IN THE SUPREME COURT OF THE STATE OF NEVADA

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LAS VEGAS DEVELOPMENT GROUP, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. 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 2006-7, Respondent.	Supreme Court No. 81961 Consolidated with No. 82266

APPEAL

From the Eighth Judicial District Court,
The Honorable Mark R. Denton, District Court Judge
District Court Case No. A-17-756215-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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.

Las Vegas Development Group, LLC (*"LVDG"*) is a private limited liability company with no publicly held corporation owning 10% or more of its stock. Appellant is represented by Roger P. Croteau and Timothy E. Rhoda of Roger P. Croteau & Associates, Ltd.

JURISDICTIONAL STATEMENT

This is an appeal from a Findings of Fact, Conclusions of Law and Judgment (*"FFCL"*) filed on September 17, 2020, arising from a bench trial that took place on July 28-29, 2020. Joint Appendix (*"JA"*) 382. Also at issue is an associated Order Granting Motion for Attorneys Fees and Costs in Part. (JA 0631). Notice of entry of the FFCL was filed on October 1, 2020. (JA 476). Notice of entry of the Order awarding attorneys' fees was filed on December 23, 2020. (JA 636). The non-appearing co-defendant, Dania V. Hernandez, was voluntarily dismissed on October 15, 2020. (JA 498). As a result, the orders appealed from constituted final judgments as to all parties below and were therefore appealable under NRAP 3A(b)(1). Appellant timely filed separate appeals of the two Orders on October 15, 2020 (JA 501) and December 23, 2020 (JA 645), respectively. This Court subsequently consolidated the two appeals pursuant to an Order entered on April 2, 2021.

ROUTING STATEMENT

Appellant avers that the instant matter raises as a principal issue a question of statewide public importance, namely the following questions:

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

On September 11, 2020, the Nevada Supreme Court accepted the above certified question as framed by the Ninth Circuit Court of Appeals, in Appeal No. 81129. Oral argument took place on June 29, 2021, however, an opinion has not yet issued. Because the instant appeal may assist in resolving the certified question, Appellant suggests that the Nevada Supreme Court should retain and decide this appeal.

STATEMENT OF ISSUES FOR REVIEW

1. Whether a purported lien holder whose debt is secured by real property that was the subject of a homeowners association lien foreclosure sale is required to bring an action to contest and adjudicate the force and effect of such foreclosure sale upon its security interest within a statutory period of time.
2. Whether the failure to timely bring an action to adjudicate the force and effect of a homeowners association lien foreclosure sale constitutes a waiver of any defenses that may exist in favor of the lien holder.
3. Did the district court err by refusing to dismiss the Bank's Counterclaim based upon the statute of limitations.
4. Did the district court err by granting judgment to the Bank upon the conclusion of trial.
5. Did the district court err by awarding attorneys' fees and costs to the Bank.

STATEMENT OF THE CASE

The instant action relates to real property commonly known as 1524 Highfield Court, North Las Vegas, Nevada (*the "Property"*). (JA 002). The Property is located within a common interest community governed by Hidden Canyon Owners Assocation (*"HOA"*). *Id*. The Property was the subject of a homeowners association lien foreclosure sale conducted pursuant to NRS Chapter 116 on March 2, 2011 (*"HOA Foreclosure Sale"*). (JA 004). At the time of the HOA Foreclosure Sale, the Property was owned by non-appearing Defendant, Dania V. Hernandez (*"Former Owner"*). (JA003). HOA purchased the Property at the HOA Foreclosure Sale. (JA 005). HOA thereafter sold the Property to Appellant, LVDG, on or about March 30, 2011. (JA 007).

LVDG filed its initial Complaint on May 31, 2017, more than six years after the date of the HOA Foreclosure Sale. Thereafter, LVDG relatively immediately filed a First Amended Complaint asserting a single claim for Quiet Title/Declaratory Relief against Former Owner and 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 2006-7 (*"BONY" or the "Bank"*). (JA 001). The Bank filed an Answer and Counterclaim on June 15, 2017, also asserting a claim for Quiet Title/Declaratory Relief. (JA 013). Former Owner did not appear and

was ultimately dismissed from the action pursuant to Voluntary Dismissal filed on October 15, 2020. (JA 498).

On June 16, 2017, LVDG filed a Motion to Dismiss Counterclaim and for Summary Judgment. (JA 039). This Motion was heard and denied on August 10, 2017, with the district court treating it as motion to dismiss. (JA 082). On March 18, 2019, the Bank filed a Motion for Summary Judgment. (JA 102). This Motion was heard on July 11, 2019, and was also denied. (JA 368). The matter then proceeded to trial on July 28-29, 2020. (JA 648-788).

Upon the conclusion of the trial, the district court entered its FFCL, granting judgment in favor of the Bank. (JA 382). In doing so, the district court determined that the Bank's First Deed of Trust was not extinguished for a variety of reasons. *Id*. However, each of these purported bases was improper for a single reason: the Bank failed to timely prosecute an action to adjudicate the force and effect of the HOA Foreclosure Sale for a period of over six years. As a result, any possible statute of limitations had expired prior to the time that the Bank filed its Counterclaim.

FACTUAL BACKGROUND

No significant dispute exists regarding the facts surrounding this matter. On February 27, 2020, prior to trial, the parties filed Stipulated Facts for Trial (JA 789), stipulating to the following facts:

1. On April 10, 2006 Dania Hernandez purchased the property located at 1524 Highfield Court, Las Vegas, Nevada. Hernandez financed the purchase with a loan from Countrywide Home Loans, Inc. in the amount of $208,000.00. The loan was evidenced by a note and secured by a deed of trust recorded against the property on April 19, 2006.

2. The deed of trust was assigned to BONY via an assignment of deed of trust.

3. The property is located in the Hidden Canyon Owners Association (HOA) and is subject to the HOA's covenants, conditions, and restrictions (CC&Rs).

