOME LOANS, INC., f/k/a FCH FUNDING, INC., an unknown corporate entity,

Respondents/Cross-Appellants.

SUPREME COURT NO. 79055

DISTRICT COURT NO. A-15-715532-C

RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO APPELLANT'S MOTION TO STAY AND TO HOLD ALL DEADLINES IN ABEYANCE

Respondents/Cross-Appellants, James R. Blaha ("Blaha") and Noble Home Loans Funds Inc., f/k/a FCH Funding, Inc. ("NHLS") (collectively "Respondents" or "Blaha Defendants"), by and through their undersigned counsel, hereby submit their Response in Opposition to Appellant/Cross-Respondent Las Vegas Development Group, LLC's ("Appellant" or "LVDG") Motion to Stay Appeal.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 25, 2019, Appellant/Cross-Respondent LVDG filed a Motion to Stay Appeal and to Hold All Deadlines in Abeyance ("Motion"). LVDG's Motion argues that this Court should stay all deadlines in this case until this Court resolves the petition for en banc reconsideration in Bank of America v. Thomas Jessup, LLC Series VII, 135 Nev. Adv. Op. 7, 435 P.3d. 1217 (Nev. 2019). LVDG's Motion brazenly argues that "to the extent any harm might be suffered by the parties as a result of a stay, such harms are outweighed by the avoidance of expense on the part of the parties and the outlay of judicial resources."

LVDG's Motion should be denied because: (1) LVDG will not suffer any hardships or inequities in going forward; (2) Blaha will continue to suffer damages if the stay is granted; and (3) the orderly course of justice weighs heavily against a stay in this case. As explained more fully below, LVDG's delays are the central theme of this case. Blaha has been the record title holder of the Property since September 30, 2011. In the last eight years, Blaha has expended in excess of $350,000.00 to purchase, improve and maintain the Property. Each month this litigation drags on, Blaha's investment in the Property only further increases. Blaha should not be forced to wait one day more than is necessary for this Court to render a final judgment to remove the cloud from his title to the Property.

II. FACTUAL OVERVIEW

This case involves a title dispute related to 7639 Turquoise Stone Ct., Las Vegas, NV 89113 ("Property"), within the Nevada Trails II Community ("HOA").

On April 12, 2011, LVDG paid $5,200.01 to purchase the Property at an NRS Chapter 116 HOA Foreclosure Sale conducted by Absolute Collection Services ("ACS") knowing that in order to establish its interest in the Property free and clear of any encumbrances, LVDG may need to incur litigation costs that were so high LVDG might simply choose to "walk away" from the Property.

Prior to LVDG's bid at the HOA Foreclosure Sale, BAC's counsel sent correspondence to ACS requesting that ACS provide BAC's counsel with the amount required to tender nine months of common assessments to allow BAC to discharge its obligations to the HOA pursuant to NRS 116.3102. ACS responded, advising: "a 9 month Statement of Account is not valid." ACS further advised BAC's counsel that once BAC provided ACS with a "Trustees Deed Upon Sale showing your client's possession of the property and the date that it occurred . . . we will provide a 9 month super priority lien Statement of Account."

On August 29, 2011, approximately four months after LVDG acquired its interest in the Property, the Property was sold at a Deed of Trust Foreclosure Sale to third-party purchaser, EZ Properties LLC ("EZ"), for $151,300.00.

One-month later, on September 30, 2011, Blaha purchased the Property from

EZ for $208,000.00. Blaha has maintained record title ownership to the Property since his purchase in 2011.

Although LVDG acquired its interest in the Property knowing that its interest would be the subject of litigation and that its interest could potentially be extinguished by a foreclosure on the Deed of Trust, LVDG took no steps to stop the Deed of Trust Foreclosure Sale or to protect its interest in the Property. After learning that the Property had been sold to a third-party purchaser at the Deed of Trust Foreclosure Sale, LVDG failed to take any action to protect its interest in the Property. Instead, LVDG did nothing, without explanation, for nearly four years.

After purchasing the Property in 2011, Blaha exercised exclusive dominion and control over the Property. During this same time, LVDG took no action to assert any claim to the Property. It was not until March 19, 2015, when LVDG initiated this litigation, that LVDG took any action to contest the Deed of Trust Foreclosure or otherwise challenge Blaha's record title to the Property.

