IN THE SUPREME COURT OF THE STATE OF NEVADA

NONA TOBIN, AS TRUSTEE OF THE GORDON B. HANSEN TRUST, DATED 8/22/08, Appellant, vs. JOEL A. STOKES; SANDRA F. STOKES, AS TRUSTEE OF THE JIMIJACK IRREVOCABLE TRUST; YUEN K. LEE, AN INDIVIDUAL, D/B/A MANAGER; F. BONDURANT, LLC; SUN CITY ANTHEM COMMUNITY ASSOCIATION, INC.; AND NATIONSTAR MORTGAGE, LLC, Respondents.	No. 79295

RESPONDENTS, SUN CITY ANTHEM COMMUNITY ASSOCIATION, JOEL A. STOKES AND SANDRA F. STOKES, AS TRUSTEES OF THE JIMIJACK IRREVOCABLE TRUST, YUEN K. LEE, AN INDIVIDUAL D/B/A MANAGER, AND F. BONDURANT, LLC'S, ANSWERING BRIEF

KALEB D. ANDERSON, ESQ.
Nevada Bar No. 7582
DAVID T. OCHOA, ESQ.
Nevada Bar No. 10414
LIPSON NEILSON P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 – Telephone
(702) 382-1512 – Facsimile
dochoa@lipsonneilson.com
Attorneys for Respondent
Sun City Anthem Community Association

JOSEPH Y. HONG, ESQ.
Nevada Bar No. 5995
HONG & HONG LAW OFFICE
1980 Festival Plaza Dr., # 650
Las Vegas, Nevada 89135
(702) 870-1777 - Telephone
(702) 879-0500 - Facsimile
Yosuphonglaw@gmail.com
Attorney for Respondents
Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC

NRAP 26.1 DISCLOSURE STATEMENT

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 disqualifications or recusal.

Lipson Neilson P.C. states that it has no parent corporation and that no publicly held corporation owns 10% more of its stock.

Kaleb D. Anderson and David T. Ochoa are the attorneys who have appeared for Respondent in this case.

Respondent, Sun City Anthem Community Association is a non-profit corporation and has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED this 1st day of July, 2020

LIPSON NEILSON P.C.

/s/ David Ochoa

Kaleb D. Anderson, Esq. (Bar No. 7582)
David T. Ochoa, Esq. (Bar No. 10414)
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89148

NRAP 26.1 DISCLOSURE STATEMENT

In accordance with NRAP 26.1, the undersigned counsel of record for Respondents, Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC (collectively "Jimijack"), certifies the following are persons and entities described in NRAP 26.1 (a), and must be disclosed. These representations are made so the Judges of this Court may evaluate possible disqualifications ore recusal.

Regarding all parent corporations of Jimijack and any public-held company which owns 10% or more of the party's stock, there no such corporations.

In addition, the following is a list of the names of all law firms whose partners or associates have appearing for the party in the case, including proceedings in District Court.

For Respondents, Jimijack:

Joseph Y. Hong, Esq. of Hong & Hong Law Office.

DATED this 1st day of July, 2020.

/s/ Joseph Y. Hong

JOSEPH Y. HONG, Esq.
Attorney for Respondents
Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC

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1. Whether the District Court correctly determined that the HOA foreclosure was properly noticed.

2. Whether the District Court correctly determined that the delinquency was accurately calculated.

3. Whether the District Court correctly determined that the Notice of Sale was not cancelled prior to the HOA foreclosure sale.

4. Alternatively, whether equity weighs in favor of upholding the HOA foreclosure sale.

STATEMENT OF THE FACTS

In 2003, Gordon B. Hansen obtained a loan to purchased the real property located at 2763 White Sage Drive., Henderson, NV 89052 (the "Property').[1]

The property was subject to the HOA's Covenants, Conditions and Restrictions "CC&Rs".[2]

In 2008, title to the property was transferred to the Gordon B. Hansen Trust (the "Trust"). [3] Nona Tobin became the sole trustee of the Trust in January 2012

[1] AA Vol. II 000207, ¶ 9, and AA Vol. VI 001133-00137 (2003 Grant, Bargain and Sale Deed).
[2] AA Vol. IV 000673-000675 (CC&Rs).
[3] AA Vol. II 000187 (Grant, Bargain, Sale Deed).

when Gordon Hansen passed away.[4]

In 2012, the Trust defaulted on the homeowners' assessments.[5]

On September 17, 2012, Red Rock sent Gordon Hansen letters indicating that his account was in collections with them.[6] The Letters that were sent to both addresses (Olivia Heights and White Sage) stated in bold:

> **A "30 Day Period" has been established for disputing the validity of the debt, or any portion thereof.**

Id.

On September 20, 2012, Sun City Anthem sent Gordon Hansen a Notice of Hearing that his account was delinquent and they were considering suspending membership privileges.[7]

On October 3, 2012, Tobin sent a letter to Sun City Anthem informing Sun City Anthem that Gordon Hansen passed away ("Tobin Letter").[8]

The Tobin Letter also stated she was late and delinquent on assessments, that she was attempting to short sale the Property, and she did not intend to pay any additional assessments after the enclosed check. *Id*.

Tobin in fact never paid assessments after the October 2012 Letter.[9]

The Tobin Letter stated:

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[4] AA Vol. II 000294-00025, ¶ 22.
[5] AA Vol. IV 000679-000682 (Ledger).
[6] AA Vol. IV 000684-000685 (Letters).
[7] AA Vol. IV 000687 (Hearing Notice).
[8] AA Vol. IV 000689-000690 (Tobin Letter).
[9] AA Vol. IV 000679-000682 (Ledger).

> Enclosed please find:
> l, Certificate of death for Gordon B. Hansen, property owner, on 1/14/2012
> 2. Check for $300 HOA dues
>
> On 2/14/2012, I listed Mr. Hansen's property for short sale with the Proudfit Realty Company. I continued to pay the HOA dues owed on the property, and wrote the enclosed check on 8/17/2012. Unfortunately, I failed to mail the check in a timely fashion. Subsequently, an offer was placed on the property as a short sale, and it is my understanding that the buyers will be moving in within the next month.
>
> It is my request that the HOA pursue collection of any future HOA dues from the buyers within the escrow or from them directly once the sale is complete or however you normally handle cases in which the owner is deceased.
>
> Any questions, please contact Doug Proudfit[.]

(*See* Tobin Letter, AA Vol. IV 000689-000690).

The Trust allowed caretakers to live at the Property followed by potential purchasers of the property without requiring they pay the HOA assessments.[10]

The Trust's prospective purchasers took over for the caretakers in October 2012.[11]

On November 5, 2012, Red Rock sent letters to both addresses (Olivia Heights and White Sage) addressed to The Estate of Gordon N. Hansen,

[10] AA Vol. II 000299 at ¶¶ 18-19.
[11] *Id.*

informing that they received the notification that Gordon Hansen had passed, and requesting the Estate contact the office within thirty days of the letter.[12]

The Red Rock Financial ("Red Rock") Ledger and Payment Allocation indicate that payment was applied to July 1, 2012 Quarter Assessment and the July 31, 2012 Late Fee. *Id*.

