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9 IN THE SUPREME COURT OF THE STATE OF NEVADA

10 LAS VEGAS DEVELOPMENT
11 GROUP, LLC, A NEVADA LIMITED
12 LIABILITY COMPANY,

Appellant,

13 vs.

14 THE BANK OF NEW YORK
15 MELLON, F/K/A THE BANK OF NEW
16 YORK, AS TRUSTEE FOR THE
17 CERTIFICATEHOLDERS OF CWABS,
INC., ASSET-BACKED
CERTIFICATES, SERIES 2006-7,

Respondent.

Supreme Court No. 81961

Supreme Court No. 82266

District Court Case No. A756215

18
19 **APPELLANT'S MOTION TO STAY APPEALS**

20 **AND TO HOLD ALL DEADLINES IN ABEYANCE**

21 COMES NOW, Appellant, LAS VEGAS DEVELOPMENT GROUP, LLC,
22 by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and
23 hereby presents its Motion to Stay Appeals and to Hold all Deadlines in Abeyance.

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1 This Motion is made and based upon the attached Memorandum of Points and
2 Authorities and all papers and pleadings on file herein.

3 DATED this 4th day of March, 2021.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

5
6 */s/ Timothy E. Rhoda*

7 ROGER P. CROTEAU, ESQ.

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14 *Attorney for Appellant*

15 **LAS VEGAS DEVELOPMENT GROUP, LLC**

16
17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **INTRODUCTION**

19 The real property that is the subject of this matter is the subject of two
20 appeals, No. 81961, which is an appeal of the trial court's judgment after a bench
21 trial, and No. 82266, which is an appeal of a resulting award of costs and fees to
22 the prevailing party. The Opening Brief in Appeal No. 81961 is presently due on
23 March 8, 2021, pursuant to this Court's Order dated January 28, 2021. The
24 Opening Brief in Appeal No. 82266 is presently due on April 28, 2021, pursuant
25 to this Court's Order dated December 29, 2020. For the reasons set forth below,
26 good cause exists to stay both appeals. Although the Opening Brief in Appeal
27 No. 82266 is not due for some time, it is at least to some degree contingent upon
28 the result of Appeal No. 81961 and may be rendered moot as a result thereof. As a
result, it makes sense to stay both appeals at this time.

STATEMENT OF THE FACTS

The instant appeal involves real property commonly known as 1524
Highfield Court, Las Vegas, Nevada (*the "Property"*). The Property was the

1 subject of a homeowners association lien foreclosure sale (*“HOA Foreclosure*
2 *Sale”*) conducted pursuant to NRS Chapter 116. The HOA Foreclosure Sale
3 occurred on March 2, 2011, and was conducted by Alessi & Koenig, LLC (*“HOA*
4 *Trustee” or “Alessi”*) on behalf of Hidden Canyon Owners Association (*“HOA”*).
5 HOA purchased the Property at the HOA Foreclosure Sale and thereafter
6 conveyed it to the Appellant, Las Vegas Development Group, LLC (*“LVDG”*).
7 LVDG remains the title owner of the Property to this date. The Respondent, Bank
8 of New York Mellon (*“BONY”*), claimed to possess a secured interest (*“First*
9 *Deed of Trust”*) in the Property at the time of the HOA Foreclosure Sale.

10 Prior to the HOA Foreclosure Sale, Miles Bauer Bergstrom & Winters
11 (*“Miles Bauer”*) transmitted a check in the amount of \$88.50 to Alessi, purporting
12 to represent 9 months of assessments, i.e., nine-twelfths of the HOA’s annual
13 assessment of \$118.00. However, the HOA’s assessments were due annually, not
14 monthly. As a result, because the entire annual assessment became due in the 9
15 months preceding the HOA Lien, the entire amount of the yearly assessment was
16 entitled to superpriority status. *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat’l*
17 *Ass’n EE*, 466 P.3d 1276, 1277-78 (Nev. 2020). It naturally follows that Miles
18 Bauer did not pay enough money to satisfy the superpriority portion of the HOA
19 Lien prior to the HOA Foreclosure Sale.