4. Hernandez failed to pay the HOA all amounts due to it. The HOA, through its agent, Alessi & Koenig, LLC (Alessi) recorded a notice of delinquent assessment lien on June 3, 2009. Per the notice, the amount due to HOA was $571.85.

5. The HOA, through its agent Alessi, recorded a notice of lien on September 2, 2009. The notice states the amount due to HOA was $1,404.49.

6. On October 20, 2009, Miles Bauer Bergstrom & Winters LLP (Miles Bauer), as the attorneys of MERS, as nominee BAC Home Loans Servcing, LP, as then-servicer of the loan, requested a breakdown of the HOA arrears from HOA, through its agent Alessi, identifying the superpriority amount allegedly owed to HOA.

7. On or about December 17, 2009, Alessi provided a facsimile cover letter and Resident Transaction Detail. in response. According to the Resident Transaction Detail, at the time the lien was recorded, Hernandez was delinquent for six months of assessments.

8. For 2009, the HOA charged assessments for common expenses of $118 annually, or $9.83 monthly.

9. There were no charges for nuisance or abatement maintenance assessed against Hernandez's account.

10. On January 21, 2010, Miles Bauer forwarded a letter, together with a check payable to Alessi in the amount of $88.50 to Alessi.

11. Alessi refused Miles Bauer's payment.

12. The HOA, through its agent Alessi, recorded a notice of trustee's sale on August 9, 2010. The notice states the amount due to HOA was $2,862.23.

13. Alessi, on behalf of the HOA, foreclosed on the property on March 2, 2011. A foreclosure deed in favor of the HOA was recorded March 3, 2011.

14. On March 30, 2011, the HOA quitclaimed its interest to LVDG in exchange for $4,500.

15. BoNYM retained appraiser Scott Dugan to perform a retroactive Fair Market Value Appraisal of the property at the time of the foreclosure sale. Mr. Dugan is qualified to render an opinion regarding the fair market value of the property on March 2, 2011. As Mr. Dugan opines in the expert report, the property's fair market value at the time of the HOA's sale was $76,000.
(JA 789-791).

While the foregoing facts are important as a matter of background, the critical fact in this appeal is the fact that neither BONY nor any of its predecessors or agents filed any action to contest the force and effect of the HOA Foreclosure Sale upon its First Deed of Trust for a period of well over six years after the HOA Foreclosure Sale took place. Because BONY failed to timely adjudicate the force and effect of the HOA Foreclosure Sale, any defenses that it possessed were necessarily waived.

SUMMARY OF THE ARGUMENTS

For the past many years, the purchasers of real properties at homeowners association lien foreclosure sales in Nevada have been embroiled in litigation with purportedly secured deed of trust holders such as the Bank regarding the force and effect of NRS 116.3116 *et seq.*, which provides a homeowners association with a superpriority lien on an individual homeowner's property for up to nine months of unpaid association dues. In a nutshell, the purchasers of these properties have always asserted that homeowners association lien foreclosure sales served to extinguish all junior liens, including a first position deed of trust, pursuant to black letter lien law. Deed of trust holders such as the Bank incorrectly asserted that their security interests survived the HOA lien foreclosure sales.

Pursuant to its decision in the matter of *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this Court determined that a homeowners association's lien is a true priority lien, the foreclosure of which extinguishes all subordinate liens, including a first deed of trust. "The SFR decision made winners out of the investors who purchased foreclosure properties in HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often yielded a small fraction of the loan balance."

Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC, 2015 U.S. Dist. LEXIS 66249, 1-2 (D. Nev. May 19, 2015) (Dorsey, J.).

This matter arises from a Complaint filed by LVDG more than six years after the HOA Foreclosure Sale related to the Property took place and more than six years after LVDG purchased the Property in good faith from the HOA. After LVDG served its First Amended Complaint on June 9, 2017 (JA 011), the Bank filed a Counterclaim on June 15, 2017, pursuant to which it contested the force and effect of the HOA Foreclosure Sale that took place on March 2, 2011. (JA 013). It is undisputed that neither the Bank nor any of its predecessors or agents had not previously taken any action to contest the HOA Foreclosure Sale during the intervening time period of 6 years and 105 days. As a result of its extraordinary delay, BONY's claims became time-barred.

For the reasons set forth herein, Nevada law dictates that in the absence of a timely filed lawsuit to adjudicate its claim that its security interest was unaffected by the HOA Foreclosure Sale, the Bank must be deemed to have waived any such claims and such claims must be deemed time-barred. This is so because Nevada law specifically provides for various statutory presumptions that favor buyers at foreclosure sales. If an interested lien holder disputes these presumptions, it is required to timely file an action within the appropriate period of limitations to

prove that its interest was unaffected for some reason. The failure to do so results in the waiver of any defense to extinguishment that a party such as the Bank might possess. In this case, it matters not what period of limitations is applied; because the Bank delayed for well over six full years, any conceivable statute of limitations expired.

ARGUMENT

1. STANDARD OF REVIEW

When the issue at hand is purely a question of law, such as in cases where statutory construction is at issue, review is *de novo*. *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31, 125 Nev. Adv. Rep. 33 (Nev. 2009).

2. PURPOSES OF A STATUTE OF LIMITATIONS

The statute of limitations serves to prohibit suits "after a period of time that follows the accrual of the cause of action." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). "[S]uch limitation periods are meant to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 257, 277 P.3d 458, 465 (2012). The public policies embodied in statutes of limitation are important considerations because they "stimulate activity,

punish negligence, and promote repose by giving security and stability to human affairs." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 19 (1990) (citing 51 Am.Jur.2d Limitation of Actions §18 (1970). "Statutes of limitation find their justification in necessity and convenience rather than logic, and it has been said that they represent expedience rather than principles." 51 Am.Jur.2d Limitation of Actions §19, p. 603 (citing *Chase Secur. Corp. v. Donaldson*, 325 U.S. 304 (1945)).