On December 14, 2012, the HOA, through Red Rock recorded a notice of delinquent assessment lien.[13]

On March 12, 2013, the HOA, through Red Rock, recorded a notice of default and election to sell.[14] The first notice of default was rescinded on or about April 3, 2013.[15]

The Trust's prospective purchasers that had been living in the home since October 2012 and not paying assessments withdrew their purchase offer and moved out in April, 2013.[16]

On April 8, 2013, a second notice of default and election to sell was recorded by the HOA through Red Rock.[17]

The second notice of default and election to sell correctly notes the start of the

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[12] AA Vol. IV 000695-000702 (Response Letter, Ledger, Payment Allocation).
[13] AA Vol. IV 000704 (Lien for Delinquent Assessments).
[14] AA Vol. IV 000706 (First Notice of Default).
[15] AA Vol. IV 000708 (Notice of Rescission of First Notice of Default).
[16] *Id.*
[17] AA Vol. IV 000710 (Second Notice of Default).

delinquency since July 1, 2012, stating:

> As of 07/01/2012 forward, all assessments, whether monthly or otherwise, late fees, interests, Association charges, legal fees and collection fees and costs, **less any credits**, have gone unpaid.[18]

The Red Rock Ledger indicates the July 1, 2012 assessment payment was late, this was put in the second notice of default and election to sell, and is confirmed by the Tobin Letter.[19]

On February 12, 2014, the HOA, through Red Rock, recorded a notice of foreclosure sale.[20]

The Notice of Sale correctly references the second notice of default and election to sell that was recorded on April 8, 2013.[21]

Red Rock complied with all mailing requirements.[22] Mailings went to both the Property address (White Sage) and Tobin's home address (Olivia Heights).[23] Tobin signed for some of the mailings herself.[24]

The sale was scheduled for March 7, 2014, in the Notice of Sale.[25]

The sale was posted and published.[26]

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[18] See AA Vol. IV 000708 (Second Notice of Default) (emphasis added).
[19] See footnotes 5, 8, and 17.
[20] AA Vol. IV 000712-000713 (Notice of Foreclosure Sale).
[21] See footnote 17 and 20.
[22] AA Vol. IV 000715-000748 (Mailings).
[23] *Id*.
[24] *Id*.
[25] See footnote 20.
[26] AA Vol. IV 000750-000757 (Posting and Publication).

The sale was postponed three times.[27]

The postponements were made in part to help Tobin attempt to short sale the property.[28]

Tobin contracted with Craig Leidy to help her short sale the Property.[29]

Craig Leidy requested the HOA waive thousands of dollars off the debt.[30]

The HOA did communicate that it would waive some amounts but could not grant the waiver to the extent requested.[31]

Communication between Nationstar and Craig Leidy appears to indicate the balance was too high for Nationstar to allow the short sale.[32]

Sometime in May 2014, The Estate of Gordon Hansen entered into a Purchase Agreement with MZK Residential LLC, contingent on short sale approval.[33]

The HOA foreclosure took place on August 15, 2014, whereby the HOA, through Red Rock, sold the Property to Thomas Lucas representing Opportunity Homes LLC for $63,100.00.[34]

A foreclosure deed in favor of Opportunity Homes LLC was recorded on

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[27] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).
[28] *Id*., at AA Vol. IV 000781-000785.
[29] *Id*., at AA Vol. IV 000780.
[30] *Id*., at AA Vol. IV 000783, and 000785.
[31] Id., at AA Vol. IV 000785.
[32] *Id*., at AA Vol. IV 000782, and 000783.
[33] AA Vol. IV 000789-000794 (MZK Residential LLC Purchase Agreement).
[34] AA Vol. IV 000796-000807 (Sale Documents/Foreclosure Deed).

August 22, 2014.[35]

On October 13, 2014, Tobin sent an email to Craig Leidy, where she indicates her belief that he failed to protect the Trust's interest, that she believed he was working with the Purchaser Thomas Lucas, and also that she is aware that Red Rock interplead the excess proceeds.[36]

On August 11, 2017, A Notice of Entry Order Granting Thomas Lucas and Opportunity Homes, LLC's Motion for Summary Judgment was filed in this case.[37] The Order states:

> While it is true that Mr. Lucas is a real estate licensee and an independent agent working with BHHS, BHHS is a real estate company that employs more than 800 real estate agents in Las Vegas valley alone, and Mr. Lucas is not bound by the agreements that Tobin could have signed with other BHHS agents.[38]

The Trust had one cause of action for Quiet Title/Declaratory Relief against the HOA.[39]

The Trust alleged the following causes of action against Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust: quiet title and

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[35] *Id.*
[36] AA Vol. IV 000809-000811. (Email from Tobin to Craig Leidy).
[37] AA Vol. IV 000813-000823
[38] *Id.,* at AA 000821.
[39] AA Vol. XIII 000809.

equitable relief, fraudulent re-conveyance, unjust enrichment, civil conspiracy, and preliminary and permanent injunction.[40]

The Trust alleged the following causes of action against Yuen K. Lee dba Manager and F. Bondurant, LLC: fraudulent conveyance, quiet title and equitable relief, and civil conspiracy.[41]

STANDARD OF REVIEW

Appellant argues for a de novo standard of review stating:

> This Court applies a de novo standard of review for summary judgment order. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P. 3d 1026, 1029 (Nev. 2005). Because JimiJack presented no evidence at trial and relied exclusively on the district court's Order and Findings, the de novo standard of review should be applied to all aspects of this matter.

However, trial testimony was presented and trial testimony is evidence. *Nika v. State*, 120 Nev. 600, 609, 97 P.3d 1140, 1147, 2004 ("This evidence includes Wilson's trial testimony"). Although SCA and Nationstar were granted summary judgment prior to the trial, Tobin went on to testify at the trial:

> Specifically, Ms. Tobin as Trustee for the Hansen Trust conceded on direct examination that the house had been subject to multiple short sale potential escrows as the house was in default with the lender. She also conceded that there was a late payment to the HOA. Thus, at least $25.00 owed to the HOA at some point. While she disagreed whether the HOA could assess the charges that she asserted were

[40] AA Vol. III 000386.
[41] AA Vol III 000427.

> added to the Hansen Trust account as a result of the Hansen Trust's failure to pay its dues on time, she provided no evidence that the charges were inaccurate or impermissible. She also testified that she received a Notice of Foreclosure Sale on the property.[42]

"The trial court's determination of a question of fact will not be disturbed unless clearly erroneous or not based on substantial evidence." *Collins v. Burns*, 103 Nev. 394, 399, 741 P.2d 819, 822, 1987, citing: *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 472, 705 P.2d 673, 675 (1985); and NRCP 52(a). "This court defers to the district court's findings of fact and will not disturb them unless they are clearly erroneous or not supported by substantial evidence." Hunter v. Gang, 377 P.3d 448, 457, 132 Nev. Adv. Rep. 22, 2016, citing *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* citing *Weddell v. H20*, Inc, (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)).

