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7 SUPREME COURT
8 STATE OF NEVADA
9

10 SHADOWWOOD HOMEOWNERS
11 ASSOCIATION; and GOGO WAY TRUST,

No. 63180

12 Appellant,

13 vs.

14 NEW YORK COMMUNITY BANK,

15 Respondent.
16
17

18 **APPELLANT GOGO WAY TRUST'S OPENING BRIEF**
19

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NRAP 26.1 DISCLOSURE

Counsel for defendant/appellant states that the defendant/appellant Gogo Way Trust is a Nevada trust. The trustee of the trust is Resources Group, LLC. The manager for Resources Group, LLC is Iyad Haddad.

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
Cases	iv
Statutes and rules.. . . .	v
Other authorities.	vi
JURISDICTIONAL STATEMENT.	vii
I. ISSUES PRESENTED ON APPEAL.	1
II. STATEMENT OF CASE	2
A. Facts pertinent to the underlying action.	2
III. STANDARD OF REVIEW.	4
IV. ARGUMENT.	4
1. There are genuine issues of material fact which preclude the granting of summary judgment	4
2. There was no evidence presented of any irregularity in the foreclosure procedures.	6
3. Defendant/appellant Gogo Way Trust is a bona fide purchaser	8
4. NYCB did not make a proper tender.	13
5. The findings of the court are not supported by substantial evidence	16
6. The standard of review on a motion for summary judgment is a de novo review.	17
V. CONCLUSION	17
CERTIFICATE OF COMPLIANCE	19
CERTIFICATE OF MAILING.	20

TABLE OF AUTHORITIES

CASES

Nevada cases

<u>Baily v. Butner</u>	64 Nev. 1, 176 P.2d 226 (1947)	12
<u>Berge v. Fredericks</u>	95 Nev. 183, 591 P.2d 246 (1979)	4, 11
<u>Bowler v. Vannoy</u>	67 Nev. 80, 215 P.2d 248 (1950)	12- 13
<u>Brunzell v. Woodbury</u>	85 Nev. 29, 449 P.2d 158 (1969)	8
<u>Canfield v. Gill</u>	101 Nev. 170, 697 P.2d 476 (1985).	16
<u>Golden v. Tomiyasu</u>	79 Nev. 503, 387 P.2d 989 (1963)	8
<u>Long v. Towne</u>	98 Nev. 11, 639 P.2d 528 (1982)	8
<u>Moore v. DeBernardi</u>	47 Nev. 33, 220 P. 544 (1923)	12
<u>Moresi v. Swift</u>	15 Nev. 215 (1880)	9
<u>Turner v. Dewco Services, Inc.</u>	87 Nev. 14, 479 P.2d 462 (1971)	8
<u>25 Corp., Inc. v. Eisenman Chemical Co.</u>	101 Nev. 664, 709 P.2d 164 (1985)	4
<u>Wood v. Safeway, Inc.</u>	121 Nev. 724, 121 P.3d 1026 (2005)	3- 4, 17

Federal and other cases

<u>Celotex Corp. v. Catrett</u>	477 U.S. 317 (1986)	3
<u>Firato v. Tuttle</u>	48 Cal. 2d 136, 308 P.2d 333 (1957)	9-10, 13
<u>Gaffney v. Downey Savings & Loan Ass'n,</u>		
200 Cal. App. 3d 1154, 246 Cal. Rptr. 421 (1988)		14
<u>JCC Development Corp. v. Levy</u>		
208 Cal. App. 4th 1522, 146 Cal. Rptr. 635 (2012)..		10
<u>Melendrez v. D&I Investment, Inc.</u>		
127 Cal. App. 4th 123, 26 Cal. Rptr. 413 (2005)		7, 8
<u>Moeller v. Lien</u>	25 Cal. App. 4th 822, 30 Cal. Rptr. 777 (1994)	13, 14
<u>Nguyen v. Calhoun</u>	105 Cal. App. 4th 428, 129 Cal. Rptr. 436 (2003)	14, 15
<u>United States v. Countrywide Home Loans,</u>		
405 F.App'x3, 2010 WL 393095 (9th Cir. 2010)		7, 8

1	<u>Will v. Mill Condo. Owners' Ass'n</u> , 176 Vt. 380, 848 A.2d 336 (2004)	6
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2 **STATUTES CITED:**

3	NRS 107.080.	11, 13, 15, 16
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4	NRS 116.31162	16
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5	NRS 116.31163	16
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6	NRS 116.31164	16
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7	NRS 116.31166	12, 16
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8	Cal. Civ. Code 2924	11, 12
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9 **OTHER AUTHORITIES**

10	5 Miller & Starr §11:50	8
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ISSUES PRESENTED ON APPEAL

1. There are genuine issues of material fact which preclude the granting of summary judgment
2. There was no evidence presented of any irregularity in the foreclosure procedures
3. Defendant/appellant Gogo Way Trust is a bona fide purchaser
4. Respondent NYCB did not make a proper tender
5. The findings of the court are not supported by substantial evidence
6. The standard of review on appeal on a granting of a motion for summary judgment is a de novo review

STATEMENT OF THE CASE

A. Facts Pertinent to the Underlying Action

The underlying action arises from a dispute over the ownership of the real property commonly known as 3923 Gogo Way, #109, Las Vegas, Nevada (hereinafter "Property").