"A claim for declaratory relief is subject to a statute of limitations generally applicable to civil claims." *Zuill v. Shanahan*, 80 F.3d 1366, 1369-70 (9th Cir. 1996); *Levald v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (noting that statute of limitations applicable to damages action applies equally to claims for declaratory judgment). When a complaint shows on its face that the cause of action is barred by the statute of limitations, the burden falls upon the plaintiff to demonstrate that the bar does not exist. *Bank of Nevada v. Friedman*, 82 Nev. 417, 422, 420 P.2d 1, 4 (1966).

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3. NEVADA LAW DICTATES THAT A HOA FORECLOSURE SALE PRESUMPTIVELY EXTINGUISHES A FIRST DEED OF TRUST AS A MATTER OF LAW

Elementary black letter lien law dictates that the foreclosure of a lien extinguishes the lien foreclosed upon as well as all subordinate liens. A homeowners association lien is a true superpriority lien, the foreclosure of which extinguishes a first deed of trust. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014). Moreover, this Court has acknowledged that an association's notices constitute prima facie evidence that the association foreclosed on the superpriority portion of the lien. See *PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103*, 395 P.3d 511 (Nev. 2017) (unpublished); *PNC Bank, N.A. v. Saticoy Bay, LLC Series 4208 Rolling Stone Dr. Tr.*, 398 P.3d 290 (Nev. 2017) (unpublished). Thus, at the very least, the foreclosure of an HOA lien constitutes prima facie evidence that a first deed of trust was extinguished.

In a quiet title case, a presumption exists in favor of the record title holder. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669 (1996). This is opposed to holders of secured interests, who are not record title holders. For a plaintiff to succeed on its quiet title action, it must prove that its claim to the property is

superior to all others. *Id.* ("In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself."). Where a bank contests a foreclosure sale, it is a bank's burden to show that a foreclosure sale should be set aside. See *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 646 (Nev. 2017). Thus, in order to prevail in a quiet title action, a secured lien holder must overcome not only the presumption that exists in favor of the record title holder but also various other statutory presumptions that exist against it.

Pursuant to NRS 116.31166(1), the recitals made in a HOA Foreclosure Deed are conclusive proof of the matters recited, e.g., that the process complied with the applicable law for foreclosure of HOA liens. NRS 47.240(6) provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in a HOA Foreclosure Deed are "conclusive proof" of the default of the Former Owner and that the HOA complied with all notice and mailing requirements related to the HOA Foreclosure Sale.

Notwithstanding the statutorily conclusive nature of the recitals, in the matter of *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp, Inc*., this Court effectively determined that the recitals of the HOA Foreclosure Deed are in

fact only presumptions. *Shadow Wood*, 366 P.3d 1105, 1110 (Nev. 2016). It should be noted that there is no reason that the *Shadow Wood* holding should be any less applicable to foreclosure sales conducted pursuant to NRS Chapter 107.

To the extent that covenant number 8 of NRS 107.030 might be adopted by a deed of trust, there is no reason that the statutory requirement that

> the recital[s] therein [of a deed issued upon foreclosure of a deed of trust] of default, and of recording notice of breach and election of sale, and of the elapsing of the 3-month period, and of the giving of notice of sale, and of a demand by beneficiary, his or her heirs or assigns, that such sale should be made, shall be conclusive proof of such default, recording, election, elapsing of time, and of the due giving of such notice, and that the sale was regularly and validly made on due and proper demand by beneficiary, his or her heirs and assigns; and any such deed or deeds with such recitals therein shall be effectual and conclusive against grantor, his or her heirs and assigns, and all other persons

should be given conclusive effect. See NRS 107.030. Indeed, NRS Chapter 107 provides interested parties with a period of time in which to contest a foreclosure sale conducted pursuant to its provisions despite the so-called "conclusive" presumptions. As discussed below, this time period is very short.

Aside from the deed recitals, Nevada law provides that a foreclosure sale and the resulting deed are both presumed valid. NRS 47.250(16)-(18) (stating that there are disputable presumptions "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person,

has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed."). A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof. *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (citing *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 368 (1989).) In order to overcome these presumptions, a bank, as the party against whom they are directed, bears the sole burden of proving that the nonexistence of the presumed fact is more probable than its existence. *Id*. (citing NRS 47.180.). This must be accomplished by timely filing an action to rebut the presumptions.

The "conclusive" presumptions contained in NRS 116.31166 are consistent with the common law presumption that "[a] nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by **pleading and proving** an improper procedure and the resulting prejudice.'" *Fontenot v. Wells Fargo Bank*, 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011) (Emphasis added). Furthermore, "[t]he conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with

some required procedure which deprived the trustor of his right of reinstatement or redemption." *Moeller v. Lien*, 25 Cal. App. 4th 822, 831, 30 Cal. Rptr. 777 (1994). Nevada's detailed and comprehensive statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See Miller & Starr, California Real Property 3d §10:210.

Taken in their totality, the presumptions that exist under Nevada law create at the very least a presumption that a first deed of trust is extinguished by a homeowners association lien foreclosure sale. The burden to rebut this presumption lays squarely with a party that disputes it, i.e., a secured lien holder. As such, any lien holder that disputes the force and effect of a homeowners association lien foreclosure sale upon its security interest must timely file an action to judicially confirm its claims or forever waive them. If a bank cannot as a matter of law show that it has any ongoing interest in real property that can be enforced against the property owner because it failed to timely bring an action, then the bank is barred from any relief. *Bank of N.Y. Mellon v. Ruddell*, 380 F. Supp. 3d 1096, 1101 (D. Nev. 2019).

As mentioned above, this Court is currently considering the statute of limitations, if any, governing a bank's claim that its secured interest was unaffected by a homeowners association lien foreclosure sale pursuant to a

certified 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"*). In *Thunder Properties*, US Bank delayed for well over 5 years before it even sought to assert that any defect existed in the HOA Foreclosure Sale. After over 5 ½ years, US Bank filed suit alleging that "[o]n information and belief, had U.S. Bank or anyone else attempted to tender the amounts due under Woodland Village's claimed lien, Woodland Village and/or its agents would have rejected the attempted tender." *Thunder Properties,* AA5. As a result, the US Bank alleged that it was excused from protecting its interest. *Id.*, AA9. The HOA Foreclosure Sale was presumptively valid and presumptively extinguished US Bank's security interest. US Bank was aware of this fact for well over 5 years before it finally took action. As a result of its extraordinary delay, US Bank lost the opportunity to even contest the HOA Foreclosure Sale. The instant scenario is substantially identical except for the fact that the Bank delayed even longer in this case.