Summary Judgment was appropriate based on the evidence presented with the Motion for Summary Judgment, the pleadings on file, and the Trust's admissions within its own pleadings. The determination that Summary Judgment was appropriate is bolstered by the subsequent trial testimony and additional findings of fact. The factual findings at trial should not be changed unless this

[42] AA Vol. XIII 002577-2578.

Court determines they were clearly erroneous. A district court's application of law to facts is reviewed de novo. *24/7 Ltd v. Schoen*, 399 P.3d 916 (Nev. 2017) (citing *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)).

SUMMARY OF ARGUMENT

The Appellant Trust's arguments on appeal are the same arguments reviewed by the District Court during: Summary Judgment, Reconsideration, and Trial. This Court should uphold the decisions by the District Court because the delinquency was properly calculated, the HOA foreclosure sale was properly noticed, and the notice of foreclosure sale was not cancelled prior to the sale.

The Trust's claims regarding the amount of delinquency and notice hinge on an allegation that the collection company did not timely credit the Trust's last payment. However, this last payment was late and was accompanied by a letter from the trustee of the Trust acknowledging the payment was late.[43] The Trust never challenged the accuracy of this letter (its own letter) in the case below.

The Trust's final argument is that a screen shot from the Ombudsman's office appears to indicate that the notice of sale was cancelled. However, the District Court determined:

[43] AA Vol. IV 000689-000690 (Tobin Letter).

> … the screenshot was not authenticated as necessary pursuant to NRCP 56. Additionally, even if authenticated, the screenshot does not create a genuine issue of material fact because it does not establish that the sale was cancelled prior to the time of the foreclosure sale, the basis for the remarks, and whether the statements as indicated are the Ombudsman's opinions or the truth.[44]

Additionally, the HOA made alternative arguments below that were not reached by the District Court, once summary judgment was granted on other grounds. However, even if this Court were to not uphold the underlying decision, the Court should still find that equity prevents the setting aside of this foreclosure sale.

ARGUMENT

The District Court's finding that SCA properly foreclosed should be upheld. The Trust alleges that issues of fact remain regarding the following:

> SCA and RRFS made numerous mistakes in attempting to foreclose upon the Property, including: (i) failing to provide Tobin with a notice and right to a hearing as required by the CC&Rs; (ii) failing to properly credit payments; (Hi) failing to accurately calculate the amount due; (iv) failing to provide proper notice of the foreclosure sale; and (v) conducing a foreclosure sale on a cancelled Notice of Sale.

Opening Brief at p. 25-26: 17-21 and 1. However, these arguments were thoroughly considered by the District Court during Summary Judgment,

[44] Order on Motion for Summary Judgment (AA Vol. XIII 001045-001058).

Reconsideration, and Trial.[45] The district court reviewed the arguments and substantial evidence in deciding in favor of all the respondents and against the Trust.[46] This Court has noted that "'Rule 56 should not be regarded as a 'disfavored procedural shortcut'" but instead as an integral part of the rules of procedure as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Wood v. Safeway. Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) and s*ee* NRCP 56. "Taking into consideration that inferences will be drawn in favor of a party opposing a motion for summary judgment, 'the opponent must nevertheless show [it] can produce evidence at the trial to support [its] claim.'" *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 417, 633 P.2d 1220, 1222, 1981 Nev. LEXIS 549, citing, *Thomas v. Bokelman*, 86 Nev. 19, 14, 462 P.2d 1020, 1023 (1970). The decision of the District Court should be upheld as Appellant failed to demonstrate below that issues of fact remained.

[45] AA Vol. IV 000652-000826, AA Vol. X 0001885-001888, and AA Vol. XIII 002565-2580.
[46] *Id.*

A. The District Court correctly determined that SCA provided notice to the Trust and that SCA's CC&R's did not require a hearing specific to foreclosure, nor did the Trust allege below that NRS 116 required a hearing for foreclosure.

1. NOTICE

On the issue of Notice, the District Court reviewed the following: 1) copies of the recorded notices were part of the record. On December 14, 2012, the HOA, through Red Rock Financial ('Red Rock") recorded a notice of delinquent assessment lien.[47] On March 12, 2013, the HOA, through Red Rock, recorded a notice of default and election to sell.[48] The first notice of default was rescinded on or about April 3, 2013.[49] On April 8, 2013, a second notice of default and election to sell was recorded by the HOA through Red Rock.[50] On February 12, 2014, the HOA, through Red Rock, recorded a notice of foreclosure sale.[51]

2) Mailings for the Notices were part of the record. Red Rock complied with all mailing requirements.[52] Mailings went to both the Property address (White Sage) and Tobin's home address (Olivia Heights).[53] Tobin signed for some of the mailings herself.[54]

3) Prior to the mailing of foreclosure notices Red Rock sent letters informing of collections, and the letters were part of the record below.[55] SCA's assessments

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[47] AA Vol. IV 000704 (Lien for Delinquent Assessments).
[48] AA Vol. IV 000706 (First Notice of Default).
[49] AA Vol. IV 000708 (Notice of Rescission of First Notice of Default).
[50] AA Vol. IV 000710 (Second Notice of Default).
[51] AA Vol. IV 000712-000713 (Notice of Foreclosure Sale).
[52] AA Vol. IV 000715-000748 (Mailings).
[53] *Id*.
[54] *Id*.
[55] AA Vol. IV 000684-000685 (Letters).

were paid quarterly.[56] SCA asserted throughout the litigation that the quarterly assessment that was due at the beginning of July 2012 was not paid until after the next quarterly assessment became due at the beginning of October.[57] Thus, when Red Rock begins to send collection letters the assessment payment is already months late. On September 17, 2012, Red Rock sent Gordon Hansen letters indicating that his account was in collections with them.[58] The Letters that were sent to both addresses (Olivia Heights and White Sage) stated in bold:

> **A "30 Day Period" has been established for disputing the validity of the debt, or any portion thereof.[59]**

On October 3, 2012, Tobin sent a letter to Sun City Anthem informing Sun City Anthem that Gordon Hansen passed away.[60] On November 5, 2012, Red Rock sent letters to both addresses (Olivia Heights and White Sage) addressed to The Estate of Gordon N. Hansen, informing that they received the notification that Gordon Hansen had passed, and requesting the Estate contact the office within thirty days of the letter.[61]

4) Tobin and her real estate agent were in contact with SCA throughout the foreclosure process and those communications were part of the record.[62] Again, the October 3, 2012, Tobin Letter informed that Gordon Hansen passed away.[63] The Tobin Letter also stated she was late and delinquent on assessments, that she was

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[56] AA Vol. IV 000679-000682 (Ledger).
[57] AA Vol. IV 000652-000826.
[58] AA Vol. IV 000684-000685 (Letters).
[59] *Id.*
[60] AA Vol. IV 000689-000690 (Tobin Letter).
[61] AA Vol. IV 000695-000702 (Response Letter, Ledger, Payment Allocation)
[62] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).
[63] See footnote 60.

