IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION,

Appellant,

v.

IKON HOLDINGS, LLC, a Nevada limited liability company;

Respondent,

CASE NO. 63178

Dist. Ct. Case No. A-11-647850-B

RESPONDENT'S APPENDIX

VOL. 2

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DATED this 24th day of February, 2014.

ADAMS LAW GROUP, LTD.

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

U.S. BANK NATIONAL ASSOCIATION, Plaintiff v. LINDA A PERRY; and TERRACINA TERRASOL HOMEOWNERS ASSOCIATION, Defendants	CASE NO.: A-12-666569-C DEPARTMENT 27

DECISION AND ORDER

Plaintiff U.S. Bank National Association (hereinafter "Plaintiff" or "US Bank"), filed its Verified Complaint for Judicial Foreclosure and Deficiency Judgment of Deed of Trust on August 9, 2012. Defendant Terracina Terrasol Homeowners Association (hereinafter "TTHOA") filed an Answer to Plaintiff's Verified Complaint on September 7, 2012. The Default of Defendant Linda Perry (hereinafter "Perry") was entered December 10, 2012.

Plaintiff filed a Motion for Summary Judgment on February 8, 2013. TTHOA filed a Limited Opposition and Countermotion for Summary Judgment to Enforce Super Priority Lien Pursuant to NRS 116.3116 on February 27, 2013. Plaintiff filed a Reply in support of its Motion for Summary Judgment and Opposition to TTHOA's Countermotion for Summary Judgment on March 4, 2013. TTHOA filed a Reply in Support of its Countermotion on March 8, 2013. The Court heard oral argument on the

matters March 14, 2013 and took the pending Motions under advisement. The Court now issues its Decision and Order as follows:

COURT FINDS after review that, in contrast to Plaintiff's request for absolute priority with respect to US Bank's first mortgage security interest, the basis for TTHOA's Limited Opposition is simply a request that TTHOA's super priority lien be accounted for in the Order and Judgment herein. In consideration of the super priority lien amount due TTHOA, the Court must determine whether or not the super priority lien, statutorily granted to the homeowners' association, includes not only the assessment amounts but also late fees, interest, collection fees and costs, and attorney's fees, as TTHOA posits.

Defendant argues that attorney's fees, late fees, interest, and collection fees are calculated on top of the 9-month assessment amount which results in the following:

Assessments	=	$62/month * 9 months	=	$ 558.00
Late Fees	=	$10/month * 9 months	=	$ 90.00
Interest	=	5.25% * $648 ($558 + $90)	=	$ 34.02
Collection Fees & Costs			=	$ 519.80
Attorney Fees			=	$3,370.50
SUPER PRIORITY LIEN TOTAL			=	$4,572.32

Plaintiff's Reply in Support of its Motion for Summary Judgment acknowledges a super priority lien in favor of the Defendant TTHOA for $558.00 only.

COURT FURTHER FINDS after review NRS 116 governs common-interest ownership communities, and NRS 116.3116 *et seq.* governs the rights of a homeowners' association to its lien interests. Specifically, NRS 116.3116 states that

> The association has a lien on a unit for...*any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due*. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section...

NEV. REV. STAT. 116.3116 (1) (emphasis added).

Further, the statute provides

> [a] lien under this [NRS 116.3116] is prior to all other liens and encumbrances on a unit except…[l]iens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to…[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent…
>
> The *lien is also prior to all security interests described in paragraph (b) to the extent of* any charges incurred by the association on a unit pursuant to NRS 116.310312 and *to the extent of the assessments for common expenses* based on the periodic budget adopted by the association pursuant to NRS 116.3115 *which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien…*

NEV. REV. STAT. 116.3116 (2) (emphasis added).

COURT FURTHER FINDS after review TTHOA argues that NRS 116.3116 (7), in conjunction with Defendant's interpretation of NRS 116.3116 (2), entitles TTHOA to attorney's fees in addition to the nine (9)-month assessment calculation. While this Court acknowledges that NRS 116.3116 (7) provides that "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party," attorney's fees are *not* included within the super priority lien amount. NEV. REV. STAT. 116.3116 (7).

COURT FURTHER FINDS after review that "where a statue is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 88, 94-95, 993 P.2d 50, 55 (2000).

Here, the plain meaning of the language of NRS 116.3116 (2) reads "*to the extent of*…assessments…which would have become due…during the 9 months immediately preceding institution of an action…" NEV. REV. STAT. 116.3116 (2) (emphasis added).

The language used, "to the extent of," is not reasonably susceptible to more than one meaning beyond the placement of a ceiling, a limit, or an amount which is not to be exceeded.

Although the Nevada Supreme Court has not yet addressed the instant issue, there exists a library of persuasive authority which support the conclusion that the super priority lien, including fees, interest, and the like are not to exceed an amount equal to nine (9) months of HOA assessments. The first opinion is found in the State of Nevada, Department of Business and Industry, Real Estate Division's ("NRED") December 12, 2012 Advisory Opinion (Adv. Op. 13-01, Issued Dec. 12, 2012) (hereinafter "Decision 13-01). Although the Court acknowledges the non-binding nature of the Advisory Opinion, Decision 13-01 is directly on point and is, therefore, highly persuasive.

NRED Decision 13-01 asks the question, "Pursuant to NRS 116.3116, may the portion of the association's...super priority lien...contain "costs of collecting" defined by NRS 116.310313?" *Decision 13-01*, at pg. 1. NRED answered this question in the negative. Id. NRED Decision 13-01 further considers, "Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses...plus charges incurred...pursuant to NRS 116.310312?" Id. Again, NRED answered in the negative: "The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien...may not exceed 9 months of assessments as reflected in the association's budget, *and it may not include penalties, fees, late charges, fines, or interest.*" Id. at 2 (emphasis added). NRED expanded in saying "...while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged...the total amount of

//

super priority lien attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget." Id. at 12 (emphasis in original).

COURT FURTHER FINDS after review that several departments in the Eighth Judicial District Court ("EJDC") have addressed this issue, and those departments have consistently ruled that NRS 116.3116 (2) establishes a statutory cap on the super priority lien.

Presiding Civil Judge Elizabeth Gonzalez of the EJDC, Department XI, ruled that "The words 'to the extent of' contained in NRS 116.3116 (2) mean 'no more than,' which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded." Wingbrook Capital, LLC v. Peppertree Homeowners Assoc., *Order* at 4:3-5 (Case No. A-11-636948-B, filed Jun. 3, 2011) ("Gonzalez Order"). Judge Gonzalez ruled that

> While assessments, penalties, fees, charges, late charges, fines and interest may be included within the Assessment Cap Figure, *in no event can the total amount of the Assessment Cap Figure exceed an amount equaling 9 times the homeowners' association's monthly assessment amount* to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien.

Id. at 4:13-18.

Judge Mark Denton of the EJDC, Department XIII, similarly ruled

> ...the Super Priority Lien amount is not without limits and NRS § 116.3116 is clear that the amount of the Super Priority Lien...is limited 'to the extent' of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action...Thus, the phrase contained in NRS § 116.3116 (2) which states, '...to the extent of...' means a maximum figure equaling 9 times the association's regular, monthly (not annual) assessments...
>
> The words "to the extent of' contained in NRS § 116.3116 (2) mean 'no more than,' which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded...

> Thus, while assessments, penalties, fees, charges, late charges, fines and interest may be included within the Super Priority Lien, *in no event can the total amount of the Super Priority Lien exceed an amount equaling 9 times the homeowners' association's regular monthly assessment amount...*

Ikon Holdings, LLC v. Horizons at Seven Hills Homeowners Assoc., *Order* at 4:4-5:4 (Case No. A-11-647850-C, filed Jan. 19, 2012) (emphasis added) (hereinafter "Denton Order").

Judge Susan Scann of the EJDC, Department XXIX, also issued an Order in the case of Prem Deferred Trust v. Aliante Master Assoc., which contained, verbatim, the language of the Denton Order, *supra.* Id., *Order* at 4:4-5:4 (Case No. A-11-651107-B, filed Sep. 25, 2012) (emphasis added) (hereinafter "Scann Order").

Judge Abbi Silver, EJDC, Department XV, issued a similar decision:

> The Association's Super Priority Lien Amount pursuant to NRS 116.3116 may include interest, late fees and costs of collection, but is capped by the applicable period of common expense assessments, i.e., a figure equaling 9 months of common expense assessments based upon the Association's periodic budget. The words to the extent of contained in NRS 116.3116(2) mean no more than, which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

Peccole Ranch Community Assoc. v. Elsinore, LLC, *Order Denying in Part and Granting in Part Plaintiff's Motion for Partial Summary Judgment*, at 5:2-6 (Case No. A-12-658044-C, filed Sep. 17, 2012) (emphasis added) (hereinafter "Silver Order").

COURT ORDERS for good cause appearing, and consistent with NRED Decision 13-01 and the decisions of the EJDC departments which have considered the issues before this Court, Plaintiff's Motion for Summary Judgment GRANTED IN PART and DENIED IN PART. Defendant TTHOA's Countermotion for Summary Judgment is also GRANTED IN PART and DENIED IN PART.

Plaintiff's Motion for Summary Judgment shall be GRANTED, but subject to a super priority lien in favor of Defendant TTHOA in the amount of five hundred fifty-eight dollars and zero cents ($558.00).

Dated: March 20, 2013

Nancy L Alf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I mailed to the attorneys and in proper person as follows:

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

NEW YORK COMMUNITY BANK,

Plaintiff,

v.

SHADOW WOOD HOMEOWNERS' ASSOCIATION, INC.; GOGO WAY TRUST; and DOES 1 through 20, inclusive,

Defendants.

GOGO WAY TRUST,

Counterclaimant,

v.

NEW YORK COMMUNITY BANCORP, INC.; DOE Individuals I through X; and ROE Corporations XI through XX,

Counterdefendants.

Case No.: A-12-660328-C
Dept. No.: XV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date of Hearing: March 13, 2013
Time of Hearing: 9:00 a.m.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having come before the Court on March 13, 2013, for the hearing on the Motion for Summary Judgment filed by Plaintiff NEW YORK COMMUNITY BANK (hereinafter, "NYCB'S Motion"), by and through its counsel of record, Gregg A. Hubley, Esq., of PITE

DUNCAN, LLP, on February 8, 2013, and the Motion for Summary Judgment filed by Defendants, SHADOW WOOD HOMEOWNERS' ASSOCIATION, INC. and GOGO WAY TRUST (hereinafter, "Defendants' Motion"), by and through Defendants' counsel of record, ALESSI & KOENIG, LLC, on February 8, 2013; Plaintiff appearing at the March 13, 2013, hearing through its counsel, Gregg A. Hubley, Esq., and Defendants appearing by and through their counsel, Huong Lam, Esq.; the Court being having reviewed the pleadings filed, the moving papers, and being fully advised in the premises, and with good cause appearing therefor, hereby GRANTS Plaintiff's Motion for Summary Judgment, and DENIES Defendants' Motion for Summary Judgment, based upon the following Findings of Fact and Conclusions of Law.

I.

FINDINGS OF FACT

1. The real property at issue in these proceedings is located at 3923 Gogo Way, #109, Las Vegas, Nevada, 89103, Assessor's Parcel Number 162-18-613-029 ("Subject Property").

2. Prior to Plaintiff NYCB's foreclosure sale, the Subject Property was owned by non-party, Virginia V. Fedel, who had executed a Promissory Note secured by a Deed of Trust, which was recorded on April 27, 2007, in the Official Records of Clark County, Nevada, as Instrument No. 20070427-0004835.

3. Virginia V. Fedel defaulted on the terms of the Promissory Note and Deed of Trust referenced in Paragraph 2, above, by failing to make the payments required. Virginia V. Fedel also failed to pay the monthly assessments as set forth in the CC&Rs recorded by Defendant SHADOW WOOD HOMEOWNERS' ASSOCIATION.

4. The beneficial interest in the Deed of Trust executed by Virginia V. Fedel was assigned to Plaintiff NYCB, and the Assignment was recorded in the Official Records of Clark County, Nevada, as Instrument No. 20100707-0003641, on July 7, 2010.

5. On June 1, 2010, a Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust ("NYCB NOD") was recorded on June 1, 2010, in the Official Records of Clark County, Nevada, as Instrument No. 20100602-0003706. On March 8, 2011, the Nevada Foreclosure Mediation Program issued a Certificate of Completion authorizing Plaintiff

NYCB to proceed with foreclosure, which was recorded on April 13, 2011, in the Official Records of Clark County, Nevada, as Instrument No. 20110413-0002248.

6. On May 9, 2011, Plaintiff NYCB purchased the Subject Property at a Trustee's Sale ("NYCB's Foreclosure Sale") for $45,900.00, and a Trustee's Deed Upon Sale was recorded in the Official Records of Clark County, Nevada, as Instrument No. 20110524-0003017 ("NYCB's TDUS).

7. The Subject Property is located within a condominium association which has significant common area expenses, and the Subject Property is governed by SHADOW WOOD HOMEOWNERS' ASSOCIATION, INC.'s ("Shadow Wood"), Declaration of Covenants, Conditions and Restrictions for Shadow Wood Condominiums ("CC&Rs"). Shadow Wood issues monthly assessments against all units pursuant to the CC&Rs.

8. The monthly assessments relative to the Subject Property had a delinquent balance since 2008, as, prior to NYCB's Foreclosure Sale, Virgina V. Fedel failed to pay all of the monthly assessments.

9. Although the monthly assessments were delinquent, Shadow Wood and/or its agents had accepted partial payments from Virgina V. Fedel, and did not hold a foreclosure sale to collect the unpaid/delinquent balance until after NYCB's Foreclosure Sale.

10. On June 29, 2011, Shadow Wood and/or its agents executed a Notice of Delinquent Lien ("Notice of Lien") which was recorded in the Official Records of Clark County, Nevada, on July 7, 2011, as Instrument No. 20110707-0002436. The Notice of Lien indicated that Shadow Wood had a lien against the Subject Property in the amount of $8,238.87, consisting of collection and/or attorney fees, assessments, interest, late fees, service charges, and collection costs.

11. On August 29, 2011, Shadow Wood and/or its agents executed a Notice of Default and Election to Sell under Homeowners Association Lien ("HOA NOD"), which was recorded in the Official Records of Clark County, Nevada, on October 13, 2011, as Instrument No. 20111013-0001665. The HOA NOD indicated that the amount due as of August 29, 2011, was $6,608.34.

12. On November 2, 2011, and December 2, 2011, NYCB's representative contacted Shadow Wood's agent, Alessi & Koenig, in writing, requesting a detailed statement identifying the amount of the lien payoff requested by Shadow Wood. Shadow Wood's agent sent a response to the

payoff demand to another employee of Shadow Wood's agent, apparently in error, and NYCB did not receive this response.

13. NYCB's representative contacted Ticor Title of Nevada, Inc., the escrow agent for NYCB's Foreclosure Sale, on December 12, 2011, requesting assistance with its attempts to communicate with Shadow Wood's agents and obtain a payoff statement. On December 28, 2011, Ticor Title of Nevada, Inc., sent an escrow demand to Shadow Wood's management company, MP Association Management. On December 28, 2011, Gerald Marks, the owner of MP Association Management completed, signed and returned the Demand Form to Ticor Title of Nevada, Inc. The executed Demand Form stated that the monthly dues on the Subject Property had been paid to 11-31-11, that the next payment was due on 12-1-11, that there was a delinquent amount of $328.94, that the account had not been sent to a collection agency, and that no liens had been filed against the Subject Property.

