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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

26 FLAMINGO, LLC., et al.,

Defendants.

2:11-CV-1936 JCM (RJJ)

ORDER

Presently before the court is plaintiff Federal Deposit Insurance Corporation’s motion for summary judgment (doc. # 27) and defendant 26 Flamingo’s countermotion for summary judgment (doc. # 30). Defendant filed an opposition to plaintiff’s motion (doc. # 29) and plaintiff replied (doc. # 38). Plaintiff filed an opposition to defendant’s countermotion (doc. # 39) and defendant replied (doc. # 40).

I. Background

On or about October 11, 2005, non-parties to this suit, Dynasty Towers, LLC and Outback Steakhouse entered into a purchase agreement. The purchase agreement related to the sale and development of property located at 3695 West Flamingo Road, Las Vegas, NV 89103. Outback sold Dynasty the subject property for the purposes of constructing a multi-tower high rise condominium project.

...

1 On or about March 7, 2008, Dynasty executed a deed of trust with Community Nevada Bank
2 (“Community Bank deed of trust”) in order to obtain \$6.6 million loan from the bank. This deed
3 encumbered the subject property.

4 The purchase agreement was amended twice.¹ The second amendment took place on or about
5 April 4, 2008. This amendment increased the purchase price, extended the plan approval date,
6 reduced the payment in lieu of condominium unit from \$5 million to \$4 million, and provided for
7 a second priority deed of trust to secure payment of the payment in lieu of condominium unit and
8 other amounts due under the purchase agreement. In April 2008, Dynasty granted Outback the
9 second deed of trust (“Outback deed of trust”); this deed secured Dynasty’s obligations.

10 On April 4, 2008, through a Grant, Bargain, Sale Deed (“GBS deed”), Outback conveyed title
11 to the subject property to Dynasty. The GBS deed incorporated the purchase agreement and the two
12 related amendments. The Community Bank deed of trust, the Outback deed of trust, and the GBS
13 deed were all recorded at the same time on April 4, 2008.

14 On or about November 13, 2008, Community Bank recorded a notice of default and on
15 March 2, 2009, Community Bank recorded notice of trustee’s sale. On March 24, 2009, Outback
16 recorded a notice of covenant running with the land (“notice of covenant”). On August 14, 2009,
17 Community Bank closed and plaintiff was appointed receiver. On this same day, plaintiff issued a
18 press release and notice of Community Bank’s closure. On February 2, 2010, plaintiff acquired title
19 to the subject property through a trustee sale authorized under the Community Bank deed of trust.
20 On May 27, 2011, 26 Flamingo, LLC was created. On September 9, 2010, Outback became entitled
21 to the payment in lieu of condominium unit of \$4 million. On June 26, 2011, Outback assigned by
22 quitclaim deed all rights, title, and interest in the notice of covenant, payment in lieu of
23 condominium unit, covenant in the GBS deed, and the Outback deed of trust to defendant.

24 On June 20, 2011, defendant notified plaintiff of the assignment and demanded that plaintiff
25 pay defendant \$4 million for payment in lieu of condominium unit. On December 21, 2011, plaintiff

27 ¹ The first amendment did not substantially change the nature of the purchase agreement, it only extended the
28 closing date by a few days.

1 filed the instant case seeking declaratory relief. (Doc. # 1). On January 13, 2012, defendant filed
2 counterclaims for declaratory relief and specific performance. (Doc. # 8). Plaintiff has filed a motion
3 for summary judgment (doc. # 27) and defendant has filed a countermotion for summary judgment
4 (doc. # 30).

5 **II. Discussion**

6 **A. Standard of Review**

7 The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings,
8 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
9 show that “there is no genuine issue as to any material fact and that the movant is entitled to a
10 judgment as a matter of law.” FED. R. CIV. P. 56(a). A principal purpose of summary judgment is “to
11 isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24
12 (1986).