attempting to short sale the Property, and she did not intend to pay any additional assessments after the enclosed check.[64] Tobin in fact never paid assessments after the October 2012 Letter.[65]

The Tobin Letter stated:

> Enclosed please find:
>
> l. Certificate of death for Gordon B. Hansen, property owner, on 1/14/2012
>
> 2. Check for $300 HOA dues
>
> On 2/14/2012, I listed Mr. Hansen's property for short sale with the Proudfit Realty Company. I continued to pay the HOA dues owed on the property, and wrote the enclosed check on 8/17/2012. Unfortunately, I failed to mail the check in a timely fashion. Subsequently, an offer was placed on the property as a short sale, and it is my understanding that the buyers will be moving in within the next month.
>
> It is my request that the HOA pursue collection of any future HOA dues from the buyers within the escrow or from them directly once the sale is complete or however you normally handle cases in which the owner is deceased.
>
> Any questions, please contact Doug Proudfit[.][66]

Tobin later contracted with Craig Leidy to help her short sale the Property.[67]

Craig Leidy requested the HOA waive thousands of dollars off the debt.[68]

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[64] *Id.*
[65] AA Vol. IV 000679-000682 (Ledger).
[66] See footnote 60.
[67] AA Vol. IV 000780.
[68] AA Vol. IV 000783, and 000785.

The HOA did communicate that it would waive some amounts but could not grant the waiver to the extent requested.[69] Communication between Nationstar and Craig Leidy appears to indicate the balance was too high for Nationstar to allow the short sale.[70]

5) The Court later heard trial testimony from Tobin regarding Notice.[71] Although SCA was granted summary judgment prior to the trial, Tobin went on to testify at the trial:

> Specifically, Ms. Tobin as Trustee for the Hansen Trust conceded on direct examination that the house had been subject to multiple short sale potential escrows as the house was in default with the lender. . . . She also testified that she received a Notice of Foreclosure Sale on the property.[72]

The District Court had the above evidence when considering notice and appropriately found in reviewing the substantial evidence that notice was proper and the Trust had notice.

2. HEARING WITH THE HOA

Again, the Trust alleges they are appealing because SCA "fail[ed] to provide the requisite notices and right to a hearing required by the CC&Rs"[73] The District Court reviewed the following regarding the

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[69] AA Vol. IV 000785.
[70] AA Vol. IV 000782, and 000783.
[71] AA Vol. XIII 002577-2578.
[72] *Id*.
[73] Opening Brief at p. 25 and 29.

Trusts argument that a hearing was required: 1) The September 20, 2012, letter from Sun City Anthem to Gordon Hansen included a Notice of Hearing that his account was delinquent and they were considering suspending membership privileges.[74] That Notice of Hearing was specific to terminating membership privileges.[75] Related to this is the fact that Tobin was not only the Trustee of the White Sage property, but owned her own home in the community.[76] SCA was never going to terminate her membership privileges if she was current on her own assessments, and they did not have to continue with the hearing once they were informed Gordon Hansen had passed away.

2) The Trust had the opportunity to direct the District Court to any relevant portions of the CC&Rs during summary judgment considerations. SCA argued below in its Opposition to Reconsideration the following:

> The portion of the CC&Rs referenced by Tobin is separate issue from foreclosure, and it does not require a hearing prior to foreclosure. However, this sub-argument was addressed at the hearing. Counsel for Sun City Anthem obtained the video of the hearing to prepare the Findings of Fact and Conclusion of Law that has been filed. Specifically, 22 minutes into the hearing counsel for Sun City Anthem addresses the claim that a notice of hearing was not provided to Tobin. The particular reference to the CC&Rs is not included in the Opposition to the Motion but added in the new declaration attached to the Motion for Reconsideration at ¶ 46, refencing section 7.4 of the CC&Rs. As argued by Sun City

[74] AA Vol. IV 000687 (Hearing Notice).
[75] *Id.*
[76] Opening Brief at p. 3 ¶ 1.

Anthem's counsel this section of the CC&Rs is a separate issue from foreclosure involving "sanctions for violation of the Governing Documents." Further down in section 7.4 at 7.4(iii) (See portions of CC&Rs attached as **Exhibit 1**), it references the sanction that was considered in this case, and it states: "suspending any Person's right to use any recreational facilities within the Common Area." As argued previously, a notice of hearing was sent on this sanction to suspend use of the facilities, but it is a different issue separate and apart from foreclosure and cannot impact the foreclosure sale. The portion of the CC&Rs dealing with foreclosure is section 8.7 and 8.8.

> 8.7 Obligation for Assessments.
> (a) Personal Obligation. Each Owner, by accepting a deed or entering into a contract of sale any portion of the Properties, is deemed to covenant and agree to pay all assessments authorized in the Governing Documents.
>
> 8.8 Lien for assessments/Foreclosure.
> In accordance with the Act, and subject to the limitations of any applicable provision of the Act of Nevada law, the Association shall have an automatic statutory lien against each Lot to secure payment of delinquent assessments, as well as interest, late charges, and costs of collection (including administrative costs and attorneys' fees). . .
>
> Such lien, when delinquent, may be enforced in the manner prescribed in the Act. The Association may foreclose its lien by sale after:
>
> (a) The Association has mailed by certified or registered mail, return receipt requested, to the Owner or his successor in interest, at his address if known and at the address of the Lot, a notice of delinquent assessment . . .

See Portions of the CC&Rs attached as Exhibit 1. As Section 8.8 of the CC&Rs makes clear, foreclosure is "in accordance with the Act" and requires mailing of recorded notices.

This misstatement of law by Tobin was addressed at the hearing. The law does not require a notice of hearing but mailing

> of recorded notices (*See* the relevant versions of NRS 116.3116 through NRS 116.31168), and the Court found the notices were properly sent, which is reflected in the Order. *See* Order.[77]

SCA's Opposition to the Motion for Reconsideration points out that the Trust never referenced this specific portion of CC&Rs until its Motion for Reconsideration.[78] The Opposition also points out that despite the specific section of the CC&Rs not being reference by the Trust, the CC&Rs were discussed during the summary judgment hearing.[79] SCA further argued in the Opposition that the Portion of the CC&Rs referenced by the Trust during reconsideration is not related to foreclosure, but sanctions such as suspending membership privileges to community facilities.[80] SCA argued that foreclosure is actually address in section 8.7 and 8.8 of the CC&Rs and the Court was able to review these sections of the CC&Rs.[81] Section 8.8 of the CC&Rs makes clear, foreclosure is "in accordance with the Act" and requires mailing of recorded notices.[82] The Trust never argues the statute requires a hearing with the HOA before they foreclose. The Trust never argues they requested a hearing with the HOA. In fact the Trust admits they were in

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[77] AA Vol. XIII 0001360-1361.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] AA Vol. XIII 0001366-1369.
[82] *Id*., and s*ee* the relevant versions of NRS 116.3116 through NRS 116.31168.

discussions with the HOA through its real estate agent to attempt to waive a portion of lien to assist with an attempt short sale, and the HOA did agree to waive a portion.[83] The short sale was ultimately not approved.[84] Finally, again, Tobin later testified at trial that she received notice.[85] The District Court correctly interpreted the CC&Rs to reference foreclosure was per the statute that required the mailing of the recorded notices and found that the Trust obtained the notices.[86]

B. The District Court correctly found that SCA properly credited payments and that SCA accurately calculated the delinquency.