14. On January 18, 2012, Defendant Shadow Wood and/or its agents executed a Notice of Trustee's Sale ("HOA NOS"), scheduling the HOA Trustee's Sale for February 22, 2012. The HOA NOS was recorded on January 27, 2012, in the Official Records of Clark County, Nevada, as Instrument NO. 20120127-0002208. The HOA NOS stated that an unpaid balance existed in the amount of $8,539.77.

15. On January 23, 2012, NYCB received a ledger of past due amounts from Shadow Wood's agent, Alessi & Koenig, which listed an outstanding balance of $6,445.54, which was good through February 1, 2012.

16. On January 31, 2012, NYCB sent a check to Shadow Wood's agent, Alessi & Koenig, in the amount of $6,783.16, as payment for the balance reflected on the January 23, 2012, ledger and payment of future assessments through April 1, 2012.

17. Shadow Wood's agent, Alessi & Koenig, received NYCB's payment of $6,783.16. Shadow Wood's agent, Alessi & Koenig, rejected the payment of $6,783.16, and advised NYCB on February 8, 2012, that the outstanding balance now totaled $9,017.39.

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18. At the time that Shadow Wood recorded and served the Notice of Lien, the regular monthly assessment applicable to the Subject Property was $168.81 per month. For the period of nine (9) months preceding the Notice of Lien, nine (9) regular monthly assessments applicable to the Subject Property totaled $1,519,.29.[1]

19. On February 22, 2012, Shadow Wood's agent, Alessi & Koenig, sold the Subject Property to Defendant Gogo Way Trust at the HOA Trustee Sale for $11,018.39. On March 1, 2012, a Trustee's Deed Upon Sale was recorded in the Official Records of Clark County, Nevada, as Instrument No. 20120301-0004775 ("HOA TDUS").

20. Shadow Wood's Notice of Lien and all of its HOA foreclosure efforts in relation to the Subject Property were based upon the alleged failure of the unit owner to pay the monthly assessments of the HOA, coupled with the collection costs and attorney's fees allegedly incurred in the foreclosure. Shadow Wood has not claimed that its lien on the Subject Property was related to nuisance abatement costs incurred by Shadow Wood (NRS 116.310312), and has not claimed that its foreclosure on the Subject Property related to fines or penalties related to a violation that posed an imminent threat of harm to other unit owners or residents (NRS 116.31162(4)(a)) or a penalty for failure to adhere to a construction schedule for the completion of an improvement (NRS 116.31162(4)(b)).

21. Shadow Wood's agent, MP Association Management, documented the receipt of $3,442.39 from the HOA Trustee Sale on March 22, 2012. Shadow Wood's agent, MP Association Management, documented a "Bad Debt Write Off," also on March 22, 2012, in the amount of $3,013.15, bringing the purported HOA dues owed on the Subject Property current.

22. On April 18, 2012, NYCB filed its Verified Complaint for Quiet Title and Declaratory Relief. On October 5, 2012, pursuant to a Stipulation and Order filed September 17, 2012, NYCB filed its First Amended Complaint for Quiet Title and Declaratory Relief. On October 30, 2012, Defendants filed an Answer to the First Amended Complaint and Defendant Gogo Way asserted a Counterclaim for Quiet Title and Declaratory Relief against NYCB.

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[1] $168.81 X 9 months (September, 2010, through May, 2011) = $1,519.29.

23. Any Findings of Fact which should be construed as Conclusions of Law shall be deemed as such, and any Conclusions of Law which should be construed as Findings of Fact shall be deemed as such.

II.

CONCLUSIONS OF LAW

1. Summary Judgment is appropriate if the "...pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56(c). The determination of materiality depends upon the underlying substantive law, and includes only those factual issues that could change the ultimate outcome of the case. Wood v. Safeway, 121 Nev. 724, 730, 121 P.3d 1026 (2005). The Court must consider all properly asserted facts and evidence in a light most favorable to the nonmoving party, but the nonmoving party must show that there is more than just a "metaphysical doubt" as to the operative facts to avoid summary judgment, and must, by affidavit or otherwise, set forth specific facts that demonstrate the existence of genuine issues for trial. Wood v. Safeway, 121 Nev. 724, 732.

2. "[W]hen a senior lienholder forecloses and sells property to a person other than the junior lienholder, the junior lienholder is 'sold-out' and can institute proceedings to collect the debt without attempting to fruitlessly proceed against the property." McDonald. v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. 812, 818, 123 P.3d 748 (2005). Any amount allegedly owed by Virginia V. Fedel to Shadow Wood or its agents prior to NYCB's Foreclosure Sale was sold out, with the exception of those identified in NRS 116.3116 and NRS 116.310312, and Shadow Wood or its agents could have instituted proceedings against Virginia V. Fedel to recover the amount(s) claimed.

3. Shadow Wood cannot foreclose on a lien by sale when that lien is based upon a fine or penalty for violating the governing documents of the association unless the violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents, or the penalty is imposed for a failure to adhere to a schedule required pursuant to NRS 116.310305. NRS 116.31162(4).

4. Shadow Wood's lien was entitled to super priority status in this matter only to the extent of "...the assessments for common expenses based on the periodic budget adopted by the association .... which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien[.]" NRS 116.3116(2).

5. Although not precedential, the State of Nevada Department of Business and Industry, Real Estate Division ("Real Estate Division") published an Advisory Opinion on December 12, 2012, setting forth that costs of collection cannot properly be included in an HOA's super-priority lien, and stating that "...liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4)." The Real Estate Division further suggests that it is unreasonable to expect that fines, which generally cannot be used as the basis for foreclosure, survive a foreclosure of the first security interest.

6. The Nevada Supreme Court has held that "...the responsibility for determining which fees may be charged, the maximum amount of such fees, and whether they maintain a priority, rests with the Real Estate Division and the CCICCH." Dep't. of Bus. & Indus. v. Nev. Ass'n Servs., Inc., 128 Nev.Adv.Op. 34, at *4 (2012).

7. Plaintiff NYCB is entitled to summary judgment as a matter of law on the declaratory relief claim and claim for quiet title, quieting title in favor of Plaintiff NYCB and against Gogo Way Trust immediately. Pursuant to this Court's equitable powers, the HOA TDUS recorded March 1, 2012, is hereby immediately set aside, invalidated and rescinded, and the Court declares that NYCB's TDUS, recorded on May 9, 2011, is superior to and not subject to any interest held or claimed by Gogo Way Trust.

8. The HOA foreclosure sale (February 22, 2012) was based at least in part upon collection costs, attorney's fees, and other fees that predated NYCB's Foreclosure Sale (May 9, 2011) and had been wiped out. Nine (9) months of regular monthly assessments applicable to the Subject Property from the time of the Notice of Lien totaled $1,519.29.

8. The undisputed facts demonstrate that Shadow Wood and/or its agents supplied several lien payoff figures to NYCB that differed significantly. Shadow Wood has conceded by Affidavit that it or its agents made at least one "mistake" in providing payoff figures which

overstated the amount of its lien. Shadow Wood's agent has further admitted that at least one of the payoff demands was not sent to NYCB, but was instead mistakenly sent to another employee of Shadow Wood's agent. Shadow Wood's other agent, MP Association Management, advised in writing less than two months before the HOA Trustee Sale that the monthly assessments on the Subject Property had been paid to the end of November, 2011, the next payment was due on December 1, 2011, and that the amount in delinquency relative to the Subject Property was only $328.94.

9. NYCB attempted in good faith to pay off the lien asserted by Shadow Wood and/or its agents, sending payment of $6,783.16 on January 31, 2012, after having received a ledger of past due amounts from Shadow Wood's agent on January 23, 2012, asserting an outstanding balance of $6,445.54. Shadow Wood and/or its agents rejected the payment and sent it back to NYCB. NYCB's efforts to pay off the lien asserted by Shadow Wood and/or its agents were frustrated by the unreasonable and oppressive actions of Shadow Wood and/or its agents.

10. Shadow Wood's agent, MP Association Management, provided documents that demonstrate that Shadow Wood ultimately received the sum of $3,442.39 from the HOA Trustee Sale, and wrote off $3,013.15 as a bad debt. NYCB's payment of $6,783.16 more than satisfied the nine (9) months of assessments ($1,519.29) on which Shadow Wood could have legitimately based a super-priority lien, and would have netted Shadow Wood more than it ultimately collected. The Court believes, based upon the papers and pleadings submitted, as well as oral argument at the hearing of this matter, that Shadow Wood and/or its agents were attempting to profit off of the subject HOA foreclosure by including exorbitant fees and costs that could not be used as the basis for an HOA foreclosure sale in this matter.

11. Defendant Gogo Way Trust was not a bona fide purchaser at the subject HOA foreclosure sale, and is not entitled to the protections of NRS 645F.440.

12. The HOA TDUS recorded by Shadow Wood and/or its agents is not conclusive proof that Shadow Wood "...satisfied all the foreclosure requirements," as Defendants contend.

/./.

/./.

III.

ORDER

Good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is GRANTED in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based upon the Court's equitable powers, the HOA Foreclosure Sale of February 22, 2012, to Gogo Way Trust was not legitimate and is set aside, and the HOA TDUS recorded on March 1, 2012, in favor of Gogo Way Trust is rescinded. NYCB is entitled to immediate possession of the Subject Property, and title is to be restored to NYCB immediately and shall be *ex post facto* to February 22, 2012.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Gogo Way Trust was not a bona fide purchaser at the March 1, 2012, HOA foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is to pay Shadow Wood the amount that it was rightly due for its super-priority lien under NRS 116.3116(2), based upon the Shadow Wood Notice of Lien, in the total amount of $1,519.29.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is DENIED in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the trial setting previously entered in this matter is vacated, and any pending Motions are denied as moot.

IT IS SO ORDERED this 9th day of April, 2013.

DISTRICT COURT JUDGE **Abbi Silver**

Respectfully Submitted by:

PITE DUNCAN, LLP

GREGG A. HUBLEY (NV Bar #007386)
Attorneys for Plaintiff/Counterdefendant NEW YORK COMMUNITY BANK

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DISTRICT COURT

CLARK COUNTY, NEVADA

FIRST 100, LLC,

Plaintiff,

v.

RONALD BURNS, et al.,

Defendants.

CASE NO.: A677693
DEPARTMENT NO. XX

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter having come on for hearing on the 8th day of May, 2013; Luis A. Ayon, Esq., and Margaret E. Schmidt, Esq., appearing for and on behalf of Plaintiff; Chelsea A. Crowton, Esq., appearing for and on behalf of Defendant, U.S. Bank; Karl L. Nielson, Esq., appearing for and on behalf of Defendant, Ronald Burns; Gregory L. Wilde, Esq., appearing for and on behalf of Defendant, National Default Servicing Corporation; and the Court having hearing arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion by Defendant U.S. Bank NA to dismiss the Complaint pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure ("NRCP").

(2) This dispute arises from foreclosure proceedings conducted against a residential property located at 3055 Key Largo Drive, Unit #101, Las Vegas, Nevada 89120, identified by APN 162-25-614-153 ("the Subject Property"). The Subject

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

Property is located within a common-interest community governed by a homeowners' association as defined in NRS Chapter 116, known as the Canyon Willows Owners Association (HOA). The prior owners of the property (who are not parties to this action) failed to pay all monthly assessments due under the operating documents of the common-interest community. In response, the HOA asserted a lien against the Subject Property and initiated foreclosure proceedings pursuant to NRS 116.3116 et seq. which culminated in a foreclosure sale conducted on February 2, 2013.

(3) The Plaintiff is First 100 LLC, a Nevada limited-liability corporation, which alleges that it acquired the Subject Property at the February 2, 2013 public auction. According to the allegations of the Complaint, the Plaintiff properly recorded a Deed on February 4, 2013 reflecting its purchase of the Subject Property. However, two days later, on February 6, 2013, the Subject Property was re-sold by way of foreclosure and Trustee's Sale initiated by Defendant National Default Servicing Corporation, who asserted that it was the named trustee under Deed of Trust previously recorded against the Subject Property on October 30, 2006, as Instrument No. 200610300002548 (and referred to in the pleadings as the "BNC Mortgage Deed of Trust"). Defendant Robert Burns purchased the Subject Property at the February 6, 2013 Trustee's Sale.

(4) The Plaintiff's Complaint asserts three causes of action: (First) Wrongful Foreclosure against Defendant National Default Servicing Corporation; (Second) Declaratory Relief/Quiet Title against all Defendants; and (Third) Injunctive Relief against Defendant Burns.

(5) As framed by the parties' briefing and oral arguments, the issue before the Court is a straightforward question of law. The Plaintiff contends that the February 2 foreclosure sale conducted pursuant to NRS 116.3116 et seq. and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguished, by operation of law, any and all prior encumbrances upon the Subject Property. Thus, according to the Plaintiff, the subsequent Trustee's Sale conducted on

February 6 was unlawful because the October 30, 2006 Deed of Trust against the Subject Property had been extinguished in its entirety by the February 2 foreclosure sale. Therefore, the Plaintiff alleges that it is the rightful and legal owner of the Subject Property via its purchase of the Subject Property on February 2 free and clear of all prior encumbrances.

(6) In considering a Motion to Dismiss pursuant to NRCP 12(b)(5), the Court must accept all factual allegations of the pleadings to be true and view those allegations both liberally and in the light most favorable to the non-moving party. However, the Court need not accept the parties' assertions of law as true. The Court's analysis is limited to the factual allegations contained within the four corners of the Complaint and all inferences reasonably arising therefrom. A claim can only be dismissed if it is clear beyond any reasonable doubt that the plaintiff cannot prove any set of facts at trial that would entitle it to relief. Furthermore, a complaint can be dismissed even if all of the elements of a cause of action have been technically pled so long as the Court, relying on "judicial experience and common sense," finds that the allegations of the complaint are "conclusory" or "implausible." *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009)[1].

(7) In this case, the parties do not appear to dispute that the February 2, 2013 foreclosure sale was properly conducted in accordance with all of the legal requirements of NRS Chapter 116. The parties also do not appear to dispute that the BNC Mortgage Deed of Trust was a perfected legal encumbrance upon the Subject Property properly recorded on October 30, 2006. The parties also do not appear to dispute that the lien asserted against the Subject Property by the HOA was proper and legal under the provisions of NRS Chapter 116. The parties also do not appear to dispute that, if the Plaintiff's interpretation of the legal consequences of NRS Chapter 116 is correct, the Plaintiff has properly pled the elements supporting its causes of

[1] *Ashcroft* was decided pursuant to FRCP 12(b)(6). However, where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this Court in applying the Nevada Rules. *E.g., Executive Management Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 53 (2002). NRCP 12(b)(5) is identical to FRCP 12(b)(6).

action.

(8) Therefore, the question before the Court is a straightforward question of statutory interpretation: whether a foreclosure sale properly initiated and conducted pursuant to NRS Chapter 116 automatically extinguishes all prior encumbrances on the property such that a bona fide purchaser at the foreclosure sale acquires the property free and clear of all prior encumbrances.

(9) In interpreting the scope and meaning of a statute, the Court looks first to the words of the statute. The words of a statute are assigned their ordinary meaning unless it is clear from the face of the statute that the Legislature intended otherwise. When "the language of a statute is plain and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Estate of Smith v. Mahoney's Silver Nugget*, 127 Nev. Adv. Op. 76 (November 23, 2011). If the Legislature has independently defined any word or phrase contained within a statute, the Court must apply the definition created by the Legislature. If, and only if, the Court determines that the words of the statute are ambiguous when given their ordinary and plain meaning, then reference may be made to other sources such as the legislative history of the statute in order to clarify the ambiguity. An "ambiguity" exists where a provision is susceptible to two reasonable interpretations.

(10) A threshold question in this case is whether the security interest represented by the BNC Mortgage Deed of Trust is senior or junior to the lien asserted by the HOA. NRS 116.3116 states in part as follows:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except...
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent....

