

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

2
3 ALBERT ELLIS LINCICOME, JR., AND
4 VICENTA LINCICOME,

5 Appellants,

6 v.

7
8 SABLES, LLC A NEVADA LIMITED
9 LIABILITY COMPANY, AS TRUSTEE OF
10 THE DEED OF TRUST GIVEN BY
11 VICENTA LINCICOME AND DATED
12 5/23/2007; FAY SERVICING, LLC, A
13 DELAWARE LIMITED LIABILITY
14 COMPANY AND SUBSIDIARY OF FAY
15 FINANCIAL, LLC; PROF-2013-M4 LEGAL
16 TITLE TRUST BY U.S. BANK, N.A., AS
17 LEGAL TITLE TRUSTEE; BANK OF
18 AMERICA, N.A.; BRECKENRIDGE
19 PROPERTY FUND 2016, LLC, A UTAH
20 LIMITED LIABILITY COMPANY;
21 NEWREZ, LLC, D/B/A SHELLPOINT
22 MORTGAGE SERVICING, LLC; 1900
23 CAPITAL TRUST II, BY U.S. BANK TRUST
24 NATIONAL ASSOCIATION; AND MCM-
25 2018-NPL2,

26 Respondents.

Supreme Court Case No.
84238

Electronically Filed
Apr 13 2022 05:12 p.m.
Third Judicial District
Elizabeth A. Brown
Clerk of Supreme Court
Court Case No. SCV
01332

27 **RESPONDENT BRECKENRIDGE PROPERTY FUND 2016, LLC'S
REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL**

 Comes now Respondent Breckenridge Property Fund 2016, LLC

 ("Breckenridge"), by and through its undersigned counsel of record, Hutchison &
Steffen, and hereby submits its Reply in Support of its Motion to Dismiss Appeal
as follows:

1 **I. ARGUMENT IN REPLY**

2
3 **A. Breckenridge's claims have not been fully adjudicated by the**
4 **Trial Court requiring dismissal as to Breckenridge.**

5 Appellants admit that in this Court's Order Partially Dismissing Appeal in
6 Appeal No. 83261 ("Dismissal Order"), this Court held that the lower court's
7 Order on Breckenridge Motion for Summary Judgment ("Breckenridge MSJ") "is
8 not appealable as it does not dispose of all the claims and issues raised by
9 Breckenridge. See Appellants' Opposition at p. 7. Because "no other statute or
10 court rule appears to authorize an appeal" from said district court order, this Court
11 granted the motion to dismiss the appeal as to Breckenridge.
12

13
14 Yet, despite Breckenridge's remaining claims still pending before the Trial
15 Court, Appellants somehow claim that their instant appeal is proper. Giving
16 Appellants' assertions a fair reading, it appears the Appellants are claiming that all
17 of Breckenridge's claims have been adjudicated by the Trial Court. This is
18 inaccurate.
19

20
21 For example, Breckenridge has pending claims for slander of title, unjust
22 enrichment, and rent or monies for possession of the subject property, and any
23 amount of damages for these claims, as this Court noted in response to
24 Breckenridge's motion to dismiss in the Appellants' First Appeal.¹ While
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¹ Unless otherwise stated capitalized terms are given the meaning ascribed to them in the motion to dismiss.

1 Appellants are correct that in the interim Breckenridge has largely resolved its
2 claim for writ of restitution, that is only one of several pending claims that remain.

3
4 Further, Appellants are misrepresenting the Trial Court orders they cite. In
5 its Order Concerning Breckenridge Property Fund 2016, LLC's Motion for Entry
6 of Order Granting Permanent Writ of Restitution and Payment of Overdue Rents
7 and Plaintiff's Motion for Stay Pending Appeal entered on November 5, 2021,
8 ("Restitution Order") – attached as Exhibit 21 to the Appellants' Opposition and
9 Exhibit 1 hereto for the Court's convenience – found unequivocally that
10 Breckenridge is entitled to further judgment against the Appellants based on
11 Breckenridge's pending claim for unpaid rents:
12
13

14
15 28. Here, the appeal was taken upon a certification of a final
16 judgment pursuant to NRCP 54(b) prior to Breckenridge obtaining a
17 final judgment. However, *Breckenridge has demonstrated that it will*
18 *be entitled to damages* against Plaintiffs based on the fair market
19 monthly rental value of the Property multiplied by the number of
20 months in the Property.