The Trust's allegations below that SCA through Red Rock did not properly credit the Trust's last payment and did not accurately calculate the delinquency are related. Essentially, the Trust's argument is that SCA's notices reference a July 2012 delinquency but the Trust alleges July's quarterly assessment was paid and should not be included in the delinquency; and it concludes the notices are incorrect because the July payment was made.[87] The argument asked the District Court to court assume the Trust paid on time and that Red Rock did not apply the payment

[83] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).
[84] AA Vol. IV 000782, and 000783.
[85] AA Vol. XIII 002577-2578.
[86] AA Vol. XII 002551-002564, AA Vol. X 001885-001888, and AA Vol. XIII 02565-002580.
[87] Opening Brief at p. 25-26.

correctly, and then to conclude Red Rock foreclosed incorrectly. However, that is not what happened here, and it is Tobin's own words that confirm there was a delinquency that Red Rock began collecting on and eventually foreclosed on. The District Court reviewed the following: 1) On October 3, 2012, Tobin sent a letter to the HOA that was eventually stamped received by Red Rock on October 8, 2012.[88]

The Letter stated:

> Unfortunately, I failed to mail the check in a timely fashion. Subsequently, an offer was placed on the property as a short sale, and it is my understanding that the buyers will be moving in within the next month.
>
> It is my request that the HOA pursue collection of any future HOA dues from the buyers within the escrow or from them directly once the sale is complete or however you normally handle cases in which the owner is deceased.[89]

2) The information matched Red Rock's ledgers indicating the July 2012 assessment was not timely paid.[90] 3) Tobin admits The prospective purchaser's took over for the caretakers in October 2012.[91] This makes the Tobin Letter more likely to be accurate, as it both confirms that Tobin believes the potential purchaser would be moving it, and it was her request the HOA pursue assessments from them; and that she was paying her last

[88] AA Vol. IV 000689-000690 (Tobin Letter).
[89] *Id*.
[90] AA Vol. IV 000679-000682 (Ledger).
[91] AA Vol. II 000299 at ¶¶ 18-19.

payment although late.[92] 4)The record indicates that Tobin was notified throughout the foreclosure process, and continued to attempt to short sale the Property throughout the foreclosure process.[93] Throughout those notifications and attempts to short sale, Tobin never communicated a belief to Red Rock that her payment in check 143 that accompanied the Tobin Letter was not timely applied.

5) The Notices indicate that the delinquency began on July 1, 2012. For example, the second notice of default and election to sell correctly notes the start of the delinquency since July 1, 2012, stating:

> As of 07/01/2012 forward, all assessments, whether monthly or otherwise, late fees, interests, Association charges, legal fees and collection fees and costs, **less any credits**, have gone unpaid.[94]

The Trust argues that the notice incorrectly states that no payments of any kind have been made since July 1, 2012.[95] . The Trust also repeats this argument for the Foreclosure Deed, arguing that the statement is indicating no payments since that date.[96] This argument is factually incorrect and a misreading of the above cited

[92] AA Vol. IV 000689-000690 (Tobin Letter).
[93] AA Vol. IV 000710 (Second Notice of Default), AA Vol. IV 000712-000713 (Notice of Foreclosure Sale), AA Vol. IV 000715-000748 (Mailings), AA Vol. IV 000750-000757 (Posting and Publication), and AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).
[94] AA Vol. IV 000710 (Second Notice of Default).
[95] AA Vol. II 000230 ¶ 23.
[96] AA Vol. II 000230 ¶ 25.

statement from the Notices.[97] The statement is indicating the start date of the delinquency and the fact that the delinquency has never been completely satisfied (meaning reached a zero balance).[98] This is true because of the inclusion of the language "less any credits."[99] The statement is stating all the amounts that make up the delinquency less and credits has not been brought to a zero balance.[100]

Tobin also argues that the July date is incorrect, because July assessments should have been paid and the account should have received a zero balance at that time.[101] However, this argument is based on the assumption that Tobin paid timely, which again is contradicted by the Tobin Letter.[102] The Letter aligns with the Red Rock ledger to demonstrate the payment was not received until October.[103] Therefore, the statement in the notices that the delinquency beginning in July 2012 never reached a zero balance is accurate and confirmed by the ledgers.[104]

6) The District Court reviewed the Trust's own pleadings that do not allege that Tobin's October 3, 2012 letter is inaccurate when it states the payment was

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[97] See AA Vol. IV 000710 (Second Notice of Default), AA Vol. IV 000712-000713 (Notice of Foreclosure Sale).
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] AA Vol. II 000230 ¶¶ 23-26.
[102] AA Vol. IV 000689-000690 (Tobin Letter).
[103] AA Vol. IV 000679-000682 (Ledger).
[104] *Id.*, and *see* AA Vol. IV 000710 (Second Notice of Default), AA Vol. IV 000712-000713 (Notice of Foreclosure Sale).

late.[105] Specifically, Tobin's declaration attached to the Opposition to SCA's Motion for Summary Judgement stated:

> 8. I did not recall the timing and method of submitting the last payment (check 143, dated August 17, 2012 of $275 assessments for the quarter ending September 30, 2012 plus $25 installment late fee, and the anomalies with cancelled checks made me think I had delivered it on August 17, 2012 with the check of the assessments paid for my own house.
> 9. On or about December 24, 2018 I saw SCA00063, a letter signed by me to SCAHOA dated 10/3/12.
> 10. SCA0063 refreshed my memory that check 143 was sent with Instructions to collect future assessments out of escrow because the house had been sold and to direct questions to Real Estate Broker Doug Proudfit, who was also a long-time SCA owner in good standing.[106]

The declaration above should be interpreted as: the October 3, 2012, letter SCA attached to its Motion for Summary Judgment reminded Tobin that she did tell SCA her payment was late, and that she believed she had sold the house, and told SCA to get future payments from the new owners.[107] Essentially, the declaration could have challenged the accuracy of the Tobin Letter, however Appellant did not go there in the declaration to challenge the Tobin Letter's accuracy. "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits

[105] AA Vol. V AA000898.
[106] *Id*.
[107] *Id*.

to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." *Nutton v. Sunset Station, Inc.*, 2015 Nev. App. LEXIS 4, *28-29, 131 Nev. 279, 293, 357 P.3d 966, 976, 131 Nev. Adv. Rep. 34; citing *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 262 P.3d 705 (2011) (court may deny summary judgment if additional discovery necessary to fully respond). However, Appellant below had time to attach the declaration to its Opposition but did not challenge the accuracy of the Tobin Letter in the declaration or put forth what evidence they had or could obtain to challenge the accuracy of the Tobin Letter.[108] Tobin's previous statement in the October 3, 2012, letter taken as true indicates there is no disputed material fact that the delinquency was properly accounted for and foreclosed on.[109] Additionally, even if Appellant attempted to attack the accuracy of the Tobin Letter at the summary judgment stage it had additional hurdles as a party cannot defeat summary judgment by contradicting itself. See *Aldabe v. Adams,* 81 Nev. 280, 284–85, 402 P.2d 34, 36–37 (1965) (refusing to credit sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party). A declaration or affidavit of Tobin the Trustee that attacked the accuracy of the previous Tobin Letter would not be enough to overcome summary judgment, and the Trust would have needed some other additional