13 Summary judgment is appropriate when the contract terms are clear and unambiguous, even
14 if the parties disagree as to their meaning. *See United States v. King Features Entertainment, Inc.*,
15 843 F.2d 394, 398 (9th Cir. 1988); *see also Int’l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d
16 1401, 1406 (9th Cir. 1985). Interpretation of the contract, including whether it is ambiguous, is a
17 matter of law. *Beck Park Apts. v. United States Dep’t of Housing*, 695 F.2d 366, 369 (9th Cir. 1982).
18 In Nevada, a contract provision “is ambiguous if it is reasonably susceptible to more than one
19 interpretation.” *See Magrave v. Doormat Properties, Inc.*, 110 Nev. 824, 827 (1994). Further,
20 “ordinarily summary judgment is improper because the differing views of the intent of parties will
21 raise genuine issues of material fact.” *Maffei v. Northern Ins. Co. Of New York*, 12 F.3d 892, 898;
22 *see also Sicor Ltd v. Cetus Corp.*, 51 F.3d 848, 857 (9th Cir. 1995).

23 Where a moving party’s papers are insufficient to support a motion for summary judgment,
24 or reveal a genuine issue of material fact, summary judgment is inappropriate. *Martinez v. Stanford*,
25 323 F.3d 1178, 1182-83 (9th Cir. 2003). At summary judgment, a court’s function is not to weigh
26 the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See*
27 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to
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1 be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence
2 of the nonmoving party is merely colorable or is not significantly probative, summary judgment may
3 be granted. *See id.* at 249–50. **B. Analysis**

4 **1. Language of relevant instruments**

5 As an initial matter, Nevada is a race/notice state where the first party to record, unless there
6 is notice, has priority. *See* NEV. REV. STAT. 111.325 (2011). The order of recordation is relevant as
7 it evidences notice. However, the court acknowledges that there are circumstances when the express
8 language of an instrument determines the respective priority of the documents rather than the
9 sequence of recordation. *See Phelps v. American Mortg. Co.*, 6 Cal. 2d 604, 609 (1936) (overruled
10 in part on other grounds by *Firato v. Tuttle*, 48 Cal. 2d 136 (1957)).² But for that to be the case, the
11 express language must be exactly that, *express*.

12 Here, it is apparent from the instruments that the language is *not* express. This is the case
13 even more so when the relevant documents contain language that do not clearly delineate the
14 relationship between the instruments. This circumstance lends itself to require evidence of the intent
15 of the drafting parties; something neither party in this instant matter can provide insight to. Even
16 further, neither party has provided the court with evidence from the drafting parties to this effect.

17 The court need only identify a genuine issue of any material fact to deny a motion for
18 summary judgment. *See* FED. R. CIV. P. 56(a). However, the court, in considering all the evidence
19 provided, *see Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011), highlights three
20 instances in which the language the parties rely upon is ambiguous or there is a genuine issue of
21 material fact. Thus, summary judgment, in favor of either party, is not appropriate.

22 **a. Section 29 of the purchase agreement**

23 The purchase agreement, upon which both parties rely, particularly section 29, is ambiguous
24 regarding the subordination of the purchase agreement in relation to subsequent instruments. As
25 such, there are material issues of fact, including those relating to the parties’ intent with respect to
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28 ² Such as the instruments being recorded at the same time on the same day.

1 the type of interest, if any, that remained actionable following the transfer of interest from Outback
2 to defendant.

3 Section 29 of the purchase agreement reads in pertinent part:

4 ... in the event the Construction Lender takes title to the Project by foreclosure or by
5 deed in lieu of foreclosure prior to the Unit Closing Date, the Construction Lender
6 shall not be bound by this Agreement, provided that Purchaser has delivered a Surety
7 Bond required by Section 6, paragraph (j) of this Agreement.

8 (Doc. # 27-1, ex. 3, § 29).

9 I. Parties' positions

10 Plaintiff states that § 29 contains an exception that subordinates the purchase agreement in
11 the event of a foreclosure (doc. # 27, 15:11-12), and that any interest created in the purchase
12 agreement would be extinguished upon foreclosure by the "Construction Lender." Thus, plaintiff
13 argues that defendant's purported interest was subordinated by the Community Bank deed of trust.
14 Under this reading, it follows that when plaintiff foreclosed on the subject property, defendant's
15 interest in the property was extinguished.

