IN THE SUPREME COURT OF THE STATE OF NEVADA

LN MANAGEMENT LLC SERIES 3111 BEL AIR 24G, Appellant, v. BANK OFAMERICA, N.A.; DITECH FINANCIAL LLC, Respondent.	Supreme Court Case No.: 82534

Appeal
From the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark R. Denton
District Court Case A-12-669570-C

APPELLANT'S REPLY BRIEF

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Bank of America, N.A. and Ditech Financial LLC ("Respondents") responds to Appellant's Opening Brief arguing that the lower Court decision should be upheld because the District Court correctly applied the Federal Foreclosure Bar, correctly held that Futility Excused Tender, and correctly determined that the Five-Year Rule had not expired.

The facts of the case do not support this conclusion, requiring reversal and remand.

RESPONDENTS FAILED TO PROVE FUTILITY

Nothing in Respondent's Answering Brief nor in the record below establishes that Collections of America ("COA") would have rejected Appellant's tender if they had sent a check.

This Court addressed these very arguments in Bank of America, N.A. v. Thomas Jessup, LLC Series VII, 462 P.3d 255 (Table), 2020 WL 2306320 (unpublished). The Court held that "Appellants contend that ACS's September 2011 letter demonstrates that it foreclosed on only the subpriority portion of Foxfield's lien. We disagree, as ACS's mistaken belief regarding the foreclosure sale's effect could not alter the sale's actual legal effect, particularly when the superpriority portion of the HOAs lien was still in default at the time of the sale and the sale otherwise complied with NRS Chapter 116s requirements." That is exactly what Respondent argues here. Unfortunately COA's mistaken belief regarding the

foreclosure sales effect does not alter the actual legal effect of the sale. Respondent still had an affirmative duty to attempt tender. Respondent provided no evidence that if they had provided a tender, COA would have rejected it. Nothing in the email commuinication or alleged to have transpired in the telephone conversation supports that contention. Without that the Court must assume that COA would have taken the payment and applied it to the account regardless of its belief regarding the super-priority status.

The NVSC went on to hold in Jessup that "While we recognize that *Shadow Canyon* supports appellants argument, *see id.* at 749 n.11, 405 P.3d at 648 n.11 (citing *ZYZZX2 v. Dizon,* No. 2:13-CV-1307, 2016 WL 1181666 (D. Nev. 2016)), the district court found that "Mr. Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property." The implication behind this factual finding is that the district court determined it was unreasonable for Mr. Jung to abandon Miles Bauer's legal position regarding NRS 116.3116(2) (2009) based solely on ACS's September 2011 letter, and we are not persuaded that this finding was clearly erroneous." Mr. Garabedian, also worked at Miles Bauer with Mr. Jung and there was nothing that precluded him from tendering a check for the nine months of the assessments. Nothing in their communication indicates that COA would have rejected the payment and in fact COA provided Miles Bauer with a payoff statement and

adequate information to determine the nine months that would have been necessary to protect BANA's interest and yet Miles Bauer made no attempt to pay.

Respondents next twist the holding in 7510 Perla Del Mar Ave. Tr. v. Bank of Arnerica, N.A., 136 Nev., Adv. Op. 6, 458 P.3d 348, 349 (2020). The NVSC, in Perla Del Mar held "an offer to pay the superpriority amount in the future, once that amount is determined, does not constitute a tender sufficient to preserve the first deed of trust". The Court held that in order to be excused from making a tender, BANA would have to show that payment would have been futile, which Respondents have failed to establish because there is no evidence that COA would have rejected the payment and there is no evidence that BANA even attempted and was rejected in this case or any other.

Respondents attempt to deflect their burden on Appellants to refute futility but that is misplaced. Appellants have refuted the Respondents claim of futility and Respondents have offered nothing to support their claim other than an empty claim that "BANA knew the HOA's trustee would not accept tender" without even a scintilla of evidence that COA had ever rejected an alleged tender.