New York Community Bank (hereinafter "Respondent NYCB") was the assigned beneficiary of a deed of trust recorded as an encumbrance to the Property on April 27, 2007. See copy of deed of trust at App. Pgs. 258-302 and copy of assignment of deed of trust at App. Pgs. 310-311. Respondent NYCB obtained title to the Property pursuant to a trustee's deed upon sale recorded with the Clark County Recorder on May 24, 2011. App. Pgs. 318-321. As reflected in this trustee's deed, Respondent NYCB was the highest bidder at a public auction held on May 9, 2011 on a credit bid on its deed of trust.

After the trustee's sale to Respondent NYCB, Gogo Way Trust (hereinafter "Gogo Way") obtained title to the property by way of a trustee's deed upon sale recorded with the Clark County Recorder on March 1, 2012. See copy of trustee's deed upon sale at APP. Pgs. 383-384. This trustee's deed upon sale arose from a delinquency in assessments due from Respondent NYCB to the Shadow Wood Homeowners' Association (hereinafter "the HOA") pursuant to NRS Chapter 116. (APP. Pg. 186 ¶12)

As verified in the trustee's deed upon sale, the agent for the HOA recorded a notice of delinquent assessment lien on July 7, 2011, recorded a notice of default and election to sell under homeowners association lien, and mailed, posted and published a notice of foreclosure sale scheduling a public auction on February 22, 2012. At the public auction held on February 22, 2012, Gogo Way was the highest bidder and paid the bid amount of \$11,018.39 in cash for the Property. (APP. Pgs. 383-384)

Respondent NYCB filed its complaint against the HOA and Gogo Way on April 18, 2012 asserting two causes of action: 1) quiet title to remove Gogo Way's claim to the

1 Property; 2) declaratory relief that Respondent NYCB remained the owner of the
2 Property following the HOA sale held on February 22, 2012. (APP. Pgs. 1-62) By
3 stipulation, Respondent NYCB filed a first amended complaint on October 5, 2012.
4 (APP. Pgs. 119-180) In response to the first amended complaint, the HOA and Gogo
5 Way filed an answer and counterclaim seeking declaratory relief and quiet title
6 determining that title to the Property had vested in Gogo Way. (APP. Pgs. 181-189)

7 On February 7, 2013, defendants filed a motion for summary judgment to have the
8 court determine that title to the Property had vested in Gogo Way. (APP. Pgs. 196-257)

9 On February 8, 2013, Respondent NYCB filed a motion for summary judgement
10 seeking to have the court rescind the HOA sale held on February 22, 2012 and restore
11 title to the Property to Respondent NYCB. (APP. Pgs. 258-499)

12 Following further briefing and oral argument at a hearing held on March 13, 2013,
13 the court granted Respondent NYCB's motion for summary judgment and denied
14 defendants' motion. Written findings of fact, conclusions of law, and order granting
15 plaintiff's motion for summary judgment were filed on April 10, 2013. (APP. Pgs. 917-
16 925) Paragraph 11 of the conclusions of law states: "Defendant Gogo Way Trust was not
17 a bona fide purchaser at the subject HOA foreclosure sale, and is not entitled to the
18 protections of NRS 645F.440." (APP. Pg. 924, ¶11) The third paragraph in the court's
19 order states that "Defendant Gogo Way Trust was not a bona fide purchaser at the March
20 1, 2012, HOA foreclosure sale." (APP. Pg. 925)

21 Notice of entry of the court's order was filed and mailed on April 16, 2013. (APP.
22 Pgs. 926-938) Defendants filed their notice of appeal on May 7, 2013.

23 **STANDARD OF REVIEW**

24 In the case of Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005), this
25 Court adopted the standard employed by the United States Supreme Court in Celotex
26 Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), to decide motions
27
28

1 for summary judgment. This Court stated that “[t]his court reviews a district court’s grant
2 of summary judgment de novo, without deference to the findings of the lower court.” 121
3 P.2d at 1029. This Court also stated:

4 Summary judgment is appropriate under NRCP 56 when the pleadings,
5 depositions, answers to interrogatories, admissions, and affidavits, if
6 any, that are properly before the court demonstrate that no genuine
7 issue of material fact exists, and the moving party is entitled to judgment
8 as a matter of law. The substantive law controls which factual disputes
 are material and will preclude summary judgment; other factual disputes
 are irrelevant. A factual dispute is genuine when the evidence is such
 that a rational trier of fact could return a verdict for the nonmoving party.

9 121 P.2d at 1031.

10 ARGUMENT

11 **1. There are genuine issues of material fact which preclude the granting of summary** 12 **judgment**

13 Defendant/appellant Gogo Way Trust asserted throughout the proceedings before
14 the District Court its status as a bona fide purchaser for value without notice of any
15 outstanding claims. See 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d
16 164, 172 (1985).