On March 19, 2019, the Blaha Defendants filed a Motion for Summary Judgment on the basis that: (1) Bank of America v. Thomas Jessup, LLC Series VII, 135 Nev. Adv. Op. 7, 435 P.3d. 1217 (Nev. 2019) ("Jessup") was controlling; thus, the HOA foreclosure did not extinguish the Deed of Trust; and (2) LVDG's claims are barred by the equitable doctrines of laches and estoppel because LVDG waited four years – during which time Blaha spent *hundreds of thousands of*

dollars – before challenging Blaha's interest in the Property.

When the HOA was still a party to this action in the District Court, the HOA filed a brief in which the HOA conceded that the Jessup decision controls this case and acknowledged that the Deed of Trust survived the HOA Foreclosure Sale such that title to the Property should be quieted in favor of the Blaha Defendants.

On May 24, 2019, the District Court granted the Blaha Defendants' Motion for Summary Judgment. LVDG filed a Notice of Appeal and the Blaha Defendants filed a Notice of Cross-Appeal. The Blaha Defendants' Cross-Appeal requests that, if this Court does not affirm the District Court's Judgment in favor of the Defendants concluding that the NRS Chapter 116 HOA Foreclosure Sale did not extinguish the BAC's first Deed of Trust, then this Court should review the District Court's Order as it relates to the Blaha Defendants' equitable defenses.

On September 24, 2019, in a split decision, this Court granted en banc reconsideration in the Jessup case. LVDG failed to seek a stay at that time; instead, LVDG waited until days before its Opening Brief was due to file its Motion seeking a stay.

III. ARGUMENT

A court has discretion to grant a motion to stay an action pending an independent proceeding if the court finds that a stay is "efficient for its own docket and the fairest course for the parties." Leyva v. Certified Grocers of California,

Ltd., 593 F.2d 857, 863 (9th Cir. 1979). When deciding whether to issue a stay, the court must consider the following competing interests:

> (1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Singer v. Las Vegas Athletic Clubs, 376 F. Supp. 3d 1062, 1070 (D. Nev. 2019) (citing CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)). The moving party "bears the burden of establishing its need." Id. Here, LVDG failed to establish the need for a stay. Instead, LVDG summarily concludes that any harm suffered by the parties are outweighed by the avoidance of expense. See Motion, p.5, ll.10–15.

A. LVDG will not suffer any hardship or inequity going forward.

LVDG's only assertion of hardship in going forward in this case is, without any explanation, "expense." Id. However, a mere assertion of expenses for continuing to litigate "does not constitute a clear case of hardship or inequity for purposes of a stay." Singer, 376 F. Supp. 3d at 1070 (internal citations omitted).

Moreover, even assuming that "expenses" constitute hardship in favor of a stay (they do not), LVDG does not elaborate as to which expenses are left to be incurred at this stage of the litigation. At this point, all that remains for LVDG is its opening brief, which is due in a week. However, this cannot constitute hardship or *inequity* for LVDG in favor of a stay because the Blaha Defendants will be

incurring the same "expenses." Further, while this Court ordered a rehearing on Jessup *more than a month ago,* LVDG decided to wait until the briefing deadline in this matter to bring its Motion. LVDG's conduct in this instance weighs against finding any alleged hardships or inequities for LVDG in going forward.

Accordingly, LVDG's Motion should be denied because LVDG does not have any cognizable hardships or inequities in going forward with this case. See Singer, 376 F. Supp. 3d at 1070.

B. Blaha will continue to suffer damage if the stay is granted.

LVDG's Motion does not even consider the *definite* harm Blaha will suffer if this case is delayed any further. See generally Motion. As will be briefed more fully for this Court, LVDG's claims are barred by the doctrine of laches and equitable estoppel and any further delay continues to prevent Blaha from enjoying, improving, and exercising his expansive rights as the owner of the Property.

Here, Blaha has been the record title holder of the Property since September 30, 2011. Although LVDG had actual knowledge of a potential dispute over the title to the Property, LVDG's waited until 2015 to assert its interest in the Property. Yet, by that point, the Property had already been sold *twice.* Blaha purchased the Property for $208,000 – *forty times* more than LVDG bid at HOA Foreclosure Sale. Since 2011, Blaha has spent in excess of $150,000.00, improving and maintaining the Property. Each month this litigation continues, Blaha continues to

incur costs to maintain the Property. During the eight years Blaha has been the record owner of the Property, he has incurred in excess of $40,000.00 in property taxes and HOA assessments alone.