20 Although the HOA Foreclosure Sale took place on March 2, 2011, BONY
21 took no action to contest the force and effect of the HOA Foreclosure Sale upon its
22 First Deed of Trust until it filed its Counterclaim in the underlying action on June
23 15, 2017. Thus, more than six years passed between the date of the HOA
24 Foreclosure Sale on March 2, 2011, and the filing of BONY’s claims on June 15,
25 2017. The Plaintiff/Appellant asserted at the time of trial that BONY waived any
26 opportunity to contest the force and effect of the HOA Foreclosure Sale as a result
27 of its years of inaction.
28

LEGAL ARGUMENT

A. STATEMENT OF THE LAW

A “court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (*Leyva v. Certified Grocers of California, Ltd.* 593 F.2nd 857, 863-4 (9th Cir. 1979).

Factors a court may consider when deciding whether to issue a stay of proceeding include the interests of the parties, the efficient use of judicial resources, and the interests of the public and persons not parties to the litigation. *See e.g. Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-5 (9th Cir. 1995).

B. TWO PRIMARY LEGAL ISSUES OF THIS APPEAL ARE CURRENTLY THE SUBJECT OF OTHER ACTIONS PENDING BEFORE THIS COURT

Two of the primary issues involved in this appeal are (1) what, if any, statute of limitations governed BONY’s claims objecting to the force and effect of the HOA Foreclosure Sale, and (2) whether Miles Bauer’s tender of 9 months of assessments was sufficient to satisfy the superpriority portion of the HOA Lien where the assessments were due and payable on an annual basis. Both of these issues are presently before this Court in other appeals.

First, the issue of what statute of limitations applies to a lienholder’s claim that its lien was not extinguished by a foreclosure sale was presented to the Ninth Circuit Court of Appeals in the matter of *U.S. Bank, N.A., as Trustee for the Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates Series 2006-BC4 vs. Thunder Properties, Inc.*, Case No. 17-16399 (“*Thunder Properties*”). The factual circumstances of *Thunder Properties* are substantially identical to those of the instant matter. In *Thunder Properties*, the federal district court determined that the secured lender’s claims that its lien

1 was unaffected by a homeowners association lien foreclosure sale was time-
2 barred.

3 In *Thunder Properties*, the Ninth Circuit Court of Appeals declined to
4 determine the appropriate statute of limitations governing the secured lender's
5 claims under Nevada law and instead certified the question to this Court.
6 Specifically, the Ninth Circuit Court of Appeals certified the following question to
7 the Nevada Supreme Court:

8 (1) When a lienholder whose lien arises from a mortgage for the
9 purchase of a property brings a claim seeking a declaratory judgment
10 that the lien was not extinguished by a subsequent foreclosure sale of
11 the property, is that claim exempt from statute of limitations under
12 *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699
(Nev. 2016)?

11 (2) If the claim described in (1) is subject to a statute of limitations:
12 (a) Which limitations period applies?
13 (b) What causes the limitations period to begin to run?

13 *Id.* The instant appeal potentially hinges at least in part upon an identical
14 question.

15 On September 11, 2020, this Court issued an Order accepting the certified
16 question that was issued in *Thunder Properties*, Appeal No. 81129. At this point
17 in time, the Opening Brief and Answering Brief have been filed, as well as an
18 amicus brief by SFR Investments Pool. Pursuant to an Order of this Court dated
19 February 26, 2021, the Reply Brief is presently due on March 19, 2021. This
20 Court's determination of the certified question issued in *Thunder Properties* could
21 very likely be dispositive of the instant appeal, this appeal should be stayed
22 pending its resolution.