17 The issue of one’s status of a bona fide purchaser, especially the element of the
18 purchaser’s knowledge or notice of outstanding claims, is an issue of fact. In the case of
19 Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979), this court stated:

20 In the case at hand, the court below granted summary judgment for Valdez
21 upon the premise that the evidence established that she was a bona fide
22 purchaser for value who had recorded first, and thus was entitled to the
23 protection of the recording act. However, a party claiming title to the land
24 by a subsequent conveyance must show that the purchase was made in good
25 faith, for a valuable consideration; and that the conveyance of the legal title
26 was received before notice of any equities of the prior grantee. Brophy M.
27 Co. v. B. & D. M. Co., 15 Nev. 101, 106 (1880). Accord, Allison Steel Mfg.
28 Co. v. Bentonite, Inc., 86 Nev. 494, 471 P.2d 666 (1970); Moore v. De
 Bernardi, 47 Nev. 33, 213 P. 1041, 220 P. 544 (1923); Moresi v. Swift, 15
 Nev. 215 (1880); Gilson v. Boston, 11 Nev. 413 (1876). When the evidence
 is viewed, as it must be upon this appeal, in the light most favorable to
 appellant and without benefit of inferences favorable to movant Valdez, it
 is apparent that there are genuine issues of material fact which remain to be
 resolved, and that summary judgment, therefore, should not have been
 granted.

1 In the findings of fact and conclusions of law granting the motion for summary
2 judgment, the court made 22 separate paragraphs of findings of fact. The order is devoid
3 of any findings regarding the requisite elements of a bona fide purchaser. Only one of the
4 findings of fact even mentions appellant Gogo Way Trust. In paragraph 19, the order
5 states:

6 On February 22, 2012, Shadow Wood's agent, Alessi & Koenig, sold the
7 Subject Property to Defendant Gogo Way Trust at the HOA Trustee Sale for
8 \$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").

9 The conclusions of law mention Gogo Way Trust twice. Paragraph 7 states:

10 Plaintiff NYCB is entitled to summary judgment as a matter of law on the
11 declaratory relief claim and claim for quiet title, quieting title in favor of
12 Plaintiff NYCB and against Gogo Way Trust immediately. Pursuant to this
13 Court's equitable powers, the HOA TDUS recorded March 1, 2012 is hereby
14 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.

15 Paragraph 11 concludes:

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

18 At no point in the findings of fact and conclusions of law, are there any findings
19 of the purchase for value or knowledge of any outstanding claims on the part of Gogo
20 Way Trust.

21 In its supplemental memorandum filed on March 1, 2013 (App. Pgs. 524-657),
22 Respondent NYCB admitted in footnote 4 at pages 8 and 9 of the pleading (App. Pgs.
23 531-532):

24 It is unknown whether Shadow Wood, MP Association Management,
25 or Alessi & Koenig knew the principals/trustors of GOGO WAY TRUST,
26 or whether this was a sweetheart deal under which financial and/or other
27 benefits were exchanged so that this HOA foreclosure sale could go
28 forward and the property could be purchased for a fraction of its actual
value. If the Court chooses not to grant NYCB's Motion for Summary
Judgment, this will become one of many factual issues that need to be
probed in further discovery.

1 Respondent NYCB thereby admitted that a genuine factual dispute existed
2 regarding this material issue. Unless Respondent NYCB can prove that Gogo Way was
3 aware of Respondent NYCB's private communications to stop the HOA foreclosure sale
4 held on February 22, 2012, Gogo Way acquired title free of the unrecorded claims by
5 Respondent NYCB. In this regard, the Court must remember that at the time of the sale
6 held on February 22, 2012, Respondent NYCB no longer held a lien against the Property
7 – the prior recorded deed of trust had been extinguished by Respondent NYCB's credit
8 bid at the trustee's sale held on May 9, 2011. At the time of the HOA foreclosure sale,
9 the publicly recorded documents revealed only that Respondent NYCB was an owner of
10 the Property and had defaulted on its obligations to the HOA.
11

12 Summary judgment should not have been granted in this case. Respondent NYCB
13 has admitted that there are issues of fact to be tried. The judgment should be reversed for
14 this reason.

15 **2. There was no evidence presented of any irregularity in the foreclosure procedures**

16 In it's motion for summary judgment, Respondent NYCB claimed that the HOA
17 failed to act in good faith and failed to sell the Property in a commercially reasonable
18 manner. For this argument, Respondent NYCB relied on the Vermont case of Will v.
19 Mill Condo. Owners' Ass'n, 176 Vt. 380, 848 A.2d 336 (2004). In the Will case, the
20 court reversed a summary judgment entered in favor of the buyers at the foreclosure sale
21 of appellant's condominium where the condominium was valued at \$70,000 and the
22 buyers paid \$3,510.10. In reaching it's decision the court noted that there was only one
23 bidder at the sale, that the attorney conducting the sale advised the bidder that the
24 minimum acceptable bid at the sale would be \$3510.10, and that this "was an assurance
25 that the condominium would be sold for exactly that low amount." 848 A.2d at 343.
26