The inequity and continuing harm caused by LVDG's delay in initiating this action – weighing strongly against a stay – is precisely why the Blaha Defendants' request a review of their equitable defenses through their Cross-Appeal. The equitable doctrine of laches "may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." Bldg. & Const. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd., 108 Nev. 605, 610–11, 836 P.2d 633, 636–37 (Nev. 1992). Many courts have found that laches prevents a plaintiff from waiting *months* to challenge a foreclosure, when the plaintiff cannot provide a reasonable excuse for the delay. See, e.g., Steinberg v. Federal Home Loan Mortg. Corp., 901 F. Supp. 2d 945, 952 (E.D. Mich. 2012); Lamas v. Citizens & S. Nat'l Bank, 245 S.E.2d 301, 302 (Ga. 1978).

Yet, here, LVDG waited nearly *four years* to assert an interest in the Property and the only proffered excuse is that LVDG consciously decided to delay, based on the anticipated litigation costs. Moreover, LVDG's *knowing* delay caused the Property to be sold to third-party purchaser at a valid Deed of Trust foreclosure sale and then sold a *second* time in a traditional sale to Blaha.

This matter has been in litigation since 2015. A stay will only continue to delay Blaha's ability to take any productive actions that property owners are entitled to take, such as adding any additional improvements or selling the Property. Further, Blaha must continue to expend his own funds to maintain the Property until this case is resolved – while simultaneously being prevented from exercising his expansive rights as Property owner. Accordingly, Blaha will assuredly continue to incur damages if there is further delay in this matter.

C. The orderly course of justice weighs against a stay.

LVDG's Motion should be denied because the orderly course of justice, including additional appealable issues in this case and judicial efficiency, weighs against a stay. See Singer, 376 F. Supp. 3d at 1071.

1. Blaha's Cross-Appeal counters the need for a stay.

LVDG's entire Motion is based on this Court's rehearing of Jessup. However, LVDG fails to mention that the Blaha Defendants filed a Notice of Cross-Appeal in this action, which is highly relevant to LVDG's Motion. The equitable defenses raised in the Blaha Defendants' Cross-Appeal are not at issue in Jessup. Thus, if the decision in Jessup alters the District Court's Order, this Court will still need to rule on the Blaha Defendants' Cross-Appeal as it relates to the equitable defenses. As this Court may rule on the issues in this Appeal regardless of Jessup, the orderly course of justice weighs strongly against a stay.

2. The necessity of judicial efficiency weighs against a stay.

Discretionary "stays should *not be granted* unless it appears likely the other proceedings will be concluded *within a reasonable time*." Singer, 376 F. Supp. 3d at 1070 (citing Leyva, 593 F.2d at 864 (emphasis added)). Here, it does not appear likely that Jessup or any subsequent cases that LVDG may later assert affects the Judgment, will be decided within a reasonable time. Even assuming that the rehearing schedule is not modified and there will be no post-hearing briefing in Jessup, LVDG's requested stay would likely only be lifted when a written decision is entered. Such a process is often lengthy and arduous. As a result, LVDG's Motion should be denied because it is not likely that the proceedings will be concluded within a reasonable time.

Moreover, it does not appear as though a substantive change of the law is anywhere near imminent. While the jurisprudence of NRS Chapter 116 is continuously evolving, the fundamental framework is already in place. The rehearing in Jessup is much less significant than other HOA foreclosure cases previously pending before this Court that may have justified a stay (such as facial unconstitutionality). This Court has already decided that a deed of trust beneficiary can preserve its interest by tendering the superpriority portion of the HOA's lien before the foreclosure sale is held. Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev. 604, 427 P.3d 113 (Nev. 2018). The only

issue for rehearing in Jessup is clarifying the meaning of "tender" by using universally-accepted contractual principles. Granting LVDG's Motion may expose this Court to the risk of indefinite stay requests in all HOA foreclosure cases whenever there is a possibility that a forthcoming decision may slightly alter the analysis of NRS Chapter 116.

Because "a stay here would not serve the orderly course of justice," Singer, 376 F. Supp. 3d at 1071, LVDG's Motion should be denied.

IV. CONCLUSION

For the aforementioned reasons, LVDG's Motion should be denied and this Appeal should proceed as scheduled.

DATED this 1st day of November, 2019.

KOLESAR & LEATHAM

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B), I certify that I am an employee of Kolesar & Leatham and that on November 1, 2019, I submitted **RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO APPELLANT'S MOTION TO STAY AND TO HOLD ALL DEADLINES IN ABEYANCE** to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

Roger P. Croteau, Esq.
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Pursuant to NRAP 25(c)(B), service was made by depositing a copy of **RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO APPELLANT'S MOTION TO STAY AND TO HOLD ALL DEADLINES IN ABEYANCE** for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to the parties listed below:

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