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7
8 SUPREME COURT
9 STATE OF NEVADA

10 SHADOW WOOD HOMEOWNERS
ASSOCIATION; and GOGO WAY
11 TRUST,

No. 63180

12 Appellants,

13 vs.

14 NEW YORK COMMUNITY BANK,

15 Respondent.
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18

19
20 **APPELLANT GOGO WAY TRUST'S REPLY BRIEF**

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ARGUMENT

1. Gogo Way's claim to be a bona fide purchaser is not a new theory raised for the first time on appeal.

At pages 6 to 13 of its Opening Brief, Gogo Way Trust (hereinafter "Gogo Way") established that the record on appeal contains no evidence to support the district court's conclusion of law that "Defendant Gogo Way was not a bona fide purchaser at the March 1, 2012, HOA foreclosure sale." See page 9 of order, dated April 10, 2013. (APP. Pg. 925) In particular, Gogo Way purchased the property at a duly noticed foreclosure sale without notice of the unrecorded dispute between New York Community Bank (hereinafter "Respondent NYCB") and Alessi & Koenig regarding the cure payment tendered by Respondent NYCB and returned by Alessi & Koenig prior to the HOA sale.

At pages 14 to 21 of its Answering Brief, Respondent NYCB argues that NRS 645F.440 does not apply to an HOA foreclosure sale and that this statute was "repeatedly argued to the District Court as the sole basis of its [Gogo Way] bona fide purchaser defense." (Answering Brief, Pg. 19, ll. 17-18) Respondent NYCB then claims that the citations at pages 9 to 13 of Gogo Way's Opening Brief regarding Gogo Way's status as a bona fide purchaser raise "**a new theory** for the first time on appeal, which is inconsistent with or different from the one raised below." (Answering Brief, Pg. 19, ll. 22-23) Gogo Way disputes this characterization of the arguments that it made to the district court.

The defendants filed a motion for summary judgment on February 7, 2013. (APP. Pgs. 196-257) At page 5 of this motion, defendants cited this court's decision in Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982), and argued "as the evidence shows, the Association issued all the foreclosure notices required by law and sold the Property to a bona fide purchaser, the Gogo Way Trust." (APP. Pg. 200). Defendants also stated in this motion that "[a] public auction was held where a bona fide purchaser, The Gogo

1 Trust, acquired the Property.” (APP. Pg. 208) Gogo Way made no reference to NRS
2 645F.440 in this pleading.

3 On February 8, 2013, Respondent NYCB filed a motion for summary judgment.
4 (APP. Pgs. 258-491). On March 1, 2013, defendants filed their opposition to plaintiff’s
5 motion summary judgment. (APP. Pgs. 668-727). Page 11 of this opposition cites NRS
6 645F.300 *et seq* and NRS 645F.440 in support of defendants’ argument that plaintiff had
7 “not provided any evidence whatsoever that the Gogo Way Trust, or any representative
8 of the Gogo Way Trust, engaged in any fraud or deceit upon the homeowner.” (APP. Pg.
9 678, ll. 25-27)

10 On March 7, 2013, Respondent NYCB filed a reply in support of its motion for
11 summary judgment. (APP. Pgs. 731-795) At pages 17 and 18 of this reply, Respondent
12 NYCB argued that NRS 645F.330, NRS 645F.350, NRS 645F.440, and NRS 645F.450
13 did not apply to the HOA sale in this case and then cited the case of United States v.
14 Countrywide Home Loans, 408 F.App’x 3, 2010 WL 3938095 (9th Cir.), to argue that
15 Gogo Way Trust could not be a bona fide purchaser because it had not paid “fair value”
16 for the property at the HOA sale. (APP. Pgs. 747-748)

17 On March 12, 2013, defendants filed a reply to opposition to plaintiff’s motion for
18 summary judgment. (APP. Pgs. 908-915) At pages 4 and 5 of this reply, defendants
19 quoted from NRS 645F.440, but they also cited this Court’s decision in Long v. Towne,
20 98 Nev. 11, 639 P.2d 528 (1982) and NRS 116.31166 as support for their argument that
21 the sale to Gogo Way should not be set aside by the court. (APP. Pgs. 911-912)

22 In its findings of fact, conclusions of law, and order granting plaintiff’s motion for
23 summary judgment, filed on April 10, 2013 (APP. Pgs. 917-925), the court mentions
24 NRS 645F.440 in Paragraph 11 of its findings of fact (APP. Pg. 924), but the court’s
25 conclusion of law that “Defendant Gogo Way was not a bona fide purchaser at the March
26 1, 2012, HOA foreclosure sale” includes no reference to NRS 645F.440. (APP. Pg. 925)

1 On September 20, 2013, Gogo Way filed its opposition to plaintiff's motion for
2 attorneys fees, (APP. Pgs. 1145-1148) and Gogo Way cited three of the cases cited in its
3 Opening Brief in support of its argument that it was a bona fide purchaser. (APP. Pgs.
4 1146-1147).

5 Consequently, NRS 645F.440 was not the **sole** basis for Gogo Way's claim to be
6 a bona fide purchaser, and every single argument raised by Gogo Way below was not
7 based upon statute as Respondent NYCB claims. (Answering Brief, Pg. 20, ll. 18-19)
8 In addition, Respondent NYCB did not limit itself to discussing the provisions of NRS
9 645F.440 when it argued that Gogo Way was not a bona fide purchaser. Gogo Way is
10 not seeking to introduce new arguments on appeal that are inconsistent with the
11 arguments presented to the district court.
12

13 **2. As the purchaser at a duly noticed HOA sale, Gogo Way obtained absolute title**
14 **to the Property free of Respondent NYCB's claim to ownership.**

15 At page 21 of its Answering Brief, Respondent NYCB claims that because Gogo
16 Way purchased the property at a foreclosure sale, it cannot be a bona fide purchaser.
17 However, none of the cases cited by Respondent NYCB state that a purchaser at a
18 foreclosure sale cannot be a bona fide purchaser.