> The lien is also prior to all security interests described in paragraph (b) to the extent of...the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(11) Thus, under NRS 116.3116, a previously perfected first security interest retains its seniority over a subsequent lien asserted by a homeowners' association *except* to the extent that the subsequent association lien is based upon unpaid regular periodic assessments for common expenses. In that event, notwithstanding that the association's lien was asserted subsequently in time, a portion of the homeowners' association lien (limited to what was unpaid during the nine months immediately preceding the lien) is given artificial priority over a previously perfected first security interest. The portion of the association lien equating to what was unpaid during those nine months is commonly said to have "super-priority" status over other prior encumbrances. If the association claims that more than nine months' assessments stand unpaid, then the amount unpaid during the nine months immediately preceding the lien is entitled to "super priority" status over other encumbrances, but any assessments remaining unpaid for more than nine months would be subordinate to other previously perfected encumbrances.

(12) The parties do not appear to dispute that the lien asserted by the HOA in this case was based upon regular periodic assessments that were unpaid during the nine

months immediately preceding the imposition of the lien. Therefore, as a matter of law, the lien asserted by the HOA is deemed to be senior to the security interest created by the BNC Mortgage Deed of Trust even though the HOA lien was asserted subsequently in time. The parties do not appear to dispute this legal conclusion.

(13) Thus, the parties appear to agree that the HOA lien was senior to the BNC Mortgage Deed of Trust at the instant in time immediately before the property was sold via foreclosure sale to the Plaintiff on February 2, 2013. However, what the parties vigorously dispute is whether the junior security interest (the BNC Mortgage Deed of Trust) was extinguished by operation of law as a result of the February 2 foreclosure sale.

(14) NRS 116.31162 states that, after a lien is asserted by a homeowner's association and certain procedures are followed, the association "may foreclose its lien by sale." If the association chooses to proceed with a non-judicial foreclosure sale, then NRS 116.31164 governs how the foreclosure sale is to occur. After the foreclosure sale is completed, NRS 116.31164 governs how the proceeds of the sale must be allocated. In particular, NRS 116.31164(3) states:

> 3. After the sale, the person conducting the sale shall....
> (c) Apply the proceeds of the sale for the following purposes in the following order:
> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
> (5) Remittance of any excess to the unit's owner.

(15) Thus, the plain language of NRS 116.31164 expressly contemplates that the proceeds must first used to pay the expenses of the sale, taxes and other governmental charges, legal expenses, and the association's lien, and then to satisfy

"subordinate claim[s] of record."

(16) In this case, the parties agree that the proceeds of the sale totaled only approximately $2,000.00, far less than what would have been required to pay off all of the liens and security interests that existed against the Subject Property prior to the foreclosure sale. Accordingly, the question before the Court can be phrased as follows: when the proceeds from a foreclosure sale conducted pursuant to NRS 116.31164 are inadequate to satisfy all of the various lienholders when distributed as required in NRS 116.31164(3), does the failure to satisfy the subordinate interests mean that those subordinate interests survive the foreclosure sale to the extent that they remain unsatisfied, or instead that those subordinate interests are extinguished by operation of law such that a bona fide third-party purchaser at the foreclosure sale takes the property free and clear of any unsatisfied subordinate encumbrances?

(17) The Plaintiff avers that the latter case is true. Consequently, the Plaintiff asserts that because all subordinate interests were extinguished on February 2 when it acquired the Subject Property, the subsequent foreclosure sale conducted on February 6 based upon an unpaid subordinate security interest was unlawful. On the other hand, the Defendant avers that the former must be true. Consequently, the Defendant avers that its subordinate security interest survived the February 2 sale because the interest remained unsatisfied from the proceeds of that sale, and accordingly it possessed the legal right to foreclose upon the Subject Property and trigger a second foreclosure sale in order to satisfy its subordinate interests. In effect, the Defendant argues that the Plaintiff, by purchasing the Subject Property for an amount insufficient to pay off all existing encumbrances, only acquired the property "subject to" those unsatisfied encumbrances.

(18) The Court has reviewed the entirety of NRS Chapter 116, and there appears to be no statutory provision that expressly states that an unsatisfied junior lien either is, or is not, extinguished by operation of law as a consequence of a foreclosure sale conducted pursuant to NRS 116.31164. In their briefs, the parties are also unable

to identify any particular provision expressly on point. Therefore, in analyzing the answer to this question, the Court must consider other sources, such as the legislative history of NRS 116.31164, and other similar statutes contained within the NRS.

(19) NRS Chapter 116 was originally introduced in 1991 as Assembly Bill 221, with the stated purpose of "adopt[ing] the Uniform Common-Interest Ownership Act," or UCIOA (Preamble of AB 221, introduced January 24, 1991; statement of introduction of AB 221, Minutes of the Assembly Committee on Judiciary, February 20, 1991). At the time, the UCIOA had already been adopted in several other states and was under consideration in at least 3 others. (Memorandum dated March 13, 1991 from Uniform Common Interest Ownership Act Subcommittee, in the legislative record as an exhibit to Minutes of the Assembly Committee on Judiciary, March 20, 1991). NRS 116.3116 originally corresponded to Section 100 of AB 221, and NRS 116.31164 originally corresponded to Section 102 of AB 221. The "super priority" lien verbiage included within Section 100 of AB 221 is identical to NRS 116.3116 as it exists today, except that the original "super priority" lien was limited to assessments unpaid during the six months (rather than 9 months) immediately preceding the lien. The time period was expanded to nine months in 2009 by Assembly Bill 204.

(20) NRS 116.3116 was subjected to various technical amendments in 1993 through AB 612 (which did not affect the "super priority" language at issue here). During testimony in support of the technical amendments, one of the drafters of the original bill testified that:

> "As a general proposition, it makes good sense to follow a uniform law as closely as possible, utilizing the optional suggestions in the uniform act to customize the law as necessary. The corresponding benefit -- especially important in a small state like Nevada -- is our own version of a uniform law with precedent in other uniform law jurisdictions. Maintaining the uniform law also makes available the very helpful explanatory comments, some of which contain illustrative examples, and all of which, like the act itself, represent not only very careful draftsmanship, but the input of all of the different groups involved in the homeowner association process; that is, developers, consumers, lenders, local governmental authorities, state regulators, managers and other

professionals, as well as homeowners associations themselves." (Testimony of Michael Buckley, Chairman of the Uniform Common-Interest Ownership Act Subcommittee, before the Assembly Judiciary Committee on May 20, 1993).

(21) Thus, one of the principal drafters of the bill expressly urged that the Nevada Legislature adhere as closely as practicable to the uniform version of the UCIOA, and the Nevada Legislature did so by enacting the "super priority" language originally included in the UCIOA into NRS 116.3116 without any amendment (and with virtually no debate). Consequently, the legislative history surrounding AB 221 contains virtually nothing useful to the Court's analysis in the case at hand. However, the Legislature apparently contemplated that adoption of the uniform language without amendment would enable Nevada courts to look to "precedent in other uniform law jurisdictions" as well as the background and explanatory comments accompanying the UCIOA in resolving questions relating to the scope and meaning of NRS 116.3116.

(22) Indeed, the Nevada Supreme Court regularly looks outside the confines of NRS Chapter 116 and to the Uniform Act (as well as other sources) in interpreting various provisions of NRS Chapter 116. *E.g., Holcomb Condominium HOA v. Stewart Venture LLC*, 129 Nev. Adv. Op. 18 (April 4, 2013) ("the term 'separate instrument' is not defined in NRS Chapter 116 or the Uniform Common-Interest Ownership Act (UCIOA)"); *Beazer Homes Holding Corp. v. District Court*, 128 Nev. Adv. Op. 66 (Dec. 27, 2012) (citing "the commentary to the Restatement (Third) of Property, section 6.11, which mirrors section 3–102 of the Uniform Common Interest Ownership Act, upon which NRS 116.3102 is based"); *Boulder Oaks Community Association v. B&J Andrews*, 169 P.3d 1155 (2007) (unpublished) ("NRS Chapter 116 is Nevada's version of the Uniform Common-Interest Ownership Act and largely mirrors the uniform act [and citing to] the commentary to [the UCIOA]").

(23) NRS 116.3116 is modeled upon Section 3-116 of the 1982 version of the UCIOA, which was originally drafted by the National Conference of Commissioners on Uniform State Laws. NRS 116.3116 deviates from Section 3-116 in expanding the period of "super priority" to include unpaid assessments occurring during the preceding

9 months instead of merely 6 months, but otherwise NRS 116.3116 is identical to UCIOA Section 3-116.

(24) Official Comment 1 to Section 3-116 describes the purpose of the section as follows:

> "To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. ... A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity of protecting the priority of the security interests of lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provision of some state statutes which forbid some lending institutions from making loans not secured by first priority liens [state law should be consulted]."

(25) Thus, the drafters of the UCIOA expressly contemplated that, as a practical matter in most cases, the holder of the first security interest would seek to protect its interest from subordination to a "super priority" lien by simply paying the unpaid assessments. However, the Comment does not expressly specify whether, if a lender chooses not to do so and instead permits the property to proceed to foreclosure, the lender's first security interest is thereby extinguished. Furthermore, nothing else in either the plain text or comments of UCIOA appear to relate specifically to the question of whether a foreclosure sale initiated due to unpaid assessments extinguishes all other junior liens, including a first security interest rendered junior because of the "super priority" provision. Quite to the contrary, Comment 1 suggests that the drafters of the UCIOA intended to leave this question to state law rather than establishing uniform national standards.

(26) In Opposition to the Motion, the Plaintiff notes that, as a general principle of Nevada law, foreclosure of a superior security interest extinguishes all junior interests that did not participate in the foreclosure process. *E.g., Brunzell v.*

Lawyers Title Ins. Co., 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). The Plaintiff also notes that the Nevada Department of Business and Industry has issued an administrative opinion, dated December 12, 2012, that interprets NRS Chapter 116.3116 such that a foreclosure based upon a "super priority" lien extinguished a first security interest made junior only due to the "super priority" statute. The Plaintiff also cites to an opinion by a Washington State appellate court (interpreting a statute identical to the UCIOA) finding that a foreclosure based upon a "super priority" lien extinguished a first security interest that was given notice of the pending foreclosure and yet chose not to participate. *Summerhill Village HOA v. Roughly*, 270 P.2d 639 (Wash.Ct.App. 2012). The Plaintiff also notes that some Judges of this Judicial District have resolved this question in favor of the Plaintiff's argument. The Court also notes that at least one scholarly commentator has opined that a non-judicial foreclosure sale under the UCIOA extinguishes all junior liens that did not participate in the foreclosure process as "necessary parties." *See*, Winokur, "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under The UCIOA," 27 Wake Forest Law Review 353, 378 n.106 (1992) ("foreclosure extinguish[es] the Less-Prioritized Lien").

(27) In support of its Motion, the Defendant cites to an opinion issued by Judge Dawson of the U.S. District Court, *Diakonos Holdings LLC v. Countrywide Home Loans*, 2013 WL 531092 (D.Nev. February 11, 2013), rejecting the reasoning of the Washington court in *Summerhill*. The Defendant also cites to various unpublished, non-precedential Orders issued by other Judges of this Judicial District that have found that a foreclosure sale based upon a "super priority" lien does not extinguish a first security interest upon the property. (*See*, Defendant's Motion, pages 11-14).

(28) In short, the situation before this Court appears to be as follows. By this Motion, this Court is asked to interpret the scope and meaning of a statute that was enacted by the Nevada Legislature after virtually no meaningful debate, that was modeled on a broad uniform act that specifically left unanswered the question raised by

this Motion, whose legislative sponsor urged the Legislature not to deviate from the text of the uniform act so that the courts of this State could rely upon precedent from other states, and upon which the courts of different states, and the Judges of this Judicial District, have taken different positions.

(29) In the absence of clear guidance from the text of the statute or its legislative history, this Court is left to examine other sources for guidance. One such source consists of other statutes that relate to matters similar to those addressed by NRS 116.3116.

(30) In Nevada, holders of security interests against real property may initiate foreclosure through multiple statutory avenues. For example, the holder of a mortgage may initiate a judicial foreclosure via NRS 40.430 et seq. The holder of a deed of trust may also initiate a non-judicial foreclosure (commonly known as a "Trustee's Sale") pursuant to NRS 107.080 et seq. A landlord (or other assignee of the right to receive rent from real property) may also seek the appointment of a receiver to initiate a foreclosure upon a security instrument pursuant to NRS 107A.260.

(31) It is well-settled that any foreclosure sale conducted pursuant to NRS 40.462, 107.080, or 107A.260 automatically extinguishes all junior security interests against the property. *E.g.*, *Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Thus, the Defendant is essentially arguing that a foreclosure conducted pursuant to NRS 116.3116 is something wholly unique under Nevada law, because it would represent the only type of foreclosure permitted in Nevada under which junior liens would not be automatically extinguished.

(32) However, if the Defendant is correct that foreclosures conducted pursuant to NRS 116.3116 are unique under Nevada law, then there must exist something in the text or legislative history of NRS 116.3116 that says so. Under settled rules of statutory interpretation, the Court cannot read NRS 116.3116 as a unique, unprecedented, and *sui generis* departure from long-established norms relating to

foreclosure sales in Nevada unless there is some indication in the text or legislative history that the Legislature intended this to be the case. There is not. Quite to the contrary, the complete absence of anything within NRS Chapter 116 regarding the question of extinguishment suggests that the Legislature intended that Chapter 116 foreclosures would be handled as any other type of foreclosure.

(33) Notably, NRS 40.462 was enacted in 1989, and NRS 107.080 was originally enacted in 1927. In other words, both NRS 40.462 and 107.080 pre-date the enactment of NRS 116.3116, as does the opinion of the Nevada Supreme Court in *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). Thus, the Legislature must be presumed to have known when NRS 116.3116 was enacted that the normal consequence of a foreclosure sale in Nevada would be that all junior liens are automatically extinguished. Had the Legislature intended that NRS 116.3116 represent a singular departure from established legal norms, the Legislature certainly could have included language to that effect. The Court notes that the Legislature utilizes a variety of common phrases throughout the NRS when it intends to create exceptions to other statutes; *see, for example*, NRS 78.090(1) ("Notwithstanding the provisions of NRS 77.300..."); NRS 62B.390(1) ("Except as otherwise provided in NRS 62B.400..."); NRS 62E.010(2) ("Except as otherwise provided by specific statute...."); NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter..."); NRS 48.025 ("All relevant evidence is admissible, except as otherwise provided by this title..."); NRS 51.075(2) ("The provisions of NRS 51.085 to 51.305, inclusive, are...not restrictive of the exception provided by this section"). Yet none of these phrases are contained anywhere within NRS Chapter 116 in any context that suggests an intention to depart from the ordinary rule that, in Nevada, foreclosure sales extinguish junior liens. The absence of any language to this effect suggests that this was not the intention of the Legislature.

(34) Moreover, NRS 116.3116 et seq. contains a series of specific departures and deviations from the foreclosure proceedings established in NRS 40.462 and 107.080, but none that relate to the extinguishment or non-extinguishment of junior liens. For example, the idea of "super priority" exists nowhere in NRS Chapter 40 or 107. Similarly, neither NRS 40.462 nor 107.080 include the kinds of specific notice provisions required by NRS Chapter 116 before a foreclosure sale can be initiated. Yet the Legislature included no language in NRS 116.3116 that can be read as departing from the principle of extinguishment. It is well-settled that the inclusion of one thing must be read as the implying the omission of another (*"expressio unius est exclusio alterius"*). Thus, when the Legislature chose to include language designed to deviate in certain specific ways from established foreclosure practices, but not language that changes whether junior liens are extinguished, that choice must be deemed by this Court to have been intentional and deliberate.

