



In the Supreme Court of the State of Nevada

Electronically Filed
May 21 2021 02:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

INDICATE FULL CAPTION:

ADRIANA DIAZ individually; and JAIME
DIAZ, individually;

Appellant

vs.

BCMB1 TRUST, and DOES I-X
individuals and ROES XI-XX

Respondent

Case No. 82873

DOCKETING STATEMENT

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRCP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitute grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. **Judicial District:** Eighth Judicial District Department 8
County Clark Judge The Honorable Jessica K. Peterson
District Ct. Docket No. A-20-819873-C

2. **Attorney filing this docket statement:**

Attorney David J. Winterton, Esq. Telephone: (702) 363-0317
Firm: David J. Winterton & Associates Ltd.
Address: 7881 W. Charleston Blvd., Suite 220,
Las Vegas, Nevada 89117
Client(s): Adriana and Jaime Diaz

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney: Allison R. Schmidt, Esq. Telephone: (702) 382-1500
Firm: Ghidotti / Berger, LLP
Address: 8716 Spanish Ridge Ave., #115
Las Vegas, Nevada 89148
Client(s): BCMB1 TRUST

(List additional counsel on separate sheet if necessary)

4. **Nature of disposition below (check all that apply):**

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |

- | | |
|---|---|
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| X Dismissal | <input type="checkbox"/> other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of NRCp 60(b) Relief | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Other disposition (Specify): _____ |
| <input type="checkbox"/> Review of agency determination | |

5. Does this appeal raise issues concerning any of the following:

No.

- ☐ Child Custody
☐ Venue
☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. Nature of the action. Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

This was a quiet title action to remove a lien on a certain piece of Property. The parties filed bankruptcy over ten years ago. The Debt was terminated. The bank made no effort to collect on the Property for over ten years. Pursuant to NRS 106.240, the Plaintiff filed to have the lien removed from the Property. The District Court dismissed the law suit stating that a bankruptcy does not terminate the debt. This appeal was filed in that the Movant believes that a bankruptcy does terminate a debt.

9. Issues on appeal. State concisely the principal issue(s) in this appeal:

1. Whether the District Court properly applied NRS 106.240.
2. Whether or not the District Court erred when a debt was discharged when the Plaintiff filed bankruptcy qualifies as being discharged under NRS 106.240.
3. Whether or not the District Court erred in reading the statute then after the

expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms were wholly due, terminated and conclusively presumed that the Debt has been regularly satisfied and the lien discharged.

4. Whether the not the filing of the bankruptcy terminates the debt.
5. Whether the or not the debt has been satisfied according to the statute so the lien is discharged.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

Not aware of any other proceedings.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

X N/A

☐ Yes

☐ No

If not, explain: _____

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

X A substantial issue of first-impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

There is one published case on this issue but no cases dealing with a bankruptcy and the interpretation of the statute

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph (s) of the rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of the importance

or significance:

The Plaintiff believes that the interpretation of the statute and the how the filing of a bankruptcy is interpreted by the statute. NRAP 17 (a)(10) is why the matter should be heard by the Nevada Supreme Court. There are strong public policies on this issue.

14. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A
Was it a bench or jury trial? N/A

15. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice? No

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from April 8, 2021.**

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: Not applicable

17. Date written notice of entry of judgment or order served April 8, 2021 .

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),**

None

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

☐ NRCP 50(b) Date of filing _____.

☐ NRCP 52(b) Date of filing _____.

☐ NRCP 59 Date of filing _____.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may be toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____ 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____.

(c) Date written notice of entry of order resolving motion served _____.

Was service by:

- ☐ Delivery
☐ Mail/electronic/fax

19. **Date notice of appeal was filed:** May 3, 2021

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other** _____

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

- | | | | |
|--------------------------|------------------------|--------------------------|--------------|
| X | NRAP 3A(b)(1) | <input type="checkbox"/> | NRS 38.205 |
| <input type="checkbox"/> | NRAP 3A(b)(2) | <input type="checkbox"/> | NRS 233b.150 |
| <input type="checkbox"/> | NRAP 3A(b)(3) | <input type="checkbox"/> | NRS 703.376 |
| <input type="checkbox"/> | Other (specify). _____ | | |

Explain how each authority provides a basis for appeal from the judgment or order:

The Summary Judgment was a final order of all issues on appeal

22. **List all parties involved in the action in the district court:**

(a) Parties

1) Plaintiffs

ADRIANA DIAZ and JAIME DIAZ

2. Defendants.

BCMB1 TRUST

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

Plaintiffs' Claims	Date of formal Disposition
1) Quiet Title	April 8, 2021
2) Injunction	April 8, 2021

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:

☒ YES
☐ NO

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ YES
☐ NO

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b):

Not Applicable

27. Attach file-stamped copies of the following documents

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motions(s)
- Orders of NRCP 14(a) dismissals formally resolving each claim, counterclaims cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry of each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

ADRIANA and JAIME DIAZ

Name of appellant

Date: May 21, 2021

David J. Winterton, Esq.

Name of counsel of record


Signature of counsel of record

____ Clark County, State of Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☒ By Electronic Service (ECF)
- ☐ By personally serving it upon him/her; or
- ☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: if all names and addresses cannot file below, please list names below and attach a separate sheet with the addresses.)

Dated this 21st day of May, 2021.



Signature



CASE NO: A-20-819873-C
Department 24

COM
DAVID J. WINTERTON, ESQ.
Nevada Bar No. 004142
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Facsimile: (702) 363-1630
Email: david@davidwinterton.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ADRIANA DIAZ individually; and JAIME
DIAZ, individually;

Plaintiffs,

vs

BCMB1 TRUST, and DOES I-X
individuals and ROES XI-XX;

Defendant.

Case No.
Dept No.

COMPLAINT

(Exempt from Arbitration because it deals
with title to real property)

Plaintiffs, ANDRIANA DIAZ and JAIME DIAZ (hereinafter collectively "Diaz"), by and
through their counsel, David J. Winterton, of David J. Winterton & Assoc., Ltd., hereby submits
this Complaint against Defendant, BCMB1 TRUST and represents the following to this Honorable
Court:

NATURE OF ACTION

1. This Complaint is to quiet of title of real property owned by Plaintiffs.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action under § 6, article 6 of the Nevada Constitution.
3. This Court has jurisdiction over this matter pursuant to N.R.S. 4.370.
4. Venue is proper in this Judicial District under N.R.S. § 13.010 and 13.040.

PARTIES

5. The following are real parties of interest pursuant to N.R.C.P. Rule 17 and have been authorized to bring this cause of action.

5. Plaintiff, ADRIANA DIAZ is an individual who at all times relevant herein was living in Clark County, State of Nevada.

6. Plaintiff, JAIME DIAZ is an individual who at all time relevant herein was residing in Clark County, State of Nevada.

7. Defendant, BCMB1 TRUST (hereinafter "Bank") is a legal entity who at all times relevant herein was authorized to do business in Clark County, Nevada.

8. The true names and capacities of Defendants sued herein as DOES I through X, inclusive, and each of them, are unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiffs will seek to amend this complaint to set forth the true names and capacities of said fictitiously named Defendants when the same have been fully ascertained.

9. The true names and capacities of Defendants sued herein as ROES I through X, inclusive, and each of them, are unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. They represent legal entities that have been sued and Plaintiffs will seek to amend this complaint to set forth the true names and capacities of said fictitiously named Defendants when the same have been fully ascertained.

GENERAL ALLEGATIONS

10. The Diaz's acquired a certain piece of property located at 5913 W. Gown Road., Las Vegas, Nevada ("Property") in March of 2003.

11. When they purchased the home, the Plaintiff obtained a mortgage. The mortgage was secured by a deed of trust on the Property, which is the subject of this foreclosure.

12. The Diaz's then obtained a second mortgage on the Property some time prior to 2009. The second mortgage was secured by a second deed of trust on the Property.

13. The Plaintiff's then filed a Chapter 7 bankruptcy in the United States Bankruptcy court

District of Nevada, Case No. 09-16951-mkn. The case was filed on April 30, 2009. The Debtor received his discharge on August 12, 2009.

14. The note was terminated in this case on August 12, 2009 when the discharge came down. It would be a violation of the United States Bankruptcy Court and the Court Injunction issued on August 12, 2009 if the Defendant made any effort to have the Plaintiff make any payments on the Note. It was discharged.

15. When the note was terminated but the deed of trust stayed on the Property.

16. The Petitioners are not liable under the Note.

17. There have been no payments or activity on the note for over ten (10) years after the termination of the contract.

18. According to the Defendant's statement as of July 1, 2020, "As of June 3, 2020, you are 3,958 days delinquent on your mortgage loan and your most delinquent payment was due 8/1/2009." If you base the facts on the Defendants calculations, it has been 10 years and eight (8) months delinquent. It is past the ten (10) year statute of limitations.