27 In the present case, on the other hand, Respondent NYCB presented absolutely no
28 evidence of any irregularity in the handling of the public auction held on February 22,

1 2012. The record on appeal contains no evidence that Gogo Way was the only bidder or
2 that Gogo Way had any unfair advantage in entering it's high bid of \$11,018.39. Instead,
3 Respondent NYCB simply attacks the sale price as being "barely twenty percent (20%)"
4 of the Property's appraised value based on a seven month old appraisal, dated July 21,
5 2011. App. Pg. 272, ll. 1-8. A copy of the appraisal is attached to Respondent NYCB's
6 motion as Exhibit 8. This appraisal valued the Property at \$53,000 as of July 21, 2011.
7 App. Pgs. 323-347. No evidence was offered proving the value of the Property on
8 February 22, 2012.

9
10 In its reply to defendant's opposition to plaintiff's motion for summary judgment,
11 filed on March 7, 2013, Respondent NYCB again claimed that "Gogo Way purchased the
12 subject property for a commercially unreasonable price (which alone defeats its
13 proclaimed bona fide purchaser status)." (APP. Pg. 739, ll. 16-18) Respondent NYCB
14 cited no authority for this statement, and it is contradicted by multiple authorities.

15 At pages 17 and 18 of it's reply (App. Pgs. 747-748), Respondent NYCB cited the
16 unpublished decision in United States v. Countrywide Home Loans, 405 F.App'x3, 2010
17 WL 393095 (9th Cir. 2010), for the proposition that: "A buyer at a foreclosure sale is a
18 bona fide purchaser if he (1) bought the property for fair value; and (2) had no knowledge
19 or notice of anyone else's rights to the property." (App. Pg. 747 ll. 22-24) Plaintiff then
20 asserted that "[i]t can hardly be argued with a straight face that \$11,018.39 is 'fair value'
21 for a property that was purchased only ten (10) months earlier for more than four times
22 that amount." (App. Pg. 782, ll. 7-8)

23
24 In adding the word "fair" to describe the word "value," the Countrywide case
25 misstates the law. As authority for it's statement, the court in Countrywide cited the
26 California case of Melendrez v. D&I Investment, Inc., 127 Cal. App. 4th 1238, 26 Cal.
27 Rptr. 413, 424-425 (2005), where the borrowers sought to set aside a foreclosure sale that
28 they claimed was made in violation of a repayment agreement in which the lender agreed

1 to postpone the sale. Following a three day bench trial, the court concluded that the sale
2 was valid. In affirming the trial court's determination that the buyer was a bona fide
3 purchaser, the court stated:

4 Thus, the two elements of being a BFP are that the buyer (1) purchase the
5 property in good faith for value, and (2) have no knowledge or notice of the
6 asserted rights of another. (14 Powell on Real Property (1996) Recording
7 Acts and Priorities, § 82.01[2], p. 82-12.) The first element does not require
8 that the buyer's consideration be the fair market value of the property (or
9 anything approaching it). (Id., §82.02[2], pp. 82-77 to 82-79.) Instead, the
10 buyer need only part with something of value in exchange for the property.
11 (See Horton v. Kyburz (1959) 53 Cal.2d 59, 65-66, 346 P.2d 399 [rejecting
12 contention that BFP must give "adequate consideration" sufficient to obtain
13 specific performance of a contract].

14 The decision in Countrywide also cites 5 Miller & Starr § 11:50, but this section
15 contains no requirement that "fair" value be paid by a bona fide purchaser.

16 Moreover, the decision in Countrywide did not involve a claim that the amount of
17 the sale price prevented the buyer from being a bona fide purchaser. Instead, the finding
18 was based on the inconsistencies in the public record which, upon reasonable inquiry,
19 would have led the buyer to discover that Countrywide's senior deed of trust had
20 erroneously been reconveyed.

21 The Vermont and federal authorities cited by the plaintiff/respondent are contrary
22 to well established Nevada law. This Court has stated on multiple occasions that mere
23 inadequacy of price is not sufficient to set aside a foreclosure sale where there is no
24 showing of fraud, unfairness, or oppression. Long v. Towne, 98 Nev. 11, 639 P.2d 528,
25 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); Brunzell
26 v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969); Golden v. Tomiyasu, 79 Nev. 503, 387
27 P.2d 989 (1963). The foreclosure sale in issue in the case of Long v. Towne, Id. involved
28 a foreclosure of an HOA lien. The other cited cases involved foreclosure of a deed of
trust. Consequently, the fact that it purchased the Property for \$11,018.39 does not
disqualify Gogo Way from being a "bona fide purchaser."

1 **3. Defendant/appellant Gogo Way Trust is a bona fide purchaser**

2 Gogo Way Trust is bona fide purchaser for value of the subject property without
3 notice of any outstanding claims of NYCB. The bona fide purchaser doctrine was
4 adopted by this court as far back as 1880, in the case of Moresi v. Swift, 15 Nev. 215
5 (1880). This court stated:

6 without notice,
7 will be protected in equity, applies equally to real estate, chattels, and
8 personal estate.

