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Electronically Filed
Jun 22 2021 06:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9 ***

10 LAS VEGAS DEVELOPMENT
11 GROUP, LLC, A NEVADA LIMITED
LIABILITY COMPANY,)
12)
Appellant,)
13)
vs.)
14)
THE BANK OF NEW YORK
15 MELLON, F/K/A THE BANK OF NEW
YORK, AS TRUSTEE FOR THE)
16 CERTIFICATEHOLDERS OF CWABS,
INC., ASSET-BACKED)
17 CERTIFICATES, SERIES 2006-7,
Respondent.)
18)

Supreme Court No. 81961

CONSOLIDATED WITH

Supreme Court No. 82266

District Court Case No. A756215

19 **APPELLANT'S MOTION TO STAY APPEAL OR, ALTERNATIVELY,**
20 **FOR EXTENSION OF TIME TO FILE OPENING BRIEF AND APPENDIX**

21 **(First Request)**

22 COMES NOW, Appellant, LAS VEGAS DEVELOPMENT GROUP, LLC,
23 by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and
24 hereby presents its Motion to Stay Appeal or, Alternatively, For Extension of
25 Time to File Opening Brief and Appendix. This Motion is made and based upon

26 //

27 //

1 the attached Memorandum of Points and Authorities and all papers and pleadings
2 on file herein.

3 DATED this 22nd day of June, 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 On March 4, 2021, Appellant filed a Motion to Stay Appeals and to Hold all
20 Deadlines in Abeyance in relation to the two consolidated appeals herein, Nos.
21 81961 and 82266. Said Motion sought a stay pending the resolution of two issues
22 pending before this Court: (1) the entitlement of the entirety of an annual
23 homeowners assessment to superpriority status as originally determined in
24 *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 466 P.3d 1276, 1277-78
25 (Nev. 2020); and (2) the statute of limitations, if any, governing a bank's claim
26 that its secured interest was unaffected by a homeowners association lien
27 foreclosure sale as currently pending before this Court pursuant to a certified
28 question from 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. The certified question was accepted by this
Court and is currently the subject of Appeal No. 81129 ("*Thunder Properties*").

1 These two issues are the primary issues at play in the instant appeal. On April 2,
2 2021, this Court adjudicated the motion, issuing an Order consolidating the two
3 appeals and directing that Appellant shall have until June 28, 2021, in which to
4 file and serve its Opening Brief.

5 Pursuant to its recent decision in *Anthony S. Noonan Ira, LLC v. U.S. Bank*
6 *Nat'l Ass'n EE*, 485 P.3d 206 (Nev. 2021), upon *en banc* reconsideration, this
7 Court reversed its earlier panel decision in the matter of *Anthony S. Noonan IRA,*
8 *LLC v. U.S. Bank Nat'l Ass'n EE*, 466 P.3d 1276 (Nev. 2020), pursuant to which it
9 had held that, because the entire annual assessment at issue therein became due in
10 the 9 months preceding the HOA Lien, the entire amount of the yearly assessment
11 was entitled to superpriority status. This decision likely resolves one of the two
12 primary issues of this appeal. However, the remaining issue is the appropriate
13 statute of limitations applicable to claims such as those raised by the bank herein.
14 The certified question of *Thunder Properties*, which will address this issue,
15 remains outstanding, with oral argument scheduled to take place on June 29, 2021,
16 one day after the Opening Brief herein is currently due.

17 **STATEMENT OF THE FACTS**

18 The instant appeal involves real property commonly known as 1524
19 Highfield Court, Las Vegas, Nevada (*the "Property"*). The Property was the
20 subject of a homeowners association lien foreclosure sale (*"HOA Foreclosure*
21 *Sale"*) conducted pursuant to NRS Chapter 116. The HOA Foreclosure Sale
22 occurred on March 2, 2011, and was conducted by Alessi & Koenig, LLC (*"HOA*
23 *Trustee" or "Alessi"*) on behalf of Hidden Canyon Owners Association (*"HOA"*).
24 HOA purchased the Property at the HOA Foreclosure Sale and thereafter
25 conveyed it to the Appellant, Las Vegas Development Group, LLC (*"LVDG"*).
26 LVDG remains the title owner of the Property to this date. The Respondent, Bank
27 of New York Mellon (*"BONY"*), claimed to possess a secured interest (*"First*
28 *Deed of Trust"*) in the Property at the time of the HOA Foreclosure Sale.

