IN THE SUPREME COURT OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE, FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-25, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	**Supreme Court No. 81604** District Court Case No. A790150 Appeal from the Eighth Judicial District Court, Clark County, Nevada

APPELLANT'S REPLY BRIEF

Respectfully Submitted by:
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25 ("BNYM") is a New York Banking institution. The Bank of New York Mellon Corporation, a Delaware corporation, owns 100% of BNY Mellon.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25
- Specialized Loan Servicing LLC

There are no other known interested parties.

ZBS Law, LLP fka Zieve, Brodnax & Steele, LLP fka Law Offices of Les Zieve has represented Bank of New York Mellon in this matter since its inception.

DATED this 21st day of July, 2021

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INTRODUCTION

Appellant The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee, for the Certificiateholders of CWABS, Inc. Asset-Backed Certificates, Series 2005-25 ("BNYM") seeks reversal of the District Court's July 22, 2020, Findings of Fact, Conclusions of Law, and Judgment. (*See*, Appendix Vol. II, p. 400). In the Judgment, the district court found that BNYM made its loan "wholly due by virtue of the Notice of Default recorded on April 29, 2008." *Id*. at p. 403. The court reasoned that "[t]he Notice of Default clearly and unequivocally states in relevant part, "present beneficiary…has declared and does declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." *Id*.

Finally, the court found that a 2008 and a 2009 loan modification both were ineffective to cure the loan's default status or to reinstate it as an installment loan. *Id*. With respect to the 2008 modification, the court found it to be ineffective because while it was signed by the borrower, it was not signed by then-beneficiary Countrywide. *Id*. at 401. With respect to the 2009 modification, the court found it to be ineffective because there was no evidence that the borrower made a payment pursuant to the agreement.[1] *Id*. at 402. As a result, the court deemed the loan presumed satisfied pursuant to NRS 106.240 on April 29, 2018. *Id*. at 403.

The court's decisions were clearly erroneous because the plain language of NRS 106.240 provides that liens created by deeds of trust will terminate at the expiration of ten years after the debt becomes "wholly due" under "the terms [of the deed of trust]" or "any recorded written extension thereof." NRS 106.240. Here, the deed of trust evidences a loan maturity date of December 1, 2046. (*See*, Appendix Vol. I, p. 12), and there were no recorded extensions of that maturity date.

Second, BNYM's records reflect two loan modification agreements – one in 2008 and one in 2009 – both of which would have cured the default and reinstated the loan as an installment contract. While it is true that neither modification is executed by Countrywide, each were executed by the borrowers and BNYM's 30(b)(6) witness testified that they were completed. (*See*, App. Vol. II at 390). As such, the evidence clearly demonstrates that the loan had been reinstated pursuant to either the 2008 or 2009 modification.

One needs to look no further to BNYM's second Notice of Default recorded on January 16, 2019, to confirm this fact. (*See*, Appendix Vol. II, p. 257). The 2019 Notice of Default states in no uncertain terms that the loan was current up to the payment which would have been due on May 1, 2009. Subsequently, a Notice of Acceleration was forwarded to the borrowers pursuant to the deed of trust on September 17, 2013, providing further proof that the loan had, in fact, been

reinstated by either the 2008 or 2009 loan modification, or both. Whether or not the borrower actually made a payment to the 2009 modification is immaterial for the determination of whether the prior default was cured and the loan had been reinstated.

Thus, the undisputed record below establishes that BNYM's deed of trust had not been extinguished by NRS 106.240 as of April 29, 2018, as asserted by Respondent. Accordingly, the district court's decision should be reversed. Alternatively, this matter should be remanded to the district court for further discovery as to the status of the 2008 and 2009 loan modifications.

ARGUMENT

I. THE NOTICE OF DEFAULT DID NOT ACCELERATE THE LOAN AS CONTEMPLATED BY NRS 106.240.

In *Pro-Max Corp. v. Feenstra*, 117 Nev. 90 (2001), this Court considered the effect of NRS 106.240 on notes executed on May 11, 1982, with a maturity date of May 14, 1984 - two years later. In its ruling, this Court concluded that "it is undisputed that no written agreements to extend the notes and deeds of trust were ever executed or recorded. Therefore, under the plain language of the statute, the deeds of trust were conclusively presumed to have been satisfied in 1994, which is ten years after the notes became due." *Id.*, at 94. Simply put, NRS 106.240 is silent as to notice of acceleration outside the loan documents, and "[w]here the

language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id*. at 95.