(35) Furthermore, not only did the Legislature include no language departing from the principle of extinguishment under NRS Chapter 40 and 107, it included language in NRS Chapter 116 highly similar to language contained in NRS Chapter 107 that expressly recites that junior liens are extinguished. NRS 107.080(5) recites that a Trustee's Sale "vests in the purchaser the title of the grantor...without equity or right of redemption." NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption." This similarity suggests that the Legislature intended that a purchaser at a NRS Chapter 116 foreclosure sale acquires exactly the same title as he would have acquired had the foreclosure been a NRS Chapter 107 Trustee's Sale, i.e., title free and clear of junior encumbrances. Moreover, the words "without equity or right of redemption" were defined long ago by the Nevada Supreme Court, which held that a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all

equity of redemption as completely as a decree of court." *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003).

(36) Thus, the operation of NRS 116.3116 appears to be as follows. NRS 116.316 creates a series of specific and unique requirements when an HOA imposes a lien against a property and wishes to initiate a foreclosure sale to satisfy unpaid assessments. Where NRC Chapter 116 is silent, the Court must presume that the Legislature intended that the ordinary and established principles governing the conduct of foreclosure sales in Nevada apply to "fill in the gaps."

(37) Accordingly, when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages. NRS 116.3116(2). However, in order to perfect this "super priority" lien, the association must give proper notice to all parties including any holders of first security interests whose priority will have been adversely affected. NRS 116.31163(2). Furthermore, if the association wishes to foreclose upon the property in order to satisfy its lien, it may do so, but only after given specific notice to all subordinate lienholders of record. NRS 116.311635(1)(a)(2). As expressly contemplated by Comment 1 to UCIOA Section 3-116, most subordinate lienholders would likely protect their interest from extinguishment by simply paying off the unpaid assessments. Indeed, that appears to be the specific purpose of requiring that those lienholders be given notice under NRS 116.31163(2) and NRS 116.311635(1)(a)(2). But if those subordinate lienholders fail to stave off foreclosure by paying off the assessment, then their subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). After the sale is completed, any subordinate claims are automatically extinguished by operation of law. *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973) (holding that non-judicial foreclosure sales automatically extinguish junior liens). If the lender's mortgage remains unsatisfied after the foreclosure sale, it may be

able to pursue a deficiency action against the mortgagor of record (the original defaulting party), but not any claim against the property itself or against new bona fide third-party who purchased the property at the foreclosure sale.

(38) In their briefs, both parties advance various policy and "fairness" arguments in support of their respective positions. For example, the Defendant argues that permitting a bona-fide third-party purchaser to procure a property for a mere $2,000 while extinguishing a mortgage worth many times that amount is "unfair". However, any junior lienholder has a simple remedy for this unfairness -- as expressly contemplated by Comment 1 to UCIOA Section 3-116, a lender can avoid foreclosure and protect its interest from extinguishment by simply intervening to pay off the assessments.

(39) Moreover, the Court notes that the Defendant's argument would lead to an equally "unfair" result. In this case, if the Defendant's argument were adopted, then the net result would be that the Plaintiff will have paid $2,000 to satisfy the association's lien, yet does not own the Subject Property. In effect, the Plaintiff paid off the lien asserted by the HOA and acquired nothing in return, because immediately after it acquired the Subject Property, the property was taken by the Defendant and sold to someone else for more money. This result appears fundamentally unfair to bona fide third-party purchasers who will have paid off the assessments that the lender failed to pay despite having been given specific notice of the existence of the unpaid assessments, and despite the obvious intent of the drafters of the UCIOA that, in most cases, the lender would protect its own interest by paying off the assessments. This result would achieve the perverse outcome of actually rewarding sloth and inaction on the part of the lender, who, as expressly recognized by Comment 1 to UCIOA Section 3-116, is the one party (other than the defaulting owner) in a position to stop the foreclosure, protect its own interests, and make the association whole by paying the assessments. Instead, the Defendant's interpretation of NRS 116.3116 would result in the association and the lender being made whole at the expense of bona fide third-party

purchasers, a result that is quite obviously absurd.

(40) The Defendant appears to suggest this outcome, however unfair, is the natural consequence of the fact that the Plaintiff attempted to purchase the Subject Property for less than the cumulative total of all existing encumbrances upon the Subject Property, and "buyer beware" because, had the Plaintiff properly done its homework, it should have known that it might stand to lose the Subject Property unless it purchased the Subject Property for an amount sufficient to pay off all existing liens.

(41) But, as noted, the party best-positioned to protect its interests (and incidentally to protect any innocent third parties) is the lender whose interests are directly at stake. It is a well-recognized principle of Nevada law that when both potential interpretations of a statute or rule are unfair to someone, the brunt of any unfairness should not fall on innocent third parties. *E.g., NC-DSH Inc. v. Garner*, 125 Nev. 647. 656 (2009) (in choosing who should suffer from the fraudulent actions of an agent, "ordinarily. the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt"); *Rothman v. Fillette*, 469 A.2d 543, 545 (Pa. 1983) (cited approvingly in *NC-DSH Inc. v. Garner*, 125 Nev. 647, 656 (2009)) ("a principal acting through an agent in dealing with an innocent third party must bear the consequences of the agent's fraud" because of "the long recognized principle that where one of two innocent persons must suffer because of the fraud of a third...the loss should be borne by him who put the wrongdoer in a position of trust and confidence and thus enabled him to perpetrate the wrong"). *See also, Tri-County Equipment & Leasing v. Klinke*, 128 Nev. Adv. Op. 33 (June 28, 2012) (Gibbons, J., concurring) (when one party is likely to receive a windfall, it should be the party who lacks any responsibility for the situation) (relevant citations omitted). In this case, it is true that the lender cannot be said to bear responsibility for the non-payment of assessments by the record owner. However, the lender is in a far better position to protect its interests, make the association whole, and eliminate the need for foreclosure than a third-party purchaser at the foreclosure sale with no connection to the lender, the

HOA, or the previous owner. Yet, accepting the Defendant's argument in this case would result in the Plaintiff being the only party who suffers any monetary loss from the non-payment of assessments, as both the HOA and the Defendant have been made whole. That result is fundamentally unfair and could not have been what the Legislature intended.

(42) In a sense, this outcome can be seen as unfair to the lender whose interest in this case was extinguished by the purchase of the Subject Property for a mere $2,000. However, Comment 1 to UCIOA Section 3-116 proposes two simple solutions. First, the lender (having been given specific notice of the association's "super priority" lien) can protect its interest by paying the unpaid assessments before foreclosure is initiated by the association, thereby removing the "super priority" lien and ensuring that its security interest is the most senior one remaining. Alternatively, and more proactively, as noted by Comment 1 the lender can ensure that there can never be a default or a "super priority" lien by simply impounding money in advance and paying the assessments itself, much as lenders now commonly impound money to pay tax bills in order to prevent tax liens and government tax foreclosures. In either case, the association will have been made whole, thus accomplishing the fundamental purpose of NRS 116.3116, and the lender can seek to satisfy its own security by initiating its own foreclosure at which its security interest would be the most senior encumbrance.

(43) In general, however, questions regarding the fairness of any public policy are for the Legislature to resolve, not for the Judiciary. The Legislature is entitled to enact legislation that may, in some instances, be unfair to some parties. But the Judiciary cannot substitute its own judgment for that of the Legislature and read a statute in a manner other than as it is drafted merely because the application of the statute might seem unwise. In this case, the disposition of this Motion is based upon the application of clear principles of statutory interpretation. In the complete absence of any language in NRS Chapter 116 reflecting a Legislative intent to depart from the

established principle that subordinate liens are extinguished by foreclosure sales, the Court must assume that the Legislature intended that Chapter 116 foreclosures operate precisely in the same manner.

(44) For the foregoing reasons, the Defendant's Motion to Dismiss is DENIED.

DATED: May 30, 2013

JEROME T. TAO
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

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Paula Walsh, Executive Assistant

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

BROADCAST REPORT

TIME : 05/30/2013 16:09
NAME : DEPT 20
FAX : 7026714439
TEL : 7026714440
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DATE	TIME	FAX NO./NAME	DURATION	PAGE(S)	RESULT	COMMENT
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05/30	15:50	6928099	03:49	20	OK	ECM
05/30	15:54	2588787	11:01	20	OK	
05/30	16:05	9461345	03:22	20	OK	ECM

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CV : COVERPAGE
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DISTRICT COURT

CLARK COUNTY, NEVADA

METROPLEX REALTY, LLC., Plaintiff, vs. BLACK HAWK HOMEOWNERS ASSOCIATION, SHADOW WOOD HOMEOWNERS' ASSOCIATION, INC, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Defendants.	Department No: 18 Case No: A-12-663304-C **ORDER** Date of Hearing: May 7, 2013 Time of Hearing: 8:15 a.m.

This matter came before the Court on May 7, 2013, at 8:15 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Ryan Kerbow, Esq., of Alessi & Koenig appeared on behalf of the Defendants. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

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WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Plaintiff has asserted a claim of right under NRS §116.3116(2) (the "Super Priority Lien" statute) against Defendants and Defendants have an interest in contesting said claim, the present controversy is between persons or entities whose interests are adverse, both parties have a legal interest in the controversy (i.e., a legally protectible interest), and the issue involved in the controversy (the meaning of NRS 116.3116(2)) is ripe for judicial determination as between the parties. *Kress v. Corey 65 Nev. 1, 189 P.2d 352 (1948);* and

WHEREAS Plaintiff and Defendants, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116(2) (including whether Defendant demanded from Plaintiff amounts in excess of that which is permitted under the NRS §116.3116(2)); and

WHEREAS Plaintiff has a legal interest in the controversy as it was Plaintiff's money which had been demanded by Defendants and it was Plaintiff's property that had been the subject of a homeowners' association statutory lien by Defendants; and

WHEREAS the issue of the meaning, application and interpretation of NRS §116.3116(2) is ripe for determination in this case as the present controversy is real, it exists now, and it affects the parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS §116.3116(2) would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

WHEREAS, pursuant to NRS §30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by NRS §116.3116(2) and they may, therefore, have determined by this Court any question of construction or validity arising under NRS §116.3116(2) and obtain a declaration of rights, status or other legal relations thereunder; and

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THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. Plaintiff's Motion for Summary Judgment on Declaratory Relief is granted in part.

2. NRS §116.3116 is a statute which creates for the benefit of Nevada homeowners' associations a general statutory lien against a homeowner's unit for (a) any construction penalty that is imposed against the unit's owner pursuant to NRS §116.310305, (b) any assessment levied against that unit, and (c) any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due (the "General Statutory Lien"). The homeowners' associations' General Statutory Lien is noticed and perfected by the recording of the associations' declaration and, pursuant to NRS §116.3116(4), no further recordation of any claim of lien for assessment is required.

3. Pursuant to NRS §116.3116(2), the homeowners' association's General Statutory Lien is junior to a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent ("First Security Interest") except for a portion of the homeowners' association's General Statutory Lien which survives extinguishment by the foreclosure of the First Security Interest (the "Super Priority Lien").

4. However, the Super Priority Lien amount is not without limits and NRS §116.3116(2) is clear that the amount of the Super Priority Lien is limited "to the extent" of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action to enforce its General Statutory Lien (which is 9 months of regular, common assessments) and "to the extent of" external repair costs pursuant to NRS §116.310312.

5. The base assessment figure used in the calculation of the Super Priority Lien is the unit's un-accelerated, monthly assessment figure for association common expenses which is wholly determined by the homeowners association's "periodic budget," as adopted by the association, and not determined by any other document or statute. Thus, the phrase

contained in NRS §116.3116(2) which states, "... to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien..." means a maximum figure equaling 9 months of the association's regular, common expense assessments. If assessments are paid quarterly, then 3 quarters of assessments (i.e., 9 months) would equal the Super Priority Lien, plus external repair costs pursuant to NRS §116.310312.

6. The words "to the extent of" contained in NRS §116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

7. Further, if regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien (i.e., shorter than 9 months of regular, common expense assessments,) the shorter period shall be used in the calculation of the Super Priority Lien, except that notwithstanding the provisions of the regulations, that shorter period used in the calculation of the Super Priority Lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

8. At this time, the Court declines to rule on that part of Plaintiff's Motion that requests a determination specifying what, if any, amounts demanded by Defendants exceeded the limitations imposed by NRS 116.3116(2).

IT IS SO ORDERED.

MAY 2 9 2013

DISTRICT COURT JUDGE Date

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS MOTOR COACH OWNERS ASSOCIATION, INC., a Nevada Corporation, Plaintiff, vs. AMERICAN UNDERWRITERS LIFE INSURANCE COMPANY, DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-12-664235-C Dept. No.: VIII DATE: March 12, 2013 Time: 9:00 a.m.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on March 12, 2013, before the Honorable Douglas Smith, on plaintiff's, Las Vegas Motor Coach Owners Association, Inc. ("HOA" or "Plaintiff"), motion for summary judgment. The defendant, American Underwriters Life Insurance Company ("American") having filed an opposition thereto, and the HOA having filed its reply points and authorities. At the March 12, 2013, hearing, the HOA was represented by its attorneys of record, Brent A. Larsen, Esq. and Shana S. Gullickson, Esq., and American was represented by its attorney, Frank A. Ellis III, Esq. of Ellis & Gordon.

At the hearing, the parties, by and through their respective counsel, agreed that the court should consider this matter as cross-motions for summary judgment. The court,

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having reviewed the pleadings and papers on file herein, having reviewed the applicable legal authority, having heard the oral arguments of counsel, and having been fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

I. **FINDINGS OF FACTS.**

1. The plaintiff is a homeowners' association ("HOA") formed under Chapter 116 of the Nevada Revised Statutes, that consists of and represents the individual lot owners of the Las Vegas Motor Coach Resort common-interest community.

2. The defendant American is a life insurance company that is the beneficiary under two deeds of trust recorded on two lots within the common-interest community. American received those deeds of trust from the owners of the property, Randolph Peterson and Teri Peterson (collectively the "Petersons"), one which was recorded against Lot 37 on January 11, 2008, and one which was recorded against Lot 38 on November 16, 2007. (*A true and correct copy of the recorded trust deed on Lot 37 is attached to American's opposition as exhibit A, and a true and correct copy of the recorded trust deed on Lot 38 is attached to the opposition as exhibit B.*)

3. The trust deed on Lot 37 was recorded to secure a loan made by American to the Petersons on January 11, 2008, in the amount of $111,930.00, and the trust deed on Lot 38 was recorded to secure a loan made by American to the Petersons on November 16, 2007, also in the amount of $111,930.00.

4. The plaintiff recorded a Lien for Delinquent Assessments on Lot 37 on or about February 25, 2010, in the amount of $1,335.80 ("Lot 37 Lien"). The Lot 37 Lien includes language in relevant part as follows: "*This amount also includes assessments, late fees, interest, fines/violations and collection fees and costs.*" The Lot 37 Lien was not mailed or served on American in any manner. (*A true and correct copy of the Lot 37 Lien is attached to the opposition as exhibit C.*)

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5. The plaintiff recorded a Lien for Delinquent Assessments on Lot 38 on or about January 14, 2010, in the amount of $1,889.92 ("Lot 38 Lien"). The Lot 38 Lien includes language as follows: "*This amount also includes assessments, late fees, interest, fines/violations and collection fees and costs.*" The Lot 38 Lien was not mailed or served on American in any manner. (*A true and correct copy of the Lot 38 Lien is attached to the opposition as exhibit D.*)

6. The HOA assessments during the 9 months preceding the recording of the Lot 37 Lien and the Lot 38 lien were $308.00 per month, per lot.

