IN THE SUPREME COURT OF THE STATE OF NEVADA

SACHA HUYNH TAN, A/K/A SACHA HUYNH, A/K/A SACHA TAN, AS TRUSTEE OF THE 1993 DAVIS FAMILY TRUST, Appellants, vs. BARRY COHEN, AN INDIVIDUAL; AFFORDABLE COMMUNITIES, LP, A NEVADA LIMITED PARTNERSHIP; GARY G. COHEN AND NICHOLAS HEIMAN, TRUSTEES OF THE EXEMPT TRUST CREATED UNDER THE KENNETH R. SAUNDERS LIVING TRUST, DATED MAY 1, 2009; GARY G. COHEN AND NICHOLAS HEIMAN, TRUSTEES OF THE NON-EXEMPT TRUST CREATED UNDER THE KENNETH R. SAUNDERS LIVING TRUST, DATED MAY 1, 2009; AND WARREN H. ASHMANN, TRUSTEE OF THE WARREN H. ASHMANN RETIREMENT TRUST, Respondents.	No. 85281
SACHA HUYNH TAN, A/K/A SACHA HUYNH, A/K/A SACHA TAN, AS TRUSTEE OF THE 1993 DAVIS FAMILY TRUST, Appellants, vs. BARRY COHEN, AN INDIVIDUAL; AFFORDABLE COMMUNITIES, LP, A NEVADA LIMITED PARTNERSHIP, Respondents.	No. 85559

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting a motion to dismiss in an action involving real property. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

On July 24, 2006, the then-trustee of the 1993 Davis Family Trust ("the Davis Trust") signed two promissory notes, receiving $2 million in loans from the Warren H. Ashmann Retirement Trust ("the Ashmann

Trust") and Daniel & Brook Las Vegas One, LLC. The loans were secured by deeds of trust recorded against the Davis Trust's real property ("the Davis Property"). According to the terms of the deeds of trust, their purpose was to "secur[e] payment of the sum of $1,000,000.00 with interest thereon according to the terms of a promissory note or notes of even date herewith made by Trustor, payable to order of Beneficiary, and all extensions or renewals thereof." The promissory notes provided that the loans were wholly due and payable on or before August 1, 2009. Two years after the notes' maturity date, a Subordination Agreement was signed by the lenders only and then recorded on April 14, 2011, indicating that "[t]o date no payments of principal or interest have been made on either note and the maker is in default on both notes as a result of the failure to make such payments." The Davis Trust allegedly never repaid the loans.

On September 24, 2021, respondents sent a letter demanding payment of the outstanding balance on the loans. On November 16, 2021, respondents recorded a notice of breach and election to sell under the deed of trust, noting that the entire principal balance and interest of the loans had not been paid and "became due on September 24, 2021."

On December 1, 2021, Sacha Huynh Tan, as successor trustee of the Davis Trust, filed a quiet title action seeking a declaration that the deeds of trust were extinguished pursuant to NRS 106.240. Tan filed an amended complaint on December 15, 2021, adding a second claim for declaratory relief on the basis that the purchase agreement is unenforceable. On January 10, 2022, respondents Gary Cohen and Nicholas Heimann, trustees of the Exempt Trust Created Under the Kenneth K. Saunders Living Trust and Non-Exempt Trust Created Under

the Kenneth K. Saunders Living Trust, filed a notice disclaiming any interest in the Davis property.

On February 8, 2022, Barry Cohen and Affordable Communities (collectively "Cohen") moved to dismiss Tan's complaint and extinguish the *lis pendens*; alternatively seeking summary judgment on Tan's claims. The crux of Cohen's argument was that the lenders' recorded Subordination Agreement extended the due date of the loans to June 30, 2016, thus defeating Tan's claim under NRS 106.240. Cohen attached various exhibits to the motion including the original promissory notes, the recorded deeds of trust, the various recorded assignments of the deeds of trust, the Subordination Agreement, and the notice of breach and election to sell under the deed of trust from November 2021. Warren H. Ashmann, as trustee of the Ashmann Trust filed a joinder to Cohen's motion.

In opposing Cohen's motion, Tan moved for leave to amend her complaint, which the district court granted on April 6, 2022. On May 24, 2022, the district court entered findings of fact and conclusions of law (FFCL) granting Cohen's motion to dismiss pursuant to NRCP 12(b)(5), finding that the 2011 Subordination Agreement extended the maturity date of the loans.