16 Defendant states that the purchase agreement contemplated foreclosure and required
17 additional security; otherwise the construction lender would be bound by the purchase agreement.
18 (Doc. # 29, 17:25-26). Defendant goes on to point out that plaintiff has not provided any evidence
19 to demonstrate that Community Bank was a construction lender. Thus, any foreclosure by
20 Community Bank or its predecessor, plaintiff, would still be bound by the purchase agreement.
21 Further, defendant goes on to argue that even if Community Bank was a construction lender, plaintiff
22 has not provided any evidence to demonstrate that community bank posted a surety bond. Thus, the
23 Community bank deed of trust is subordinate to the purchase agreement obligations.

24 ii. Remaining genuine issue of material fact

25 On this point, even if language of § 29 is not itself ambiguous, there still remains ambiguity
26 as to the intended impact of this section. First, it is unclear to what extent the parties intended the
27 purchase agreement to survive subsequent instruments. Plaintiff, looking to section 29, states that
28 "[t]he 'terms' of the [agreement] and the First and Second Amendments confirm the intentional and

1 contemplated subordination of the [agreement] to the financing” (doc. # 27, 15:21-22); however,
2 defendant contends that this subordination is based on the type of loan and whether a bond was
3 posted for that preferred position (doc. # 29, 18:2-4). Second, there remains a genuine issue of
4 material fact as to the type of financing Community Bank provided Dynasty and also whether a bond
5 was posted.

6 Alone, this remaining genuine issue of material fact warrants denial of both motions for
7 summary judgment.

8 **b. Non-encumbrance clause of the Community Bank deed of trust**

9 “The Covenant of Non-Encumbrance” in the Community Bank deed of trust states:

10 The Borrower and Guarantor(s) further covenant and agree that, until such time as
11 the Note is paid in full, the Borrower and Guarantor(s) will not, without the prior
12 written consent of the Bank, create, incur, place or permit to be created or placed, or
13 through any act of failure to act, acquiesce in the placing of, or allow to remain, any
14 mortgage, pledge, lien (whether statutory, constitutional or contractual), security
15 interest, encumbrance, charge or conditional sale or other title retention agreement,
16 regardless of whether the same are expressly subordinate to the indebtedness owed
17 to the Bank, with respect to the Real Estate and The Property, or leases or rents
18 relating thereto.

19 (Doc. # 27-1, ex. 1, 12-13).

20 **i. Parties’ positions**

21 Plaintiff states that “according to the express language of the [Community Bank deed of
22 trust], the parties to the [deed] intended it would have priority over any other encumbrance
23 referenced or purportedly created in the [Outback deed of trust] or the GBS [d]eed.” (Doc. # 27,
24 15:1-3). This would mean that when plaintiff foreclosed on the subject property, all other interests
25 on the property would be junior to the superior position of the Community Bank deed of trust and
26 would be extinguished upon foreclosure. This leaves nothing for Outback to transfer to defendant.
27 Plaintiff’s contention hinges on the perspective that defendant’s alleged interest in the land was not
28 created until after the Community Bank deed of trust was executed. Thus, if the interest did not exist,
the deed could not be impacted by a nonexistent interest.

Defendant asserts that the non-encumbrance clause has no ability “to invalidate any existing

1 encumbrance.” (Doc. # 29, 17:4-5). Further, defendant states that it is not clear whether Community
2 Bank gave written approval as required by the clause. Defendant’s contention hinges on the
3 perspective that its assigned interest in the land was created in the purchase agreement, the initial
4 contract between Dynasty and Outback, and thus was an existing encumbrance at the time that the
5 Community Bank deed of trust was executed. It follows then that its interest in the subject property
6 would survive foreclosure based upon the Community Bank deed of trust.