21 See Exhibit 1 at p. 6, ¶ 28. Thus, contrary to the Appellants' inaccurate assertions,
22 the Trial Court itself, along with this Court, specifically recognized that pending
23 issues remain with respect to Breckenridge's unadjudicated claims. Thus, while it
24 is true that Breckenridge prevailed on its motion for summary judgment, it does
25 not necessarily follow that the motion for summary judgment disposed of all of its
26 claims. This Court as well as the Trial Court have specifically recognized that
27 additional claims of Breckenridge remain to be adjudicated by the Trial Court.

1 In addition, Appellants have not received certification of Breckenridge's
2 summary judgment order and this appeal is improper. Nevada law does not
3 preclude motions for attorney fees except in cases where a final judgment has been
4 entered. *See* NRCP 54(b); *see also Bowlby v. Bowlby*, 129 Nev. 1099 (2013)
5 (Westlaw Unpublished) (Recognizing that attorney fee awards, among other
6 orders, could not be appealed from as no final judgment had been entered). While
7 orders awarding attorney fees may constitute special orders entered after final
8 judgment in certain circumstances (*Smith v. Crown Fin. Servs. of Am.*, 111 Nev.
9 277, 280, 890 P.2d 769, 771 (1995)), it is inaccurate for Appellants to suggest that
10 an award of attorney fees can render an order appealable when it otherwise is not,
11 as is the case with Breckenridge's Summary Judgment Order in this case.
12
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16 **II. CONCLUSION**

17 For all these reasons, Respondent Breckenridge respectfully requests that
18 this Court dismiss the instant appeal, and grant such other and further relief as the
19 Court deems appropriate.
20

21 Dated this 13th day of April, 2022.

22 /s/Brenoch Wirthlin
23

24 John T. Steffen (4390)
25 Brenoch R. Wirthlin (10282)
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27 Las Vegas, NV 89145

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Breckenridge Property Fund, LLC*

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **RESPONDENT BRECKENRIDGE
PROPERTY FUND 2016, LLC'S REPLY IN SUPPORT OF MOTION TO
DISMISS APPEAL**, 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 Nev. R. App. P. Rule 27. Further, this Reply complies with Nev. R.
App. P. 27(d) as it contains no more than 5 pages. 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 13th day of April, 2022.

/s/Brenoch Wirthlin

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CERTIFICATE OF SERVICE

I certify that on the 13th day of April, 2022, I served the foregoing,
**RESPONDENT BRECKENRIDGE PROPERTY FUND 2016, LLC’S REPLY
IN SUPPORT OF MOTION TO DISMISS APPEAL**, on all parties of record to
this appeal, via Electronic Service through the E-Flex System.

/s/Danielle Kelley
An Employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

FILED

2021 NOV -5 AM 11:05

TANYA SUE IRONE
COURT ADMINISTRATOR
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CLERK OF DISTRICT COURT

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Attorneys for Intervenor

**THIRD JUDICIAL DISTRICT COURT
LYON COUNTY, NEVADA**

ALBERT ELLIS LINCICOME, JR., and
VICENTA LINCICOME,

Plaintiff,

v.

SABLES, LLC, a Nevada limited liability
company, as Trustee of the Deed of Trust given
by Vicenta Lincicome and dated 5/23/2007; FAY
SERVICING, LLC, a Delaware limited liability
company and subsidiary of Fay Financial, LLC;
PROF-2013-MF LEGAL TITLE TRUST by U.S.
BANK, N.A., as Legal Title Trustee; for BANK
OF AMERICA, N.A.; and DOES 1-50.,

Defendants.

BRECKENRIDGE PROPERTY FUND 2016,
LLC,

Defendant in Intervention.

Case No.: 18-CV-01332
Dept No.: II

ORDER CONCERNING:

**BRECKENRIDGE PROPERTY FUND 2016,
LLC'S MOTION FOR ENTRY OF ORDER
GRANTING PERMANENT WRIT OF
RESTITUTION AND PAYMENT OF
OVERDUE RENTS**

AND

**PLAINTIFFS' MOTION FOR STAY
PENDING APPEAL**

1 On October 12, 2021, at 1:30 p.m., the Court held a hearing in the above-captioned matter to
2 consider Defendant in Intervention Breckenridge Property Fund 2016, LLC's Motion for Entry of Order
3 Granting Writ of Permanent Restitution and Payment of Overdue Rents and on Plaintiffs' Motion for
4 Stay Pending Appeal. Todd W. Prall and Casey J. Nelson appeared on behalf of Defendant in
5 Intervention Breckenridge Property Fund 2016, LLC. Michael G. Millward appeared on behalf of the
6 Plaintiffs. Ramir M. Hernandez appeared on behalf of Fay Servicing, LLC and US Bank Prof-2013-M4
7 Legal Title Trust. Paige L. Magaster appeared on behalf of Bank of America, N.A.