Standard of Review

Under NRCP 12(b)(5) a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Dismissal under NRCP 12(b)(5) is only appropriate "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). In reviewing a motion to dismiss under NRCP 12(b)(5), this court "recognize[s] all factual allegations in [the] complaint as true and draw all

inferences in its favor." *Id.* Courts considering dismissal under NRCP 12(b)(5) may "take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). This court reviews dismissal under NRCP 12(b)(5) de novo. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

But, if "matters outside the pleadings are presented to and not excluded by the court" as it considers a motion under NRCP 12(b)(5), then "the motion must be treated as one for summary judgment under [NRCP] 56." NRCP 12(d); *see also Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08, 167 P.3d 408, 409 (2007) (holding this court reviews dismissal orders that consider matters outside the pleadings as if they are orders granting summary judgment). A district court must grant summary judgment where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "A genuine issue of material fact exists . . . when a reasonable jury could return a verdict for the nonmoving party." *Witherow*, 123 Nev. at 308, 167 P.3d at 409. This court reviews de novo orders granting summary judgment. *Id.*

The district court's order dismissed Tan's complaint under NRCP 12(b)(5). However, Cohen attached sixteen exhibits to his motion to dismiss. While these exhibits were mostly documents recorded with the Clark County Recorder's office, Cohen also included several unrecorded documents, including a declaration in support of his motion and the original promissory notes. In its FFCL, the district court concluded that it need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." (quoting *Sprewell v. Golden State Warriors*,

266 F.3d 979, 988 (9th Cir. 2001), *amended on other grounds by* 275 F.3d 1187, 1188 (9th Cir. 2001)). However, rather than excluding the unrecorded documents and limiting its analysis to matters of public record, the district court proceeded as if all of Cohen's exhibits were subject to judicial notice. *See Witherow*, 123 Nev. at 307-08, 167 P.3d at 409. It is not clear from the order or the record if the district court actually considered any of Cohen's unrecorded exhibits, but it is clear that the documents were "presented to and not excluded by the court." *See* NRCP 12(d). Thus, we conclude this court must review the district court's FFCL as if it was an order granting summary judgment and review de novo. *See Witherow*, 123 Nev. at 307-08, 167 P.3d at 409; *see also Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (affirming a district court's decision if it "reache[d] the right result, although it [was] based on an incorrect ground").

The deed of trust terminated by law under NRS 106.240

NRS 106.240 only applies to extensions of when the loan becomes wholly due

Nevada's ancient mortgage statute, NRS 106.240, "provides a means by which liens on real property are automatically cleared from the public records after a certain period of time." *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.*, 138 Nev., Adv. Op. 22, 507 P.3d 194, 195 (2022).[1] Specifically,

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[1]Upon our review of the documents provided in Tan's appendix we determine that the record on appeal was deficient. *See* NRAP 30(b). While "[b]revity is required" in compiling appendices, NRAP 30(b), appendices must include all transcripts necessary to this court's review of the issues, NRAP 30(b)(1), as well as some specific documents, NRAP 30(b)(2). Tan's appendix failed to include her opposition to Cohen's motion to dismiss and the transcript from the hearing on the motion. Moreover, while Tan included the transcript from the hearing on her motion to amend the judgment in her appendix, the motion to alter judgment itself and the order

the statute provides that liens recorded upon real property which have become "wholly due" and remain unpaid

> shall at the expiration of 10 years after the debt secured by the . . . 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.

NRS 106.240 (emphasis added). This conclusive presumption "applies without limitation to all debts secured by deeds of trust on real property." *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 97, 16 P.3d 1074, 1079 (2001).

This court reviews the interpretation of statutes de novo. *Pro-Max*, 117 Nev. at 94-95, 16 P.3d at 1077. "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Erwin v. State*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting *Charlie Brown Constr. Co. v.*

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denying the motion appear only in her docketing statement, and she did not provide her reply brief, which was "essential to determination of issues raised." NRAP 30(b)(1), (3).

Rather than correcting these deficiencies, Tan simply argued the omitted documents had "no bearing on the issues." This court presumes necessary documents omitted from the record support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Further, this court is unable to discern whether Tan preserved her arguments below—which was necessary considering the waiver arguments raised. *See id.*, 123 Nev. at 603-04, 172 P.3d at 135. We caution appellants' counsel that substantial under inclusion or inadequacies in the record on appeal may result in the imposition of sanctions. NRAP 30(g). Nonetheless, the record is sufficient here to allow this court to address the NRS 106.240 dispute at the heart of this appeal.

Boulder City, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)) (further internal citations omitted). "If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous." *Nev. Dep't of Corr. v. York Claims Servs., Inc.*, 131 Nev. 199, 203-04, 348 P.3d 1010, 1013 (2015).

The ordinary meaning of an extension is "[a] period of additional time to take an action, make a decision, accept an offer, or complete a task." *Extension*, Black's Law Dictionary 728 (11th ed. 2019); *see also Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 611 (2020) (noting that the court gives statutory words "their plain and ordinary meanings unless the context requires a technical meaning or a different meaning is apparent from the context"). But a plain reading of the statute suggests it does not apply to an extension of just any loan term, but only where the extension changes the time at which the loan becomes "wholly due." *See* NRS 106.240. Thus we conclude that the language in NRS 106.240 unambiguously provides for extinguishment of a deed of trust ten years after a debt becomes wholly due according to the terms of a deed of trust or pursuant to the terms of "any recorded written extension thereof."

