

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

ELK POINT COUNTRY CLUB
HOMEOWNERS, ASSOCIATION, INC., also
known as ELK POINT COUNTRY CLUB,
INC., a Nevada non- profit, non-stock
Corporation,

Appellant,

v.

K.J. BROWN, L.L.C., a Nevada limited
liability company; TIMOTHY D. GILBERT
and NANCY AVANZINO GILBERT, as
trustees of the TIMOTHY D. GILBERT AND
NANCY AVANZINO GILBERT
REVOCABLE FAMILY TRUST DATED
DECEMBER 27, 2013,

Respondents.

Supreme Court No. 82484

District Court Case No. 2020-CV-00124

Electronically Filed
Nov 16 2021 03:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT'S OPPOSITION TO
RESPONDENTS' MOTION TO LIFT
STAY OF PRELIMINARY
INJUNCTION**

Appellant, ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC., also known as ELK POINT COUNTRY CLUB, INC., ("Appellant") by and through its counsel of record, hereby submit this opposition to Respondents' motion to lift the Order Granting Motion to Stay Matter Pending Interlocutory Appeal ("Stay Order") which was issued by the District Court in the underlying matter. Respondent's instant motion (which is presented as the fourth attempt to deny issuance of the stay) fails to demonstrate that the stay should not be implemented pursuant to NRAP 8 and fails to provide sufficient reasons that this Court should overturn the District Court's Stay Order.

///

///

FACTS

The underlying District Court case arose from Respondents' complaint and request for preliminary injunction against Appellant requesting that an injunction issue to prevent Appellant from allowing homeowners to rent their properties to short-term (30 days or less) renters on the grounds that such rentals are precluded by Appellant's governing documents and IRC 501(c)(7) tax exempt status. The District Court granted Respondents' request for a preliminary injunction and enjoined Appellant from allowing its homeowners to rent to both short-term and long-term renters which prompted Appellant's interlocutory appeal in Nevada Supreme Court, Case No. 82484.

Appellant moved for a stay of the preliminary injunction and the underlying proceedings pending the interlocutory appeal on February 22, 2021. *See*, Exhibit 4 to Respondents' motion. Respondents first opportunity to argue against the stay was put forth on March 8, 2021 in their opposition to the motion to stay. *See*, Exhibit 5 to Respondents' motion. Despite Respondents' argument, the District Court found that the factors to be weighed when deciding to issue a stay were equally balanced, encouraging the preservation of the status quo, *i.e.* that no injunction be issued during the pendency of the appeal. *See*, Exhibit 2 to Respondents' motion. Thus, the District Court entered an Order Granting Stay of Preliminary Injunction Pending Resolution of the Interlocutory Appeal ("Stay Order") on March 15, 2021. *Id.*

Respondents again attempted to oppose the issuance of the stay through their motion for clarification filed on April 5, 2021 which Appellant opposed on April 12, 2021. *See*, Exhibit 7 to Respondents' motion. Unconvinced by Respondents' arguments regarding ambiguity in the Stay Order and that the stay of the injunction should only apply to long-term rentals, the District Court denied the motion for clarification on April 22, 2021. *See*, Exhibit 10 to Respondents' motion.

With the stay of proceedings properly implemented, Respondents again attempted to overturn the stay by filing an improper appeal (Nevada Supreme Court, Case No. 82824). The appeal was dismissed due to lack of jurisdiction since the temporary delay in enforcing the preliminary injunction was not an appealable issue pursuant to NRAP 3A(b). *See*, Exhibit 3 to Respondents' motion.

LEGAL ARGUMENT

A. Respondents' have failed to demonstrate that the relief requested should be granted because the District Court properly considered the NRAP 8 factors in determining that a stay was appropriate as the factors weigh in favor of preserving the status quo.

Pursuant to NRAP 8(c), the factors that courts should consider in determining whether a stay is appropriate are as follows:

- (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;
- (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;
- (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and
- (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

No one factor carries more weight than the others. *See, Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004). Although the Court in *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657 (2000) recognized that "if one or two factors are especially strong, they may counterbalance other weak factors." *See, Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004).

Respondents instant motion to lift the stay of the underlying proceedings and preliminary injunction relies upon the assertion that Appellant did not offer any evidence upon which the District Court could justify staying the injunction order. However, this is an abhorrently incorrect statement. As can be seen by the prior briefing submitted to the District Court (submitted along

with Respondents' motion) and as described herein, Appellant properly moved the District Court for a stay of the proceedings under NRAP 8(a) and has demonstrated that the factors to be considered in deciding whether to grant a stay weigh in favor of Appellant (or in the least, are equally balanced). As such, the issuance of the stay is properly supported and should remain in place in order to preserve the status quo during the pendency of the appeal.

i. The object of the appeal would undoubtedly be defeated if the stay was lifted and the preliminary injunction was enforced.