[108] *Id.*
[109] *Id*.

evidence. *Aldabe v. Adams.* The Trust did not articulate a belief that the Tobin Letter was false or assert this other evidence exists to support that belief. The Trust though continues the argument that the payment was misapplied as late, till this day.[110] This court should consider the frivolousness of the argument in the face of this declaration.[111]

The Trust sent the payment late and it was applied when received.[112] It is not disputed that the payment was applied to the July assessment and late fee, however, the reality is the payment was late and the October 2012 quarterly assessment was already owing when SCA and Red Rock received this July payment in October, and therefore the balance that started in July was not paid down to zero when the payment was applied.[113]

The Trust admits the same on appeal stating: "Tobin did not accurately recall the timing and method of submitting the last dues payment" . . . . After seeing [the Tobin Letter], Tobin's memory was refreshed . . . Opening Brief p. 5 ¶¶ 14-16.[114]

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[110] Opening Brief at p. 25-26: 17-21 and 1.
[111] AA Vol. V AA000898.
[112] AA Vol. IV 000689-000690 (Tobin Letter) and AA Vol. IV 000679-000682 (Ledger).
[113] *Id.*
[114] Compare with AA Vol. V 000898 ¶¶ 8-10, and with AA Vol. IV 000689-000690 (Tobin Letter).

6) Subsequently there was also Tobin's trial testimony to consider:

> Specifically, Ms. Tobin as Trustee for the Hansen Trust conceded on direct examination that the house had been subject to multiple short sale potential escrows as the house was in default with the lender. She also conceded that there was a late payment to the HOA. Thus, at least $25.00 owed to the HOA at some point. While she disagreed whether the HOA could assess the charges that she asserted were added to the Hansen Trust account as a result of the Hansen Trust's failure to pay its dues on time, she provided no evidence that the charges were inaccurate or impermissible.[115]

Based on the substantial evidence the District Court correctly concluded that no payments were misapplied and the delinquency that began in July 2012 was never paid down to zero; despite a payment being made and the delinquency being paid down some. This was accurately reflected in Red Rock's Ledgers and Notices going forward until the foreclosure sale.[116]

C. The District Court reviewed the specific Trust allegation regarding the Notice of Sale and correctly found SCA foreclosed on a valid lien and the Notice of Sale was not cancelled.

The Trust argues that a screen shot from the Ombudsman's office appeared to indicate that the Notice of Sale was cancelled.[117] No legal argument was made below or here on appeal that the way to cancel a Notice of Sale is to have this language appear on the Ombudsman's screen. The Trust did not argue or provide

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[115] AA Vol. XIII 002577-2578.
[116] See AA Vol. IV 000679-000682 (Ledger), AA Vol. IV 000710 (Second Notice of Default), AA Vol. IV 000712-000713 (Notice of Foreclosure Sale).
[117] Opening Brief p 15 ¶58.

any evidence that a recession of the Second Notice of Default or Notice of Sale appeared in the county record. The delinquency was valid and continuing, and the Trust had communicated in October of 2012 they would no longer pay assessments.[118]

In SCA's Opposition to the Trust's Motion for Reconsideration SCA argued and the Court considered the following:

> As argued by the HOA previously, the sale was postponed, however, a postponement is not a cancellation, and does not require the recording of a new notice of sale. Nothing in the recorded documents rescinds the Notice of Sale. Tobin offered a screenshot from the Ombudsman's office to argue the Notice of Sale was cancelled. This argument was addressed at the hearing. See Sun City Anthem's argument in Video of hearing at 23:30 and Court's decision in Video of hearing at 24:20 and 28:45.
>
> Tobin now attempts to authenticate the evidence; however, reconsideration is only proper if the newly discovered evidence is "substantially different" from the prior evidence and "not previously obtainable in the exercise of due diligence." *Masonry and Tile Contractors v. Jolly Urga & Wirth*, 113 Nev. 737, 741 (1997)(emphasis added). See also, *Mustafa v. Clark County School District*, 157 F.3d 1169, 1178-79 (9th Cir., 1998) (generally, leave for reconsideration is only granted upon a showing of: (1) newly discovered evidence; (2) the court having committed clear error or manifest injustice; or (3) an intervening change in controlling law); *Harvey's Wagon Wheel Inc. v. MacSween,* 96 Nev. 215, 217-218, 606 P.3d 1095, 1097 (1980).

[118] AA Vol. IV 000679-000682 (Ledger), and AA Vol. IV 000689-000690 (Tobin Letter).

Additionally, the Court provided and the Order indicates:

> the HOA has met its burden in establishing that there is no genuine issue of material fact and that it is entitled to summary judgment. Tobin has failed to meet her burden in opposing the Motion because the screenshot was not authenticated as necessary pursuant to NRCP 56. Additionally, even if authenticated, the screenshot does not create a genuine issue of material fact because it does not establish that the sale was cancelled prior to the time of the foreclosure sale, the basis for the remarks, and whether the statements as indicated are the Ombudsman's opinions or the truth. The totality of the facts evidence that the HOA properly followed the processes and procedures in foreclosing upon the Property.

Tobin is not presenting new facts or law on this point.[119]

The evidence presented during summary judgment and discussed above establishes a valid lien was foreclosed on. Reconsideration was correctly denied under *Masonry and Tile Contractors v. Jolly Urga & Wirth*, 113 Nev. 737, (1997), *Mustafa v. Clark County School District*, 157 F.3d 1169, (9th Cir., 1998), and *Harvey's Wagon Wheel Inc. v. MacSween,* 96 Nev. 215, 217-218, 606 P.3d 1095 (1980). The subsequent trial testimony discussed establishes it was a valid lien, and the Trust does not explain why or how the Notice of Sale would have been cancelled. The substantial evidence establishes SCA properly followed the processes and procedures in foreclosing upon the Property.

[119] Opposition to Reconsideration AA Vol VIII 001362-1363, citing: Order on Motion for Summary Judgment (AA Vol. XIII 001045-001058).

