

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

SPANISH HEIGHTS ACQUISITION  
COMPANY, LLC; SJC VENTURES  
HOLDING COMPANY, LLC, d/b/a SJC  
VENTURES, LLC,

Petitioners,

v.

CBC PARTNERS I, LLC; CBC  
PARTNERS, LLC; 5148 SPANISH  
HEIGHTS, LLC; KENNETH ANTOS  
AND SHEILA NEUMANN-ANTOS;  
DACIA, LLC,

Respondents.

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Clerk of Supreme Court

Supreme Court No. 82868  
District Court Case No. A-20-813439-B

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**MOTION TO DISMISS APPEAL**

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## **MOTION TO DISMISS APPEAL**

Respondents hereby move to dismiss this appeal as moot. This motion is made pursuant to NRAP 27 and based on the following Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

Respondents request that this appeal be dismissed with each party to bear their own fees and costs. At issue Findings of Fact and Conclusions of Law (“FFCL”) concerning the foreclosure of real property secured by a Promissory Note, Deed of Trust, and Forbearance Agreements.

On April 29, 2021 Appellants filed their Notice of Appeal, appealing the FFCL entered by the district court on April 6, 2021. The case was transferred to the Settlement Program; however, the parties were unable to reach a settlement. As such, the briefing was reinstated by order filed on July 29, 2021.

The district court case moved forward to resolve the remaining issues not addressed in the April 6, 2021 FFCL. On November 15, 2021, the Parties entered into a Settlement on all claims, the material terms of which were placed on the record. As a result, this appeal is now moot.

#### **I. Facts and Prior Proceedings**

1. This action involves a Promissory Note, associated Deed of Trust and related Forbearance Agreements (the “Documents”).

2. The Promissory Note was secured by real property commonly known as 5148 Spanish Heights Drive, Las Vegas, Nevada 89148 (the “Property”).

#### **The Promissory Note**

3. On or about April 16, 2007 Kenneth M. Antos and Sheila M.

Neumann-Antos transferred ownership of the Property to Kenneth M. Antos and Sheila M. Neumann-Antos, Trustees of the Kenneth and Shelia Antos Living Trust dated April 26, 2007 (“Antos”).<sup>1</sup>

4. On June 22, 2012, Antos, together with nonparties KCI Investments, LLC, entered into a Secured Promissory Note with CBC Partners I, LLC (“CBCI”).<sup>2</sup>

5. The June 22, 2012 Secured Promissory Note (the “Note”) was modified and amended several times.<sup>3</sup>

6. On December 29, 2014, a Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (“Deed of Trust”) was recorded against the Property in the Clark County Recorder’s Office as Instrument No. 201412290002856 to secure the Note.<sup>4</sup>

7. This Deed of Trust was subordinate to two (2) additional Deeds of Trust recorded against the Property.

8. The Deed of Trust was subsequently modified on July 22, 2015 and on December 19, 2016.<sup>5</sup>

### **The Forbearance Agreement**

9. On or about July 21, 2017, Jay Bloom, manager of SJC Ventures, LLC (“SJCVC”), proposed to service the Promissory Note in exchange for ownership in the Property.<sup>6</sup>

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<sup>1</sup> A

<sup>2</sup> B

<sup>3</sup> C

<sup>4</sup> D

<sup>5</sup> E

<sup>6</sup> F

10. On or about September 27, 2017, Antos and SJCVC entered into a Forbearance Agreement of the Note, acknowledging default and that CBCI had fully performed.<sup>7</sup>

11. As part of the Forbearance Agreement, Antos conveyed the Property to Spanish Heights Acquisition Company, LLC (“SHAC”) and SHAC leased the property to SJCVC.<sup>8</sup>

12. On December 1, 2019, CBCI, SHAC and SJCVC entered into an Amendment to the 2017 Forbearance Agreement, extending the date of the balloon payment to March 31, 2020.<sup>9</sup>

13. On April 1, 2020, a Notice of Default and Demand for Payment was sent to SHAC and SJCVC.<sup>10</sup>

14. On April 6, 2020, CBCI sold the Note and security associated with the Note to 5148 Spanish Heights, LLC (“5148 SH”).<sup>11</sup>

### **The Underlying Proceedings**

15. The original complaint was filed on April 9, 2020 and the First Amended Complaint on May 15, 2020.

16. After considerable Motion practice, on January 12, 2021, a Stipulation and Order was entered wherein the parties stipulated to five issues to be adjudicated by the district court at the bifurcated trial.<sup>12</sup> The issues were: 1) contractual

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<sup>7</sup> G

<sup>8</sup> G

<sup>9</sup> H

<sup>10</sup> I

<sup>11</sup> J

<sup>12</sup> Exhibit K

interpretation and/or validity of the underlying “Secured Promissory Note” between CBC Partners I, LLC and KCI Investments, LLC and all modifications thereto; 2) interpretation and/or validity of the claimed third-position Deed of Trust and all modifications thereto, and determination as to whether any consideration was provided in exchange for the Deed of Trust; 3) contractual interpretation and/or validity of the Forbearance Agreement, Amended Forbearance Agreement and all associated documents/contracts; 4) whether the Doctrine of Merger applies to the claims at issue; and 5) whether the One Action Rule applies to the claims at issue.