1 Prior to the HOA Foreclosure Sale, Miles Bauer Bergstrom & Winters
2 (“*Miles Bauer*”) transmitted a check in the amount of \$88.50 to Alessi, purporting
3 to represent 9 months of assessments, i.e., nine-twelfths of the HOA’s annual
4 assessment of \$118.00. However, the HOA’s assessments were due annually, not
5 monthly. One of the issues in this appeal was whether Miles Bauer’s tender of
6 9/12 of the annual assessment was sufficient to protect the bank’s interest. As
7 stated above, this Court’s *en banc* decision in *Anthony S. Noonan Ira, LLC v. U.S.*
8 *Bank Nat’l Ass’n EE*, 485 P.3d 206 (Nev. 2021) has likely answered that question.
9 However, the second issue of this appeal remains outstanding.

10 Although the HOA Foreclosure Sale at issue herein took place on March 2,
11 2011, BONY took no action to contest the force and effect of the HOA
12 Foreclosure Sale upon its First Deed of Trust until it filed its Counterclaim in the
13 underlying action herein on June 15, 2017. Thus, more than six years passed
14 between the date of the HOA Foreclosure Sale on March 2, 2011, and the filing of
15 BONY’s claims on June 15, 2017. In the interim time period, BONY took no
16 action whatsoever to assert that its interest had survived. The Plaintiff/Appellant
17 asserted at the time of trial that BONY waived any opportunity to contest the force
18 and effect of the HOA Foreclosure Sale as a result of its many years of inaction.
19 This is an issue that *Thunder Properties* is likely to address head on.

20 LEGAL ARGUMENT

21 A. STATEMENT OF THE LAW

22 A “court may, with propriety, find it is efficient for its own docket and the
23 fairest course for the parties to enter a stay of an action before it, pending
24 resolution of independent proceedings which bear upon the case.” *Mediterranean*
25 *Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (*Leyva v.*
26 *Certified Grocers of California, Ltd.* 593 F.2nd 857, 863-4 (9th Cir. 1979).
27 Factors a court may consider when deciding whether to issue a stay of proceeding
28 include the interests of the parties, the efficient use of judicial resources, and the

1 interests of the public and persons not parties to the litigation. *See e.g. Keating v.*
2 *Office of Thrift Supervision*, 45 F.3d 322, 324-5 (9th Cir. 1995).

3 **B. THE ISSUE OF THE APPLICABLE STATUTE OF LIMITATIONS,**
4 **IF ANY, GOVERNING THIS MATTER REMAINS THE SUBJECT**
5 **OF AN ACTION PENDING BEFORE THIS COURT**

6 As set forth above, the annual assessment issue of *Noonan IRA* has been
7 addressed by the *en banc* court. The resulting opinion has likely streamlined this
8 appeal significantly as it may justify the district court's determination that Miles
9 Bauer's tender of 9 months of assessments was sufficient to satisfy the
10 superpriority portion of the HOA Lien foreclosed upon even where the
11 assessments were due and payable on an annual basis. However, the second issue
12 of this appeal has not yet been resolved by the Court.

13 The issue of what statute of limitations applies to a lienholder's claim that
14 its lien was not extinguished by a foreclosure sale was presented to the Ninth
15 Circuit Court of Appeals in the matter of *Thunder Properties* after the federal
16 district court determined that the secured lender's claims that its lien was
17 unaffected by a homeowners association lien foreclosure sale was time-barred.
18 In *Thunder Properties*, the Ninth Circuit Court of Appeals declined to determine
19 the appropriate statute of limitations governing the secured lender's claims under
20 Nevada law and instead certified the question to this Court. Specifically, the
21 Ninth Circuit Court of Appeals certified the following question to the Nevada
22 Supreme Court:

- 23 (1) When a lienholder whose lien arises from a mortgage for the
24 purchase of a property brings a claim seeking a declaratory judgment
25 that the lien was not extinguished by a subsequent foreclosure sale of
26 the property, is that claim exempt from statute of limitations under
27 *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699
(Nev. 2016)?
28 (2) If the claim described in (1) is subject to a statute of limitations:
(a) Which limitations period applies?
(b) What causes the limitations period to begin to run?

Id. The instant appeal potentially hinges at least in part upon an identical

1 question.

2 On September 11, 2020, this Court issued an Order accepting the certified
3 question that was issued in *Thunder Properties*, Appeal No. 81129. At this point
4 in time, briefing has been completed and oral argument is scheduled to take place
5 on June 29, 2021, the day after the Opening Brief herein is presently due. Because
6 this Court's determination of the certified question of *Thunder Properties* could
7 very likely be dispositive of the instant appeal, this appeal should be stayed
8 pending its resolution.

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

10 The ultimate resolution of the certified question presented in *Thunder*
11 *Properties* will bear heavily on the instant appeal. Given the fact that BONY took
12 no action to contest the HOA Foreclosure Sale for over 6 years after it took place,
13 BONY's claims will be barred if ANY statute of limitations is deemed to apply.
14 At the very least, the Court's decision will likely significantly impact this appeal.
15 *Thunder Properties* remains pending before this Court. Briefing has been
16 completed and this Court is to hear oral arguments on June 29, 2021. As a result,
17 the certified question of *Thunder Properties* will likely be resolved in the
18 relatively near future.