The Trust proceeded to a Bench Trial on June 5th and 6th, 2019 for its claims against Yuen K. Lee dba Manager, F. Bondurant, LLC. and the Jimijack Irrevocable Trust. Yeun K. Lee dba Manager, F. Bondurant, LLC. and the Jimijack Irrevocable Trust did not have any claims against the Trust wherein Jimijack Irrevocable Trust's claim for Quiet Title/Declaratory Relief against Nationstar Mortgage, LLC and its predecessor, Bank of America, N.A., were resolved pursuant to a settlement with Nationstar Mortgage LLC. Thus, the only claims for the Bench Trial were the Trust's claims against Yuen K. Lee dba Manager and F. Bondurant, LLC. for fraudulent conveyance, quiet title and equitable relief, and civil conspiracy, and against Jimijack for fraudulent re-conveyance, unjust enrichment, civil conspiracy, and preliminary and permanent injunction. At the time of trial, the Trust only presented the testimony of Nona Tobin. No other witnesses were presented. No documents of any kind were admitted into as evidence. The district court, therefore, correctly found that the Trust failed to meet is burden of proof. AA Vol. XIV 002559. The district court entered its Findings of Facts, Conclusions of Law and Judgment in favor of Yuen K. Lee dba Manager, F. Bondurant, LLC. and Jimijack Irrevocable Trust and against the Trust on all of the Trust's claims. AA Vol. XII 002551-2564.

D. Alternatively, equity weighs in favor of upholding the sale.

The substantial evidence establishes the July payment by the Trust was in fact late and not misapplied by the collection company Red Rock. Yet, additionally, the Trust's claim is based on a false premise, that an accounting error would entitle the Trust to equitable relief, even though the Trust did not attempt to pay the total delinquency.

Even assuming in the alternative that a payment was timely made and misapplied, equity would still weigh in favor of Respondents given the totality of the situation. The Trust would not have been prejudiced by an error if one had occurred, as under the facts here the Trust never attempted to pay the delinquency even though it was outstanding for about two years, and the sale was postponed multiple times.[120] First, the Trust never addressed the timing of the payment with Red Rock. It is undisputed that years of assessments went unpaid after that check. If the Trust had raised the issue at the time, Red Rock could have re-noticed the delinquency and restarted the process. Second, the Trust allowed caretakers followed by potential purchasers to live at the property without requiring they pay the HOA assessments.[121]

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[120] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).
[121] AA Vol. II 000299 at ¶¶ 18-19.

For the following reasons even if the Court assumes in the Trust's favor that the payment was timely made, Equity weighs in favor of the Respondents given the other facts surrounding the sale.

1. Review Under *Shadow Wood* Provides the Trust is Not Entitled to an Equitable Determination to undue the sale.

"When sitting in equity, [], courts must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016), referencing: see *e.g., In re Petition of Nelson,* 495 N.W.2d 200, 203 (Minn.1993). Here, there is no factual universe where the Tobin Letter does not exist, and as argued above the Trust does not challenge the letters accuracy or claim it to be a mistake by Tobin. The record is clear that the Trust never took action to argue a payment was misapplied prior to the sale. The Trust's own actions must be considered by the Court.

> Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):
>
> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, *EVEN IF THE AMOUNT IS IN DISPUTE.* YOU MUST ACT BEFORE THE SALE DATE.

Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). Similar to NYCB in *Shadow Wood*, the Trust is arguing it disputed the lien amount. Yet, similar to NYCB, the Trust did not do any of things the *Shadow Wood* Court references such as attend the sale, request arbitration on the amount, or seek to enjoin the sale. Without taking those actions and the more obvious actions of just communicating it to Red Rock, the court should not believe the Trust was prejudiced by an accounting error that was a small part in a total amount the Trust was not going to pay anyway.

The interaction between Craig Leidy and Red Rock is telling. Tobin contracted with Craig Leidy to help her short sale the Property.[122] Craig Leidy requested the HOA waive thousands of dollars off the debt.[123] If Tobin the trustee actually believed that payments were misapplied and it led to additional charges that discussion would have come up during the waiver of debt. The HOA did communicate that it would waive some amounts but could not grant the waiver to the extent requested.[124] Factually, all late fees and interest amounts were going to be waived if Trust could accomplish the short sale of the Property.[125] Communication between Nationstar and Craig Leidy appears to indicate the balance

[122] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy)
[123] *Id.*
[124] *Id.,* at AA Vol. IV 000785
[125] *Id.*

was too high for Nationstar to allow the short sale.[126] However, it was not any late fees or interest that prevented the short sale.[127]

Additionally, at the time the Tobin Letter was received by Red Rock in October of 2012, the Trust had just allowed potential purchaser's to move into the home without paying assessments.**[128]** The Trust apparently washed it hands of the property assuming the short sale would happen, never raised the issue of belief that its last payment was not timely credited. The Trust also never came up with a plan about what to do about the outstanding assessments if these potential purchasers did not pay them.

"[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event … to exercise due diligence and take necessary steps to preserve [his] rights." *GAC Enters. v. Medaglia* (*In re Medaglia*), 52 F.3d 451; see also *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014). Here, if the Trust knew of an error, it failed to diligently act to correct the error. There is nothing in Trust's claim or actions that would lead to setting aside the sale in equity.

[126] *Id*., at AA Vol. IV 000782, and 000783.
[127] *Id.*
[128] AA Vol. II 000299 at ¶¶ 18-19.

2. The Trust Is Estopped from Seeking Equitable Relief.

"Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *In re Harrison Living Tr.,* 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005).

> This court has previously established the four elements of equitable estoppel: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

Id. Here, with the Tobin Letter the Court should find that the Trust is now Estopped from arguing the payment was timely and misapplied. Taking the factors out of order, to the second factor, Tobin must have intended the Letter be acted upon, as it makes specific requests.[129] To the third factor, the HOA and Red Rock, clearly believed the payment was untimely, as indicated by their Ledgers.[130] They could have filed a new delinquency if they believed there was an accounting error, and it does not make any sense for them to proceed with the accounting error if it only led to additional late fees that the HOA was willing to waive anyway.[131] To the fourth factor, Red Rock's file contained the Tobin Letter.[132] The Red Rock file also

[129] AA Vol. IV 000689-000690 (Tobin Letter).
[130] AA Vol. IV 000679-000682 (Ledger).
[131] AA Vol. IV 000785.
[132] AA Vol. IV 000689-000690 (Tobin Letter).

included a Progress Report that establishes on October 8, 2012 they received the "correspondence via mail."[133] The Progress Report indicates Red Rock processed the payment on October 18, 2012.[134] Red Rock relied on the letter to process the payment included with it, and nothing in the letter dated October 3, 2012 made Red Rock believe the payment should not be applied in October.[135] To the first factor, if the Trust never knew of an accounting error before the sale, it was never harmed because it never intended or attempted to pay the delinquency. The only way the Trust could have been harmed is if it was aware of the error, and attempted to correct it during the sale and was unable to. The facts do not demonstrate this, and it is more likely the payment was untimely. However, considering the factors, if the Trust became aware that the payment was not timely applied and the Tobin letter was not accurate, it did nothing to correct the issue prior to the sale. Estoppel functions to prevent the Trust from benefiting from a correctable mistake now after the sale.

[133] AA Vol. IV 000825 (Red Rock Homeowner Progress Report).
[134] *Id.*
[135] AA Vol. IV 000689-000690 (Tobin Letter).