LVDG owned the Property at issue in this appeal for over 6 years after it purchased it from HOA without any knowledge whatsoever that the Bank might

continue to claim an interest in the Property. During this time period, LVDG maintained the Property and treated it as its own. Only after 6 years of inaction by the Bank did LVDG file the action appealed from with the intention of formally clearing its title. Only then did the Bank suddenly claim that its security interest was wholly unaffected by the HOA Foreclosure Sale. To say that the Bank's late action disturbed LVDG's "level of security," *Winn*, 128 Nev. at 257, and "security and stability," *Petersen,*106 Nev. at 274, is an understatement. Moreover, the Bank's delayed action serves to dissuade LVDG and other similarly situated parties from engaging in economic activity such as purchasing real property at foreclosure sales. *Id*.

It is clear that statutory presumptions must be given full force and effect unless and until rebutted. It is equally clear that a party cannot possess an unlimited period of time in which to rebut the presumptions. Finding in such manner would allow institutions such as the Bank to potentially sit on their rights for decades before wresting real property from the hands of good faith purchasers.

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4. UNLIKE PURCHASERS, IN NEARLY ALL INSTANCES, BANKS POSSESSED ACTUAL KNOWLEDGE OF THE HOA FORECLOSURE SALES AND ANY EFFORTS THEY TOOK TO PROTECT THEMSELVES

Under NRS 116.31166(1), the holder of a first deed of trust may pay the superpriority portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest. *See* Nev. Rev. Stat. § 116.31166(1); *see also SFR Investments*, 334 P.3d at 414. As noted above, in this particular case, it is undisputed that Miles Bauer Bergstrom & Winters, LLP (*"Miles Bauer"*) contacted HOA's agent, Alessi, and forwarded a check to ostensibly pay the superpriority portion of the HOA Lien on January 21, 2010. (JA 790). This necessarily proves that the Bank or its predecessor possessed actual advance knowledge of the HOA Foreclosure Sale. It is equally clear that the Bank possessed actual knowledge of its purported "tender" for **well over seven years before this litigation was initiated**. During this time period, neither the Bank nor its predecessor took any action to contest the HOA Foreclosure Sale. Despite the fact that the Bank may have purported to pay the superpriority portion of the HOA Lien, it must nonetheless be required to file an action to "plead and prove" that its security interest was protected under the specific facts at hand. *Fontenot*, 198

Cal. App. 4th at 272. As here, the fact that a bank may have made some form of effort in any given case does not mean that its interest was protected if the Bank failed to timely bring a legal action to "plead and prove" its claims.

5. A BANK MUST TIMELY FILE AN ACTION TO PROVE THAT IT ACTUALLY PROTECTED ITS INTEREST

The Bank effectively argued at trial that a bank need not file a legal action in order to confirm that its security interest was not extinguished. However, this assertion disposes of all of the presumptions that exist under Nevada law in favor of the purchasers of real property at foreclosure sales – whether NRS Chapter 116 or 107. Indeed, the Bank's position would create a reverse presumption that a bank did protect its interest if the bank, in its sole discretion, determines this to be the case. To say that this undermines Nevada law is an understatement.

As discussed above, in association with its claimed tender, the Bank possessed actual knowledge of all the facts surrounding the HOA Foreclosure Sale and its efforts to protect itself. Specifically, the Bank or its predecessor was aware of the sale; it was aware that Miles Bauer was retained; and it was aware of or should have been aware of what actions Miles Bauer may have taken or not taken. This is opposed to the purchasers at the homeowners association lien foreclosure sales who, prior to 2015, in nearly all cases possessed no knowledge whatsoever

of any communications that may have taken place between a homeowners association's agent and a bank or Miles Bauer. As a result, the purchasers appeared at the homeowners association lien foreclosures sales and bid in good faith without any way of knowing that a bank may have taken *some* action to protect itself. Thereafter a period of years often passed before the banks did anything at all.

Aside from the foregoing, various defects can exist with respect to efforts that may have been made to tender by banks. For example, Appellant's counsel is aware of occasions on which Miles Bauer sent its correspondence to an incorrect address for the HOA's agent and the correspondence was thus not received though no fault of the HOA or its agent. The HOA's agent could hardly be expected to respond to Miles Bauer under such circumstances but a bank may or may not be aware of the defect in its tender efforts. Similarly, whether due to miscalculation or some other reason, Miles Bauer may have sent a check in an insufficient amount that did not serve to satisfy the superpriority portion of the HOA lien. Indeed such was claimed at the trial of this matter where the assessments related to the Property were annual rather than monthly. Because the Bank paid only 9/12

of the annual assessment, LVDG asserted that the Bank's tender was ineffective in any event.[1]

Under the foregoing circumstances, a bank might unilaterally deem its security interest to be protected and simply proceed with a foreclosure of its deed of trust after a homeowners association lien foreclosure sale extinguished it. At that point, whether the bank's foreclosure is initiated in good faith or not, the purchaser and/or current owner of the subject property would be placed in the position of either losing its property or filing suit against the bank without any knowledge of the facts. Unlike the Bank, the purchaser and/or owner possesses no knowledge regarding any efforts taken by the Bank to tender or whether such efforts were effective. Indeed, the property owner would be forced to file a legal action with no idea whether it possesses legal grounds for doing so.

Perhaps the most powerful argument that a bank is required to file a legal action to confirm the effect of a homeowners association lien foreclosure sale upon its security interest is the fact that banks have filed many hundreds or thousands of such cases over the course of the past several years. If they were not

[1] This argument has since been mooted by this Court's en banc decision in the matter of *Anthony S. Noonan Ira, LLC v. U.S. Bank Nat'l Ass'n EE*, 485 P.3d 206 (Nev. 2021).

required to do so, why would this be the case? Through the filing of these actions, the banks have acknowledged the burden that they must meet.