Importantly, NRS 106.240 provides for discharge of the debt and lien "at the expiration of 10 years after the debt secured by the mortgage or deed of trust **according to the terms thereof** … become wholly due." NRS 106.240 (emphasis added). A plain reading of the qualifier "according to the terms thereof" means that one must refer to the loan documents themselves for terms setting the maturity date of the loan.

Here, the deed of trust evidences a loan maturity date of December 1, 2046. (*See*, Appendix Vol. I, p. 12). Throughout the course of discovery, Respondent produced no evidence that BNYM executed, agreed, or recorded anything to alter the maturity date set forth therein. Therefore, according to the terms of the loan instruments, NRS 106.240 does not serve to extinguish the deed of trust until ten years after the maturity date as set forth in the note – December 1, 2056.

Respondent's urging to the contrary is simply a self-serving statement in an effort to obtain yet another property for a fraction of its true cash value and the district court's decision – that the 10-year period under NRS 106.240 was triggered by virtue of BNYM recording the Notice of Default – should be reversed.

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II. EVEN IF THE LOAN HAD BEEN MADE WHOLLY DUE PURSUANT TO THE NOTICE OF DEFAULT, THE LOAN WAS RESTORED BY EITHER THE 2008 MODIFICATION, THE 2009 MODIFICATION, OR BOTH.

Whether or not this Court agrees that the April 24, 2008, Notice of Default accelerated the debt for purposes of a NRS 106.240 analysis, sufficient evidence was presented by BNYM to unequivocally establish that the default as to this loan had been cured and the loan was subsequently reinstated. Thereafter, the evidence demonstrates that as of September 17, 2013, the loan had not yet been re-accelerated. (*See*, App. Vol. II at 379-380).

In its Answering Brief, Respondent asserts that BNYM recorded its Notice of Default and Notice of Sale and then "did nothing…" (OB at p. 2). This is simply not true and the documents produced clearly establish otherwise. The documents show that after the Notice of Default and Notice of Sale were recorded, BNYM's predecessor-in-interest, Countrywide, began working with the borrower to restore the loan, as evidenced by Loan Modification Agreements dated August 25, 2008, and March 13, 2009. (*See*, App. Vol. II, p. 408-409). Subsequently, a trial modification was offered to the borrowers in early 2010 and the borrowers filed for bankruptcy in October 2010. (*See*, App. Vol. II, p. 390; *See also*, App. Vol. I, p. 155). The borrower's Chapter 7 bankruptcy proceeding was ultimately terminated in March, 2011. (*See*, App. Vol. I, p. 155).

When the borrowers continued to fail to make payments, BNYM sent an acceleration notice on September 17, 2013, advising that note was due for the May 1, 2009, payment and that failure to pay the total amount due under the Deed of Trust by October 20, 2013 "*may result in acceleration of the entire balance outstanding under the Note…*" (*See*, App. Vol. II, p. 379-380) (emphasis added). Clearly then, as of October 19, 2013, the debt had not yet been accelerated.

Respondents sole focus here is that "the Bank did not even attempt to decelerate the debt, and never recorded a rescission of NOD #1." OB at p. 3. Despite this statement, Respondent points to no statute or caselaw that requires a Notice of Rescission to be recorded in order to decelerate a loan. Here, the borrowers entered into loan modifications in August 2008 and March 2009, which necessarily decelerated the debt obligation – to the extent it had been accelerated – restoring the loan to an installment contract. BNYM's 30(b)(6) witness confirmed the existence of these modifications during her deposition on February 20, 2020. (*See*, App. Vol. II, p. 390).