9 The Court, after hearing arguments of counsel and sworn testimony from Plaintiffs Albert Ellis
10 Lincicome, Jr., and Vincenta Lincicome, and for good cause, enters the following Findings of Fact,
11 Conclusions of Law, and Order.

12
13 **A. Findings of Fact.**

14 1. On June 23, 2021, the Court entered an order denying Plaintiffs' motion for partial
15 summary judgment and granting summary judgment in favor of Defendants Bank of American, N.A.,
16 Shellpoint Mortgage Servicing, Prof-2013 M4 Legal Trust, U.S. Bank, N.A. as Legal Trustee (the and
17 Fay Servicing, LLC (hereinafter the "Banks MSJ Order") and certified the judgment as final under NRC
18 54(b).

20 2. On June 23, 2021, the Court entered a separate order granting summary judgment in favor
21 of Breckenridge Property Fund 2016, LLC ("Breckenridge") on its First and Third Claims for Relief for
22 Quiet Title and Writ of Possession (hereinafter, the "Breckenridge MSJ Order").

23 3. The Breckenridge MSJ Order and the Banks MSJ Order are collectively the MSJ Orders.

24 4. In the MSJ Orders, the Court made numerous findings of fact and conclusions of law
25 which are adopted herein by reference.
26
27
28

1 5. In granting summary judgment in favor of Breckenridge, the Court found that
2 Breckenridge purchased the Property at a properly noticed foreclosure sale and is therefore entitled to
3 both title to and possession of the real property at issue in this case, which is located at 70 Riverside
4 Drive, Dayton, Nevada 89403 (the "Property").

5 6. On July 23, 2021, Plaintiffs filed a Notice of Appeal, which sought review of both the
6 MSJ Orders, among other things.

7 7. On September 9, 2021, Breckenridge filed a Motion for Entry of Order Granting
8 Permanent Writ of Restitution and Payment of Overdue Rents (the "Motion for Permanent Writ of
9 Restitution")
10

11 8. On or about September 14, 2021, Plaintiffs served their Motion for Stay Pending Appeal
12 (the "Motion for Stay").
13

14 9. On or about September 22, 2021, Plaintiffs served an opposition to the Motion for Writ
15 of Permanent Restitution in which Plaintiffs simply incorporated the Motion for Stay as their opposition.

16 10. On October 1, 2021, Breckenridge filed an opposition to the Motion for Stay.

17 11. On October 6, 2021, Breckenridge filed a Reply in Support of the Motion for Permanent
18 Writ of Restitution.
19

20 12. On September 28, 2021, the Court entered an Order Granting Ex Parte Application for
21 Order shortening Time for Hearing on Breckenridge's Motion for Permanent Writ of Restitution, which
22 set a hearing on Breckenridge's motion for October 13, 2021 at 1:30 p.m.

23 13. Breckenridge purchased the Property at a properly noticed foreclosure sale on January 4,
24 2019 for \$294,000.00. A Three-Day Notice to vacate the Property was served on the Plaintiffs on January
25 28, 2019.
26
27
28

1 14. Plaintiffs have continued to live in the Property from February 1, 2021 to the present,
2 which is a total of 32 months through the end of September 2021.

3 15. Based on the current rental market and the evidence provided by Breckenridge, the Court
4 finds that a fair market rental value for the Property is \$2,500 per month.

5 16. Plaintiffs testified concerning their assets at the hearing on October 13, 2021. Plaintiffs
6 testified that they have a rental property that is secured by a trust deed located Carson City, Nevada. The
7 debt secured by the deed of trust is somewhere between \$225,000 and \$250,000, with a potential market
8 value of around \$325,000. The rental income they receive from the property is only a few hundred dollars
9 more than the mortgage payment each month.
10

11 17. Plaintiffs testified that they have a retirement account with approximately \$125,000.00
12 and that they live on approximately \$3,000.00 per month in social security income.
13

14 18. Plaintiffs testified that they have a significant amount of medical bills.