6. NEVADA LAW SUPPORTS A POLICY OF MAKING FORECLOSURE SALES FINAL SUBJECT TO ONLY BRIEF PERIODS OF TIME IN WHICH THEY MAY BE CONTESTED

In the case of the foreclosure of a first deed of trust by a financial institution like the Bank, depending on its standing, a party wishing to contest the foreclosure possesses only a 30 to 90 day window in which it may contest the sale pursuant to Nevada law. Specifically, NRS 107.080 provides as follows:

> 5. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption. Except as otherwise provided in subsection 7, a sale made pursuant to this section must be declared void by any court of competent jurisdiction in the county where the sale took place if:
>
> (a) The trustee or other person authorized to make the sale does not substantially comply with the provisions of this section;
>
> (b) Except as otherwise provided in subsection 6, an action is commenced in the county where the sale took place within 30 days after the date on which the trustee's deed upon sale is recorded pursuant to subsection 10 in the office of the county recorder of the county in which the property is located; and
>
> (c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the

> county where the sale took place within 5 days after commencement of the action.
>
> 6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of subsection 4 to the grantor, to the person who holds the title of record on the date the notice of default and election to sell is recorded, to each trustor or to any other person entitled to such notice, the person who did not receive such proper notice may commence an action pursuant to subsection 5 within 90 days after the date of the sale.
>
> 7. Upon expiration of the time for commencing an action which is set forth in subsections 5 and 6, any failure to comply with the provisions of this section or any other provision of this chapter does not affect the rights of a bona fide purchaser as described in NRS 111.180.

NRS 107.080(5)-(7). In the event that a party fails to timely file an action to contest the foreclosure sale as required by NRS 107.080(5)-(6), NRS 107.080(7) specifically provides that any defect in the foreclosure process cannot affect the rights of a bona fide purchaser. Under these circumstances, how could it conceivably make sense that a party contesting a foreclosure sale conducted pursuant to NRS Chapter 116 would possess an unlimited period of time in which to contest the sale?

In the context of a foreclosure sale conducted pursuant to NRS Chapter 107, a subordinate lien holder that was not provided with statutorily required notice possesses a period of only 90 days from the date of the foreclosure sale to

commence an action to contest the sale. NRS 107.080(6). If the subordinate lien holder fails to timely file an action, NRS 107.080(7) very specifically provides that the foreclosing party's failure to properly carry out the foreclosure sale "does not affect the rights of a bona fide purchaser." NRS 107.080(7). Notably, NRS 107.080(7) does **NOT** in any manner whatsoever provide that an unsuspecting bona fide purchaser must purchase the property subject to a subordinate lien which it had no reason to believe was protected from extinguishment. This would stand foreclosure law upon its head. Nonetheless, good faith purchasers of property at NRS Chapter 116 sales have been subjected to exactly this treatment, with courts frequently finding that the innocent purchasers acquired property subject to seemingly subordinate liens that with balances exceeding the value of the property. This is the case despite the lack of any available notice of this fact.

7. NEVADA'S COURTS HAVE ROUTINELY APPLIED A STATUTE OF LIMITATIONS TO CLAIMS SUCH AS THOSE BROUGHT BY THE BANK

Judge Gloria M. Navarro of the United States District Court has noted that an intra-District split exists regarding the time period in which a lien holder must contest the force and effect of a homeowners association lien foreclosure sale, stating as follows:

> The Nevada Supreme Court has yet to weigh in on which limitations period applies to a lienholder's quiet title claim. Consequently, there is an intra-District split as to whether lienholders have four or five years to bring quiet title actions.

Bank of Am., N.A. v. Woodcrest Homeowners Ass'n, 2019 U.S. Dist. LEXIS 54950, *11. The Ninth Circuit Court of Appeals also noted this fact in its Order Certifying Questions in *Thunder Properties*, stating as follows:

> Federal district courts in Nevada have overseen a substantial number of cases raising claims similar to U.S. Bank's in recent years and have been split on the appropriate statute of limitations to apply. Some courts have imposed the five-year limitations period prescribed by Nevada Revised Statutes §§ 11.070 and 11.080. See, e.g., *Deutsche Bank Nat'l Tr. Co. v. SFR Invs. Pool 1, LLC*, No. 2:18-cv-597, 2019 U.S. Dist. LEXIS 166439, 2019 WL 4738005, at *4 (D. Nev. Sept. 27, 2019); *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 2:16-cv-2005, 2017 U.S. Dist. LEXIS 122174, 2017 WL 3317813, at *2 (D. Nev. Aug. 2, 2017); *Nationstar Mortg., LLC v. Falls at Hidden Canyon Homeowners Ass'n*, No. 2:15-cv-01287, 2017 U.S. Dist. LEXIS 91343, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017). Others have resorted to the four-year catch-all limitations period. See, e.g., *JPMorgan Chase Bank, N.A. v. Saticoy Bay LLC Series 7517 Apple Cider*, No. 2:17-cv-02948, 2019 U.S. Dist. LEXIS 163976, 2019 WL 4677013, at *2 (D. Nev. Sept. 25, 2019); *Bank of N.Y. Mellon v. Ruddell*, 380 F. Supp. 3d 1096, 1100 (D. Nev. 2019); *U.S. Bank Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, 376 F. Supp. 3d 1085, 1091 (D. Nev. 2019); *Nationstar Mortg. LLC v. Safari Homeowners Ass'n*, No. 2:16-cv-02542, 2019 U.S. Dist. LEXIS 163976, 2019 WL 121960, at *2 (D. Nev. Jan. 6, 2019); *Bank of N.Y. v. S. Highlands Cmty. Ass'n*, 329 F. Supp. 3d 1208, 1213-14 (D. Nev. 2018); *Bank of Am., N.A. v. Country Garden Owners Ass'n*, No. 2:17-cv-01850, 2018 U.S. Dist. LEXIS 42446, 2018 WL 1336721, at *2 (D. Nev. Mar. 14, 2018). And at least one district court has applied the three-year limitations period for liabilities

> created by statute codified at Nevada Revised Statutes § 11.190(3). See *Nationstar Mortg. LLC v. Curti Ranch Two Maint. Ass'n, Inc.*, No. 3:17-cv-00699, 2018 U.S. Dist. LEXIS 56406, 2018 WL 1611190, at *3 (D. Nev. Apr. 2, 2018).

