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IN THE SUPREME COURT OF THE STATE OF NEVADA

LEIDIANNE L BAUTISTA, an individual
and CONSTANTINE S. NACAR, an
individual,

APPELLANTS

v.

ROC TITLE, LLC, a Nevada Limited
Liability Company, NEVADA
ASSOCIATION SERVICES, INC., a
Nevada Corporation, SATICOY BAY
LLC SERIES 10449 FORKED RUN, a
Nevada Limited Liability Company and
DOES 1 through 10 and ROE
CORPORATIONS I
through X, inclusive.

RESPONDENTS

SC Case No. 85204

Dist Ct. Case No.: A-22-852903-C

APPELLANT’S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no corporations for Appellants.

The attorneys who appeared for Appellants or will be appearing are:

LEIDIANNE L BAUTISTA – Joseph A. Scalia, Esq. – Senior Counsel LLC.

CONSTANTINE S. NACAR - Joseph A. Scalia, Esq. – Senior Counsel LLC.

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this matter pursuant to NRAP Rule 3A as it is an order denying a preliminary injunction. On August 15, 2022, the Court entered its order denying Appellants' Emergency Request for Stay of Redemption Date and Injunction Preventing Transfer of Property. The Notice of Entry of Order was entered on August 15, 2022. The Notice of Appeal was timely filed pursuant to NRAP 4(a)(1) on August 16, 2022.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(12) as it is a case challenging the denial of injunctive relief. However, Appellant believes this court should retain this matter based upon the principal issue of public policy in a case of relatively new impression that the District Court Judge stated they had never heard of it before. AA-000100 line 10-14.

STATEMENT OF ISSUES

Whether the court erred in denying the requested injunctive relief. This appeal raises an important public policy question as to whether a homeowners association/lender may receive a windfall by foreclosing on the property and whether a homeowner can sell the property during the 60 day redemption period.

STATEMENT OF THE CASE

This is a case addressing the 2015 amendments to NRS 116.3116 which allows homeowners 60 days to redeem their property after the HOA sale. On March 24, 2022, Appellant's residence was sold at a trustee sale due to delinquent Homeowners Association assessments in the amount of \$369.00. The property was worth at least \$470,000 and there was a mortgage of approximately \$202,000. Respondent Saticoy Bay's made the only bid in the amount of \$315,000. During the redemption period, owners attempted to sell the home to a third party to pay off creditors and salvage the remaining equity. Neither Saticoy, the HOA, or a title company would cooperate on the sale after the auction sale but prior to the expiration of the redemption period contrary to the explicit language of the statute.

Appellants filed a complaint on May 19, 2022 to extend the redemption period to allow them to close on an offer to sell the property for value. Despite a buyer who would have paid off the purchase money lender and ensured that Saticoy Bay received that positive return on their investment, Saticoy opposed the extension and sale. On May 20, 2022, Appellants filed an Emergency Request for Stay of Redemption Date. The court stayed any transfer of the property until a hearing on June 2, 2022. On that date the court erroneously held that Appellants had no likelihood of success on the merits and denied the injunction.

STATEMENT OF FACTS

As this was an emergency injunction hearing, the parties did not lodge evidentiary documents with the court. All citations are to the emergency motion, opposition, reply and the court's transcript.¹

Appellants, LEIDIANNE BAUSTISTA and CONSTANTINE NACAR are the homeowners of a property 10449 Forked Run Road. AA-000002 line 1-2. The property sits in a subdivision with an HOA. Due to nonpayment of the HOA fees, (less than \$1,000 of late payments and approximately \$7,000 in trustee fees.) AA-000037. The actual delinquent assessments were \$369.00. AA-000005 line 4. Defendant NEVADA ASSOCIATION SERVICES INC. sold the property at auction on March 24, 2022. AA-000044. The property was sold to Defendant SATICOY BAY who purchased the property for \$315,000.00 at auction. AA-000044. SATICOY BAY's apparent business model is to purchase properties substantially above the outstanding HOA fees, but well below the fair market value of the home. This drives up the redemption costs increasing the likelihood that a homeowner will fail to redeem and thereby converts the homeowner's surplus equity to SATICOY and all HOA auction purchasers. The statute did not intend to allow purchasers to overbid the cost of redemption and then resell the property in 60 days for immediate and complete loss of the homeowner's surplus equity.