19. Under NRS 106.240, if ten (10) years passes after the termination of the Note, then it extinguishes certain debts under the real property.

20. The bank failed to take any action for over ten and a half (10 3/4) years. The Note was terminated under the United States Bankruptcy Code. The Deed of Trust as been terminated as per the Nevada Revised Statutes specially NRS 106.240.

FIRST CAUSE OF ACTION

(Quiet Title)

21. The Plaintiffs restate and re-allege each and every allegation contained in Paragraphs 1 through 20 inclusively and incorporates them herein by reference as if fully set forth herein.

22. The Diaz's do not owe any money under the Note that has been signed in this case. The Note was terminated and discharged under the United States Bankruptcy Code.

23. The deed of trust remained on the Property for over ten (10) years.

24. The statute reads:

NV Rev Stat § 106.240 Extinguishment of lien created by mortgage or deed of trust upon real property.

The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

25. The Note has been terminated in this case due to the Bankruptcy. The lien on the Property has expired because it is past ten (10) years.
26. The deed of trust acts as a cloud on the title.
27. Accordingly, Diaz requests this Court to Order the above Defendants to expunge and forever remove the documents clouding title to the Property.
28. That the Plaintiff be awarded treble damages for a cloud on the Property.
29. Further, Diaz requests this Court to award all its attorney fees and costs for bringing this action.

SECOND CAUSE OF ACTION

(Injunction)

30. The Plaintiffs restate and re-allege each and every allegation contained in Paragraphs 1 through 29 inclusively and incorporates them herein by reference as if fully set forth herein.
31. Land is unique and cannot be replaced. If the Defendants try to foreclose on the Property, the Plaintiff will suffer irreparable harm. The land cannot be replaced.
32. The Plaintiff would lose their interest and would suffer great harm if a foreclosure is allowed.
33. The Defendant has done nothing for over ten (10) years. They would not suffer any harm.
34. The law is very clear and the Plaintiff does stand a strong likelihood of success on the merits of the case.
35. It is in the best interest of the public to uphold the NRS or get an understanding of the NRS 106.240. As a result, it is in the best interest of the public to have this issue resolved.

36. The statute reads:

NV Rev Stat § 106.240 Extinguishment of lien created by mortgage or deed of trust upon real property.

The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

37. If the Defendants proceed with foreclosure on the Property, the Plaintiff will be greatly harmed and there could be other third-parties harmed if the foreclosure is held to be invalid.

WHEREFORE, Plaintiff prays for relief against the Defendants as follows:

1. That this Court quiet title;
2. That this Court allow a Temporary Restraining Order and Injunction in place if necessary.
3. That the Plaintiff be awarded treble damages for not removing the cloud on the title.
4. For attorneys fees and costs in bringing this action;
5. For such other relief as the court deems just and proper.

DATED this 17 day of August, 2020.

Submitted by:

DAVID J. WINTERTON & ASSOC., LTD.

By: 

David J. Winterton, Esq.

Nevada Bar No. 004142

7881 W. Charleston Blvd., Suite 220

Las Vegas, Nevada 89117

Attorney for Plaintiffs

DAVID J. WINTERTON & ASSOCIATES, LTD.
7881 W. Charleston Blvd., Suite 220
Las Vegas, Nevada 89117
(702) 363-0317

VERIFICATION

STATE OF NEVADA)

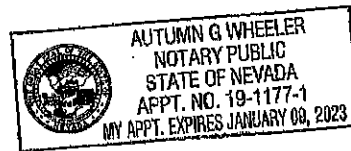
COUNTY OF CLARK)


SS:

ADRIANA DIAZ, being first and duly sworn, deposes and says: That I am a Plaintiff in the foregoing action; that I have read the foregoing Complaint and know the contents thereof; that the same is true of my knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe them to be true.


ADRIANA DIAZ

Subscribed and Sworn To before me
this 18th day of August, 2020.




NOTARY PUBLIC

STATE OF NEVADA)

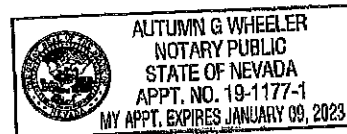
COUNTY OF CLARK)


SS:

JAIME DIAZ, being first and duly sworn, deposes and says: That I am a Plaintiff in the foregoing action; that I have read the foregoing Complaint and know the contents thereof; that the same is true of my knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe them to be true.