7 **ii. Ambiguity as to intent of the parties**

8
9 Similarly to the issue previously discussed, even if language of the non-encumbrance clause
10 is not itself ambiguous, there still remains ambiguity as to its intended impact of this clause on the
11 parties’ rights and interest in the property. Defendant points to language in the purchase agreement
12 that creates its interest in the subject property (doc. # 27-1, ex. 3, § 6); plaintiff, however, looks to
13 the second amendment’s language of “covenant running with the land” to argue that the interest was
14 not created until after the Community Bank deed of trust was executed (doc. # 27-1, ex. 5, § 7).
15 Based on the foregoing, the language of the documents, by itself, is not sufficient to determine when
16 Dynasty and Outback intended to create the purported interest in the land.

17 The ambiguity as to the intent of those party to the relevant agreements serves as a basis to
18 deny of both motions for summary judgment.

19 **c. Second amendment**

20 The second amendment at section j states:

21
22 At Closing, Purchaser shall deliver to Seller (I) Second Priority Deed of Trust
23 securing the payment of the Payment in Lieu of the Condominium Unit . . . which
24 shall encumber the Property and the remainder of the Project The Deed of Trust
25 shall be subject only to one first priority deed of trust and shall provide that prior to
26 allowing the aggregate indebtedness secured by all deeds of trust having a priority
27 superior to the Deed of Trust to exceed \$32,950,000.00, Purchaser shall deliver to
28 Seller a Surety Bond

(Doc. # 27-1, ex. 5, § j).

1 **i. Parties' positions**

2 Plaintiff contends that the second amendment “unequivocally establishes the intended priority
3 of the [Outback deed of trust].” (Doc. # 27, 15:12). Plaintiff emphasizes the language “shall be
4 subject only to one first priority deed of trust,” (*id.* at 15:14-15) which demonstrates Community
5 Bank deed of trust’s superiority to the Outback deed of trust. And once again, it would follow that
6 foreclosure under the Community Bank deed of trust would extinguish any junior interests created
7 by subsequent instruments.

8 Defendant, however, relies on the parties’ acknowledgment of how much the loan could be,
9 \$32,950,000. (Doc. # 29, 18:17-18). Defendant states that since the sale price of the subject property
10 was \$9,500,000, it would follow that a loan more than three times that amount could only be a
11 construction loan. And per § 29 of the purchase agreement, defendant’s interest in the land could be
12 subordinated only to a construction loan. Thus, defendant reads the language of “shall be subject
13 only to one first priority deed of trust” as subordination to a construction loan, not a purchase loan.
14 Thus, the Community Bank deed of trust was not intended to subordinate the Outback deed of trust.

15 **ii. Remaining genuine issue of material fact**

16 First, it is unclear what instrument the Outback deed of trust was to be subordinate to.
17 Plaintiff contends that it is the Community Bank deed of trust while defendant asserts that it can only
18 be to a construction loan. At this stage, no evidence has been provided to instruct what type of loan
19 Community Bank provided to Dynasty. Without insight as to the parties intent or evidence of the
20 type of financing Community Bank gave to Dynasty, there still remains a genuine issue of material
21 fact that precludes granting summary judgment in favor of either party.

22 The court now turns to its jurisdiction over defendant’s counterclaims under the Financial
23 Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

24 **2. FIRREA, 12 U.S.C. § 1821**

25 FIRREA mandates that the Federal Deposit Insurance Corporation (FDIC) issue a claims bar
26 date. 12 U.S.C. § 1821. The statute requires that the FDIC provide at least 90-days notice of this
27 date. 12 U.S.C. § 1821(d)(3)(B)(I). The statute further provides that the FDIC mail notice to those
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1 creditors that do not appear on the institution’s books that the FDIC later discovers. 12 U.S.C. §
2 1821(d)(3)(C)(ii). The FDIC’s failure to notify a creditor or claimant by mail does not excuse that
3 creditor or claimant from having to exhaust the FIRREA administrative remedies. *See*
4 *Intercontinental Travel Mktg., Inc. v. FDIC*, 45 F.3d 1278, 1284 (9th Cir. 1994); *see also Schettler*
5 *v. RalRon Capital Corp.*, 275 P.3d 933, 937 (Nev. 2012)

6 FIRREA also mandates a jurisdictional bar that no court shall have jurisdiction over—

7 (I) any claim or action for payment from, or any action seeking a determination of
8 rights with respect to, the assets of any depository institution for which the [FDIC]
9 has been appointed receiver, including assets which the [FDIC] may acquire from
itself as such receiver; or

10 (ii) any claim relating to any act or omission of such institution or the [FDIC] as
11 receiver.