19 Because the question at issue will soon be addressed, it is appropriate to
20 stay this appeal. Staying the appeal will avoid unnecessary expenditure of judicial
21 resources as well as the resources of the parties. At the very least, the remaining
22 primary issue in this appeal will likely be significantly simplified and streamlined.
23 To the extent that any harm might be suffered by the parties as a result of a stay,
24 such harms are outweighed by the avoidance of expense on the part of the parties
25 and the outlay of judicial resources by this Court. Indeed, if briefing is completed,
26 it may be necessary to substantially amend or re-brief the matter at hand. Any
27 prejudice that may result from a stay will weigh approximately equally upon the
28 parties. It is very clear that the pending matters "bear upon the case," and the

1 parties and the Court will be best served if the briefing of this appeal is completed
2 based upon the most current and accurate law. Appellant proposes that this
3 appeal be stayed and that the Opening Brief and Appendix be due 30 days after a
4 decision is issued in *Thunder Properties*.

5 **D. IN THE EVENT THAT THE COURT IS NOT INCLINED TO STAY**
6 **THIS APPEAL, APPELLANT RESPECTFULLY REQUESTS AN**
7 **EXTENSION OF TIME IN WHICH TO FILE THE OPENING BRIEF**

8 NRAP 31(b) provides in pertinent part as follows:

9 **(2) Stipulations.** Unless the court orders otherwise, in all appeals
10 except child custody, visitation, or capital cases, the parties may
11 extend the time for filing any brief for a total of 30 days beyond the
12 due dates set forth in Rule 31(a)(1) by filing a written stipulation with
13 the clerk of the Supreme Court on or before the brief's due date. No
14 extensions of time by stipulation are permitted in child custody,
15 visitation, or capital cases.

16 **(3) Motions for Extensions of Time.** A motion for extension of time
17 for filing a brief may be made no later than the due date for the brief
18 and must comply with the provisions of this Rule and Rule 27.

19 **(A) Contents of Motion.** A motion for extension of time for filing a
20 brief shall include the following:

- 21 (i) The date when the brief is due;
- 22 (ii) The number of extensions of time previously granted (including a
23 5-day telephonic extension), and if extensions were granted, the
24 original date when the brief was due;
- 25 (iii) Whether any previous requests for extensions of time have been
26 denied or denied in part;
- 27 (iv) The reasons or grounds why an extension is necessary; and
- 28 (v) The length of the extension requested and the date on which the
brief would become due.

As stated above, the Opening Brief and Appendix are presently due on June 28,
2021, pursuant to this Court's Order dated April 2, 2021. Appellant's counsel
also has a Ninth Circuit Court of Appeals Opening Brief and Excerpts of Records
due on June 28, 2021. This, combined with counsel's other more routine
obligations, will make it very difficult or impossible to complete the Opening
Brief and Appendix herein by June 28, 2021.

No prior extensions have been requested or denied in this matter unless the
prior Motion to Stay Appeal is deemed to be such. Appellant's counsel has
communicated with Respondent's counsel, Natalie Winslow, Esq., who has

1 advised that while she is not currently authorized to agree to a stay of this appeal
2 until after *Thunder Properties* is adjudicated, she does not oppose a 60 day
3 extension of time until August 27, 2021.

4 **CONCLUSION**

5 For the reasons discussed above, LVDG respectfully requests that this Court
6 stay this appeal and hold all deadlines in abeyance until this Court resolves the
7 certified question of *Thunder Properties*. This decision will significantly impact
8 this appeal and the parties should have the opportunity to brief this matter based
9 upon the most current and accurate law. Doing otherwise will likely drain the
10 resources of not only the parties but also this Court. In the event that this matter is
11 stayed, Appellant proposes that the Opening Brief should be due within 30 days
12 after a decision is entered in *Thunder Properties*.

13 Alternatively, if the Court is not inclined to stay this matter, Appellant
14 respectfully requests an extension of time in which to file the Opening Brief and
15 Appendix herein for 60 days until August 27, 2021, due to other pending
16 obligations, including a Ninth Circuit Court of Appeals brief that is due on the
17 same date on which the brief herein is presently due. Respondent's counsel does
18 not oppose such an extension and it is possible that *Thunder Properties* may be
19 resolved by that time in any event.

20 DATED this 22nd day of June, 2021.

21 ROGER P. CROTEAU & ASSOCIATES, LTD.

22
23 /s/ Timothy E. Rhoda
24 ROGER P. CROTEAU, ESQ.
25 Nevada Bar No. 4958
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LAS VEGAS DEVELOPMENT GROUP, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 22nd day of June, 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.