17. On February 1, 2021, the Court began the bifurcated trial.

18. On February 2, 2021, Plaintiff rested at which time Defendants made a NRCP 50(a) Motion.

19. Judge Gonzalez denied the NRCP 50(a) Motion stating, “[w]hile there is significant evidence that would support the argument that Mr. Mushkin is making, it would force the Court to weigh the credibility and the evidence at this time. I cannot do that under 50(a). So I am denying the motion for you to finish the case and then make your final arguments.”<sup>13</sup> Defendants then began their presentation of evidence.

20. On the morning of February 3, 2021, just as the bifurcated trial was resuming, Debtor filed its Chapter 11 Bankruptcy Petition, and the district court stayed the matter for thirty (30) days.

21. On March 15, 2021, the bifurcated trial resumed.

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<sup>13</sup> L

22. On April 6, 2021, Judge Gonzalez issued the Court's FFCL.<sup>14</sup>

23. The district court found that a Notice of Default and Demand for Payment was sent to SHAC and SJCVC on April 1, 2020.<sup>15</sup>

24. The district court further found that Movant's Deed of Trust is a valid lien against the Property, and that the Note is valid and enforceable.<sup>16</sup>

25. The district court further found the Note was secured by the Property,<sup>17</sup> that the "'One-Action Rule' was specifically waived by the debtor"<sup>18</sup> and is not a bar to recovery under the "Note and Security Documents".<sup>19</sup>

26. On April 9, 2021, the district court granted in part Antos' Motion for Summary Judgment, which order was filed with the Court on August 10, 2021 ("OGSJ").<sup>20</sup>

27. The OGSJ specifically found a lack of performance by SJC Ventures under the Forbearance Agreement and the Spanish Heights Acquisition Company Operating Agreement.<sup>21</sup>

28. On April 29, 2021, Appellants filed the instant Appeal.

29. On July 27, 2021, the Bankruptcy Court lifted the Automatic Stay to allow this matter to proceed in the district court.<sup>22</sup>

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<sup>14</sup> Exhibit M.

<sup>15</sup> *Id.* at p. 15 ¶70.

<sup>16</sup> *Id.* at p. 20 and ¶¶56-60.

<sup>17</sup> *Id.* at ¶4, p. 18

<sup>18</sup> *Id.* at ¶17, p. 19

<sup>19</sup> *Id.* at ¶19, p. 20

<sup>20</sup> Exhibit N

<sup>21</sup> *Id.* at 2:28-3:4

<sup>22</sup> Exhibit O

30. On or about November 15, 2021, the parties came to a Settlement and entered the following terms on the record (“Settlement”):<sup>23</sup>

THE COURT: Okay. Thank you. Go ahead, Counsel for plaintiff. Are you ready as well?

MR. GUTIERREZ: Yeah, we're ready. We came to an agreement with counsel. Thank you.

THE COURT: Thank you so very much. Okay. So, Mr. Mushkin, what do you wish to place on the record?

MR. MUSHKIN: Your Honor, yes. I want to place our basic deal points on the record. This will be followed by a formal settlement document and order -- an order for this Court as well as an order for the bankruptcy court. I'm not going to recite the parties again, but this does cover all parties for this matter. The parties have agreed to allow the use of an appraisal that was commissioned by my office. The appraiser was Kendall Britton (phonetic). That appraisal can be used in the bankruptcy case. The 5148 parties will consent to run 1111(b)(1) treatment of their claim under the plan. SJC Ventures agrees to make payments to the 5148 parties, the first of which on the claim is due January 5th.

THE COURT: What year, please? What year, please? Counsel, January 5th. What year, please?

MR. MUSHKIN: I'm sorry. 2022.

THE COURT: Thank you so very much. Go ahead, please.

MR. MUSHKIN: The failure of SJC Ventures to pay that payment on or before January 5th, 2022, will trigger the resumption of foreclosure on the subject property. The failure of SJC Ventures to pay the January 5th, 2022, payment will allow 5148 and related parties to litigate the balance of their claims in either District Court or in binding arbitration.

Your Honor, I believe that represents the entire basic terms. And, Mr. Gutierrez, if I misread anything, please advise the Court. If not, I think we're done, Judge.

THE COURT: Counsel for plaintiff, Mr. Gutierrez, on behalf of plaintiff and counterdefendant and all your client roles, are those terms; correct? Is there anything that needs to be added, and is there any clarification? What is your position? And then are you going to have your client confirm them as well? Go ahead, please, sir.

MR. GUTIERREZ: Thank you, Your Honor. This is Joseph Gutierrez for the record. Yes, Your Honor, Mr. Mushkin has summarized the terms of the 14 points that we agreed upon in our deal point and our e-mail correspondence today. Mr. Bloom is also on the

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<sup>23</sup> Exhibit P.

call. He can state if he's read them and he can confirm their accuracy (indiscernible).