23 Second, in *Noonan IRA*, this Court held as follows:

24 Based on the plain language of the statute, we conclude the entire
25 amount of a yearly assessment is entitled to superpriority status, so
26 long as the assessment became due in the 9 months preceding the
27 HOA's recording of its notice of delinquent assessments. And,
28 because the first deed of trust holder in this case did not tender the
entire superpriority amount before the HOA foreclosed on its lien, the
HOA foreclosure sale extinguished the first deed of trust on the
property. We therefore reverse the district court's judgment in favor
of respondents and remand for further proceedings.

1 *Noonan IRA*, 466 P.3d 1276, 1277-78. The factual circumstances of this case are
2 again very similar to those of *Noonan IRA*. However, on January 25, 2021, this
3 Court issued an Order granting en banc reconsideration of the *Noonan IRA*
4 decision. En banc reconsideration remains pending as of the date of this Motion.

5 Although the district court declined to follow *Noonan IRA* in this case –
6 despite the fact that it was binding law at the time of its decision – the Appellant
7 avers that it was required to do so. However, depending upon the result of this
8 Court’s en banc reconsideration, the *Noonan IRA* decision may or may not play a
9 significant role in this appeal. However, no matter how it is ultimately decided,
10 like *Thunder Properties*, the result of the instant appeal depends heavily upon the
11 manner in which *Noonan IRA* is ultimately decided.

12 **C. GOOD CAUSE EXISTS TO STAY THIS APPEAL**

13 The ultimate resolution of the certified question presented in *Thunder*
14 *Properties* and the en banc reconsideration of *Noonan IRA* will both bear heavily
15 on the instant appeal. Given the fact that BONY took no action herein for over 6
16 years after the HOA Foreclosure Sale, its claims will be barred if ANY statute of
17 limitations is deemed to apply. As for the annual assessments issue, *Noonan IRA*
18 will likely clarify whether Miles Bauer did or did not tender an amount sufficient
19 to satisfy the superpriority portion of the HOA Lien that was foreclosed upon at
20 the time of the HOA Foreclosure Sale. At the very least, this will likely
21 significantly impact this appeal.

22 Both *Thunder Properties* and *Noonan IRA* are presently before this Court.
23 Most of the briefing in *Thunder Properties* has been completed. As for *Noonan*,
24 the Appellant recently filed a Motion for Oral Argument on February 8, 2021.
25 The Respondent filed a response to said Motion on February 12, 2021, and it is
26 presently pending before the Court. Both *Thunder Properties* and *Noonan IRA*
27 will likely be resolved in the relatively near future.

28 Because the questions at issue will soon be addressed, it is appropriate to

1 stay this appeal. Staying the appeal will avoid unnecessary expenditure of judicial
2 resources as well as the resources of the parties. At the very least, the issues in this
3 appeal will likely be significantly simplified and streamlined. To the extent that
4 any harm might be suffered by the parties as a result of a stay, such harms are
5 outweighed by the avoidance of expense on the part of the parties and the outlay
6 of judicial resources by this Court. Indeed, if briefing is completed, it may be
7 necessary to substantially amend or re-brief the matter at hand. Any prejudice that
8 may result from a stay will weigh approximately equally upon the parties. It is
9 very clear that the pending matters “bear upon the case,” and the parties and the
10 Court will be best served if the briefing of this appeal is completed based upon the
11 most current and accurate law.

12 CONCLUSION

13 For the reasons discussed above, LVDG respectfully requests that this Court
14 stay this appeal and hold all deadlines in abeyance until this Court resolves the
15 *Thunder Properties* and *Noonan IRA* matters discussed above. These decisions
16 will significantly impact this appeal and the parties should have the opportunity to
17 brief this matter based upon the most current and accurate law. Doing otherwise
18 will likely drain the resources of not only the parties but also this Court.

19 DATED this 4th day of March, 2021.

20 ROGER P. CROTEAU & ASSOCIATES, LTD.

21
22 /s/ Timothy E. Rhoda
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 4th day of March, 2021, 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 and serve system.

— 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.

Stephen E. Haberfeld
8224 Blackburn Ave #100
Los Angeles, CA 90048
Settlement Judge

— 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.