15 19. Plaintiffs testified that they did not believe they could make a monthly rental payment for
16 the Property in the amount of \$2,500.
17

18 **B. Conclusions of Law.**

19 20. NRS § 40.255(1)(c) provides for removal of a person who holds over and continues in
20 possession of real property after a 3-day written notice to surrender has been served upon the person
21 “where the property . . . has been sold under a power of sale granted by NRS 107.080 to the trustee of a
22 deed of trust executed by the person . . . , and the title under such sale has been perfected” Nev.
23 Rev. Stat. Ann. § 40.255 (West).
24

25 21. Plaintiffs’ continued occupation of the Property was and is in clear violation of NRS §
26 40.255 and Breckenridge is entitled to permanent possession of the Property as prescribed in NRS §§
27 40.290 to 40.420. Therefore, Breckenridge is entitled to a permanent writ of restitution for the Property.
28

1 22. Plaintiffs have requested a stay of the proceedings in this Court to enforce the MSJ Orders,
2 including Breckenridge's request for a permanent writ of restitution.

3 23. The Nevada Supreme Court has noted that "generally, in determining whether to issue a
4 stay pending disposition of an appeal, [a court] considers the following factors:

- 5 (1) whether the object of the appeal will be defeated if the stay is denied,
6 (2) whether appellant will suffer irreparable or serious injury if the stay is denied,
7 (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and
8 (4) whether appellant is likely to prevail on the merits in the appeal.

9
10 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

11 24. The Nevada Supreme Court has "not indicated that any one factor carries more weight
12 than the others" although some courts have recognized "that if one or two factors are especially strong,
13 they may counterbalance other weak factors." *Id.*

14
15 25. Here, rather than focusing on these factors, the Court believes a stay is warranted under
16 NRCP 62(d) so long as Plaintiffs meet the requirements of securing Breckenridge's interests.

17 26. NRCP 62(d) provides:

18 Stay Pending an Appeal.

- 19
20 (1) *By Supersedeas Bond.* If an appeal is taken, the appellant may obtain a stay by
21 supersedeas bond, except in an action described in Rule 62(a)(2). The bond may be
22 given upon or after filing the notice of appeal or after obtaining the order allowing
the appeal. The stay is effective when the supersedeas bond is filed.
- 23 (2) *By Other Bond or Security.* If an appeal is taken, a party is entitled to a stay by
24 providing a bond or other security. Unless the court orders otherwise, the stay takes
25 effect when the court approves the bond or other security and remains in effect for
the time specified in the bond or other security.

26 27. The amended rule, which appears to have added subsection (2) essentially adopts the case
27 law from Nevada and the federal courts that had recognized that the rule "allows an appellant to obtain a
28

1 stay pending appeal as of right upon the posting of a supersedeas bond for the full judgment amount, but
2 that courts retain the inherent power to grant a stay in the absence of a full bond.” *Nelson v. Heer*, 121
3 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), as modified (Jan. 25, 2006) (citations omitted).

4 28. Here, the appeal was taken upon a certification of a final judgment pursuant to NRCP
5 54(b) prior to Breckenridge obtaining a final judgment. However, Breckenridge has demonstrated that
6 it will be entitled to damages against Plaintiffs based on the fair market monthly rental value of the
7 Property multiplied by the number of months in the Property.

9 29. Based on the facts presented, the Court finds that the approximately fair market monthly
10 rental value for the Property is \$2,500.00. The Court further finds that an adequate supersedeas bond in
11 this case would be the amount of a judgment were it to be entered today plus another 24 months of rental
12 payments. This amount is \$80,000.00 (32 months * \$2,500.00) plus \$60,000.00 (24 months * \$2,500),
13 which equals \$140,000.00.

15 30. Plaintiffs, however, request that the Court consider allowing Plaintiffs to provide other
16 types of security in place of a “full judgment” bond. Specifically, Plaintiffs ask for the Court to approve
17 the other real property owned by Plaintiffs, or the real property Plaintiffs own in Carson City that they
18 rent out (the “Carson City Property”).

20 31. “The purpose of security for a stay pending appeal is to protect the judgment creditor's
21 ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to
22 the creditor arising from the stay.” *Id.* at 835, 122 P.3d at 1254. “[T]he focus is properly on what security
23 will maintain the status quo and protect the judgment creditor pending an appeal.” *Id.* at 835-36, 122
24 P.3d at 1254.

26 32. The Nevada Supreme Court has recognized five factors to consider in determining
27 whether other alternative security for less than a full supersedeas bond:
28

- (1) the complexity of the collection process;
- (2) the amount of time required to obtain a judgment after it is affirmed on appeal;
- (3) the degree of confidence that the district court has in the availability of funds to pay the judgment;
- (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and
- (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. at 836, 122 P.3d at 1254.