JAIME DIAZ

Subscribed and Sworn To before me
this 18th day of August, 2020.




NOTARY PUBLIC

ORDR

Allison R. Schmidt SBN: 10743
Cuong M. Nguyen SBN: 11228
Ghidotti | Berger, LLP
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Attorney for Defendant BCMB1 Trust

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

ADRIANA DIAZ, an individual; and JAIME
DIAZ, an individual,

Plaintiffs

v.

BCMB1 TRUST; and DOES I-X; and ROES
XI-XX

Defendants.

CASE NO.: A-20-819873-C

DEPT. NO.: 24

**ORDER GRANTING MOTION TO
DISMISS**

COMES NOW Defendant BCMB1 Trust's ("BCMB1") motion to dismiss came on for hearing before this Court on March 23, 2021 at 9:00am. Allison R. Schmidt, Esq. appeared on behalf of BCMB1 and David Winterton, Esq. appeared on behalf of Adriana and Jaime Diaz ("Diaz" or "Plaintiffs"). The Court, having reviewed the motion and opposition thereto, and having heard the arguments of counsel, and good cause appearing, finds as follows:

Plaintiffs' complaint alleges that Plaintiffs are the owners of the real property located at 5913 W. Gowan Road, Las Vegas, NV (the "property"). See Compl. 10. Plaintiffs' obtained a first mortgage in March of 2003, and a second mortgage "prior to 2009". See Compl. at 11-12. In 2019, the Second deed of trust was assigned to BCMB1 Trust. The court takes judicial notice of the

1 recorded documents attached to the Motion to Dismiss, including the second deed of trust and
2 assignments.

3 Plaintiffs filed a Chapter 7 Bankruptcy petition in 2009 in the District of Nevada, case no.
4 09-16951-mkn. *Id.* at 13. Plaintiffs obtained a Chapter 7 discharge on August 12, 2009. *Id.* at 17.
5 The Plaintiffs assert their complaint that the loan was alternatively (1) “terminated” as a result of
6 their Chapter 7 Bankruptcy, or (2) extinguished under NRS 106.240 because no payments have
7 been made in over 10 years. *See* Compl. at 14-20. Further, the court takes judicial notice of the
8 Plaintiffs’ Bankruptcy case, the petition, discharge and other filings of record.

9 When ruling on a Motion to dismiss, this Court may accept all of the plaintiffs factual
10 allegations as true and draw every reasonable inference in the plaintiff’s favor to determine
11 whether the allegations are sufficient to state a claim for relief. *Sanchez v. Wal-Mart Stores, Inc.*,
12 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). A complaint should be dismissed for failure to
13 state a claim “only if it appears beyond a doubt that it could prove no set of facts, which, if true,
14 would entitle it to relief.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d
15 670, 672 (2008).

16 The court may take into account matters of public record, orders, items present in the
17 record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss
18 for failure to state a claim upon which relief can be granted. *Breliant v. Preferred Equities Corp.*,
19 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

20 Plaintiffs’ claim that the second lien was extinguished or stripped by their Chapter 7
21 bankruptcy discharge is subject to dismissal. The United States Supreme Court has expressly
22 held that the lien of a junior secured creditor may not be stripped or modified by a Chapter 7
23 bankruptcy. *Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 135 S. Ct. 1995, 1999, 192 L. Ed. 2d
24 52 (2015). Indeed, a secured creditor’s lien generally passes through a Chapter 7 bankruptcy
25 action unaffected. *In re Seymour*, No. ADV 11-02551, 2013 WL 1736471, at *7 (B.A.P. 9th Cir.
26 Apr. 23, 2013), *aff’d*, 601 F. App’x 572 (9th Cir. 2015). While Plaintiffs’ personal liability on the
27 loan was discharged, the beneficiary of the second deed of trust still may proceed against the
28 collateral to recover the funds it lent Plaintiffs.