In *Pro-Max*, it was "undisputed that no written agreements to extend the notes and deeds of trust were ever executed or recorded." 117 Nev. at 94, 16 P.3d at 1077. In contrast here, the parties dispute whether the Subordination Agreement constituted a "recorded written extension" to the due date for the deeds of trust.

The terms of the promissory note did not give lenders the right to unilaterally extend the due date

When the facts are not in dispute, "contract interpretation is a question of law, which this court reviews de novo." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see also Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d

364, 366 (2013) (holding that "[w]hether a contract is ambiguous" is an issue of law this court reviews de novo). "The goal of contract interpretation is to discern the intent of the parties." *Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev. 76, 83, 482 P.3d 665, 673 (2021) (internal quotation marks omitted). This court must first determine whether the contract's language "is clear and unambiguous; if it is, the contract will be enforced as written.'" *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Galardi*, 129 Nev. at 309, 301 P.3d at 366 (internal citation omitted). "[A]n interpretation is not reasonable if it makes any contract provisions meaningless, or if it leads to an absurd result." *Nev. State Educ. Ass'n*, 137 Nev. at 83-84, 482 P.3d at 673.

The promissory notes provide that the loans were payable in regular monthly installments beginning September 1, 2006 "until August 1, 2009, at which time the entire remaining principal balance plus any accrued interest shall become due and payable." In the event of a default, the notes provide that "the entire sum and accrued interest shall at once become due and payable, without notice, at the option of the holder of this note." The notes further provide that "[t]he makers and endorsers hereof severally waive diligence, demand, presentment for payment and protest, and consent to the extension of time of payment of this note without notice."

Under the respondents' interpretation of the promissory notes, the parties contracted for the ability to unilaterally extend the time to pay the loan in perpetuity. This interpretation would necessarily mean that not

only the lenders, but also Tan would have the ability to unilaterally extend the due date, as one of the "endorsers," in perpetuity. This interpretation of the contract is unreasonable because it produces an absurd result. *See Nev. State Educ. Ass'n*, 137 Nev. at 83-84, 482 P.3d at 673.

Tan's interpretation, that any extension beyond the maturity date would require a new agreement between Tan and the lenders, is reasonable. The term for consent without notice would not be meaningless under this interpretation as it would seemingly allow the debtor to submit late payments and allow the parties to agree separately to extensions without complying with the requirement to provide separate, formal notice. Thus, we conclude that the promissory notes did not confer a unilateral right for parties to extend the loan due date beyond the loan maturity date.

The terms of the Subordination Agreement do not extend the due date of the loans

The terms of the Subordination Agreement[2] did not extend the due date of the loans, but merely reflected the creditors' intent to delay foreclosing on the property. As relevant here, the Subordination Agreement indicated that "[t]o date no payments of principal or interest have been made on either note and the maker is in default on both notes as a result of the failure to make such payments." Sections 2.4 through 2.6 discussed the creditors' agreement amongst themselves to delay enforcement of the Davis Trust's default in order for Cohen to negotiate for payment of the loans.

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[2]Subordination agreements are generally used to "allow[ ] creditors of a common debtor to contractually rearrange the priority of their enduring liens or debt positions." *In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev. 702, 708, 359 P.3d 125, 129 (2015).

Section 2.5 provides that "[i]n order for COHEN to secure the consent from SAUNDERS and the SAUNDERS TRUST to postpone taking any enforcement action until as late as June 30, 2016, the parties propose to subordinate their respective interests." Sections 3.3 and 3.8 further clarify that the lenders were merely agreeing to delay their enforcement rights rather than change the date the loans became wholly due.

We conclude that the interpretation advanced by respondents is unreasonable. *See Nev. State Educ. Ass'n*, 137 Nev. at 83-84, 482 P.3d at 673. If the Subordination Agreement extended the date the Davis Trust's loans became wholly due, then the lenders would have had no enforcement rights to delay, defeating the purpose of the Subordination Agreement entirely. Thus, contrary to respondents' assertion that the Subordination Agreement extended the due date of the loan, it was merely an agreement to delay foreclosure of a debt that was already wholly due. Furthermore, the Subordination Agreement, which supposedly extended the due date, was executed two years *after* the maturity date of the loans.

Because we conclude that the district court erred in determining that the Subordination Agreement extended the due date for the loans, the original due date of August 2009 is controlling, and it appears that Tan timely filed the underlying complaint seeking to extinguish the loans pursuant to NRS 106.240. Because Tan timely brought the Davis Trust's claims, we further conclude that the district court erred in dismissing the complaint and reversal is warranted. Moreover, because we reverse the district court's order, this court must necessarily also reverse the district courts' order award of respondents' costs as the prevailing parties. *See Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 571, 427 P.3d 104, 112 (2018)

("Because we reverse the district court's order . . . , we necessarily reverse the . . . costs awarded . . . .").

Accordingly, we:

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

cc: Hon. Nancy L. Allf, District Judge
Thomas J. Tanksley, Settlement Judge
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