9 The case of Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333 (1957) involved
10 a fact pattern where real property was acquired by a third party after the trustee on a deed
11 of trust had reconveyed the trust deed without authority to do so. In ruling for the
12 subsequent purchaser and encumbrancer, the California Supreme Court held that the bona
13 fide purchaser doctrine protected the later purchaser and encumbrancer, even though the
14 original trust deed was reconveyed without authority. The court stated:

15
16 Instruments which are wholly void cannot ordinarily provide the foundation
17 for good title even in the hands of an innocent purchaser, as where a deed has
18 been forged or has not been delivered. Trout v. Taylor, 220 Cal. 652, 656,
19 32 P.2d 968. It does not appear, however, that section 870 of the Civil Code
20 should necessarily make the unauthorized reconveyance by a trustee void as
21 to such a purchaser. Section 2243 of that code states: "Everyone to whom
property is transferred in violation of a trust, holds the same as an involuntary
trustee under such trust, unless he purchased it in good faith, and for a
valuable consideration." (Emphasis added.) This section was also enacted in
1872 and has been treated as correlative to section 870. Chapman v.
Hughes, 134 Cal. 641, 657, 58 P. 298, 60 P. 974, 66 P. 982.

22 **The rule indicated by section 2243, which would protect innocent**
23 **purchasers for value who take without any notice that the conveyance**
24 **by the trustee was unauthorized, is in accord with the rule protecting**
25 **such purchasers who acquire their interests from one who holds a**
26 **general power and who makes a conveyance for an unauthorized**
27 **purpose**, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or
28 from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafferty v.
Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civil Code, 869. The
protection of such purchasers is consistent 'with the purpose of the registry
laws, with the settled principles of equity, and with the convenient
transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct.
814, 819, 27 L.Ed. 529. **It also finds support in the better reasoned cases**

1 **from other jurisdictions which have dealt with similar problems upon**
2 **general equitable principles and in the absence of statutory provisions.**

3 Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S.
4 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478,
5 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903;
6 Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho
7 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette
8 Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v.
9 Andrasko, 178 Wash. 145, 34 P.2d 444.

10 As section 2243 of the Civil Code must be read with section 870 of the same
11 code and because of the obvious desirability of protecting innocent
12 purchasers for value who rely in good faith upon recorded instruments under
13 the circumstances presented here, we conclude that plaintiffs were required
14 to plead that respondents were not such innocent purchasers for value in
15 order to state a cause of action against them. In the absence of such
16 allegations, the trial court properly sustained respondents' demurrers to
17 plaintiffs' first amended complaint. (emphasis added)

18 Gogo Way's status as a bona fide purchaser protects Gogo Way's title from any
19 claim by Respondent NYCB that it attempted to tender a cure amount to prevent
20 foreclosure of the HOA lien. In this case, Gogo Way purchased the Property at a
21 properly noticed public auction held on February 22, 2012 for valuable consideration
22 (\$11,018.39). The record on appeal contains no evidence that Gogo Way was made
23 aware that Respondent NYCB claimed that the HOA had wrongfully rejected a cure
24 payment tendered by Respondent NYCB to stop the trustee's sale from going forward
25 as noticed.

26 Respondent NYCB did not record any documents regarding their alleged tender to
27 put a buyer on notice that Respondent NYCB disputed in any way the validity of the
28 foreclosure proceedings instituted by the HOA. Similarly, no representative of
Respondent NYCB appeared at the foreclosure sale to put bidders on notice of its
objections to the sale. NYCB did not seek an injunction from the District Court to stop
the foreclosure sale before it occurred. NYCB could have paid the full amount demanded
by the foreclosure agent, and sued for a refund of any sums they felt was overpaid. See
JCC Development Corp. v Levy, 208 Cal. App. 4th 1522, 146 Cal. Rptr. 635 (2012).

1 Respondent NYCB stated that on January 31, 2012, it sent a check for \$6,783.16
2 to Alessi & Koenig to cure the default in payments to the HOA (APP. Pg. 265, ll. 9-12)
3 even though the notice of trustee's sale recorded on January 27, 2012 listed the unpaid
4 balance as of the initial publication as \$8,539.77 (APP. Pg. 264, ll. 1-3). Respondent
5 NYCB admits that on February 8, 2012, Alessi & Koenig rejected this payment and
6 advised Respondent NYCB that the total amount due and owing was \$9,017.39. (APP.
7 Pg. 265, ll. 13-14). Paragraph 12 of the Affidavit of Sarah Artino attached as Exhibit 22
8 to Respondent NYCB's motion for summary judgment admits that "[o]n February 14,
9 2012, NYCB received a cover letter and nine (9) month super priority demand from
10 Alessi & Koenig reflecting an outstanding balance of \$9,017.39, good through February
11 29, 2012." (APP. Pg. 387, ¶12)

13 Respondent NYCB did not tender a new check for the amount of \$9,017.39 and
14 took no action to stop the trustee's sale noticed to take place on February 22, 2012. Gogo
15 Way purchased the Property at the sale on February 22, 2012 without notice that
16 Respondent NYCB had any objection to the sale going forward.