¹ The vast majority of evidence to support Appellant's claims is in the possession of Respondents.

The homeowners listed the property for sale in an attempt to use the sale proceeds to redeem the property, pay off the statutory amounts owed to both the HOA and SATICOY BAY and salvage approximately \$150,000 in equity. The homeowners intended to use the proceeds of the sale to redeem the property and were expected to close prior to the redemption date. However, despite obtaining a cash offer for their home of \$470,000 AA - 000013, the defendants refused to allow the redemption of the property. This is directly contrary to the holding in Saticoy Bay v. Nev. Ass'n Sers 444 P.3d 428 as discussed below.

As the only way Appellants, would be able to redeem the property in the amount of \$315,000 would be to refinance the property, they needed additional time in order to close on the financing. As a result of the actions of Respondents, Appellants will lose the \$103,000 equity between the \$315,000 bid and the \$202,000 mortgage plus the \$150,000 additional equity in the home.

SATICOY BAY's business practice has the consequence of making redemption by a homeowner illusory, defeating the legislative intent of offering defaulting homeowners redemption. Most importantly, the intention of the statute is to insure that HOA fees and liens are paid, not to exact punishment on cash strapped homeowners by stripping them of their equity in favor of a HOA lien purchaser, what is akin to a private tax sale.

As a side issue, there were several defects with the trustee notice of sale. AA-000014 line 2-8. The Trustee Sale was improper as the notices of lien and default

were not served in compliance with NRS 116.31162 which requires service via certified mail. AA-000014 line 2-4 and AA-000031 and AA-000035. There is no affidavit of service recorded for either document and the documents do not claim they were served properly. The Notice of Trustee Sale does not appear to have been properly published and posted. Plaintiffs owed less than \$1000.00 in delinquent homeowners fees and penalties. The HOA, the trustee, and the buyer have all been unjustly enriched by a statute which was intended to give homeowners a chance to pay the comparatively small amount owed to the HOA.

At the time the Complaint was filed, Appellants had a buyer willing to pay the fair market value of \$470,000. Respondents refused to extend time to redeem the property or even allow Appellants' buyer to pay off the redemption value.

SUMMARY OF ARGUMENT

The District Court abused its discretion in denying the preliminary injunction. The Court's sole reason for denying the preliminary injunction as that Appellants did not enjoy a likelihood of success on the merits. In support of its decision, the court cites the following rationale:

- 1) The court notes that the tender was not effectuated by Bautista prior to the redemption deadline of May 23, 2022 based upon the auction being held on March 24, 2022.

- a. As this is the sole reason for the filing of the Complaint and request for injunction on May 19, 2022 and May 20, 2022 respectively in order to enjoin the deadline to redeem the property, the court should

not have denied the injunction simply because it could not hear the matter prior to May 23, 2022.

2) Whereas Bautista advances arguments concerning the noticing of the sale and Saticoy's purported overbidding, Bautista has not proffered any legal authority which would give this Court a sufficient basis for finding that the notice of sale was insufficient or that Saticoy overbid on the Property by bidding \$315,000.

a. The court incorrectly stated there was no legal authority proffered that the notice of sale was insufficient. Appellants cited NRS 116.31162 which enumerates the requirements for notices of sale including that the notice was mailed by certified mail, 116.31162(1)(a) and that the affidavit must state it meets the requirements in NRS 116.31162(1)(e).

b. The status of Saticoy's bid as an overbid is a factual argument to support the Unjust Enrichment cause of action. Further, as there has been minimal appellate consideration of the 2015 amendments, there is no legal authority on this issue, as acknowledged by the court at the hearing.