3. The Trust's Claim in Equity is Barred by the Doctrine of Unclean Hands.

"It is a well-known maxim that a person who comes into an equity court must come with clean hands." *Income Inv'rs v. Shelton*, 3 Wash. 2d 599, 602, 101 P.2d 973, 974 (1940). "The doctrine bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief. As such, the alleged inequitable conduct relied upon must be connected with the matter in litigation . . ." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637–38, 189 P.3d 656, 662 (2008).

Here, the Trust is asking to set aside a foreclosure on delinquency that totaled thousands of dollars because it argues if a payment was applied differently there would be less late fee charges or the delinquency start date may be different.[136] There is also the Tobin Letter where she agrees she "failed to mail the check in a timely fashion."[137] If the Tobin Letter was a mistake, there should be an additional communication by the Trust that states such. Without a subsequent communication after the Tobin Letter, the Trust was complicit in creating the issue it now alleges, as it was a correctable issue for which Red Rock could have released and recorded new documents. It is undisputed that subsequent assessments went unpaid.[138] The

[136] Opening Brief p 25.
[137] AA Vol. IV 000689-000690 (Tobin Letter).
[138] AA Vol. IV 000679-000682 (Ledger).

Trust allowed potential purchasers to move into the house without paying assessments and told the HOA these purchaser's would pay assessments when they eventually bought the house (the short sale never happened.)[139] The Trust received the notices that stated the delinquency began in July of 2012.[140] If it was a mistake, the Trust allowed Red Rock to believe it, and the Trust's inequitable conduct is directly related to the allegations now.

> In determining whether a party's connection with an action is sufficiently offensive to bar equitable relief, two factors must be considered: (1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct.[7] Only when these factors weigh against granting the requested equitable relief will the unclean hands doctrine bar that remedy.[8] The district court has broad discretion in applying these factors, and we will not overturn the district court's determination unless it is unsupported by substantial evidence.

Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 276, 182 P.3d 764, 767 (2008). To the First Factor of the egregiousness of the misconduct, the misconduct is not just the Tobin Letter that supports Red Rock's belief that the check was not mailed in a timely fashion, but the inaction to correct the alleged mistake later. The HOA essentially agreed to waive the late fees and interest to help accomplish a short sale.[141] The Trust was no longer prejudiced if the

[139] AA Vol. II 000299 at ¶¶ 18-19 and AA Vol. IV 000689-000690 (Tobin Letter).
[140] AA Vol. IV 000715-000748 (Mailings)
[141] AA Vol. IV 000759-000787 (Payoff Demands and communications with Craig Leidy).

late fees were actually inaccurate, they were not going to prevent the short sale.[142] The only reason not to communicate the issue and correct the prior Tobin Letter, would be to create an issue to challenge the foreclosure later. The Court should find the Trust's action or inaction sufficiently egregious if it believed there was an error and did not communicate it. To the Second Factor of the seriousness of the harm, the court should find that creating a cloud on title to property is sufficiently serious harm.

This Court in *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.* cited to *Income Inv'rs v. Shelton*, 3 Wash. 2d 599, 602, 101 P.2d 973, 974–75 (1940), for its position on denying equity to a party with unclean hands. The Income Inv'rs Court stated:

> Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy. 1 Pomeroy's Equity Jurisprudence (4th ed.) 739, § 398; Dale v. Jennings, 90 Fla. 234, 107 So. 175; Bearman v. Dux Oil & Gas Co., 64 Okl. 147, 166 P. 199; Deweese v. Reinhard, 165 U.S. 386, 17 S.Ct. 340, 41 L.Ed. 757. Other authorities might be cited, but the rule appears to be universal.
>
> If the parties were guilty of the conduct which the trial court found that they were, the appellant comes squarely within the rule that equity will deny it relief, because coming into a court of equity and asking relief after wilfully concealing, withholding, and falsifying books and records, is certainly not coming in with clean hands.

[142] *Id.*

Income Inv'rs v. Shelton, at 974–75. The case demonstrates that concealing, or withholding an issue can be unclean hands. Again, if the issue was raised and was in fact in error it could have been corrected. Based on the foregoing the Court should find the Trust's claim is barred by doctrine of unclean hands.

Again, these arguments are lodged in the alternative. The Court should find that the Trust's last payment was in fact late, that the start date of the delinquency was correctly noted in the foreclosure notices, and that the Trust had notice of the foreclosure sale and failed to act to prevent the foreclosure. However, even assuming alternatively that the last payment was timely, there is no path to equity for the Trust given the Tobin Letter and no subsequent communication that the letter was a mistake, as these options range from the Trust being indifferent to correcting the issue to misleading Red Rock.

CONCLUSION

This Court should uphold the decision of the District Court. Alternatively, this Court should find Equity prevents setting aside the sale.

DATED this 1st day of July, 2020.

LIPSON NEILSON P.C.

/s/ David Ochoa

DAVID T. OCHOA, Esq.
KALEB D. ANDERSON, Esq.
Attorneys for Respondent
Sun City Anthem Community Association

HONG & HONG LAW OFFICE

/s/ Joseph Y. Hong

JOSEPH Y. HONG, Esq.
Attorney for Respondents
Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC

CERTIFICATE OF COMPLIANCE

1. The undersigned hereby 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:

2. This Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

3. The undersigned further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9554 words.

4. Finally, the undersigned hereby certify that they have read this appellate brief, and to the best of their knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. The undersigned further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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. The undersigned understand that they 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.

LIPSON NEILSON P.C.

/s/ David Ochoa

DAVID T. OCHOA, Esq.
KALEB D. ANDERSON, Esq.
Attorneys for Respondent
Sun City Anthem Community Association

HONG & HONG LAW OFFICE

/s/ Joseph Y. Hong

Attorney for Respondents
Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2020, electronic service of the foregoing **RESPONDENTS, SUN CITY ANTHEM COMMUNITY ASSOCIATION, JOEL A. STOKES AND SANDRA F. STOKES, AS TRUSTEES OF THE JIMIJACK IRREVOCABLE TRUST, YUEN K. LEE, AN INDIVIDUAL D/B/A MANAGER, AND F. BONDURANT, LLC'S, ANSWERING BRIEF** was made pursuant to NRAP 25(d) to the following parties:

Melanie Morgan, Esq.
Donna Wittig, Esq.
AKERMAN LLP
1635 Village Center Circle Ste. 200
Las Vegas, NV 89134
Melanie.morgan@akerman.com
Donna.wittig@akerman.com

Attorneys for Nationstar

Joseph Y. Hong, Esq.
HONG & HONG
10781 W. Twain Avenue
Las Vegas, NV 89135

Joel A. Stokes and Sandra F. Stokes, as trustees of the Jimijack Irrevocable Trust, Yuen K. Lee, an individual d/b/a Manager; F. Bondurant, LLC

Joe Coppedge, Esq.
Michael R. Mushkin & Associates, P.C.
4475 S. Pecos Road
Las Vegas, NV 89121

Attorney for Nona Tobin Trustee of the Gordon B. Hansen Trust, dated 8/22/15

/s/ Juan Cerezo

An Employee of LIPSON NEILSON P.C.