MR. BLOOM: Yes. This is Jay Bloom on behalf of the plaintiffs, counterdefendants and third-party defendants. Yes, I believe that the terms as described (video interference) this matter in full.

THE COURT: Okay. And do you knowingly and voluntarily agree to them? That's what I heard your counsel say he was asking you to confirm.

MR. BLOOM: Yes.

THE COURT: Okay. Okay. Thank you so much. <sup>24</sup>

31. On November 24, 2021, SHAC's Bankruptcy Chapter 11 Plan of Reorganization was confirmed. <sup>25</sup>

32. Under Paragraph III(C)(3) of SHAC's Chapter 11 Plan, SHAC was required to make an interest payment to Defendants/Counterclaimants on January 1, 2022. Further, on January 5, 2022, SHAC was required to make a payment in the amount of \$4,000,000 to Defendants/Counterclaimants. <sup>26</sup>

33. On January 1, 2022, SHAC failed to make its interest payment required under the Chapter 11 Plan.

34. On January 5, 2022, SHAC failed to make the \$4,000,000 payment.

35. On January 11, 2022, Defendants/Counterclaimants by and through Nevada Trust Deed Services, recorded a Notice of Trustee's Sale against the Property. <sup>27</sup>

36. On January 19, 2022, Debtor filed an Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time

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<sup>24</sup> *Id.* at p. 19:19 – 24:7

<sup>25</sup> Exhibit Q

<sup>26</sup> *Id.* Exhibit 1

<sup>27</sup> Exhibit R



in the State Court Action (“Motion for TRO”).

37. On January 28, 2022, the hearing on the Motion for TRO was held before the Honorable Joanna S. Kishner.<sup>28</sup>

38. During the hearing on the Motion for TRO this Court found that “There’s no assertion that plaintiff can even pay the amount, wants to pay the amount; didn’t even assert that they are tendering any said amount. ... they haven’t even shown that they paid the underlying amount from 2021, even that as the undisputed amount could have been paid”<sup>29</sup>

39. Thereafter the Motion for TRO was denied.<sup>30</sup>

40. On January 28, 2022, Plaintiffs filed with this Court an Emergency Petition for Writ of Mandamus or Prohibition Directing the Eighth Judicial District Court, Clark County, Nevada, Honorable Joanna Kishner, District Judge, to Reverse the Denial of an Injunctive Relief Order with Respect to Residential Property Foreclosure Sale Set for February 1, 2022 and an Emergency Motion for Stay of Order Denying Injunctive Relief Related to Residential Foreclosure Sale Set for February 1, 2022.<sup>31</sup>

41. On February 1, 2022, this Court entered an Order Denying Petition for Writ of Mandamus or Prohibition.<sup>32</sup>

42. The Foreclosure sale occurred on February 1, 2022, with 5148 SH

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<sup>28</sup> Exhibit S.

<sup>29</sup> *Id.* 47:17-23

<sup>30</sup> *Id.* 50:20-51:6.

<sup>31</sup> Case No. 84149

<sup>32</sup> Case No. 81419

being the only bidder. 5148 SH now holds title to the Property.<sup>33</sup>

43. On February 4, 2022, SHAC filed with the Bankruptcy Court a Motion for Order to Show Cause for Violation of Confirmed Chapter 11 Plan and Related Relief along with and Motion for Order Shortening Time.

44. The Bankruptcy Motion for Order to Show Cause came on for hearing on February 11, 2022 at which time the Bankruptcy Court found that it lacks Jurisdiction over the issue as foreclosure was a contract remedy in the Plan.<sup>34</sup>

## **II. Argument**

The Settlement has rendered this Appeal moot. The Court's duty is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions." *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). The question of mootness is one of justiciability. *Cashman Equip. Co. v. W. Edna Associates, Ltd.*, 132 Nev., Adv. Op. 69, 380 P.3d 844, 853 (2016). "Even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

The parties entered the terms of their Settlement on the record.<sup>35</sup> Appellants agreed that if payments were not made in accordance with the Settlement, Respondents could resume their foreclosure of the Property. Payments were not made and the Property was foreclosed on. Thus, there is no longer a justiciable controversy regarding the April 6, 2021 FFCL. Such controversy was rendered moot

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<sup>33</sup> Exhibit T

<sup>34</sup> Exhibit U

<sup>35</sup> P

by the Settlement. Consequently, there is no longer any relief that this court can grant Appellants within the context of this Appeal.

### **III. Conclusion**

Based on the foregoing Respondents respectfully request this appeal be dismissed as moot.

Respectfully submitted this 11<sup>th</sup> day of April, 2022.

MUSHKIN & COPPEDGE

/s/Michael R. Mushin

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on this 11<sup>th</sup> day of April 2022, I served a true and correct copy of the foregoing **Motion to Dismiss Appeal** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐ via hand-delivery to the addressee listed below;
- ☐ via facsimile;
- ☐ by transmitting via email to the email address set forth below.

/s/Karen L. Foley  
An Employee of  
Mushkin & Coppedge