As stated in Appellants Opening Brief, In Bank of Am., N.A. v. Inspirada Comm. Ass'n, 2017 WL 2938198, at *2 (D. Nev. July 10, 2017), the US District Court for Nevada found that in April, 2013, Leach Johnson, another collection firm, was giving Miles Bauer information and accepting payments on behalf of

Inspirada Community Association. The actual facts in the cited case were however that no super-priority information was ever given just like in the present case, yet Miles Bauer still subsequently sent a check estimating nine months of commons assessments, which Leach Johnson accepted.

Therefore Respondents were aware that Miles Bauer did send checks, based upon a Miles Bauer estimation of monthly association dues to other collection firms that provided them similar information as in the present case and those checks were accepted. This finding completely negates Respondent's argument that any attempted payment would be futile, as an attempt was actually made, and it was accepted. Respondents in their Answering Brief make no effort to address these facts.

Nothing prevented Miles Bauer on behalf of Respondents from submitting a tender for the property the subject of this litigation. But what did Bank of America do? It did nothing instead of attempting tender.

Based on the above facts, Respondents have failed to establish futility and tender was therefore not excused and the Court should reverse and remand.

THE COURT ERRED IN NOT APPLYING THE FIVE-YEAR RULE AND RESPONDENTS FAILED TO ESTABLISH THAT IT SHOULD NOT HAVE APPLIED

Respondents fail to show that the Five-Year rule was properly applied. NRCP 41(e) only applies if an action is not brought to trial within 5 years after the

action was filed. *See* NRCP 41(e)(2)(B). This Court defines "trial" as "the examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties." United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. v. Manson, 105 Nev. 816, 819–20, 783 P.2d 955, 957 (1989).

First, Appellants did not dispute that the Court granted summary judgment on August 13, 2014. However, respondents ignore the effect of the Motion to Set Aside that grant and the fact that "setting aside" of the summary judgment makes it a nullity and non-existent for the purposes of the tolling of the Five-Year Rule. Respondents don't even attempt to address that in their Answering Brief.

Black's Law Dictionary defines "set aside" as "To set aside a judgment decree, award, or any proceedings is to **cancel, annul, or revoke them** at the instance of a party unjustly or irregularly affected by them. State v. Primm, 01 Mo. 171; Brandt v. Brandt, 40 Or. 477, 07 Pac. 508. [Emphasis added] The very act of revoking or annulling an order is to determine that it never existed and to return to the parties to the point prior to the grant of the order. In this case, the district court erred by granting summary judgment based on Respondents argument that the grant of summary judgment constituted "bringing the matter to trial" after it had annulled that judgment thus making it a non-existent event.

Second, Respondents argument that Appellants somehow waived the Five-Year rule is without any basis in the record. Respondents continue to fail to provide any evidence that Appellants requested a waiver or extension of the five year rule anywhere in its motion. Appellant's motion simply requested that the Court reopen the case for the sole purpose of allowing Appellants to file a Motion for Summary Judgment which was filed on July 30, 2018 and heard on September 27, 2018 and denied.

Respondents claim that Appellants request to set aside the dismissal order constitutes a tacit waiver of the five year rule but offer no basis for that assertion. Instead they apply meaning to the request other than what it was, a motion to reopen the case for the sole purpose of bringing a Motion for Summary Judgment which is what they did and were denied. Once the Motion was denied, the purpose for reopening the matter had been satisfied. Appellants Motion to reopen is similar to a Stipulation and Order to extend the five year rule in that a stipulation and order extends the rule to a date certain after which the Five-Year Rule is tolled. In the instant case the final disposition of Appellants Motion for Summary Judgment was the "date certain" for reopening and after that the Five-Year rule was tolled.

Respondents in their Answering Brief completely ignore the fact that Appellants raised regarding the appropriateness of their Motion for Summary Judgment in that on February 21, 2017, the district court held a status check which

resulted in the Court dismissing all the claims of Respondents without prejudice which left only LN's claims in the matter. At no time after that did Respondents move to set aside that dismissal thus making their Motion for Summary Judgment inappropriate because they had no remaining claims in the case.