7. A Notice of Breach and Election to Sell Pursuant to the Lien for Delinquent Assessments was recorded against Lot 37 on September 9, 2011. The notice includes language in relevant part as follows: "*As of 05/30/09 forward, all assessments, whether monthly or otherwise, late fees, interest, Association charges, legal fees and collection fees and costs, less any credits, have gone unpaid. As of August 31, 2011, the amount owed is $16,926.54. This amount will continue to increase until paid in full.*" (*A true and correct copy of the Notice of Breach and Election to Sell Pursuant to the Lien for Delinquent Assessments on Lot 37 is attached to the opposition as exhibit E.*)

8. A Notice of Breach and Election to Sell Pursuant to the Lien for Delinquent Assessments was recorded against Lot 38 on September 1, 2011. The notice includes language in relevant part as follows: "*As of 05/30/09 forward, all assessments, whether monthly or otherwise, late fees, interest, Association charges, legal fees and collection fees and costs, less any credits, have gone unpaid. As of August 29, 2011, the amount owed is $5,784.03. This amount will continue to increase until paid in full.*" (*A true and correct copy of the Notice of Breach and Election to Sell Pursuant to the Lien for Delinquent Assessments on Lot 38 is attached to the opposition as exhibit F.*)

9. Copies of exhibits E and F were mailed, via certified mail, to American on or about September 14, 2011 and September 8, 2011, respectively. This was the first notice that American received concerning delinquent association fees. The stated amounts claimed in each notice were in the amounts of $16,926.54 for Lot 37, and $5,784.03, for Lot 38.

10. A Notice of Foreclosure Sale was recorded on January 31, 2012, against Lot 37. The notice includes language in relevant part as follows: "*...will sell at public auction to the highest bidder, for cash payable at the time of sale in lawful money of the United Sales (sic), by cash, a cashier's check drawn by a state or national bank, a cashier's check drawn by a state or federal credit union, state or federal savings and loan association or savings association authorized to do business in the State of Nevada, in the amount of $24,607.66 as of 1/26/2012.*" (*A true and correct copy of the Notice of Foreclosure Sale on Lot 37 is attached to the opposition as exhibit G.*)

11. A Notice of Foreclosure Sale was recorded on January 31, 2012, against Lot 38. The notice includes language in relevant part as follows: "*...will sell at public auction to the highest bidder, for cash payable at the time of sale in lawful money of the United Sales (sic), by cash, a cashier's check drawn by a state or national bank, a cashier's check drawn by a state or federal credit union, state or federal savings and loan association or savings association authorized to do business in the State of Nevada, in the amount of $26,175.56 as of 1/26/2012.*" (*A true and correct copy of the Notice of Foreclosure Sale on Lot 38 is attached to the opposition as exhibit H.*)

12. Copies of exhibits G and H were mailed, via certified mail, to American on or about February 6, 2012. These notices claim that the amounts of $24,607.66 for Lot 37, and $26,175.56, for Lot 38, would need to be paid.

13. The purported foreclosure sales for both Lot 37 and Lot 38 were conducted on February 24, 2012. The opening credit bid for Lot 37 by the plaintiff was in the amount

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of $25,447.70, and the opening credit bid for Lot 38 by the plaintiff was in the amount of $25,504.01. (*A true and correct copy of an email from the plaintiff's management company, Red Rock Financial Services, clearly setting forth the opening bids, is attached to the opposition as exhibit I.*)

14. The foreclosure deed on Lot 37, attached to the plaintiff's moving papers as Exhibit 1, evidences the fact that plaintiff's opening credit bid of $25,504.01 was the only bid on Lot 37. The foreclosure deed on Lot 38, attached to the plaintiff's moving papers as Exhibit 2, evidences the fact that plaintiff's opening credit bid of $25,447.70 was the only bid on Lot 38.

15. The amount of the liens claimed by the association during this foreclosure process increased significantly and quickly as follows:

	Lot 37:	Lot 38
Liens recorded:	February 25, 2010-$1,335.80	January 14, 2010-$1,889.92
Notice of Breach:	September 9, 2011-$16,926.54	September 1, 2011-$5,784.03
Notice of Sale:	January 31, 2012-$24,607.66	January 31, 2012-$26,175.56

16. That the amount of a super priority lien, if any, on Lot 37 and Lot 38 could have been no more than the assessments for common expenses, pursuant to a budget regularly adopted by the HOA ($308.00 per month, per lot), which would have become due during the 9 months immediately preceding institution of an action to enforce the lien on each lot.

17. Therefore, the opening credit bid on the foreclosure of a super priority lien (had the HOA actually been foreclosing on a super priority lien) would have been $2,722.00 on Lot 37, and $2,722.00 on Lot 38.

18. Any of the foregoing findings that are more properly conclusions of law, shall be so considered.

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II. **CONCLUSIONS OF LAW**

1. Under Nevada law, summary judgment is proper where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and that no genuine issue remains for trial. See, *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 378 P.2d 979 (1963); *Olson v. Iacometti*, 91 Nev. 241, 533 P.2d 1360 (1975); *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 566 P.2d 819 (1977); *Intermountain Veterinary Medical Ass'n v. Kiesling-Hess Finishing Co.*, 101 Nev. 107, 706 P.2d 137 (1985); *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 706 P.2d 845 (1985); *Palevac v. Mid Century Non Auto*, 101 Nev. 835, 710 P.2d 1389 (1985).

2. The facts in this matter are not in dispute, and no genuine issue remains for trial.

3. American is entitled to judgment as a matter of law, as more particularly set forth herein.

4. NRS 116.3116 governs home owners association super priority liens and provides in relevant part, concerning this super priority status, as follows:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the *assessments for common expenses* based on the period budget adopted by the association pursuant to NRS 116. 3115 which would have become due in the absence of acceleration *during the 9 months immediately preceding institution of an action to enforce the lien...*

5. Nothing in any of the notices sent to American by the HOA gave any indication that the proposed foreclosure sales on Lot 37 and Lot 38 were on the HOA's alleged super priority lien.

6. None of the notices sent to American by the HOA makes any reference to the super priority lien.

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7. The first indication to American that there even were delinquent association fees due, or that the plaintiff was going to foreclose on those delinquent fees, was when it received exhibits E and F, the notices of breach and election to sell.

8. These notices, Exhibits E and F, make no specific mention of a purported super priority lien, and the amounts listed in each notice ($16,926.54 for Lot 37 and $5,784.03 for Lot 38) would have provided no notice, or given any indication, to American that the HOA was foreclosing on a super priority lien (which can only be made up of 9 months of the regular monthly association fees).

9. The HOA never mailed, and American never received, any notice of the filing of, or the contents of, exhibits C and D, the liens for delinquent assessments.

10. Only assessments for common expenses based on the period budget adopted by the association pursuant to NRS 116.3115, which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, can be included in a super priority lien, and in any foreclosure of a super priority lien.

11. The Lot 37 Lien and the Lot 38 Lien, exhibits C & D, violate this restriction. Each contains the same language that states: "*This amount also includes assessments, late fees, interest, fines/violations and collection fees and costs.*"

12. There are other non-permitted charges included in the Lot 37 Lien and Lot 38 Lien. Attached to the opposition as exhibits K and L, respectively, are the HOA's transaction reports (charges and payments) for Lot 37 and Lot 38. At the time exhibit C (the Lot 37 Lien) was recorded on the property (February 25, 2010), the HOA's transaction report (exhibit K) shows only $831.00 dollars outstanding (and that includes late fees which are not permitted to part of the lien), yet the recorded lien indicates that $1,335.80 is past due.

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Further, at the time exhibit D (the Lot 38 Lien) was recorded on the property (January 14, 2010), the HOA's transaction report (exhibit L) shows only $1,287.82 outstanding (and that includes late fees which are not permitted to part of the lien), yet the recorded lien indicates that $1,889.92 is past due.

13. Since the Lot 37 Lien and the Lot 38 Lien are flawed, then the foreclosure on each is flawed.

14. American was never provided with notice of the delinquent assessments on Lot 37 or Lot 38. Further, no notice of the Lot 37 Lien or the Lot 38 Lien was ever provided to American.

15. Exhibits E & F attached to the opposition, the notices of breach and election to sell, were the first actual notice of any kind to American disclosing that anything was delinquent on these lots.

16. Exhibit E contains the following language: "*As of 05/30/09 forward, all assessments, whether monthly or otherwise, late fees, interest, Association charges, legal fees and collection fees and costs, less any credits, have gone unpaid. As of August 31, 2011, the amount owed is $16,926.54. This amount will continue to increase until paid in full.*"

17. Exhibit F contains the following language: "*As of 05/30/09 forward, all assessments, whether monthly or otherwise, late fees, interest, Association charges, legal fees and collection fees and costs, less any credits, have gone unpaid. As of August 29, 2011, the amount owed is $5,784.03. This amount will continue to increase until paid in full.*"

18. Nowhere in Exhibit E or Exhibit F is American put on notice that a super priority lien is being foreclosed, or is it told the amount necessary to payoff the alleged super

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priority liens. 19. At no time during this entire process was American put on notice of a super priority lien, or the amount necessary to pay the same.

20. The next event in this flawed foreclosure process is when the HOA sent the notices of foreclosure sale, exhibits G & H attached to the opposition. These notices provided no information to American that the HOA was foreclosing on super priority liens, nor did either notice disclose to American the amounts allegedly required to pay off the super priority liens.

21. The notice for Lot 37, exhibit G, includes language in relevant part as follows: "*...will sell at public auction to the highest bidder, for cash payable at the time of sale in lawful money of the United Sales (sic), by cash, a cashier's check drawn by a state or national bank, a cashier's check drawn by a state or federal credit union, state or federal savings and loan association or savings association authorized to do business in the State of Nevada, in the amount of $24,607.66 as of 1/26/2012.*"

22. The notice for Lot 38, exhibit H, includes language in relevant part as follows: "*...will sell at public auction to the highest bidder, for cash payable at the time of sale in lawful money of the United Sales (sic), by cash, a cashier's check drawn by a state or national bank, a cashier's check drawn by a state or federal credit union, state or federal savings and loan association or savings association authorized to do business in the State of Nevada, in the amount of $26,175.56 as of 1/26/2012.*"

23. Nowhere in exhibit G or exhibit H is American advised that a super priority lien is being foreclosed, or what amount it would take to cure the alleged super priority liens.

24. At the purported foreclosure sales for Lot 37 and Lot 38, the HOA failed to foreclose on any super priority assessment liens.

25. Exhibits 1 and 2, attached to the HOA's motion for summary judgment (the foreclosure deeds on Lot 37 and Lot 38), are void abinitio.

DOUGLAS E. SMITH
DISTRICT JUDGE
DEPARTMENT EIGHT
LAS VEGAS NV 89155

26. The HOA failed to follow the proper statutory foreclosure procedures to foreclose on super priority liens, including on Lot 37 and Lot 38.

27. Equity requires that the HOA's foreclosures on Lot 37 and Lot 38, do not, under any circumstances, wipe out American's $111,930.00 deeds of trust on each lot, exhibits A and B, respectively.

28. Any of these conclusions of law that should more properly be findings of fact, shall be so considered.

WHEREFORE, GOOD CAUSE APPEARING, the court renders the following Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment is hereby granted in favor of defendant American;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the foreclosure deeds, exhibit 1 and 2 attached to the plaintiff HOA's motion for summary judgment, are canceled, voided and held for naught, and American's trust deeds on each lot, exhibit A and exhibit B, remain valid and enforceable first trust deeds against Lot 37 and Lot 38, respectively.

DATED this 6th day of June, 2013.

DISTRICT COURT JUDGE TG

DOUGLAS E. SMITH
DISTRICT JUDGE
DEPARTMENT EIGHT
LAS VEGAS NV 89155

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Clerk of the Court
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

PETER MCALLESTER, an individual; and AMBER MCALLESTER, an individual,

Plaintiff,

Case No. CV12-02254

Dept. No. 1

vs.

SILVER STATE CONDOMINIUM OWNERS ASSOCIATION, DOES I-X,

Defendant.

/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ON CLAIM OF DECLARATORY RELIEF

On April 5, 2013, Plaintiffs Peter McAllester and Amber McAllester ("Plaintiffs"), by and through counsel, James R. Adams, Esq. and Puoy K. Premsrirut, Esq., filed a *Motion for Summary Judgment on Claim of Declaratory Relief*. On May 6, 2013, Defendant Silver State Condominium Owners Association ("Defendant"), by and through counsel Sheila Van Duyne Romero, Esq., filed an *Opposition*. Plaintiffs filed a *Reply* on May 24, 2013 and submitted the matter for decision.

Summary judgment is appropriate when the record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The pleadings and the record are construed in the light most favorable to the nonmoving party. *Id.* However, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the operative facts. *Id.*

at 732. To avoid having summary judgment entered against it, the nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial. *Id.* A genuine issue exists where the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.* at 731. The nonmoving party's documentation must be admissible evidence and cannot build a case on the gossamer threads of whimsy, speculation and conjecture. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

"If the [party] moving [for summary judgment] will bear the burden of persuasion [at trial], that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Cuzze v. Univ. & Cmty. College Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). "If the moving party meets its burden, then the nonmoving party bears the burden of production to demonstrate that there is a genuine issue of material fact." *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 256 P.3d 958, 961 (Nev. 2011) (citation omitted).

Further, "judges need not paw over the files without assistance from the parties." *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999). "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' *designate* 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (emphasis added).

Plaintiffs have asked the Court to determine the construction of NRS §116.3116(2) in its claim for Declaratory Relief. "An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation . . . ." *Alameda County Land Use Assn. v. City of Hayward*, 38 Cal.App.4th 1716, 1723, 45 Cal. Rptr.2d 752, 756 (1995). In *Kress v. Corey*, the Nevada Supreme Court held that:

> The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows: (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). Here there exists a justiciable controversy related to NRS §116.3116(2) where the interests of the party are adverse. Plaintiffs have a legally protectable interest in the controversy, namely specific funds received pursuant to a foreclosure sale. The issue is ripe for determination as the issues involved are of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

This case arises from Defendant's statutory lien on real property located at 1518 Irene Way in Sparks, Nevada (the "Unit"). The Unit is subject to Defendant's covenants, conditions, and restrictions ("CC&RS") and is also subject to NRS 116 (Common Interest Ownership Uniform Act). Pursuant to NRS §116.3116(1), a homeowners' association, such as Defendant, has a lien on any unit within the association for any assessment levied against that unit or any fines imposed against the unit's owner from the time the assessment or fine becomes due. This lien is junior to the first security interest of the unit's first mortgage lender except for the specified portion of the lien as defined in Nevada Revised Statutes §116.3116(2), otherwise known as the "super priority lien."

> NRS §116.3116(2) states:
> A lien under this section is prior to all other liens and encumbrances except:
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS §116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS §116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6

months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

Plaintiff argues that the super priority lien should be limited to an amount equaling 9 months of association's assessments for common expenses based upon its periodic budget plus certain repair costs pursuant to NRS §116.310312. Defendant asserts that the Court should include interest, late fees, and costs of collection (including legal fees and costs) in addition to the applicable period of common expense assessments constituting the super priority lien. Defendant contends NRS §116.310313 enables an association to charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation.

The Court has reviewed the record in its entirety. "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Board of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) (citing *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983)). The fees provision of NRS §116.310313 was not included by reference in the language of NRS §116.3116(2). The legislature specifically included charges incurred pursuant to NRS §116.310312 and common expenses based on the periodic budget adopted by the association pursuant to NRS §116.3115 in the super priority lien, but did not include any of the costs and fees language of NRS §116.310313.

Subsection 4 of NRS §116.310312 allows an association to charge for the notification and collection costs and interest, but specifically states that the lien for that amount "may be foreclosed under NRS §116.31162 to 116.31168, inclusive." Subsection 6 states that "[e]xcept as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS §116.3116." The statutory language suggests that costs and attorney's fees should not be included in the super priority amount.