3) Whereas Bautista argues that escrow could not close due to ROC Title placing requirements that Bautista could not meet, and that such requirements are incorrect, any arguments that Bautista has against ROC Title for being unable to close escrow are an issue between Bautista and ROC Title and not a basis for an injunction against Saticoy or NAS.

a. The court misinterpreted the argument proffered by Appellants. The instructions from the title company has no bearing on Appellants'

motion other than to explain why they could not meet the redemption date.

- 4) Whereas the Court notes Bautista's argument concerning the equity of the matter and that the outcome is inequitable, the Court also notes Bautista's failure to make the necessary assessment payments or redeem the property in a timely manner.

- a. For the second time, this court improperly holds the timely filing of a request to stay or extend the redemption period against Appellants. Further, whether Appellants failed to pay the homeowner's assessments neither bars their right of redemption nor affects Appellants' ability to prevail on an unjust enrichment claim or a defective notice claim. The notice statutes must be complied with and the unjust enrichment claim is based upon Appellant's \$8,000 homeowners debt (including trustee's fees) but they were required to pay \$315,000 to Respondent and \$202,000 to their bank in order to redeem the property. As stated in the complaint, Appellant's were never told exactly what was required to redeem the property.

- 5) WHEREAS Bautista argues Saticoy refused to comply with providing the redemption amounts as set for in NRS 116.3116(3), Bautista argues that said section also allows for redemption by successors in interest, such as a prospective buyer.

- a. The court fails to negate Bautista's argument, yet in the previous paragraph held the failure to pay the redemption amount against Appellants.

6) Whereas the court also acknowledges Bautista's argument that a redemption right pursuant to NRS 116.3116 applies to homeowners, the Court does not find any supporting authority for Bautista's claim that a prospective buyer is a successor in interest entitled to redemption pursuant to Section 3 of NRS 116.3116.

a. NRS 116.3116 section 3 does not define successor in interest and,

in fact, should have referenced NRS 116.3116(3). Although the court claims it does not find any supporting authority for Bautista's claim that a prospective buyer is a successor in interest, it did not cite any authority that a prospective buyer is not a successor in interest.

b. It is Appellants' position that any sale of the property would effectively pay the proceeds to Bautista who would then redeem the property. Even if the buyer was determined to be paying the money directly to the HOA and Saticoy, it would be as an extension of, or successor in interest of the property.

As the Court abused its discretion and based its decision on an erroneous legal standard or clearly erroneous findings of fact, the ruling should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A party seeking a preliminary injunction must show a likelihood of success on the merits of their case and that they will suffer irreparable harm without preliminary relief. Clark Cty. Sch. Dist. v. Buchanan, 112 Nev. 1146 1150, 924 P.2d 716, 719 (1996). "[T]his court will only reverse the district court's decision when

the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." Excellence Cmty. Mgmt., LLC v. Gilmore, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (quoting Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC , 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (internal quotation marks omitted)). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." Finkel v. Cashman Profl, Inc. , 128 Nev. 68, 72-73, 270 P.3d 1259, 1262 (2012) (quoting Stratosphere Gaming Corp. v. Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (internal quotation marks omitted)).

II. THE COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT APPELLANTS DID NOT HAVE A LIKELIHOOD TO SUCCEED.

"An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." MB Am., Inc. v. Alaska Pac. Leasing Co. , 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). Shores v. Global Experience Specialists, Inc., 422 P.3d 1238 (Nev. 2018)

a. THE COURT ERRED IN FINDING THAT FAILURE TO REDEEM THE PROPERTY ON MAY 23, 2022 BARRED APPELLANTS' REQUEST FOR AN INJUNCTION.