In addressing the first NRAP 8 factor for a stay (whether the object of the appeal will be defeated if the stay is denied), Respondents presumptuously assert that the purpose of the interlocutory appeal is simply to enable the homeowners who engage in rentals in the community to continue to profit from renting out their units during the pendency of the appeal. However, this is a mischaracterization of the big picture. In fact, the object of the appeal at issue is, in part: (1) to prevent Appellant from having to engage in tumultuous rule/practice changes pertaining to short term/long term rentals in the EPCC, including sudden evictions with regard to long term rentals that will likely be highly contentious (and possibly even litigious), causing conflict with long term tenants and excessive costs to Appellant; and (2) to prevent Appellant from having to engage in potentially superfluous discovery relating to long term rentals that would be irrelevant to this matter, but for the improper finding of the District Court in granting the preliminary injunction.

If this matter was required to proceed forward with the preliminary injunction put into place, the appeal's purpose would undoubtedly be defeated in that Appellant would inherently be forced to immediately implement effective changes to the rental practice within the EPCC community which could lead to contentious and possibly even litigious eviction of long-term renters. Appellant would also be forced to participate in unnecessary discovery which may end up being entirely unrelated to the underlying proceedings if the appeal is successful. (Relevancy of

long-term rental information has only arisen because of the aforementioned ruling of the District Court regarding the permissibility of operating units for profit in the EPCC community, which implicated long-term rentals essentially *sua sponte*.)

On the other hand, a stay of the proceedings and preliminary injunction would clearly prevent the harm sought to be obviated by the appeal. Furthermore, should Appellant prevail on appeal, but not be permitted a stay, it would be too little too late as all the afore-enumerated harm will have already come to pass. Respondents misguided argument that the Stay Order prematurely granted Appellant's requested relief as a result of the appeal and therefore already defeated the object of the appeal blatantly ignores the well-accepted premise that the status quo should be maintained while an appeal is undertaken in order to avoid causing irreversible harm. *See, Westside Charter Serv. v. Gray Line Tours*, 99 Nev. 456, 460, 664 P.2d 351, 353 (1983) ("The purpose of a stay is to preserve the status quo *ante*.").

Accordingly, this factor weighs heavily in support of Appellant in that the stay should be allowed to remain in place.

ii. Lifting the stay would cause irreparable harm to Appellant whereas Respondents suffer no meaningful harm.

As explained above, should this matter not be stayed pending the interlocutory appeal, Appellant will be forced to engage in tumultuous changes as to their practices in the EPCC community and to enforce eviction of long-term renters which would be highly contentious, and likely even litigious. Even if Appellant prevails on appeal, the aforementioned-harm will be irreversible, in particular any emergent disputes/litigation with long-term renters. Respondents' assertion that no evidence was supplied in support of this contention is clearly incorrect.

First, Respondents averred themselves that at least three members of the EPCC community were conducting long term rentals of their property. *See*, Exhibit 2 to Respondents' motion.

However, even without this concession, the factual assertions of Appellant in support of the stay as to the potential imminent, irreparable and serious injuries if a stay was not granted are all intuitively self-evident, needing no further evidence in support. For instance, numerous and complex rules and practice changes would be needed to mandate and enforce the elimination of all rentals within the community, including but not limited to forming a body responsible for such oversight and creating rules/procedures/timelines for ensuring the compliance of homeowners in the community and compelling it in the event of disobedience. It is also intuitively obvious that conflict would arise with long-term renters, who by virtue of their sudden eviction may complain and/or even seek legal relief in court against both their landlords and Appellant, for various causes of action, such as Tortious Interference With A Contract, Breach of Contract, Breach Of Covenant Of Quiet Enjoyment, etc. It is also intuitively obvious that Appellant would be subjecting itself to lawsuits by the homeowners engaged in long-term and short-term rentals themselves, for the harm that “misinterpretation” of the Bylaws/Rules caused to them. Further, it is obvious that both long-term and short-term rental activity currently takes place in the EPCC community, as it is at the heart of the underlying litigation, such that no additional evidence would be needed to support this fact.

In addition, as articulated in the Declaration of Robert Felton submitted with Appellant’s opposition to Respondents’ motion for clarification, if the stay was not implemented as to short-term rentals, many homeowners in the community who already had renters lined up (with many of these renters coming from out of state with non-refundable travel arrangements) threatens the homeowners with liability in breaking these rental agreements. *See*, Exhibit 8 to Respondents’ motion. In turn, the homeowners would likely seek damages against Appellant as discussed above.

Thus, if the stay does not remain in place as to short term rentals, additional severe and irreversible harm would occur to many homeowners in the EPCC community as well as Appellant.

Furthermore, from the discovery perspective, if a stay of the underlying proceedings does not remain in place, Appellant (and Respondents) will be forced to engage in a large amount of potentially irrelevant and pointless discovery as relating to long-term rentals, which would be completely rendered null if Appellant prevails on appeal. This is because long-term rentals only became relevant because of the District Court's ruling prohibiting all rentals at the community, rather than just short-term rentals. The threatened harm is not merely about costs potentially expended, but rather the potential for an entire universe of discovery that will have to be conducted going forward to be potentially rendered irrelevant and null based upon the outcome of appeal and the burden this will cause on both parties and the District Court. The long-term rental related discovery, if rendered irrelevant and null by the appeal, will only serve to unnecessarily complicate the entire case by flooding it with tons of irrelevant materials and information and also necessarily lead to a large amount of contentious and complex motions to compel/for protective order and motions in limine to include/exclude such materials and information by each side.