Additionally, in December 2012, the Nevada Department of Business and Industry, Real Estate Division ("RED"), issued Advisory Opinion No. 13-01. In its Advisory Opinion, the RED opined: "The super priority lien [a homeowner's association has over a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent] is

limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312" for costs of maintenance or abating a nuisance where the unit's owner has refused. (Advisory Opinion at 2.) Further, "[t]he super priority lien based on assessments may not exceed 9 months of assessments as reflected in the associations budget, and it may not include penalties, fees, late charges, fines, or interest." *Id.*

The Nevada Supreme Court noted the RED's authority to interpret NRS Chapter 116 in *State, Department of Business and Industry, Financial Institutions Division v. Nevada Association Services, Inc.*, 294 P.3d 1223 (Nev. 2012) (noting that Nevada law requires the RED, "and no other commission or division," to interpret NRS Chapter 116).

The Court is satisfied that sufficient authority exists to limit the super priority lien to an amount equaling 9 months of an association's assessments for common expenses based upon its periodic budget plus certain repair costs pursuant to NRS §116.310312. The Court does not make any finding as to the amount of repair costs existing in this case.

Accordingly, and good cause appearing, Plaintiff's *Motion for Summary Judgment on Claim of Declaratory Relief* is GRANTED.

IT IS SO ORDERED.

DATED this 22nd day of July 2013.

JANET J. BERRY
District Judge

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 23rd day of July 2013, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

James Adams, Esq. for Plaintiffs
Sheila Romero, Esq. for Defendant

Christine Kuhl

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE HARBOR PLACE TRUST

Plaintiff,

vs.

SELENE FINANCE, LP; FIDELITY NATIONAL TITLE INSURANCE COMPANY; AARGON COLLECTION AGENCY; WILLIAM O. RICHARDSON AND TERESA M. RICHARDSON; and NEVADA LEGAL NEWS, LLC

Defendants.

Case No.: A-13-675032-C
Dept. No.: XXIII

ORDER GRANTING SELENE FINANCE, LP'S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the court on August 27, 2013, on Defendant, Selene Finance, LP's (hereinafter "Selene") Motion for Summary Judgment. Plaintiff, Paradise Harbor Place Trust, filed an Opposition and Selene filed its Reply in Support of the Motion for Summary Judgment. At the hearing, Michael Bohn, Esq., was present for Plaintiff, and Dana Jonathon Nitz, Esq., of the law firm of Wright, Finlay & Zak, LLP, appeared for Selene. The matter had previously come on for hearing on Plaintiff's Motion for Preliminary Injunction on February 19, 2013, and March 5, 2013, at which the COURT granted the motion, enjoining

Defendant Selene, its agents, employees and any person acting on its behalf from conducting a foreclosure sale on the subject property and enjoining Plaintiff from encumbering or transferring the property, unless otherwise ordered by the Court.

After considering the oral argument of counsel as well as all papers and pleadings on file, the Court denied the Preliminary Injunction and the Countermotion to Dismiss was taken under advisement. The court now finds as follows:

A. Statement of Facts

This matter concerns property commonly known as 6188 Stone Hollow Street, Las Vegas, Nevada 89141 (APN 191-05-217-040). COURT adopts the Statement of Stipulated Facts attached to Selene's Request for Judicial Notice in support of its Motion for Summary Judgment as Exhibit "AA." Facts central to this Decision include the following:

A Deed of Trust, recorded on October 31, 2006, names Defendants William O. Richardson and Teresa M. Richardson as trustors, Spectrum Funding Corporation as Lender, Lawyers Title of Nevada as trustee, and Mortgage Electronic Registration Systems, Inc. acting solely as nominee for Lender and Lender's successors and assigns as beneficiary. Various Assignments of the Deed of Trust also followed resulting in an assignment to "U.S. Bank Trust, National Association, not in its individual capacity, but solely as Trustee for SRMOF REO 2011-1 Trust as beneficiary, c/o Selene Finance LP," recorded on July 20, 2012.

A Notice of Delinquent Assessment Lien was recorded on behalf of Nevada Association Services, Inc., as agent for Heritage Estates, on November 12, 2008. A Notice of Default and Election to Sell Under Homeowners Association Lien was recorded on February 27, 2009, and there followed a (third) Notice of Foreclosure Sale, recorded on March 5, 2012. The Foreclosure Sale on the Homeowners Association Lien took place on June 29, 2012. A Foreclosure Deed in favor of Stone Hollow Avenue Trust was recorded on July 5, 2012. A Grant, Bargain, Sale Deed was recorded on July 26, 2012, transferring the property from Stone Hollow Avenue Trust to Paradise Harbor Place Trust.

B. Standard of Review for Motion for Summary Judgment

Defendant asserts that it is entitled to summary judgment under N.R.C.P. Rule 56(c)

because Plaintiff cannot prove essential elements of its claim for quiet title (or entitlement to the remedy of declaratory relief under it). Summary judgment is proper "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Villescas v. CNA Ins. Co.*, 109 Nev. 1075, 1078, 864 P.2d 288, 290 (1993) (*quoting* Nev. R. Civ. P. 56(c)); *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 172 P.3d 131, 136-37 (2007); and N.R.C.P. Rule 56(c). The party moving for summary judgment must make the initial showing that no genuine issue of material fact exists. *Cuzze*, 123 Nev. 598, 172 P.3d at 136-37. A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982).

Where, as here, the non-moving party will bear the burden of persuasion at trial, the party moving for summary judgment need only: "(1) submit[] evidence that negates an essential element of the nonmoving party's claim, or (2) 'point[] out ... that there is an absence of evidence to support the nonmoving party's case.'" *Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 714 (Nev. 2011), reh'g denied (Feb. 23, 2012). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), cert. denied, 460 U.S. 1085, 76 L.Ed.2d 349, 103 S. Ct. 1777 (1983). The plain language of Rule 56(c) "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). When the moving party has negated an essential element of the nonmoving party's claim, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2554. This standard mirrors the standard for a directed verdict under F.R.C.P. 50(a) – the functional equivalent of N.R.C.P. 50(a) – which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 250, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986); *and see* N.R.C.P. 50(a)(1) ("If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained ... without a favorable finding on that issue.").

The statement of stipulated facts clearly demonstrates the factual background of this matter. As the parties have agreed to the above facts, which are the only *material* facts, there remain only questions of law for this Court to decide.

C. Statutory Interpretation of NRS §116.3116

The question before the court is a clear-cut issue of statutory interpretation. Homeowner's association liens are governed by NRS §116.3116. Here, Plaintiff argues that a foreclosure under NRS §116.3116 extinguishes the senior deed of trust. Defendant argues that this interpretation of the statute is erroneous and would lead to absurd results.

"In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (Nev. 1996); and *Wensley v. First Nat. Bank of Nevada*, 2012 WL 1971773 (D. Nev. 2012). To prevail, Plaintiff must demonstrate that the home owner's association's notice of delinquent assessment was recorded before Selene's Deed of Trust. *See Centeno v. Mortgage Elec. Registration Sys., Inc.*, Case No. 2:11-cv-02105-GMN-RB, 2012. WL 3730528, at *3 (D. Nev. Aug. 28, 2012) (holding that without an allegation that the HOA lien "chronologically precedes" the deed of trust and without submission of the first in time lien, a claim under N.R.S 11.6,3116(2) fails). Upon the facts before the COURT, because Plaintiff cannot prove this central element, its claims for relief to quiet title fail as a matter of law. *Centeno*, 2012 WL 3730528, at *3.

The Court construes the statute under common methods of statutory construction. The court also considers NRS § 116.3116 *in pari materia* with other foreclosure statutes. *See, e.g., Williams v. United Parcel Services*, 129 Nev. Adv. Op. 41 (2013) (stating that statutory provisions are read as a whole with effect given to each word or phrase); *Barney v. Mt. Rose*

Heating & Air Conditioning, 192 P.3d 730 (2008) (statutes must read in context, policy can be considered as an interpretive aid); *State Dept. of Business and Industry v. Nevada Ass'n Srvcs., Inc.*, 294 P.3d 1223 (Nev., 2012) (court considered NRS Chapter 116 and NRS Chapter 649 in a way that harmonizes them as a whole). Accordingly, "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme **'harmoniously with one another** in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *So. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (emphasis added) (citations omitted).

The statute states in relevant part that an association's lien "is prior to all other liens and encumbrances on a unit except ... (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." NRS §116.3116(2)(b). The statute also creates a super priority interest for assessments "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." *Id.* Any amounts superfluous to the nine months are not afforded a super priority. *Id.*

The Nevada Supreme Court has not addressed what an "action" means under NRS 116.3116(2)(c). Black's Law Dictionary defines action as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." BLACK' S LAW DICTIONARY 28 (6th ed. 1990). Other departments in the Eighth Judicial District Court Department have held that an action, in the context of §116.3116, means a civil action. *See e.g., Deutsche Bank National Trust Comp. v. The Foothills at Macdonald Ranch*, Case No. A-13-680505 (Nev. 2013); *SFR Investments Pool 1, LLC v. U.S. Bank, N.A., et al.*, Case No. A-13-678814 (Nev. 2013); *Daisy Trust v. Wells Fargo Bank, N.A., et al.*, Case No, A-13-675183 (Nev. 2013).

Furthermore, this interpretation is consistent with Nevada federal district court decisions, *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (holding that when an HOA holds a non-judicial foreclosure sale, the buyer takes the property subject to the first security interest); *Weeping Hollow Ave. Trust v. Spencer*, 2013

WL 2296313, at *5 (D. Nev. May 24, 2013) (stating that the super priority Lien does not extinguish the first position deed of trust); *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC.*, 2013 WL 2460452, at *4 (D. Nev. June 6, 2013) (stating that foreclosure of neither a super-priority lien nor a first mortgage will extinguish the other, but first proceeds must go to the super-priority lien); *Salvador v. National Default Servicing Corp.*, 2013 WL 3049084, at *5-6 (D. Nev. June 13, 2013) (denying preliminary injunction for failure to establish likelihood of success on the merits because statute does not eliminate the first security interest as a matter of law).

In addition, NRS §116.3116(2)(b) must be read in conjunction with other portions of NRS 116.3116 which refer to the term "action" as a judicial proceeding. Specifically, NRS 116.3116(7) states "[a] judgment or decree in any **action** under this section must include costs and reasonable attorney's fees for the prevailing party" (emphasis added), and NRS 116.3116(10) provides that a home owner's association may institute an action to collect delinquent assessments and to foreclose a lien and the court may appoint a receiver to collect rents during the pendency of the action. Therefore, "action" under NRS §116.3116 means a civil action filed by either the lender or the HOA.

COURT FINDS that the first security interest Deed of Trust was recorded on October 31, 2006, prior to the home owner's association lien, recorded on November 12, 2008, and the home owner's association's Notice of Default and Election to Sell Under Homeowners Association Lien, recorded February 27, 2009.

COURT FINDS the home owner's association super priority lien only creates a priority to payment from foreclosure proceeds.

COURT FINDS NRS §116.3116 requires an action and is not applicable when the home owner's association forecloses under a non-judicial foreclosure statutes pursuant to NRS. 116.3116 *et seq.*

COURT FURTHER FINDS that the home owner's association foreclosure sale of its lien, under NRS §116.3116, cannot extinguish Selene's Deed Of Trust because it was recorded prior to the home owner association's lien, and Plaintiff Paradise Harbor Place Trust purchased

the property with notice of the first in time Deed of Trust and took the property subject to the first Deed of Trust.

COURT FURTHER FINDS that, while the requirements for preliminary injunction may have been present at the time of hearing of Plaintiff's Motion, Plaintiff no longer enjoys a reasonable probability of success on the merits. *See, Pickett v. Comanche Construction Co.*, 108 Nev. 422, 836 P.2d 42 (1992); *see also, Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987). Consequently, there is no need to preserve the status quo pending final judgment. *See, Ottenheimer v. Real Estate Division*, 91 Nev. 338, 535 P.2d 1284 (1975); *see also, Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 492 P.2d 123 (1972); and *Berryman v. International Brotherhood of Electrical Workers*, 82 Nev. 277, 416 P.2d 387 (1966).

COURT FURTHER FINDS that, on February 15, 2013, a judgment of dismissal as to Defendant Nevada Legal News, LLC, was entered, and on May 31, 2013, a judgment of dismissal as to Defendant Fidelity National Title Insurance Company, and, while Defendants Aargon Collection Agency, William O. Richardson and Teresa M. Richardson have been served, and defaults were entered against them, on April 11, 2013, default judgments have neither been sought nor obtained. Consequently, this Decision would not conclude all matters against all parties and would not be a final order absent an express determination by this COURT.

COURT FURTHER FINDS that that there is no just reason for delay and upon an express direction for the entry of judgment in favor of Defendant Selene on its Motion for Summary Judgment. Defendant Selene requested certification under N.R.C.P. 54(b) and Plaintiff agreed to this request.

In light of the foregoing, COURT ORDERS Defendant Selene's Motion for Summary Judgment, GRANTED.

COURT FURTHER ORDERS that the Temporary Restraining Order and Preliminary Injunction previously entered are dissolved.

COURT FURTHER DIRECTS the entry of a final judgment, pursuant to N.R.C.P. 54(b), in favor of Defendant Selene and against Plaintiff.

COURT FURTHER DIRECTS that the trial scheduled to commence September 23, 2013, at 1:00 p.m., is vacated, as are all related pretrial proceedings including the Deadline to file all Motions in Limine on August 30, 2013, and the Calendar call set for September 17, 2013.

IT IS SO ORDERED.

DATED this ____ day of July, 2013. 9-6-13

HONORABLE STEPHANY A. MILEY
DISTRICT COURT JUDGE

Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Christopher L Benner

Dana Jonathon Nitz, Esq.
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Reviewed by:
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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

SFR INVESTMENTS POOL 1, LLC, Plaintiff v. NATIONAL CITY BANK; NATIONSTAR MORTGAGE, LLC; and DAVID JOHN VIK, Defendants	CASE NO.: A-12-676349-C DEPARTMENT XXVII

DECISION AND ORDER GRANTING DEFENDANT NATIONSTAR MORTGAGE, LLC's MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on the 17th day of July, 2013; Diana S. Cline, Esq. appearing for and on behalf of Plaintiff, SFR Investments Pool1, LLC (hereinafter "Plaintiff' or "SFR"); Janice E. Jacovino, Esq. appearing for and on behalf of Defendant Nationstar Mortgage, LLC (hereinafter "Defendant" or "Nationstar"); and the Court having heard arguments of counsel, and being fully advised in the premises, **COURT FINDS** after review:

(1) This dispute arises from foreclosure proceedings conducted against a residential property located at 3673 Belvedere Park Lane, Las Vegas, Nevada 89141, Parcel No. 191-05-411-020 (the "Property"). The Property is located within a common-interest community governed by a homeowners' association as defined in NRS Chapter 116, known as Christopher Communities at Southern Highlands Golf Club Association ("HOA").

(2) Former title owner, Defendant David John Vik, failed to pay all monthly assessments due under the operating documents of the common-interest community. In response, the HOA asserted a lien against the Property[1] and initiated non-judicial foreclosure proceedings pursuant to NRS 116.3116 *et seq.* which culminated in a foreclosure sale conducted on January 26, 2013.

(3) Plaintiff acquired the Property on January 26, 2013 by successfully bidding on the Property at a publicly-held foreclosure auction in accordance with NRS 116.3116, *et. seq.* ("HOA foreclosure sale"), and the resulting foreclosure deed was recorded in the Official Records of the Clark County Recorder as Instrument Number 201301280002210 ("HOA Foreclosure Deed"), on or about January 28, 2013.