Similarly, the Court finds that Plaintiffs’ claims under NRS 106.240 is also subject to

1 dismissal. Plaintiffs plead absolutely no facts that suggest the loan has ever been “fully due” for
2 the purposes of the 10-year statute of limitations imposed by NRS 106.240. The loan, by its
3 terms, does not mature until 2033. In order to prevail on the NRS 106.240 claim, Plaintiffs must
4 plead that the loan became “wholly due” more than 10 years ago. Plaintiffs’ argument that the
5 NRS 106.240 was triggered by their Bankruptcy is without merit. Additionally, the Nevada
6 Supreme Court stated clearly that no statute of limitations applies to non-judicial foreclosures
7 because they are not judicial actions. *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec.*
8 *Mortg. Loan Tr.*, 401 P.3d 1068, 1071 (Nev. 2017) (statute of limitations applicable to actions for
9 breach of contract does not apply to nonjudicial foreclosures).

10 Based on the foregoing, BCMB1’s Motion it hereby GRANTED. Plaintiffs’ complaint is
11 dismissed with prejudice.

12 DATED this ____ day of _____, 2021

Dated this 7th day of April, 2021

13
14 

DISTRICT COURT JUDGE

8DB 42A 2EA8 C2AD
Jessica K. Peterson
District Court Judge

15
16
17 Respectfully submitted by:

18 /s/Allison R. Schmidt

Allison R. Schmidt SBN: 10743

19 Cuong M. Nguyen SBN: 11228

Ghidotti | Berger, LLP

20 Email: aschmidt@ghidottiberger.com

enguyen@ghidottiberger.com

21 Attorney for Defendant BCMB1 Trust

22 Approved as to form and content, all rights reserved:

23 No response from Plaintiffs’ counsel

24 David J. Winterton SBN: 4142

7881 W. Charleston Blvd., Suite 220

25 Las Vegas, NV 89117

26 702-363-0317

27 Attorney for Plaintiffs

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Adriana Diaz, Plaintiff(s)

CASE NO: A-20-819873-C

7 vs.

DEPT. NO. Department 8

8 BCMB1 Trust, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 4/7/2021

15 Autumn Wheeler

autumn@davidwinterton.com

16 David Winterton

david@davidwinterton.com

17 Autumn Wheeler

autumn@davidwinterton.com

18 David J. Winterton & Ltd.

david@davidwinterton.com


19 Allison Schmidt

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20 Tina Abrante

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21
22
23
24
25
26
27
28



1 **NOE**

2 Matthew Dayton SBN: 11552

3 Ghidotti | Berger, LLP

4 415 South 6th Street, #310

5 Las Vegas, NV 89101

6 Tel: (949) 427-2010

7 Fax: (949) 427-2732

8 Email: MDayton@ghidottiberger.com

9 Attorney for Defendant BCMB1 Trust

10 **EIGHTH JUDICIAL DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 ADRIANA DIAZ, an individual; and JAIME
13 DIAZ, an individual,

14 Plaintiffs

15 v.

16 BCMB1 TRUST; and DOES I-X; and ROES
17 XI-XX

18 Defendants.

CASE NO.: A-20-819873-C

DEPT. NO.: 24

NOTICE OF ENTRY OF ORDER

19 TO: ALL INTERESTED PARTIES:

20 PLEASE TAKE NOTICE that the Order Granting Motion to Dismiss was entered by the
21 above-entitled Court on the 7th day of April, 2021, a copy of which is attached hereto and made a
22 part thereof.

23 DATED this 8th day of April, 2021.

24 /s/ Matthew Dayton, Esq.

25 Matthew Dayton, SBN: 11552

26 GHIDOTTI | BERGER

27 415 South 6th Street, #310

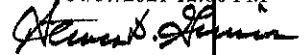
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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

ADRIANA DIAZ, an individual; and JAIME
DIAZ, an individual,

Plaintiffs

v.

BCMB1 TRUST; and DOES I-X; and ROES
XI-XX

Defendants.

CASE NO.: A-20-819873-C

DEPT. NO.: 24

**ORDER GRANTING MOTION TO
DISMISS**

COMES NOW Defendant BCMB1 Trust's ("BCMB1") motion to dismiss came on for hearing before this Court on March 23, 2021 at 9:00am. Allison R. Schmidt, Esq. appeared on behalf of BCMB1 and David Winterton, Esq. appeared on behalf of Adriana and Jaime Diaz ("Diaz" or "Plaintiffs"). The Court, having reviewed the motion and opposition thereto, and having heard the arguments of counsel, and good cause appearing, finds as follows:

Plaintiffs' complaint alleges that Plaintiffs are the owners of the real property located at 5913 W. Gowan Road, Las Vegas, NV (the "property"). See Compl. 10. Plaintiffs' obtained a first mortgage in March of 2003, and a second mortgage "prior to 2009". See Compl. at 11-12. In 2019, the Second deed of trust was assigned to BCMB1 Trust. The court takes judicial notice of the

1 recorded documents attached to the Motion to Dismiss, including the second deed of trust and
2 assignments.