33. The Court finds that the facts and circumstances of this case do not warrant allowing an alternative security other than a supersedeas bond.

34. Because Plaintiffs only asset being submitted as alternative to a bond is the Carson City Property, which has a mortgage on it, and a retirement account, the complexity of collecting on the proposed collateral is very high.

35. Because the current appeal is based on a Rule 54(b) certification, there will be a significant amount of time between an appeal and when Breckenridge can obtain a judgment in this case. Breckenridge will be required to complete the process of obtaining a judgment.

36. The Court is not confident that there will be funds available to pay Breckenridge for any judgment. Plaintiffs testimony demonstrates that their income is such that they would not be able to pay such a judgment.

37. Finally, although Plaintiffs do not appear to be in a strong financial situation, there is no evidence indicating that requirement a full supersedeas bond would place any other creditor in an unsecure position.

1
2 38. As noted above the Court finds that that a reasonable fair market monthly rental rate for
3 the Property is \$2,500. The Court further finds that a reasonably expected judgment against Plaintiffs
4 would be the amount of rent due from February 1, 2019 to the culmination of the appeal, which is
5 anticipated to be an approximate 56 months and which would equal \$140,000.00

6
7 39. Based on this findings and conclusions, the Court finds that Breckenridge is entitled to a
8 permanent write of restitution.

9 40. The Court further finds, however, that Plaintiffs should be granted a stay pending appeal
10 which would become effective upon the posting of a \$140,000.00 supersedeas bond from which
11 Breckenridge may recover its damages should it prevail on appeal. Plaintiffs shall have until November
12 12, 2021 to post the supersedeas bond.

13
14 41. The Court authorizes the issuance of a permanent writ of restitution effective November
15 15, 2021 allowing Breckenridge to remove the Plaintiffs and their belongings from the Property. Should
16 Plaintiffs post the \$140,000.00 supersedeas bond with the Court by 5:00 p.m. on November 12, 2021, the
17 permanent writ of restitution shall issue, but will be stayed pending the appeal.
18

19 **C. Order**

20 IT IS SO ORDERED.

21 IT IS FURTHER ORDERED that Breckenridge's Motion for Entry of Order Granting Permanent
22 Writ of Restitution and Payment of Overdue Rents is GRANTED IN PART and DENIED IN PART.

23 IT IS FURTHER ORDERED that the Permanent Writ of Restitution shall issue effective
24 immediately on November 15, 2021.

25
26 IT IS FURTHER ORDERED that all other relief sought in Breckenridge's Motion for Entry of
27 Order Granting Permanent Writ of Restitution and Payment of Overdue is DENIED.
28

1 IT IS FURTHER ORDERED that Plaintiffs' Motion for Stay Pending Appeal is GRANTED IN
2 PART and DENIED IN PART.

3 IT IS FURTHER ORDERED that Plaintiffs' shall be granted a stay pending appeal upon the
4 posting of a \$140,000.00 supersedeas bond.

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IT IS FURTHER ORDERED that Plaintiffs' shall have until November 12, 2021 to post the \$140,000.00 supersedeas bond, otherwise no stay pending appeal shall be granted and Breckenridge may proceed with execution upon the writ of restitution.

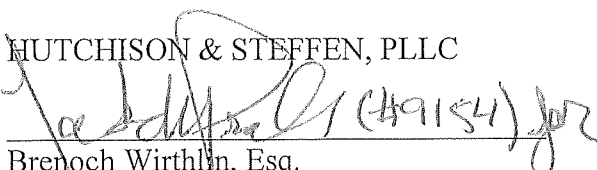
DATED this 3rd day of November 2021.


DISTRICT COURT JUDGE

Respectfully submitted by:

Dated this 28th day of October, 2021

HUTCHISON & STEFFEN, PLLC


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*Attorneys for Defendant, Breckenridge
Property Fund 2016, LLC*

Approved as to form and content by:

Dated this _____ day of _____, 2021

MILLWARD LAW, LTD.

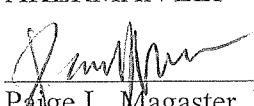
Refused to Sign

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Approved as to form and content by:

Dated this 28 day of October, 2021

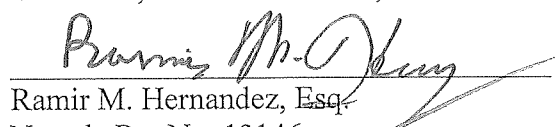
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Dated this 22nd day of October, 2021

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Servicing LLC, and Shellpoint Mortgage
Servicing, LLC*