17 California's Civil Code §2924 is similar to Nevada's NRS 107.080 governing the
18 procedures for non-judicial foreclosures of trust deeds. However, California Civil Code
19 §2924 includes a codification of the common law presumptions regarding the protections
20 provided to a bona fide purchaser at a trustee's sale. Section (6)(c) states:

21 A recital in the deed executed pursuant to the power of sale of compliance
22 with all requirements of law regarding the mailing of copies of notices or the
23 publication of a copy of the notice of default or the personal delivery of the
24 copy of the notice of default or the posting of copies of the notice of sale or
25 the publication of a copy thereof shall constitute prima facie evidence of
26 compliance with these requirements and conclusive evidence thereof in
27 favor of bona fide purchasers and encumbrancers for value and without
28 notice.

26 Nevada has not codified the protections of a bona fide purchaser at a trustee's sale,
27 but the Nevada case law is consistent with the holdings in California based on its
28 statutory codification of the bona fide purchaser doctrine.

1 NRS 116.31166 has language similar to California Civil Code §2924 (6)(c)
2 regarding the recitals in the foreclosure deed. The Nevada statute reads:

3 **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible**
4 **for proper application of purchase money; title vested in purchaser**
5 **without equity or right of redemption.**

6 1. The recitals in a deed made pursuant to NRS 116.31164 of:
7 (a) Default, the mailing of the notice of delinquent assessment, and the
8 recording of the notice of default and election to sell;
9 (b) The elapsing of the 90 days; and
10 (c) The giving of notice of sale,
11 are conclusive proof of the matters recited.

12 2. Such a deed containing those recitals is conclusive against the unit's
13 former owner, his or her heirs and assigns, and all other persons. The receipt
14 for the purchase money contained in such a deed is sufficient to discharge
15 the purchaser from obligation to see to the proper application of the purchase
16 money.

17 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and
18 116.31164 vests in the purchaser the title of the unit's owner without equity
19 or right of redemption.

20 In the case of Moore v. DeBernardi 47 Nev. 33, 220 P. 544 (1923), this court
21 stated:

22 The decisions are uniform that the bona fide purchaser of a legal title is not
23 affected by any latent equity founded either on a trust, incumbrance, or
24 otherwise, of which he has no notice, actual or constructive. Brophy M. Co.
25 v. B. & D. G. & S. M. Co., 15 Nev. 108.

26 To entitle a party to the character of a bona fide purchaser, without notice,
27 he must have acquired the legal title, and have actually paid the purchase
28 money before receiving notice of the equity of another party. Moresi v.
Swift, 15 Nev. 215.

Consistent with these holdings, in the case of Baily v. Butner 64 Nev. 1, 176 P.2d
226 (1947) this court stated:

The authorities are practically unanimous in holding that, in a suit by one
asserting a prior equity, unless exceptional circumstances exist, the duty
devolves upon the defendant, who seeks to establish a superior equity upon
the basis that he is a bona fide purchaser, to both allege and prove all of the
essential elements constituting him such bona fide purchaser, that is to say,
a purchaser for a valuable consideration without notice of the prior
agreement and the equity resulting therefrom.

The doctrine of the bona fide purchaser has even been applied to chattel. In the
case of Bowler v. Vannoy, 67 Nev. 80, 215 P.2d 248 (1950), this court stated:

1 From aught that appears from the evidence, the transaction involved was one
2 entirely between Vrenon and the Bowlers, and there being nothing
3 apparently in the record to disclose that the transaction was other than a
4 bona fide, genuine transaction, unaffected by a knowledge on the part of the
5 Bowlers of any connivance, conspiracy, fraud or other improper or tortious
6 action to the detriment of Stella B. Leonard, formerly known as Stella B.
7 Leonard Belanger, as to the transfer of said 'Belanger' cattle, so-called, the
8 well-settled legal presumption was, as to the said transaction, that the
9 Bowlers, in taking into their possession, the said forty-one head of dairy
10 cattle and the one Holstein bull, did so lawfully and rightfully, and not
11 unlawfully and wrongfully. **One acting in such a transaction, who has
12 become vested rightfully with the possession and right of possession of
13 property, must be deemed to have the right, until the contrary appears
14 and is judicially determined, to the very high position of an innocent
15 third person who has given value for the property received, and is
16 without notice of any prior equity or equities as to which he owes any
17 duty, and that he has acted in good faith.** (emphasis added)
18

11 Although the procedures for the non-judicial foreclosures are similar in Chapter
12 116 for foreclosure on a homeowners association lien and under Chapter 107 for
13 foreclosure under a deed of trust, there is one striking difference between the two
14 chapters. NRS 107.080(6) permits a party that does not receive proper notice of the sale
15 to file an action to set the sale aside within 60 days of receiving actual notice of the sale.
16 There is no similar provision in Chapter 116. This court may presume that the legislature
17 intended for ALL sales under Chapter 116 to be final and not subject to attack.
18

19 It is respectfully submitted that because of the similarities between the Nevada case
20 law and the California case law, this court should adopt the reasoning in the Firato v.
21 Tuttle case and apply the bona fide purchaser doctrine to confirm good title in Gogo Way
22 Trust.