U.S. Bank, N.A. v. Thunder Props., Inc., 958 F.3d 794, 799 n.3 (9th Cir. 2020).

What the courts have NOT done is find that no statute of limitations applies. Indeed, Appellant is unaware of a single case in which any court has determined that claims contesting the force and effect of a homeowners association lien foreclosure sale such as those of the Bank herein are unconstrained by any period of limitations. Moreover, this Court has recently found that a statute of limitations applies to similar claims in the context of the homeowners association lien foreclosure arena.

8. THIS COURT HAS HELD THAT A STATUTE OF LIMITATIONS APPLIES TO ACTIONS BROUGHT TO ENFORCE THE FEDERAL FORECLOSURE BAR IN THE CONTEXT OF HOMEOWNERS ASSOCIATION LIEN FORECLOSURE SALES

In *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, Ltd. Liab. Co.*, this Court recently addressed what statute of limitations, if any, applies to an action brought to enforce the so-called "Federal Foreclosure Bar" of 12 U.S.C. §4617(j)(3) in the context of a dispute related to real property that was the subject

of a homeowners association lien foreclosure sale. *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 475 P.3d 52, 54 (Nev. 2020). Upon consideration, this Court specifically determined that claims seeking to enforce the Federal Foreclosure Bar sound more in contract than in tort and that a 6 year statute of limitations thus applies. *Id.*, 475 P.3d at 56. Specifically, this Court stated as follows:

> HERA provides that if the claim sounds in contract, the statute of limitations is either six years or "the period applicable under State law," whichever is longer. 12 U.S.C. § 4617(b)(12)(A)(i). Nevada law also imposes a six-year statute of limitations on an action arising out of a contract. NRS 11.190(1)(b). **We therefore conclude that Chase had six years from the foreclosure sale to bring its claims**.

Id., 475 P.3d at 57 (Emphasis added). Moreover, this Court stated as follows:

> Applying a six-year statute of limitations, **Chase timely brought its action seeking to protect the FHFA's interest** by enforcing the Federal Foreclosure Bar regardless of whether the operative filing date is that of the original complaint or the amended complaint.

Id. (Emphasis added).

By virtue of its decision in *JPMorgan Chase*, this Court has previously determined that a bank "seeking to protect [an] interest" from the force and effect of a homeowners association lien foreclosure sale "had six years from the foreclosure sale to bring its claims" where its defense to extinguishment is based upon the Federal Foreclosure Bar. *Id*. However, this obviously does not mean

that the appropriate statute of limitations is always 6 years. On the contrary, the six year statute of limitations applied in *JPMorgan Chase* was solely a product of 12 U.S.C. § 4617(b)(12), a statute-of-limitations provision that applies "to any action brought by the [FHFA]" and which specifies the limitations period based on whether the action involves a contract claim or a tort claim. *Id*. at 55.

Given the fact that it is indisputable that no contract exists between the purchaser of real property at a foreclosure sale and a lien holder holding a security interest recorded against such property, nowhere in Nevada law is there any provision that could conceivably form the basis for a six year statute of limitations for claims by a secured lien holder contesting the force and effect of a homeowners association lien foreclosure sale. Nonetheless, *JPMorgan Chase* makes it abundantly clear that some statute of limitations governs such claims.

9. THE DISTRICT COURT ERRONEOUSLY FOUND THAT THE BANK'S CLAIM MUST BE TIMELY IF LVDG'S CLAIM WAS TIMELY

Pursuant to the FFCL, the district court held that the Bank was entitled to the same statute of limitations as LVDG. (JA 396). However, the Bank's competing claim for Quiet Title/Declaratory Relief was and is completely different than LVDG's because the Bank never possessed title to the Property at any point

in time. On the contrary, as the Bank must agree, it possessed nothing more than a security interest in the Property. This is opposed to LVDG, who possessed (and continues to possess) actual record legal title.

NRS 11.080 states in relevant part:

> No action for the recovery of real property, or for the recovery of the possession thereof…shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

Similarly, NRS 11.070 provides as follows:

> No cause of action or defense to an action, founded upon the title to real property, or to rents or to services out of the same, shall be effectual, unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within 5 years before the committing of the act in respect to which said action is prosecuted or defense made.

As such, both statutes apply to the "recovery of real property" or "recovery of possession" of real property and both require that the party be "seized or possessed" of the property. Because the Bank's claim was not premised upon the "recovery of real property" or the "recovery of possession" of property, and because the Bank was not "seized or possessed" of the Property, its claim cannot be governed by the 5 year time periods set forth in NRS 11.070 or NRS 11.080.

This Court addressed the 5 year statute of limitations periods of NRS 11.070 and 11.080 in *Berberich*, when it recently clarified that the limitations period provided by NRS 11.080 only starts to run when a plaintiff has been deprived of ownership or possession of the property. *Berberich v. Bank of Am., N.A.*, 460 P.3d 440, 442 (Nev. 2020). Thus, a 5 year statute of limitations applies to claims by a property owner to recover its property after a bank purports to foreclose upon a previously extinguished security interest. Such was the case in the matter of *Las Vegas Dev. Grp., LLC v. Blaha*, where the plaintiff had acquired real property at a homeowners association lien foreclosure sale and a secured lien holder thereafter carried out a foreclosure sale pursuant to a deed of trust that was alleged to have been previously extinguished. *Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 416 P.3d 233 (2018). In *Blaha*, the filing of the plaintiff's complaint within 5 years after the bank's foreclosure sale was deemed to be timely pursuant to NRS 11.080. *Id.*, 134 Nev. at 257, 416 P.3d 233 at 237. However, this determination was based upon the plaintiff's status as a title owner who was "seized or possessed" of the subject property prior to the bank's foreclosure sale. The Bank was not and is not in a similar position.