The court erroneously found that, because Appellants did not redeem the property by May 23, 2022, they could not show a likelihood to prevail. Extending or staying the deadline to redeem the property was the sole purpose of the Complaint

for injunction which was filed on May 19, 2022 and the Emergency Request for Stay of Redemption Date filed on May 20, 2022. The Court stayed the time to redeem the property in its Temporary Restraining Order entered on May 20, 2022. Therefore, it is an error of fact or law to bar Appellants from proceeding on the grounds that they didn't meet a redemption deadline which the same Court had already stayed. Much like a timely filed motion for new trial would stay the time for an appeal, a timely filed motion to extend a deadline should toll that deadline. It is illogical, and unfair to deny a request to extend a deadline on the basis of the deadline having expired after the filing of the motion but before the hearing thereon.

b. THE COURT ERRED IN FINDING THAT THERE WAS NO LEGAL AUTHORITY THAT THE NOTICE OF SALE WAS DEFICIENT OR THAT SATICOY BAY OVERBID.

The court abused its discretion when it found that there was no legal authority that the Notice of Sale was deficient, disregarding the controlling law found in NRS 116.31162 which enumerates the requirements for notices of sale including that the notice must be mailed by certified mail, 116.31162(1)(a) and that the affidavit must state it meets the requirements in NRS 116.31162(1)(e).

Appellants' Emergency Motion clearly states the Trustee Sale was improper as the notices of lien and default were not served in compliance with NRS 116.31162(1)(a) which requires service via certified mail. Appellant's motion further stated that there was no affidavit of service recorded for either document and the documents did not claim they were served properly. NRS 116.31162(1)(e)

requires an affidavit be executed and recorded with the County Recorder. Therefore there was legal authority that the Notice of Sale was deficient under NRS 116.31162.

The court also incorrectly stated there was no legal authority that Saticoy Bay overbid. This is because whether Saticoy Bay intentionally bid an amount that would preclude any homeowner from redeeming their property, is a fact to support a claim of unjust enrichment, not a legal term of art. Unjust enrichment occurs "when ever [sic] a person has and retains a benefit which in equity and good conscience belongs to another." Unionamerica Mtg., 97 Nev. at 212, 626 P.2d at 1273. In their Emergency Motion, Appellants stated that they owed \$8,000 in homeowners fees and trustee fees combined. In fact they owed less than \$1,000 in homeowners fees and late fees and more than \$7,000 in trustee fees. Saticoy Bay bid \$315,000 to purchase the property and were the only party bidding. By doing so, Saticoy Bay rendered the redemption provisions of NRS 116.31166 unable to be completed, thus defeating the legislature's intent of the right of redemption and depriving Appellants of their legal rights.

*c. THE COURT MISAPPLIED THE FACTS WHEN IT RULED THAT
THE ACTIONS OF THE ESCROW COMPANY WERE
INDEPENDENT OF RESPONDENTS.*

The court ruled that it could not control the escrow company and if Appellants believed there was something wrong on their end, they would need to address it directly with them. In so ruling, the court misapplied the facts. The facts, as stated in Appellants' reply, were that SATICOY refuses to provide the redemption

amounts. In the Emergency Motion, Appellants pointed out that the title company unreasonably required Appellants to pay the mortgage out of pocket before closing on an earlier deal that would have redeemed the property prior to the redemption date, thus casting a cloud on the redemption process. Thus this issue has no bearing on Appellants' motion other than to explain why they could not meet the redemption date.

d. THE COURT ERRED WHEN IT FOUND THAT THERE WAS NO INEQUITY BECAUSE APPELLANTS FAILED TO PAY THE ASSESSMENTS OR THE REDEMPTION TIMELY.

The court found that the Appellants could not show a likelihood to prevail because they hadn't timely paid the assessments or redeemed the property. As stated above, the Appellants' Complaint, filed prior to the expiration of the redemption period, requested an extension of, or stay of the redemption period. A temporary restraining order was granted extending the deadline and staying enforcement until the hearing on June 2, 2022. Therefore, denying Appellant's request summarily on the basis that they did not meet the same deadline they were attempting to extend and which had already been stayed, is an abuse of discretion.