12 12 U.S.C. § 1821(d)(13)(D); *see also Schettler*, 275 P.3d at 937. Congress intended a mandatory
13 exhaustion of administrative remedies before a litigant may seek relief for a claim against a failed
14 institution. *See e.g., Simon v. FDIC*, 48 F.3d 53, 57 (1st Cir. 1995).

15 **a. FIRREA bars defendant’s counterclaim**

16 Proper notice activates FIRREA’s administrative claims process. After being notified to
17 present their claims, claimants have 90 days in which to present them. 12 U.S.C. § 1821(d)(3)(B)(I).
18 “This notice is very important in that the only way that a claimant can receive a judicial
19 determination of his rights with regard to claims against the assets of the institution is to first present
20 those claims to the receiver within the prescribed 90–days.” *FDIC v. Updike Bros., Inc.*, 814 F. Supp.
21 1035, 1040-41 (D. Wyo. 1993).

22
23 The FDIC does not waive FIRREA’s administrative exhaustion requirement by failing to
24 provide notice in accordance with 12 USC § 1821(d)(3)(B)-(C). It is well known that federal courts
25 are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
26 (1994). Federal courts have no power to excuse a Congressionally mandated condition precedent to
27 federal jurisdiction regardless of the reason the condition was not met. *See id.* (Federal courts
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1 “possess only that power authorized by Constitution and statute . . .” (citations omitted)).
2 Furthermore, FIRREA contains no statutory provision providing the court with jurisdiction prior to
3 exhaustion of the claims procedure.

4 Here, defendant asserts that the FDIC failed to comply with FIRREA’s notice requirements;
5 this assertion implicates procedural due process considerations. Defendant argues that because the
6 FDIC failed to give both it and its predecessor in interest notice of the required claims procedure
7 and/or because its claim arose after the FDIC was appointed receiver, FIRREA does not bar its
8 claim. However, the court cannot circumvent the jurisdictional restrictions FIRREA proscribes. *See*
9 12 U.S.C. § 1821(d)(13)(D).

10
11 Thus, because defendant has not submitted its claims to the FDIC for administrative review,
12 the court finds that it lacks jurisdiction over defendant’s counterclaims.³ However, to the extent that
13 any affirmative defenses exist, the court retains jurisdiction over these affirmative defenses. *See*
14 *Schettler*, 275 P.3d at 939-40; *see also Resolution Trust Corp. v. Midwest Federal Sav. Bank of*
15 *Minot*, 36 F.3d 785, 793 (9th Cir. 1993).⁴

16 **III. Conclusion**

17 As explained above, plaintiff and defendant each rely on differing interpretations of the
18 relevant instruments to support the desired outcome of the case. Without evidence providing insight
19 as to the intent of the drafting parties or evidence supporting either party’s interpretation of the
20 relevant documents, this court must deny each party’s motion for summary judgment

21 Accordingly,

22 . . .

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Federal Deposit
24

25 ³ If the FDIC fails to give proper notice then the FIRREA claims process will not be initiated. Therefore, absent
26 proper notice, the claimant remains free to present claims to the FDIC because the timer period proscribed by FIRREA
for presenting claims only begins to run after the notice requirements have been properly complied with.

27 ⁴ To note, counterclaims asserted in defendant’s answer and counterclaims (doc. # 8) are not affirmative
28 defenses.


1 Insurance Corporation's motion for summary judgment (doc. # 27) be, and the same hereby is,
2 DENIED.

3 IT IS FURTHER ORDERED that defendant 26 Flamingo's countermotion for summary
4 judgment (doc. # 30) be, and the same hereby is, DENIED.

5 IT IS ALSO ORDERED that defendant 26 Flamingo's counterclaims are dismissed without
6 prejudice as this court lacks jurisdiction over these claims pursuant to FIRREA.

7 DATED September 20, 2012.

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UNITED STATES DISTRICT JUDGE