23 **4. NYCB did not make a proper tender**

24 In the case of Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994),
25 the respondent allowed a trustee's sale to go forward even though the respondent had
26 available cash deposits to pay off the loan. Id. at 828. The trial court granted the
27 respondent's request to set aside the sale because "[t]he value of the property was four
28 times the amount of the debt/sales price." Id. at 829. Reversing the trial court, the Court

1 of Appeals stated:

2 Since the presumption is rebuttable as to purchasers other than bona fide
3 purchasers, the purchaser's title may in some instances be recovered by the
4 trustor in an attack on the validity of the sale. (4 Miller & Starr, supra, §9:152,
5 pp. 502-503.) As to a bona fide purchaser, however, the presumption is
6 conclusive. Thus as a general rule, a trustor has no right to set aside a
7 trustee's deed as against a bona fide purchaser for value by attacking the
8 validity of the sale. (Homestead Savings v. Damiento, supra, 230 Cal. App.
9 3d at p. 436.) The conclusive presumption precludes an attack by the trustor
10 on a trustee's sale to a bona fide purchaser even though there may have been
11 a failure to comply with some required procedure which deprived the trustor
12 of his right of reinstatement or redemption. (4 Miller & Starr, supra, § 9:141,
13 p. 463; cf. Homestead v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The
14 conclusive presumption precludes an attack by the trustor on the trustee's sale
15 to a bona fide purchaser even where the trustee wrongfully rejected a proper
16 tender of reinstatement by the trustor. Where the trustor is precluded from
17 suing to set aside the foreclosure sale, the trustor may recover damages from
18 the trustee. (Munger v. Moore (1970) 11 Cal. App. 3d 1, 9, 11 [89 Cal. Rptr.
19 323].)
20 Id. at 831-832. (emphasis added)

21 In this case, Respondent NYCB refused to tender the amount demanded by Alessi
22 & Koenig, but instead tendered an amount calculated by Respondent NYCB. This tender
23 was properly rejected by Alessi & Koenig because as noted by the court in the case of
24 Gaffney v. Downey Savings & Loan Ass'n, 200 Cal. App. 3d 1154, 1165, 246 Cal. Rptr.
25 421 (1988), "[n]othing short of the full amount due the creditor is sufficient to constitute
26 a valid tender, and the debtor must at his peril offer the full amount." In Gaffney, the
27 court reversed a judgment for wrongful foreclosure entered in favor of the borrowers and
28 held that the lender properly rejected the borrowers' cure payments because the borrowers
mailed the July and August payments and late charges in one envelope and the September
payment in a separate envelope. The court observed that "it is a debtor's responsibility
to make an unambiguous tender of the entire amount due or else suffer the consequences
that the tender is of no effect." Id.

29 In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the
30 defaulting borrower had entered into a contract to sell the subject property to the
31 plaintiff. The trustee's sale was scheduled for July 10, 1998 at noon, and the lender

1 agreed that it would postpone the sale if the borrower could prove that the plaintiff's new
2 loan had funded. The new loan funded on July 9, 1998 and escrow closed on July 10,
3 1998, but the cure payment was not received by the lender until July 13, 1998.
4 Meanwhile, the trustee's sale was held on July 10, and the defendant purchased the
5 property. Plaintiff sued to quiet title, and the trial court ruled in favor of the plaintiff.
6 The court of appeals reversed because the debt was not paid prior to the foreclosure sale.
7 In particular, the court stated that in the absence of a direction by the lender to mail a
8 payment, "the payment is not effective until received by the creditor." Id. at 449.

9
10 The court also rejected the plaintiff's argument that the sale could be set aside
11 based on "irregularity in the sale coupled with inadequate price." Id. at 450. The court
12 rejected this argument because "[a] mistake that occurs outside (dehors) the confines of
13 the statutory proceeding does not provide a basis for invalidating the trustee's sale." Id.
14 Because the plaintiff could prove no error in connection with any statutorily required
15 notices or with the bidding process at the sale, the misunderstanding about postponing
16 the sale did not constitute adequate grounds to invalidate the trustee's sale.

17 Similarly, in the present case, Respondent NYCB has identified no error in the
18 service of the statutorily required notices or in the bidding process at the sale held on
19 February 22, 2012, and Respondent NYCB cannot prove that it timely tendered the cure
20 amount demanded by Alessi & Koenig. Instead, Respondent NYCB asserts (without
21 citing any authority) that it was entitled to calculate on its own the amount of the cure
22 payment required to stop the trustee's sale and to tender that amount. The district court
23 accepted this unfounded argument and "based upon the Court's equitable powers," set
24 aside the foreclosure sale and rescinded the trustee's deed upon sale recorded on March
25 1, 2012 in favor of Gogo Way. See Order at App. Pg. 925, ll. 6-10.