Judge Jennifer A. Dorsey has distinguished the holding of *Blaha* as it related to the plaintiff therein from claims by a bank, stating as follows:

> But the devil is in the details of NRS 11.080. This narrow statute does not apply to all quiet title actions, just those for the recovery of real property or its possession. And while purchaser LVDG was seeking to recover real property in *Blaha*, U.S. Bank stands in different shoes. Because U.S. Bank seeks only a determination that its lien remains on the property—it is not seeking to recover real property or its possession—this action is not governed by NRS 11.080 and its five-year statutory period.

In re U.S. Bank Nat'l Ass'n, 376 F. Supp. 3d 1085, 1091 (D. Nev. 2019). Thus, Judge Dorsey has confirmed that bank claims are not governed by a 5 year statute of limitations.

In almost every case, the banks who are involved in disputes related to the force and effect of homeowners association lien foreclosure sales were never "seized or possessed" of the property in dispute. As a result of this fact, NRS 11.070 and 11.080 quite simply do not apply to the banks' claims for quiet title and declaratory relief. The proper statute of limitation is either 3 years or 4 years.

10. <u>IT MATTERS NOT WHAT STATUTE OF LIMITATIONS APPLIES BECAUSE, IN THIS CASE, THE BANK TOOK NO ACTION FOR OVER SIX YEARS AFTER THE HOA FORECLOSURE SALE</u>

In *Thunder Properties*, this Court has been tasked with determining what statute of limitations, if any, applies to a bank's claims contesting the force and effect of a homeowners association lien foreclosure sale. Assuming that a statute

of limitation does apply as – to the best of LVDG's knowledge – every court addressing the issue has found, the question is whether the appropriate period of limitations is 3, 4, or 5 years. This simply does not matter in this case, where the Bank sat on its hands for over six years after the HOA Foreclosure Sale. Any possible statute of limitation expired prior to the time that the Bank took any action.

11. ANY ARGUMENT THAT NO STATUTE OF LIMITATIONS APPLIES TO THE FACTS AT HAND IS LUDICROUS

In the case from which appeal originates, the Bank delayed over 6 years by doing absolutely nothing and allowing the Property to not only be sold to HOA at the HOA Foreclosure Sale but also allowing it to be transferred to LVDG, a bona fide purchaser, without providing any notice of a claim. In a desperate attempt to salvage its lost security interest, the Bank will argue that NO statute of limitations exists which can serve to bar its claims. Given the extraordinarily long delay of the Bank, this is in fact the only argument that it can make. Unfortunately, it is wholly without merit.

The Bank relies in large part upon *City of Fernley v. State Dep't of Tax,* 366 P.3d 699 (2016) for its purported proposition that "declaratory actions do not always have a statute of limitations." However, the Bank ignores the fact that in

Fernley, this Court ruled that the four-year catchall statute of limitations of NRS 11.220 barred the City's claims for retrospective relief related to an unconstitutional statute. *City of Fernley*, 366 P.3d 699, 707, 2016 Nev. LEXIS 4, *17, 132 Nev. Adv. Rep. 4. Because the City had delayed seeking relief for almost 11 years after it possessed notice that it would be adversely affected by the statute at issue, the City was allowed to proceed only with its prospective claims for injunctive and declaratory relief from the statute. *Id*. Claims related to all of its alleged past damages were adjudged to be time-barred. Thus, contrary to the arguments of the Bank, *Fernley* actually dictates that a bank **is** barred from asserting at a late date that its security interest was unaffected by an earlier homeowners association lien foreclosure sale. Indeed, *Fernley* is highly analogous to the situation at hand. Judge Richard Boulware of the United States District Court for the District of Nevada has acknowledged this fact.

In the matter of *Bank of N.Y. Mellon v. Ruddell*, Judge Boulware stated as follows:

> BNY incorrectly asserts that no statute of limitations applies to seek declaratory relief. "A claim for declaratory relief is subject to a statute of limitations generally applicable to civil claims." *Zuill v. Shanahan*, 80 F.3d 1366, 1369-70 (9th Cir. 1996). While Nevada law recognizes that "[t]he statute of limitations applies differently depending on the type of relief sought" and that "claimants retain the right to prevent future violations of their constitutional rights [through prospective

> relief]," *City of Fernley v. State, Dep't of Tax*, 366 P.3d 699, 706 (Nev. 2016), the relief BNY seeks is retrospective in nature. BNY argues that it seeks prospective relief as to the ongoing validity of its deed of trust. But to find in favor of BNY on this claim, the Court would first need to award retrospective relief by finding that the foreclosure sale did not extinguish the senior deed of trust or that the foreclosure sale was void, meaning a deed of trust existed on which the judicial foreclosure claim could proceed.

Bank of N.Y. Mellon v. Ruddell, 380 F. Supp. 3d 1096, 1100-01 (D. Nev. 2019).

As discussed at length above, a subordinate first deed of trust is presumptively extinguished at the time of a HOA Foreclosure Sale. In the event that the Bank disputed this presumption, it was required to timely bring an action to adjudicate this dispute. As in *Fernley*, the Bank's delay bars it from seeking retrospective relief. To hold otherwise would serve to ignore the very purposes of the statutes of limitations which are designed to "promote repose by giving security and stability to human affairs." *Petersen*, 106 Nev. 271 at 274.

The Bank may also argue that the statute of limitations for what it contends is simply a declaratory relief claim has *not even begun to run yet* because lenders are not barred from foreclosing on mortgaged property merely because the statute of limitations for contractual remedies on the note has passed. The Bank attempts to support this nonsensical argument by citing an inapposite case— *Facklam v.*

HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Tr., 401 P.3d 1068, 1069 (Nev. 2017).