Accordingly, Appellant's arguments were properly supported and demonstrate a clear danger of imminent, irreparable and serious harm to Appellant if the stay is not kept in place during the pendency of the appeal.

On the other hand, Respondents will not be irreparably harmed if the stay of the underlying proceedings remains in effect. Rather, the status quo (where Respondents' claimed harm remains speculative) will simply be maintained. Whether Appellant is in any real danger of losing its IRC 26 USCS § 501(c)(7) tax-exempt status, is also wholly a question of law subject to *de novo* review. It is far from certain that *de novo* review of the requirements for 26 USCS § 501(c)(7) tax-exempt

status will be found to necessarily prohibit the type of rental activity at issue. It is also far from certain that the operation of the communities' properties and facilities in a manner as if only to serve the personal use of homeowners without regard for whether rentals of any sort are occurring, and without any receipt of any part of the profits from any such rental activities by Appellant, is actually in violation of said 26 USCS § 501(c)(7) tax-exempt status legal provisions. Thus, it is extremely uncertain whether any actual, real danger of the loss of Appellant's 26 USCS § 501(c)(7) tax-exempt status exists, whereas articulated above, there is a reasonably strong chance that the outcome of the appeal will at least alter, and perhaps reverse the District Court's interpretation of the applicable requirements of law. Thus, Respondents cannot legitimately argue that they will clearly suffer an irreparable or serious injury in this manner should the stay remain in place.

Accordingly, the factors regarding irreparable harm to the parties weighs more in favor of the stay remaining in place or, in the very least, equally balances the scale.

iii. Appellant has a reasonable likelihood it will prevail on appeal.

The outcome of the interlocutory appeal turns largely on the interpretation of Appellant's Bylaws/Rules by the Court and whether they prohibit short and long-term rentals because they are "for profit" activities. There is a reasonable probability that Appellant will prevail on appeal as "[c]onstruction of a contractual term is a question of law," (such as sets of Bylaws/Rules mutually agreed upon by the members of a community to bind them all) which appellate courts review *de novo*. See, *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 213, 215 (2007). Pursuant to a plain reading of Appellant's Bylaws, short-term rentals occurring in the EPCC community would be perfectly legitimate and thus, allowable under NRS 116.340(1). Therefore, the District Court erred when finding that Respondents demonstrated a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use.

Furthermore, it is clear that 26 USCS § 501(c)(7) is only concerned with business that the 26 USCS § 501(c)(7) tax-exempt club/HOA/organization *itself* engages in (i.e., transacts itself) and that the rental activity of private members is irrelevant. There was no dispute that, although there are homeowners in the community who engage in short and/or long-term vacation rental activities, Appellant does not operate the community's facilities in any manner that would benefit such activities, nor does it receive any share of the revenue from said rental activities. Thus, Appellant's tax-exempt status under 26 USCS § 501(c)(7) was in no danger from the private rental activity of individual members and there was simply no imminent "irreparable harm for which compensatory relief is inadequate" to justify a preliminary injunction.

A finding of either of the above-articulated central legal issues in favor of Appellant would essentially eliminate fulfillment of one of the factors required for granting a preliminary injunction (reversal of the Bylaws issue would eliminate fulfillment of factor (1), while reversal of the 26 USCS §501(c)(7) tax-exempt status issue would eliminate fulfillment of factor (2)) and would require the District Court's order to be vacated. Furthermore, the public interest in allowing the status quo of homeowners engaging in short and/or long-term vacation rental activities would also be protected.

Thus, the chance that this Court may rule in a manner contrary to the District Court (in part or in whole) when reviewing the appeal is reasonably likely to occur. As such, Appellant has a reasonable likelihood of success on appeal.

CONCLUSION

Appellant respectfully submits Respondents have failed to demonstrate that the stay should not be implemented pursuant to NRAP 8 and failed to provide sufficient reasons that this Court should overturn the District Court's Stay Order. The issuance of the stay is properly supported

and should remain in place in order to preserve the status quo during the pendency of the appeal.

Thus, Respondent's motion should be denied.

DATED this 16th day of November, 2021.

/s/ Prescott T. Jones

Prescott T. Jones, Esq. SBN: 11617
Carissa Yuhas, Esq. SBN: 14692
Resnick & Louis, P.C.
8925 West Russell Road, Suite 220
Las Vegas, NV 89148
(702) 997-3800
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **APPELLANT'S OPPOSITION TO RESPONDENTS' MOTION TO LIFT STAY OF PRELIMINARY INJUNCTION** was served this 16th day of November, 2021, by:

- [] **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below.
- [X] **BY ELECTRONIC SERVICE:** by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date pursuant to NEFCR 9.

/s/ Susan Carbone

An Employee of Resnick & Louis, P.C.