Respondents further argue that Appellants were judicially estopped from raising the Five-Year rule. Appellants have not taken two different positions such that they are estopped from raising the issue. The Five-Year Rule was tolled on October 3, 2017 BUT Appellants, as explained above, requested that it be extended solely for the purposes of bringing their Motion for Summary Judgment which they did. This request does not represent inconsistent position. The two positions are the same; the Five-Year Rule tolled on October 3, 2017 but Appellants request and were granted the extension of that for the purposes of their MSJ. Appellants June 21, 2018 Motion for reconsideration was not an abandonment or waiver of the rule merely an extension.

Respondents despite their attempt to misrepresent that facts regarding the set aside of the 2014 MSJ and the June 21, 2018 reconsideration motion fail to provide any evidence to this Court to show that Appellants waived or made any indication that they waived the tolling of the Five-Year Rule and as such their arguments fail and this Courtt must reverse and remand based on tolling of the Five- Year Rule.

RESPONDENT'S FAILED TO JUSTIFY THEIR FAILURE TO TIMELY INVOKE THE FEDERAL FORECLOSURE BAR

Respondents failed to raise the defense of the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), until August 28, 2018, almost 6 years after the foreclosure sale and long after the close of discovery when it raised it in their Opposition to LN's Motion for Summary Judgment.

The foreclosure sale took place on April 26, 2013 however Respondents filed a case on October 3, 2012 that was subsequently consolidated but never raised the Federal Foreclosure Bar as a defense. As they have readily admitted that they failed to even disclose a Fannie Mae interest until June 24, 2019.

In JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, LLC, 458 P.3d 355(Table) (Nev. 2020) the Court held that "NRCP 16.1 sets forth the time limits for required disclosures; while NRCP 26(e)(1) sets forth a party's duty to supplement such disclosures during discovery. See NRCP 16.1(a)(1) (2017); NRCP 26(e)(1) (2017). Discovery sanctions are warranted for failure to comply with discovery obligations unless the delayed disclosures are substantially justified or harmless. See NRCP 37(c)(1) (2017); Capanna v. Orth , 134 Nev. 888, 894, 432 P.3d 726, 733 (2018)..."

Respondents admit that they were aware of Fannie Mae's interest because they argued in the District Court that Fannie Mae had acquired its interest in November, 2004. Despite knowledge of that interest, respondents never disclosed

that information during discovery and until 2018 almost 6 years after the litigation had commenced. The District Court erred by finding that Respondents should not be barred from raising the Federal Foreclosure Bar as a defense based on the information that they relied upon in their Opposition to Appellants MSJ and withheld without any justification.

Respondents provide this Court with no basis upon which to justify the failure to raise the defense in almost 6 years. Respondents simply say that Appellants could have requested more discovery based on respondents untimely and unjustified late disclosure.

As to the issue of harm to Appellants, Respondents claim that their late disclosure was "harmless" but the fact remains that after six years of litigation, Respondents chose to ambush Appellants at the 11th hour with information that they were in possession of since November 2004 and withheld. This concealment result in Appellants loss of the property and there can be no greater harm to a litigant in a quiet title matter than that.

The District Court erred in not finding that Respondent waived their right to raise the Federal Foreclosure Bar in discovery and for failing to disclose any evidence of that defense until six and a half years after initiation of the litigation. This Court must reverse and remand based on that untimely disclosure.

CONCLUSION

Based on the foregoing, the district court erred as a matter of law in granting Respondent's motion for summary judgment when there was never any actual tender of money without any evidence of futility, the five year rule had run and BANA failed to disclose any alleged Fannie Mae interest during discovery and thus waived the defense. Respondent has offered nothing to refute those facts and as such the Court must issue and Order requiring reversal and remand.

Dated January 29, 2022. /s/ Kerry P. Faughnan

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CERTIFICATE OF COMPLIANCE

1.I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman;

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 2,658 words;

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 January 29, 2022.

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CERTIFICATE OF SERVICE

I certify that on January 29, 2022, I served a copy of the foregoing pleading upon all counsel of record by allowing the Court's ECF system to serve same upon:

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