26
27 In Nevada, NRS 107.080(5) provides the procedure and time limitations to set
28 aside a non-judicial foreclosure on a deed of trust. The statute provides:

1 Every sale made under the provisions of this section and other sections of
2 this chapter vests in the purchaser the title of the grantor and any successors
3 in interest without equity or right of redemption. A sale made pursuant to
4 this section must be declared void by any court of competent jurisdiction in
5 the county where the sale took place if:

6 (a) The trustee or other person authorized to make the sale does not
7 substantially comply with the provisions of this section or any applicable
8 provision of NRS 107.086 and 107.087;

9 (b) Except as otherwise provided in subsection 6, an action is commenced
10 in the county where the sale took place within 90 days after the date of the
11 sale; and

12 (c) A notice of lis pendens providing notice of the pendency of the action is
13 recorded in the office of the county recorder of the county where the sale
14 took place within 30 days after commencement of the action.

15 Like NRS 107.080(5), NRS 116.31166(3) provides that the sale of a unit pursuant
16 to NRS 116.31162, 116.31163 and 116.31164 “vests in the purchaser the title of the unit’s
17 owner without equity or right of redemption.”

18 Unlike NRS 107.080(5), NRS 116.31166(3) contains no language authorizing a
19 sale made pursuant to NRS 116.31166 to be declared void. Because no statutory
20 procedure exists to set aside an HOA sale, Respondent NYCB’s complaint to set aside the
21 properly noticed sale held on February 22, 2012 is without merit. By allowing the HOA
22 sale to proceed without objection, Respondent NYCB cannot now undermine Gogo
23 Way’s status as a bona fide purchaser of the Property.

24 **5. The findings of the court are not supported by substantial evidence**

25 In the case of Canfield v. Gill, 101 Nev. 170, 697 P.2d 476 (1985), this court stated:

26 This court will not hesitate to disturb a verdict or decision where there is no
27 substantial conflict in the evidence on any material point and the verdict or
28 decision is manifestly contrary to the evidence.

The District Court made a conclusory finding that Gogo Way Trust was not a bona
fide purchaser. There are no facts or evidence to support this finding.

1 The judgment states in part:

2 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based
3 upon the Court's equitable powers, the HOA Foreclosure Sale of February
4 22, 2012, to Gogo Way Trust was not legitimate and is set aside, and the
5 HOA TDUS recorded on March 1, 2012, in favor of Gogo Way Trust is
6 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.
(APP. 925, ll. 6-10)

7 There is absolutely no evidence in the record of any irregularity regarding the HOA
8 foreclosure sale. There is no basis for a finding that the HOA foreclosure sale conducted
9 on February 22, 2012 to Gogo Way Trust was not legitimate.

10 **7. The standard of review on a motion for summary judgment is a de novo review.**

11 The standard of review on appeal on an order granting summary judgment is a de novo
12 review. Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005).

13 **CONCLUSION**

14 The HOA foreclosure sale held on February 22, 2012 extinguished the ownership
15 interest that Respondent NYCB acquired at the trustee's sale held on May 9, 2011.

16 Respondent NYCB's dispute with the HOA and Alessi & Koenig over the amount
17 required to cure the default occurred outside of the statutory proceeding and does not
18 provide a basis for invalidating the HOA foreclosure sale.

19 Material issues of fact exist regarding Respondent NYCB's dispute with the HOA
20 and Alessi & Koenig over the payment tendered by Respondent NYCB to cure its default
21 which make the granting of Respondent NYCB's motion for summary judgment
22 improper.

23 As a bona fide purchaser, Gogo Way acquired title to the Property free and clear
24 of all competing legal or equitable claims of which Gogo Way had no notice at the time
25 that it acquired title to the Property pursuant to the Trustees' Deed Upon Sale recorded
26 on March 1, 2012. This includes Respondent NYCB's claim that its ownership interest
27 in the Property was not extinguished by the duly noticed sale held on February 22, 2012.
28

1 Having allowed this sale to proceed without objection, Respondent NYCB cannot now
2 assert that the sale was invalid and impair the rights held by Gogo Way as a bona fide
3 purchaser.

4 As a result, this Court must enter its Order reversing the order by the district court
5 granting Respondent NYCB's motion for summary judgment.

6 It is respectfully submitted that this court remand this case to the district court with
7 directions to vacate the findings of fact, conclusions of law, and order granting plaintiff's
8 motion for summary judgment, filed on April 10, 2013, and instead enter judgment in
9 favor of Gogo Way quieting title to the real property in Gogo Way's name.
10

11 DATED this 21st day of November, 2013.

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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been
4 prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New
5 Roman.

6 2. I further certify that this brief complies with the page or type-volume limitations
7 of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)
8 it is proportionately spaced and has a typeface of 14 points and contains 6829 words.

9 3. I hereby certify that I have read this appellate brief, and to the best of my
10 knowledge, information, and belief, it is not frivolous or interposed for any improper
11 purpose. I further certify that this brief complies with all applicable Nevada Rules of
12 Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the
13 brief regarding matters in the record to be supported by a reference to the page of the
14 transcript or appendix where the matter relied on is to be found.
15

16 DATED this 21st day of November, 2013.

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