(4) Plaintiff filed its Complaint on February 7, 2013, stating two causes of action: (First) Declaratory Relief/Quiet Title Pursuant to NRS 30.010, *et. seq.* and 116.3116, *et. seq.*; and (Second) Preliminary and Permanent Injunction against Nationstar and NCB.

(5) A Stipulation and Order to Withdraw Motion for Preliminary Injunction and Stay Foreclosure was filed March 26, 2013, whereby foreclosure by Defendant would be stayed until after April 24, 2013, the date set for hearing on Defendant's Motion to Dismiss.

(6) The parties agreed that should Defendant pursue foreclosure *after* April 24, 2013, Defendant would provide Plaintiff with at least twenty (20) days notice prior to conducting the sale pursuant to NRS 107.080. The Court CONTINUED the April 24, 2013 hearing to May 2, 2013, and later to May 9, 2013, to allow Plaintiff to file a Sur-Reply in response to Defendant's Reply in support of the Motion to Dismiss, which Reply had not been received by Plaintiff's Counsel. After hearing oral argument on May 9, 2013, the Court DENIED Defendant's Motion to Dismiss, refusing to consider it as a

[1] Notice of delinquent assessment lien against the property was recorded April 24, 2012.

Motion for Summary Judgment at that time because such relief was not requested in the Motion.

(7) As presented by the parties, the material facts are undisputed, and the issue before this Court involves a question of law: did the January 26, 2013 non-judicial foreclosure sale conducted pursuant to NRS 116.3116 *et seq.* and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguish, by operation of law, any and all prior encumbrances upon the Property?

(8) Pursuant to Nevada Rule of Civil Procedure ("NRCP") 56, "[a] party against whom a claim...is asserted...may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." NRCP 56 (b). "The judgment sought shall be rendered forthwith if...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56 (c).

(9) The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. Cuzze v. Univ. and Comm. College Sys. Of Nev., 123 Nev. 598, 172 P.3d 131, 134 (2007). If this initial burden is met, the non-movant must then by affidavit or other admissible evidence introduce specific facts that show a genuine issue of material fact. Id. The substantive law defines which facts are material. *See* Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A review of the record in regards to a motion for summary judgment must be viewed in a light most favorable to the non-moving party. Fire Ins. Exchange v. Cornell, 120 Nev. 303, 305 (Nev. 2004).

(10) The plain language of Nevada Revised Statutes § 116.3116 (2) (c) creates, for an association, a super priority lien "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, which would have become due in the absence of acceleration during the 9 months immediately preceding *institution of an action* to enforce the lien." NEV. REV. STAT. 116.3116 (2) (c) (emphasis added). No clear, binding Nevada case law exists to date, which would provides direction on the necessity, or not, of judicial foreclosure proceedings in order to extinguish a first security mortgage interest.[2] However, without institution of a judicial foreclosure, the interest of junior lien holders cannot be extinguished by the process employed here.

(11) While the Court is not bound by persuasive authority from other jurisdictions which require judicial foreclosure to trigger a super priority lien, the Court has previously ruled based upon, and consistent with, the case of Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., Slip Copy, 2013 WL 531092 (D.Nev., Feb. 11, 2013), which this Court found persuasive in holding that

> NRS 116.3116 (2) (c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, *but it does not eliminate the first security interest*... the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses. Instead, as in this case, the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the *purchaser at the sale takes the property subject to the security interest.*

Id. at *3.

(12) This Court also notes the decision in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC et al., 2:13-cv-00164-RCJ-NJK (D.Nev., filed Jun. 6, 2013) (hereinafter

[2] *See First 100, LLC v. Ronald Burns, et al.*, Order Denying Defendant's Motion to Dismiss, at 7:25-28 (Case No. A677693, Eighth Judicial Dist. Ct. of Nev., filed May 31, 2013) (hereinafter "*First 100 Order*").

"Bayview"), which noted, with respect to foreclosures of either an HOA's super priority lien or a first security mortgage interest on a property subject to an HOA super priority lien, that "the foreclosure of neither extinguishes the other." Id. at 6:1. The Bayview court explained:

> The Court rejects [SFR's] reading of the statues [sic]. It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

Id. at 9:3-8. This Court agrees.

(13) This Court also recognizes that, although the Advisory Opinion of the Nevada Real Estate Division[3], cited by Plaintiff, is contrary to this Court's current and prior rulings, that Opinion disclaims, at the end, that the Opinion does not have the force of law.

COURT ORDERS for good cause appearing and for the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED**.

Dated: September 11, 2013

Nancy L. Allf

NANCY ALLF
DISTRICT COURT JUDGE

[3] *Nevada Real Estate Division*, Advisory Opinion, No. 13-01, at 9 (Dec. 12, 2012) ("An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security.").

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I mailed a copy of the foregoing to the attorneys as follows:

Kristin Schuler-Hintz, Esq.
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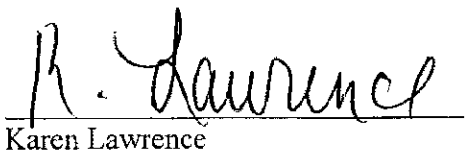

Karen Lawrence
Judicial Executive Assistant

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Plaintiff,

v.

DHI MORTGAGE COMPANY, LTD., *et al.*,

Defendants.

GREEN TREE SERVICING, LLC, a foreign limited liability company,

Counterclaimants,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Counterdefendants.

Case No.: A-12-672799-C

Dept.: XVIII

ORDER AFTER HEARING ON MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the above-captioned court on Green Tree Servicing, LLC's motion for summary judgment at 8:15 a.m. on August 13, 2013, the Honorable David Barker, presiding. After considering all evidence and testimony and reviewing the briefs of the parties, the court hereby makes its order as follows:

67487

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FINDINGS OF FACT

1. On December 11, 2006 Thomas Dake ("Dake") signed a note in the amount of $217,800.00 in favor of DHI Mortgage Company, Ltd. ("DHI") in exchange for a loan which was used to purchase the real property located at 9353 Lady Finger Court, Las Vegas, NV 89149 (the "Property").
2. On December 11, 2006, Dake assigned a Deed of Trust to DHI as security for this Note, which was recorded on December 13, 2011 in the Clark County Recorder's Office as Instrument No. 200612130002982.
3. Dake stopped making payments to the Fort Apache Square Homeowner's Association (the "HOA") pursuant to the HOA's CC&R's, and they filed a lien against the Property on August 23, 2011 in the amount of $975.00, consisting of $900.00 for collection fees and $75.00 for collection costs.
4. The Notice of Delinquent Assessment did not mention reference compliance with the relevant portions of NRS Chapter 116 giving rise to a super-priority lien.
5. The HOA filed a Default pursuant to their lien on November 11, 2011.
6. The Notice of Default did not mention reference compliance with the relevant portions of NRS Chapter 116 giving rise to a super-priority lien.
7. On May 7, 2012, the HOA, through its foreclosure of lien by sale agent, Alessi & Koenig, filed a Notice of Trustee's Sale.
8. The Notice of Trustee's Sale did not mention reference compliance with the relevant portions of NRS Chapter 116 giving rise to a super-priority lien.
9. On July 20, 2012, Alessi & Koenig, as Trustee for the HOA, conducted a non-judicial foreclosure sale and SFR Investments Pool 1, LLC ("SFR") purchased the Trustee's Deed for $5,200.00, which was recorded on July 24, 2012.
10. At no point during the foreclosure process did the HOA file an action with a court of competent jurisdiction to establish a right to foreclose on the delinquent lien.

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11. On March 5, 2012, Green Tree Servicing, LLC ("Green Tree") was assigned the Deed of Trust from MERS, as nominee for DHI Mortgage Company, Ltd., which was recorded on August 11, 2012 in the Clark County Recorder's Office as Instrument No. 201207110002121.
12. On July 11, 2012 National Default Servicing Corporation ("National") was substituted in as Trustee by Green Tree.
13. Dake stopped making mortgage payments to DHI and accrued $13,847.77 in arrearages which prompted DHI to file a Default and Election to Sell the Property on July 31, 2012.
14. On November 13, 2012, National Default Servicing Corporation, on behalf of Green Tree, recorded a notice of trustee's sale to sell the Property.
15. On November 13, 2012, National received the Certificate from the Nevada Foreclosure Mediation Program, and recorded the same as instrument no. 201211130003083.
16. On or before December 12, 2012, DHI assigned its interest in the Note and the Deed to Federal National Mortgage Association ("Fannie Mae"), and Green Tree services the loan for Fannie Mae.
17. On December 12, 2012, Fannie Mae acquired the Trustee Deed at the Trustee Sale which was duly recorded, for $233,856.45 which is the amount outstanding on the loan.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate if the pleadings, affidavit, deposition, or any other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Nev. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).
2. When the moving party has carried its initial burden to produce the foregoing evidence, the opposing party bears the burden to establish that a genuine issue as to

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any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986).

3. When the moving party has carried its initial burden to produce, the opposing party must demonstrate that the fact in contention is material — a fact that might affect the outcome of the suit under the governing law — and that the dispute is genuine — the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510 (1986); *Wood*, 121 Nev. at 731, 121 13,3d at 1031.

4. To that end, the opposing party may not rest upon general allegations and conclusions, but must, by admissible evidence, set forth specific facts demonstrating the existence of a genuine factual issue. *Wood*, 121 Nev. at 732, 121 13.3d at 1031.

5. NRS 116.3116(1) provides that an association has a lien against real property for unpaid assessments, fines or penalties levied against the unit. Homeowner association liens against units or homes for unpaid or delinquent assessments.

6. NRS 116.3116(2) provides in pertinent part:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, . (Bold emphasis added.)

7. A lien under NRS 116.3116(2) is "prior" to "all other liens and encumbrances on a unit," without the requirement of an enforcement action, except for, inter alia, "[a] first security interest." See, NRS 116.3116(2). That exception specifies the association's lien is junior to the first security interest at least until an "action" is commenced. See, NRS 116.3116(2).

8. As used in NRS chapter 116.3116, the term "action" refers to the filing of a civil lawsuit in a court of competent jurisdiction. NRCP 2, NRCP 3 and NRS 38.400.

9. The institution of an action or suit brought in a court of competent jurisdiction is a condition precedent to elevating the status of the association's junior lien to "super priority."

10. The undisputed evidence shows that Fort Apache Square HOA did not initiate a legal action and therefore the condition precedent to the creation of a super priority portion of the lien was never satisfied.

11. The ownership interest acquired by SFR at the HOA lien sale is subordinate to the first Deed of Trust held by Green Tree and holds title subject to all of the claims and interests of Green Tree.

12. Summary judgment shall be entered on behalf of Green Tree Servicing, LLC and against Plaintiff, SFR Investment Pool 1, LLC on the underlying complaint and on all of its counter-claims.

13. Plaintiff's request that the court's ruling on this matter be certified under the provisions of NRCP 54(b) is also granted.

IT IS SO ORDERED.

DATED this 20th day of September, 2013.

DISTRICT COURT JUDGE

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Connecticut General Statutes Annotated
Title 47. Land and Land Titles
Chapter 828. Common Interest Ownership Act (Refs & Annos)
Part III. Management of Common Interest Communities (Refs & Annos)

C.G.S.A. § 47-258

§ 47-258. Lien for assessments and other sums due association. Enforcement

Effective: October 1, 2013
Currentness

(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorneys' fees and costs, other fees, charges, late charges, fines and interest charged pursuant to subdivisions (10), (11) and (12) of subsection (a) of section 47-244 and any other sums due to the association under the declaration, this chapter, or as a result of an administrative, arbitration, mediation or judicial decision, are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) Notwithstanding any provision in the declaration or bylaws to the contrary, a lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to, (2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (3) liens for real property taxes and other governmental assessments or charges against the unit or cooperative. In all actions brought to foreclose a lien under this section or a security interest described in subdivision (2) of this subsection, the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection, excluding any late fees, interest or fines which may be assessed by the association during the nine-month period, and (B) the association's costs and reasonable attorney's fees in enforcing its lien. A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. This subsection does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association.

(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due; provided, that if an owner of a unit subject to a lien under this section files a petition

for relief under the United States Bankruptcy Code, [1] the period of time for instituting proceedings to enforce the association's lien shall be tolled until thirty days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code [2] is lifted.

(f) This section does not prohibit actions against unit owners to recover sums for which subsection (a) of this section creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section shall include costs and reasonable attorney's fees for the prevailing party.

(h) The association on request made in a record shall furnish to a unit owner a statement in recordable form setting forth the amount of unpaid assessments against the unit. The statement shall be furnished within ten business days after receipt of the request and is binding on the association, the executive board and every unit owner.

(i) In a cooperative, on nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed in like manner as a mortgage on real property.

(k) In any action by the association to collect assessments or to foreclose a lien for unpaid assessments, the court may appoint a receiver of the unit owner pursuant to section 52-504 to collect all sums alleged to be due from that unit owner prior to or during the pendency of the action. The court may order the receiver to pay any sums held by the receiver to the association during the pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to subsection (a) of section 47-257.

(*l*) If a holder of a first or second security interest on a unit forecloses that security interest, the purchaser at the foreclosure sale is not liable for any unpaid assessments against that unit which became due before the sale, other than the assessments which are prior to that security interest under subsection (b) of this section. Any unpaid assessments not satisfied from the proceeds of sale become common expenses collectible from all unit owners, including the purchaser.

(m) (1) An association may not commence an action to foreclose a lien on a unit under this section unless: (A) The unit owner, at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the association pursuant to subsection (a) of section 47-257; (B) the association has made a demand for payment in a record and has simultaneously provided a copy of such record to the holder of a security interest described in subdivision (2) of subsection (b) of this section; and (C) the executive board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit.

(2) Not less than sixty days prior to commencing an action to foreclose a lien on a unit under this section, the association shall provide a written notice by first class mail to the holders of all security interests described in subdivision (2) of subsection (b) of this section, which shall set forth the following: (A) The amount of unpaid common expense assessments owed to the association as of the date of the notice; (B) the amount of any attorney's fees and costs incurred by the association in the enforcement of its lien as of the date of the notice; (C) a statement of the association's intention to foreclose its lien if the amounts set forth in subparagraphs (A) and (B) of this subdivision are not paid to the association not later than sixty days after the date on which

the notice is provided; (D) the association's contact information, including, but not limited to, (i) the name of the individual acting on behalf of the association with respect to the matter, and (ii) the association's mailing address, telephone number and electronic mail address, if any; and (E) instructions concerning the acceptable means of making payment on the amounts owing to the association as set forth in subparagraphs (A) and (B) of this subdivision. Any notice required to be given by the association under this subsection shall be effective when sent.

(3) When providing the written notice required by subdivision (2) of this subsection, the association may rely on the last-recorded security interest of record in identifying the name and mailing address of the holder of that interest, unless the holder of the security interest is the plaintiff in an action pending in the Superior Court to enforce that security interest, in which case the association shall provide the written notice to the attorney appearing on behalf of the holder of the security interest in such action.

(4) The failure of the association to provide the written notice required by subdivisions (2) and (3) of this subsection prior to commencing an action to foreclose its lien shall not affect the priority of its lien for an amount equal to nine months common expense assessments, but the priority amount in such action shall not include any costs or attorney's fees.

(n) Every aspect of a foreclosure, sale or other disposition under this section, including the method, advertising, time, date, place and terms, shall be commercially reasonable.

Credits

(1983, P.A. 83-747, § 59, eff. Jan. 1, 1984; 1984, P.A. 84-472, § 16, eff. June 8, 1984; 1989, P.A. 89-254, § 14; 1991, P.A. 91-341, § 15, eff. July 3, 1991; 1991, P.A. 91-359, § 1, eff. July 5, 1991; 1995, P.A. 95-187, § 22, eff. Oct. 1, 1995; 2009, P.A. 09-225, § 32, eff. July 1, 2010; 2010, P.A. 10-186, § 13, eff. July 1, 2010; 2013, P.A. 13-156, § 1, eff. June 24, 2013; 2013, P.A. 13-156, § 2.)