Any reliance on *Facklam* is misplaced, and *Facklam* actually demonstrates why NRS 11.190 applies. In *Facklam*, the bank sought to enforce a **valid** deed of trust, and the Court simply held that the statute of limitations found in NRS Chapter 11 does not apply to non-judicial claims; i.e. a non-judicial foreclosure. This is far from the situation at issue herein where the Bank's secured interest was presumptively extinguished and rendered void as a matter of law by the HOA Foreclosure Sale and the Bank thereafter simply ignored the matter for over 6 years before filing its Counterclaim only after it was brought to court by LVDG.

The Bank may also argue that its First Deed of Trust remains valid until ten years after the note associated with the same becomes fully due pursuant to NRS 106.240 and that its claims therefore cannot barred until such time. Any reliance on NRS 106.240 is also misplaced.

NRS 106.240 is a statute of repose and not a statute of limitation like NRS 11.080 or 11.190. A statute of repose "…begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *See* Black's Law Dictionary, 1423 (7th d. 1999). NRS 106.240 is inapplicable to this matter because the plain language of the statute discusses a

non-claim if after ten years from last payment "it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged." *Id*.

12. IN THE ABSENCE OF TIMELY FILING SUIT, A BANK MUST BE DEEMED TO HAVE WAIVED ANY CLAIM THAT ITS SECURITY INTEREST WAS NOT EXTINGUISHED

All of the presumptions that exist under Nevada law favor the purchaser and/or owner of real property that was the subject of a foreclosure sale. The Bank's positions would destroy these presumptions in favor of a perverted policy that allows a lender who may or may not have taken sufficient action to protect itself to unilaterally decide whether it believes that it can successfully rebut these statutory presumptions. It is highly likely that a bank will not bother to do so. Instead, it will simply move forward with foreclosure and shift the burden of objecting to the party with far fewer resources and far less knowledge than the bank. Indeed, in this instance, it is likely that the Bank would not have taken action but for the fact that LVDG proactively filed suit to formally clear its title to the Property.

It is without doubt that a party with meritorious claims may waive them. Take for example the case of a grievous personal injury. A potential plaintiff may suffer great injury as a result of the negligence of a third party. While there may

be absolutely no dispute at law regarding the liability of the third party for these injuries, the potential plaintiff must nonetheless file an action within the appropriate period of limitations if he or she hopes to have any recovery. The failure to do so results in forever waiving the claim. The same should hold true for a bank that believes its security interest to be unaffected by a homeowners association lien foreclosure sale despite the litany of presumptions that dictate otherwise. If the bank fails to timely file an appropriate action to *prove* itself to have been protected, the unrebutted presumptions should operate by law to confirm that the bank's security interest was extinguished. Otherwise, owners of real property can never have the comfort of knowing that their property will not be wrested from them at some unknown point in the distant future for reasons of which they are completely unaware. Nor can any potential purchaser of real property confidently appear and purchase real property at foreclosure sales.

13. THE IMPOSITION OF A STATUTE OF LIMITATIONS AGAINST THE BANK PROMOTES PUBLIC POLICY AND IS NOT ABSURD

The district court effectively held that "LVDG can sue, so BONY can sue." However, as discussed above, LVDG and the Bank are in completely opposite positions, with LVDG holding record title and possession of the Property for now over a decade. The Bank, on the other hand, has never possessed either title or

possession. Imposing a statute of limitations against the Bank under the circumstances is far from absurd.

LVDG possesses record title and possession of the Property and, unlike the Bank, no statute of limitations has commenced running against it. Pursuant to NRS 11.070 and/or NRS 11.080, any potential claim by LVDG could not be time-barred until 5 years after it might lose possession of the Property. As the Bank readily admits, this is exactly contrary to its position, where the Bank never possessed either title or possession.

The positions of the Bank and LVDG are vastly different. The Bank once possessed a presumably valid security interest in the property at issue in the form of its First Deed of Trust. That security interest was presumably extinguished as a matter of law at the time of and as a result of the HOA Foreclosure Sale. Thereafter, the Bank did absolutely nothing for a period of over 6 years despite its specific knowledge of the facts and the accrual of its claim. LVDG, on the other hand, simply purchased the Property in good faith for valuable consideration without any notice of the Bank's continuing claim. LVDG continues to hold both record title and possession of the property to this very day.

14. THE AWARD OF ATTORNEYS' FEES AND COSTS TO THE BANK MUST BE REVERSED IF THE TRIAL COURT'S JUDGMENT IS REVERSED

Subsequent to the entry of the district court's FFCL, the Bank filed a Motion for Attorneys' Fees and Costs. (JA 504). This Motion was based primarily upon the Bank's status as a prevailing party and an Offer of Judgment that was previously served. *Id*. Pursuant to the district court's Decision dated December 6, 2020 (JA 627) and subsequent Order (JA 631), the court granted the Bank's Motion is part.

Obviously, in the event that the district court's FFCL is reversed based upon the statute of limitations or for any other reason, and the Bank is therefore no longer the prevailing party, the award of attorneys' fees and costs to the Bank must likewise be reversed. Such is the case because NRS 18.020 provides for an award of attorneys' fees only to a "prevailing party" and because an award of attorneys' fees pursuant to NRCP 68 is only appropriate where the offeror of an offer of judgment receives a more favorable outcome than the offer of judgment. If the district court's FFCL is reversed, neither will be the case.

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CONCLUSION

For the reasons set forth herein, the district court erred. This Court should thus reverse the district court's order and remand with clear instructions to the district court directing that judgment quieting title to the Property should be entered in favor of LVDG. Additionally, the Order Awarding Costs and Attorneys' Fees to the Bank must be vacated.

DATED this 14th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. I 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 a proportionally spaced typeface using WordPerfect X6 with 14 point, double spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 9040 words. Counsel has relied upon the word count application of the word processing program in this regard.

3. Finally, I hereby certify that I have read this appellate 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 to be supported by a reference to the page and volume number, if any, 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 this 14th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee or agent of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 14th day of September, 2021, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

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