3 Plaintiffs filed a Chapter 7 Bankruptcy petition in 2009 in the District of Nevada, case no.
4 09-16951-mkn. *Id.* at 13. Plaintiffs obtained a Chapter 7 discharge on August 12, 2009. *Id.* at 17.
5 The Plaintiffs assert their complaint that the loan was alternatively (1) “terminated” as a result of
6 their Chapter 7 Bankruptcy, or (2) extinguished under NRS 106.240 because no payments have
7 been made in over 10 years. *See* Compl. at 14-20. Further, the court takes judicial notice of the
8 Plaintiffs’ Bankruptcy case, the petition, discharge and other filings of record.

9 When ruling on a Motion to dismiss, this Court may accept all of the plaintiffs factual
10 allegations as true and draw every reasonable inference in the plaintiff’s favor to determine
11 whether the allegations are sufficient to state a claim for relief. *Sanchez v. Wal-Mart Stores, Inc.*,
12 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). A complaint should be dismissed for failure to
13 state a claim “only if it appears beyond a doubt that it could prove no set of facts, which, if true,
14 would entitle it to relief.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d
15 670, 672 (2008).

16 The court may take into account matters of public record, orders, items present in the
17 record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss
18 for failure to state a claim upon which relief can be granted. *Breliant v. Preferred Equities Corp.*,
19 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

20 Plaintiffs’ claim that the second lien was extinguished or stripped by their Chapter 7
21 bankruptcy discharge is subject to dismissal. The United States Supreme Court has expressly
22 held that the lien of a junior secured creditor may not be stripped or modified by a Chapter 7
23 bankruptcy. *Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 135 S. Ct. 1995, 1999, 192 L. Ed. 2d
24 52 (2015). Indeed, a secured creditor’s lien generally passes through a Chapter 7 bankruptcy
25 action unaffected. *In re Seymour*, No. ADV 11-02551, 2013 WL 1736471, at *7 (B.A.P. 9th Cir.
26 Apr. 23, 2013), *aff’d*, 601 F. App’x 572 (9th Cir. 2015). While Plaintiffs’ personal liability on the
27 loan was discharged, the beneficiary of the second deed of trust still may proceed against the
28 collateral to recover the funds it lent Plaintiffs.

Similarly, the Court finds that Plaintiffs’ claims under NRS 106.240 is also subject to

1 dismissal. Plaintiffs plead absolutely no facts that suggest the loan has ever been “fully due” for
2 the purposes of the 10-year statute of limitations imposed by NRS 106.240. The loan, by its
3 terms, does not mature until 2033. In order to prevail on the NRS 106.240 claim, Plaintiffs must
4 plead that the loan became “wholly due” more than 10 years ago. Plaintiffs’ argument that the
5 NRS 106.240 was triggered by their Bankruptcy is without merit. Additionally, the Nevada
6 Supreme Court stated clearly that no statute of limitations applies to non-judicial foreclosures
7 because they are not judicial actions. *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec.*
8 *Mortg. Loan Tr.*, 401 P.3d 1068, 1071 (Nev. 2017) (statute of limitations applicable to actions for
9 breach of contract does not apply to nonjudicial foreclosures).

10 Based on the foregoing, BCMB1’s Motion it hereby GRANTED. Plaintiffs’ complaint is
11 dismissed with prejudice.

12 DATED this ____ day of _____, 2021

Dated this 7th day of April, 2021

13
14 

DISTRICT COURT JUDGE

8DB 42A 2EA8 C2AD
Jessica K. Peterson
District Court Judge

15
16
17 Respectfully submitted by:

18 /s/Allison R. Schmidt

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19 Cuong M. Nguyen SBN: 11228

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22 Approved as to form and content, all rights reserved:

23 No response from Plaintiffs’ counsel

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27 Attorney for Plaintiffs

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Adriana Diaz, Plaintiff(s)

CASE NO: A-20-819873-C

7 vs.

DEPT. NO. Department 8

8 BCMB1 Trust, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 4/7/2021

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