Notes of Decisions containing your search terms (0)

View all 23

Footnotes

1 11 U.S.C.A. § 101 et seq.

2 11 U.S.C.A. § 362.

C. G. S. A. § 47-258, CT ST § 47-258

Current with Public Acts of the 2013 January Regular Session of the Connecticut General Assembly

End of Document

OGM

DISTRICT COURT

CLARK COUNTY, NEVADA

PREMIER ONE HOLDINGS,

Plaintiff,

vs.

BANK OF AMERICA, N.A.; a national Banking Association; AUGUSTA BELFORD AND ELLNGWOOD HOMEOWNERS ASSOCIATION, a Nevada Non-Profit Corporation; MOUNTAINS EDGE MASTER ASSOCIATION, a Nevada Non-Profit Corporation; REPUBLIC SERVICES, NC., a Delaware Corporation; DOES I-X INDIVIDUALS; and DOE ENTITIES XI-XX,

Defendants.

Case No.: A-13-681538-C
Dept. No.: XXV

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CLERK OF THE COURT

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

ORDER GRANTING MOTION TO DISMISS

Defendant Bank of America's Motion to Dismiss filed August 30, 2013 came on for hearing before the Court on October 1, 2013. Steven Shevorski, Esq., appeared on behalf of Bank of America ("Defendant"), Charles Lombino, Esq., appeared on behalf of Premier One Holdings ("Plaintiff"). The Court having examined the pleadings and the Court finds:

I.

FINDINGS OF FACT

Brent Magnussen obtained title to 9003 Greek Palace Avenue, Las Vegas, NV 89178, via a grant, bargain, and sale deed, which was recorded on June 9, 2009. This loan was secured by a first position deed of trust, which was recorded on that

same day. The senior deed of trust, together with the promissory note, were assigned to Defendant and this assignment was recorded on October 31, 2011.

Augusta Belford and Ellingwood Homeowner's Association ("HOA") recorded a notice delinquent assessment on April 13, 2012. HOA then recorded a notice of default and election to sell on May 29, 2012. HOA recorded a notice of sale on December 14, 2012. HOA sold the property to Plaintiff on January 11, 2013 and the trustee's deed was recorded on that same day.

II.

CONCLUSIONS OF LAW

NRS 116.3116(1) authorizes a homeowners association ("HOA") to record a lien against a residential property for unpaid association dues, fines, and certain other assessments ("HOA Lien").

A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent...." NRS 116.3116(2)(b).

However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(b)] to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessment for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien...." NRS 116.3116(2).

When interpreting NRS 116.3116(2) the language of the statute must be strictly construed because the statute is in derogation of the common law concept of

"first in time, first in right" and because NRS 116.3116(2) is an exception to the general rule of NRS 116.3116(2)(b). *Holiday v. McMullen*, 104 Nev. 294, 296, 756 P.2d, 1179, 1180 (1988); *Braunstein v. State*, 118 Nev. 68, 81, 40 P.3d 413, 422 (2002).

Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act ("UCIOA"). The UCIOA enacted the limited priority conferred on a HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust ("Holder") forecloses on the property, and the HOA would then be entitled to the priority amount of its lien, pursuant to NRS 116.3116(2), before the Holder receives any of the proceeds.

The Court of Appeals of Washington decision in *Summerhill Vill. Homeowners Ass'n v. Roughley*, 166 Wn. App. 625 (2012), is distinguishable because *Summerhill* was based on Washington specific commentary which deviates both from the UCIOA and NRS 116.3116, and was a judicial foreclosure action that gave procedural protections to the lender which are not provided under Nevada law when a HOA proceeds with non-judicial foreclosure.

III.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, this Court ORDERS as follows:

Bank of America's Motion to Dismiss is GRANTED because NRS 116.3116(2)(c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

Bank of America's Motion to Dismiss is GRANTED with prejudice with respect to Plaintiff Premier One Holdings.

IT IS SO ORDERED.

Dated this 4th day of October, 2013.

KATHLEEN E. DELANEY
District Court Judge

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, the foregoing **ORDER GRANTING MOTION TO DISMISS** was mailed to the following proper persons or was placed in the attorney's folder in the Clerk's Office as follows:

Steven Shevorski, Esq. - Akerman Senterfitt, LLP
Charles Lombino, Esq. – Hustwit & Lombino, LTD.

Cindy Springberg
Judicial Executive Assistant

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

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CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CANYON WILLOW TROP OWNERS ASSOCIATION

Plaintiff,

vs.

METROPLEX REALTY, LLC., and DOES 1 THROUGH 10, inclusive

Defendants.

METROPLEX REALTY, LLC.,

Counter Claimant,

vs.

CANYON WILLOW TROP OWNERS ASSOCIATION and DOES 1through 10 and ROE Entities 1 through 10 inclusive

Counter Defendant.

Case No.: A-13-680828-C

Dept. No.: XXVI

NOTICE OF ENTRY OF ORDER

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PLEASE TAKE NOTICE that on the 17th day of October , 2013, the attached ORDER was entered in the above referenced matter.

Dated: this 17th day of October, 2013.

ADAMS LAW GROUP, LTD.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Adams Law Group, Ltd., and that on this date, I served the following NOTICE OF ENTRY OF ORDER upon all parties to this action by:

X	Placing an original or true copy thereof in a sealed enveloped place for collection and mailing in the United States Mail, at Las Vegas, Nevada, postage paid, following the ordinary business practices;
	Hand Delivery
	Facsimile
	Overnight Delivery
	Certified Mail, Return Receipt Requested.
	Electronic Mailing or Email, Delivery Receipt Requested

addressed as follows:

Kurt R. Bonds, Esq.
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Dated the 17th day of October, 2013

An employee of Adams Law Group, Ltd.

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

CANYON WILLOW TROP OWNERS' ASSOCIATION Plaintiff, vs. METROPLEX REALTY, LLC., and DOES 1 through 10, inclusive Defendant. --- METROPLEX REALTY, LLC., Counter Claimant, vs. CANYON WILLOW TROP OWNERS' ASSOCIATION and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Counter Defendant.	Case No. A-13-680828-C Dept. No. XXVI **ORDER** Date of Hearing: September 20, 2013 Time of Hearing: 9:00 a.m.

This matter came before the Court on September 20, 2013, at 9:00 a.m., upon the Counter Claimant's Motion for Summary Judgment on Claim of Declaratory Relief and Plaintiff's Counter Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf

of the Counter Claimant. Kurt Bonds, Esq., of Alverson Taylor appeared on behalf of the Plaintiff. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Counter Claimant has asserted a claim of right under NRS §116.3116(2) (the "Super Priority Lien" statute) against Plaintiff/Counter Defendant and Plaintiff/Counter Defendant has an interest in contesting said claim, the present controversy is between persons or entities whose interests are adverse, both parties have a legal interest in the controversy (i.e., a legally protectible interest), and the issue involved in the controversy (the meaning of NRS 116.3116(2)) is ripe for judicial determination as between the parties. *Kress v. Corey 65 Nev. 1, 189 P.2d 352 (1948);* and

WHEREAS Counter Claimant and Plaintiff/Counter Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116(2); and

WHEREAS Counter Defendant has a legal interest in the controversy as it was alleged that is was Counter Claimant's money which had been demanded by Plaintiff/Counter Defendant and it was alleged that is was Counter Claimant's property that had been the subject of a homeowners' association statutory lien by Plaintiff/Counter Defendant; and

WHEREAS the issue of the meaning, application and interpretation of NRS §116.3116(2) is ripe for determination in this case as the present controversy is real, it exists now, and it affects the parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS §116.3116(2) would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

WHEREAS, pursuant to NRS §30.040 Counter Claimant and Plaintiff/Counter Defendant are parties whose rights, status or other legal relations are affected by NRS §116.3116(2) and they may, therefore, have determined by this Court any question of construction or validity arising under NRS §116.3116(2) and obtain a declaration of rights, status or other legal relations thereunder; and

THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. Counter Claimant's Motion for Summary Judgment on Declaratory Relief is granted and Plaintiff/Counter Defendant's Motion for Summary Judgment on Declaratory Relief is denied.

2. Pursuant to NRS §116.3116(2), a homeowners' association has a prioritized lien on residential real property located within its association which survives extinguishment by the foreclosure of the property's First Security Interest (the "Super Priority Lien").

3. However, the Super Priority Lien amount is not without limits and NRS §116.3116(2) is clear that the amount of the Super Priority Lien is limited "to the extent" of those assessments for common expenses based upon the association's adopted periodic budget that would have become due in the 9 month period immediately preceding an association's institution of an action to enforce its lien and "to the extent of" external repair costs pursuant to NRS §116.310312.

4. Thus, the phrase contained in NRS §116.3116(2) which states, "... to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien..." means a maximum figure equaling 9 months of the association's regular, common expense assessments (plus external repair costs pursuant to NRS §116.310312).

5. The words "to the extent of" contained in NRS §116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

IT IS SO ORDERED.

DISTRICT COURT JUDGE 10/14/13 Date

Submitted by:

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

SFR INVESTMENTS POOL 1, LLC, Plaintiff v. BAC HOME LOANS SERVICING, LP f/k/a COUNTRYWIDE HOME LOANS, LP; LOG CABIN MASTER HOMEOWNER'S ASSOCIATION; and DEBRA B. WEIGHTMAN, Defendants	CASE NO.: A-12-679289-C DEPARTMENT XXVII

DECISION AND ORDER GRANTING DEFENDANT BAC HOME LOANS SERVICING, LP's MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing on the 25th day of September, 2013; Diana S. Cline, Esq. appearing for and on behalf of Plaintiff, SFR Investments Pool 1, LLC (hereinafter "Plaintiff" or "SFR"); Janice E. Jacovino, Esq. appearing for and on behalf of Defendant BAC Home Loans Servicing, LP (hereinafter "Defendant" or "BAC"); and the Court having heard arguments of counsel, and being fully advised in the premises, **COURT FINDS** after review:

(1) This dispute arises from foreclosure proceedings conducted against a residential property located at 8304 Mooses Court, Las Vegas, Nevada 89131, Parcel No. 125-04-112-036 (the "Property"). The Property is located within a common-interest community governed by a homeowners' association as defined in NRS Chapter 116, known as Log Cabin Estates HOA ("HOA").

(2) Former title owner, Defendant Debra D. Weightman, failed to pay all monthly assessments due under the operating documents of the common-interest community. In response, the HOA asserted a lien against the Property [1] and initiated non-judicial foreclosure proceedings pursuant to NRS 116.3116 *et seq.* which culminated in a foreclosure sale conducted on January 30, 2013.

(3) Plaintiff acquired the Property on January 30, 2013 by successfully bidding on the Property at a publicly-held foreclosure auction in accordance with NRS 116.3116, *et. seq.* ("HOA foreclosure sale") and the resulting foreclosure deed was recorded in the Official Records of the Clark County Recorder as Instrument Number 201302190003811 ("HOA Foreclosure Deed"), on February 19, 2013.

(4) Plaintiff filed its Complaint on April 1, 2013, stating three causes of action: (First) Declaratory Relief/Quiet Title Pursuant to NRS 30.010, *et. seq.* and 116.3116, *et. seq.* against all defendants; (Second) Unjust Enrichment against BAC and Weightman; and (Third) Preliminary and Permanent Injunction against all defendants.

(5) An Order granting Preliminary Injunction and Enjoining Foreclosure was entered June 25, 2013, whereby foreclosure by Defendant would be stayed until the conclusion of the litigation.

(6) As presented by the parties, the material facts are undisputed, and the issue before this Court involves a question of law: did the January 30, 2013 non-judicial foreclosure sale conducted pursuant to NRS 116.3116 *et seq.* and based upon a lien asserted by a homeowner's association for unpaid assessments automatically extinguish, by operation of law, any and all prior encumbrances upon the Property?

(7) Pursuant to Nevada Rule of Civil Procedure ("NRCP") 56, "[a] party against whom a claim...is asserted...may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." NRCP 56 (b). "The judgment sought shall be rendered forthwith if...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56 (c).

(8) The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. Cuzze v. Univ. and Comm. College Sys. Of Nev., 123 Nev. 598, 172 P.3d 131, 134 (2007). If this initial burden is met, the non-movant must then by affidavit or other admissible evidence introduce specific facts that show a genuine issue of material fact. Id. The substantive law defines which facts are material. *See* Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A review of the record in regards to a motion for summary judgment must be viewed in a light most favorable to the non-moving party. Fire Ins. Exchange v. Cornell, 120 Nev. 303, 305 (Nev. 2004).

(9) The plain language of Nevada Revised Statutes § 116.3116 (2) (c) creates, for an association, a super priority lien "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, which would have become due in the absence of acceleration during the 9 months immediately preceding *institution of an action* to enforce the lien." NEV. REV. STAT. 116.3116 (2) (c) (emphasis added). No clear, binding Nevada case law exists to date, to provide direction on the necessity of judicial foreclosure proceedings in order

to extinguish a first security mortgage interest.[1] However, this court finds that without a judicial foreclosure, the interest of junior lien holders cannot be extinguished by a super priority lien and certainly not through the process employed in this case.

(10) While not bound by persuasive authority from other jurisdictions the Court notes that every federal court in Nevada has held that an HOA super priority lien does not extinguish a first position deed of trust. See Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2:13-CV-895 JCM-GWF *5 (D. Nev., Aug. 9, 2013) (listing cases). Further, this Court has previously ruled consistent with Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev., 2013), which held that

> NRS 116.3116 (2) (c) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, *but it does not eliminate the first security interest*... the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses. Instead, as in this case, the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the *purchaser at the sale takes the property subject to the security interest*.

Id. at *3.

(11) This Court also agrees with the decision in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC et al., 2013 WL 2460452 (D. Nev., 2013) as consistent with the "dominant understanding of the actors in the real estate market" and an interpretation that "gives each section of the statutes significant application and avoids an extreme result that was almost certainly not intended by the state legislature." *Id.* at *7.

The Bayview court explained:

> The Court rejects [SFR's] reading of the statues [sic]. It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their

[1] *See First 100, LLC v. Ronald Burns, et al.*, Order Denying Defendant's Motion to Dismiss, at 7:25-28 (Case No. A677693, Eighth Judicial Dist. Ct. of Nev., filed May 31, 2013) (hereinafter "*First 100 Order*").

security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

Id. at *5. This Court agrees.

(12) This Court recognizes that although the Advisory Opinion of the Nevada Real Estate Division[2], cited by Plaintiff, is contrary to this Court's current and prior rulings, that Opinion includes a disclaimer that it lacks the force of law.

(13) Finally, this Court gives considerable emphasis to the due process of all parties and rejects the arguments of Plaintiff and the Real Estate Division that a lawsuit is not required for due process. It is of great concern to this court that NRS 116.311635(1)(b)(2) does not unequivocally require a HOA to give notice of lien or sale to first security holders. Non-judicial foreclosure, as employed in this case, simply does not afford a first mortgage lien holder adequate due process to protect its lien interests. Therefore this Court must read NRS 116.3116(2) to require the HOA to institute a judicial foreclosure action to enforce its super priority lien interest.

COURT ORDERS for good cause appearing and for the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED**.

Dated: October 17th, 2013

NANCY ALLF
DISTRICT COURT JUDGE

[2] *Nevada Real Estate Division*, Advisory Opinion, No. 13-01, at 9 (Dec. 12, 2012) ("An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security.").

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I mailed a copy of the foregoing to the attorneys as follows:

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