This is why BNYM's January 15, 2019, Notice of Default indicated a default date of April 1, 2009, when the April 29, 2008, Notice of Default marks the default date as January 1, 2008. (*Cf.* App. Vol. II at p. 269 and App. Vol. 1 at 117). This is a critical distinction that was not given proper consideration by the court below and is clear evidence that this loan had been decelerated after the first

Notice of Default was recorded, despite there being no recorded notice of rescission. The September 17, 2013 acceleration notice confirms this, and by finding otherwise, the district court's decision was erroneous and should be reversed.

III. BNYM WAS NOT REQUIRED TO ASSERT AFFIRMATIVE CLAIMS TO CONFIRM THE VALIDITY OF ITS DEED OF TRUST.

Respondent contends that because BNYM did not assert affirmative causes of action in the court below, that it is somehow not entitled to a determination that its deed of trust survived an earlier HOA foreclosure due to a valid tender of the superpriority lien amount.

As this Court is aware, at its inception this matter concerned the effect of a September 19, 2012, HOA foreclosure on BNYM's deed of trust, where the evidence demonstrates the existence of a valid pre-sale tender of the superpriority portion of the HOA's lien. (*See*, Appendix Vol. I, p. 134-136). BNYM initially filed suit in federal court but rather than litigate BNYM's quiet title claim, SFR chose to move for an immediate dismissal based on statute of limitations grounds.

While the court ultimately agreed that BNYM's complaint was untimely, the court made no determination whatsoever as to the post-foreclosure status of BNYM's lien. This is important because after a valid tender, a foreclosure sale on an entire HOA lien is void as to the superpriority portion, "because it cannot

extinguish the first deed of trust on the property." *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 612 (2018).

In its Answering Brief, Respondent contends that "any attempt by the Bank to have this Court grant affirmative relief as to the validity of the Association sale, without either a claim or any cogent argument, is not only procedurally improper, but also substantively improper. (*See*, AB at p. 7). While it is true that BNYM did not assert a claim for quiet title in the lower court, there is absolutely no requirement for it to do so in order to enforce the terms of the valid loan documents.

Simply put, BNYM's pre-sale tender preserved its deed of trust and BNYM is well within its rights pursuant to the terms of the loan documents to proceed with the remedy of foreclosure unless or until a court orders otherwise. To date, that has not occurred. As a result, BNYM proceeded pursuant to the terms of the loan documents and recorded a Notice of Default in 2019.

If this Court determines that a declaration in favor of BNYM is not procedurally or substantively proper, then BNYM is still entitled to foreclose pursuant to its first-position deed of trust. Respondent's Complaint in this matter does not plead a claim for quiet title, but simply asks the district court to conclude that BNYM's deed of trust has been extinguished by operation of NRS 106.240

and did not seek a ruling as to the effect of the HOA's foreclosure on BNYM's lien.[2]

CONCLUSION

BNYM agrees that this appeal does not present issues typically encountered in foreclosure-related litigation. However, simply because the fact pattern is atypical does not mean that the district court's decision – which ignored the loan modifications and the 2013 acceleration notice – was not clearly erroneous. Accordingly, this Court should reverse the district court's granting of summary judgment in Respondent's favor and instead find that BNYM's deed of trust is not presumed satisfied pursuant to NRS 106.240.

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[2] Respondent also contended that the note and deed of trust were split at origination, that BNYM does not have possession of the wet-ink promissory note, and that BNYM therefore lacks authority to foreclose as grounds for its first cause of action for cancellation of the 2008 and 2019 notices of default. This issue was never addressed by the district court but has routinely been rejected by courts in this district. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 517 (2012) ("…a promissory note and a deed of trust are automatically transferred together unless the parties agree otherwise.") *Id*. at 258.

Alternatively, this Court should remand this matter to the district court for further proceedings.

DATED: July __21st_, 2021. ZBS LAW, LLP

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 31(a)(7) because, excluding the parts of the brief

exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,045 words.

FINALLY, I HEREBY CERTIFY that I have read this **APPELLANT'S REPLY BRIEF**, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 21st, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this __21st__ day of July, 2021, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF**, through this Court's electronic filing system to the following:

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Electronic notification will be sent to the following:

John Dolembo
Jacqueline Gilbert
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Diana Ebron

Notification by traditional means must be sent to the following:

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/s/ Sara Hunsaker
Sara Hunsaker, an employee of
ZBS LAW, LLP