The court further misapplied the law to the extent it held that Appellants' failure to pay the assessments. Since the process of redemption under NRS 116.31166 is only applicable if there are unpaid assessments the failure to pay those assessments cannot defeat a party's attempt to enforce the right of redemption. The Court abused its discretion in finding otherwise.

e. THE COURT ERRED IN DETERMINING THAT A BUYER COULD NOT BE AN AGENT OF APPELLANTS OR A SUCCESSOR IN INTEREST

"When we are called upon to interpret a statute, the starting point is the statute's plain language. See Branch Banking v. Windhaven & Tollway, LLC, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). If the language of the statute is clear, we do not go beyond it. Id." See also Volenti v. State, Dep't of Motor Vehicles, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015).

This court has already determined that Saticoy Bay has no interest in the source of the funds to redeem the property or to direct how the proceeds of the sale are distributed. Saticoy Bay LLC Series 9050 W. Warm Springs 2079 v. Nev. Ass'n Servs 444 P.3d 428 (Nev. 2019). In a more direct issue, the court held that Saticoy's purchase funds were used to redeem the property with the consent of the mortgage company. The court held that Saticoy had no standing to question the source of the funds as it no longer had an interest in its purchase money. Here, there was no question whether the funds to be used to purchase the property were from the money paid by Saticoy or not.

The term "successor in interest" is not defined in the statute. Nor has it been authoritatively defined elsewhere. Indeed, it has been noted that no single definition is applicable in every legal context. Safer v. Perper, 569 F.2d 87, 95 (D.C.Cir.1977), citing Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). The word 'successor' has a twofold meaning. It may be used in

the sense of one entitled to succeed as well as in the sense of one who has in fact succeeded.' Id. 53 P.2d at 383." Title Ins. and Trust Co. v. Chicago Title Ins. Co., 634 P.2d 1216, 97 Nev. 523 (Nev. 1981)

As the law clearly states that a purchaser, ie: one entitled to succeed in interest" is a successor, the court erroneously misapplied the law.

Requiring a homeowner who is delinquent in the sum of \$8000 counting trustee fees to pay in excess of \$315,000 to redeem the property, is unconscionable. Infact, the United States Supreme Court recently found it unconstitutional for municipalities to retain the surplus monies generated from tax lien foreclosure sales. Tyler v. Hennepin County 598 U.S. ____ (May 25, 2023). While Tyler addresses the takings clause, the same principle should be applied to NRS 116.31166 as it amounts to a windfall to the buyer and the Homeowners Association when they should have, at minimum paid the difference between the mortgage and the HOA delinquency and the purchase price to Appellants, approximately \$100,000. Not to mention the windfall profits obtained by Saticoy purchasing a property below market value, thus depriving Appellants of an additional \$150,000 or more in equity, all over an actual delinquency of less than \$1,000.

CONCLUSION

Based thereon, Appellants request this court reverse the denial of Appellants' emergency injunction, reinstate the temporary injunction which

expired on June 2, 2022 and remand the matter back to the Eighth Judicial District Court for further proceedings on the merits of Appellants' claims.

DATED this 28th day of August 2023.

/s/ Joseph A. Scalia, Esq.
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Attorney's Certificate of Compliance

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28 and 32 because it:

a. Does not exceed 30 pages as required under NRAP 32(a)(7) and has a word count of less than 14,000 words (4164 words not counting citations to the Appendix).

3. Finally, I certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition 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.

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4. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of August, 2023

/s/ Joseph A. Scalia, Esq.
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Attorney for Appellants

AFFIRMATION

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding document does not contain the social security number of any person.

Dated this 28th day of August, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Senior Counsel, LLC., and on the 28th day of August, 2023, I served a true and correct copy of the above and foregoing Respondent's Opening Brief by the method or methods indicated below:

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Dated: August 28, 2023

/s/ Joseph A. Scalia, Esq.

Employee of Senior Counsel, LLC