19 In the case of Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982), this court
20 upheld the sale of a mobile home lot by an HOA to the respondent for \$3,000.00
21 pursuant to the CC&Rs for Steamboat Mobile Homeowners Association. Rejecting the
22 appellants' argument to set aside the foreclosure sale, this Court stated:

23 Here, the lien foreclosure sale was conducted under authority of the CC&Rs
24 and in compliance with NRS 107.080. The Longs had actual notice of the
25 sale and received the excess of the sale price over the amount of the
26 Association's lien and costs. There simply was no forfeiture in this case. In
27 fact, in Moore v. Prindle, supra, this court implied that a lien foreclosure
28 sale conducted in accordance with NRS 107.080 is an equitable alternative
to forfeiture. 80 Nev. at 377, 394 P.2d at 357.

29 NRS 116.31166(3) specifically provides that "[t]he sale of a unit pursuant to NRS
116.3112, 116.3116 and 116.31164 vests in the purchaser the title of the unit's owner

1 without equity or right of redemption.” In the case of 7912 Limbwood Court Trust
2 v. Wells Fargo Bank, ____ F. Supp. 2d ____, 2013 WL 5780793 (D. Nev.), the court
3 stated:

4 The purchaser at an HOA foreclosure sale obtains the unit owner’s title
5 without equity or right of redemption, and a deed which contains the proper
6 recitals is “conclusive against the unit’s former owner, his or her heirs and
7 assigns, and all other persons.” Id. § 116.31116(2). Compare Nev. Rev.
8 Stat. § 107.080 (providing that a mortgage foreclosure sale “vests in the
9 purchaser the title of the grantor and any successors in interest without equity
or right of redemption”); Bryant v. Carson River Lumbering Co., 3 Nev.
313, 317-18 (1867)(providing that such a sale vests absolute title in the
purchaser).

10 This court has also recognized that a nonjudicial foreclosure sale terminates legal
11 interests in property. Charmicor, Inc. v. Bradshaw Finance Co., 92 Nev. 310, 550 P.2d
12 413, 415 (1976).

13 In this case, at the time of the HOA sale held on February 22, 2012, Respondent
14 NYCB was the unit owner because it had already foreclosed its deed of trust at a public
15 auction held on May 9, 2011. See trustee’s deed upon sale at App. Pgs. 312-313.

16 The trustee’s deed upon sale recorded on March 1, 2012 in favor of Gogo Way
17 (APP. Pgs. 383-384) specifically states: “All requirements of law regarding the mailing
18 of copies of notices and the posting and publication of the copies of the Notice of Sale
19 have been complied with.” (APP. Pg. 383) Pursuant to NRS 116.31166(1), these recitals
20 are “conclusive proof” of the matters recited.

21 At page 22 of its Answering Brief, Respondent NYCB argues, however, that
22 according to Huntington v. Mila, Inc., 119 Nev. 355, 75 P.3d 354 (2003), “[a] subsequent
23 purchaser with notice, actual or constructive, of **an interest in property superior** to that
24 which he is purchasing is not a purchaser in good faith, and is not entitled to the
25 protection of the recording act.”

26 At page 23 of its Answering Brief, Respondent NYCB then claims that “[t]here is
27 no genuine issue of fact that NYCB’s ownership interest in the property had been
28

1 recorded before the interest that Gogo Way was purchasing. (APP000012)” At page 24
2 of its Answering Brief, Respondent NYCB also states that “[t]he relevant inquiry is
3 whether Gogo Way was aware of a prior, superior interest in the property - not whether
4 it was aware if the HOA or its trustee behaved improperly before and during the sale.”

5 In making this argument, Respondent NYCB ignores the super priority lien rights
6 held by the HOA pursuant to NRS 116.3116(2) that are **prior** to Respondent NYCB’s
7 earlier recorded deed of trust. The HOA’s super priority lien survived the trustee’s sale
8 at which Respondent NYCB acquired its ownership of the Property, and Respondent
9 NYCB held title “subject to” the HOA’s super priority lien. By allowing the HOA to
10 foreclose its super priority lien, Respondent NYCB’s interest in the Property was
11 extinguished.
12

13 This argument also ignores that although Respondent NYCB was at one time the
14 assigned beneficiary of the deed of trust recorded on April 27, 2007, Respondent NYCB
15 became the owner of the Property by entering a credit bid at the public auction held on
16 May 9, 2011. See trustee’s deed upon sale at APP. Pgs. 318-321. Respondent NYCB
17 does not dispute that subsequent to acquiring its ownership of the Property, it failed to
18 pay its HOA assessments. Pursuant to NRS 116.3116(1), the HOA had an additional lien
19 on the Property from the time each assessment become due. Pursuant to NRS
20 116.31166(3), as the purchaser of the Property at an HOA sale, Gogo Way is vested with
21 Respondent NYCB’s title as the unit’s owner.
22

23 Respondent NYCB’s argument is therefore not based upon it having a prior lien on
24 the date of the HOA sale – its argument is based on Respondent NYCB’s claim that the
25 HOA and its agent wrongfully demanded that Respondent NYCB tender a cure payment
26 for an improper amount. Because this dispute over the cure payment took place entirely
27 outside the public record and without any involvement by Gogo Way, it does not affect
28 Gogo Way’s status as a bona fide purchaser.

At page 24, lines 5-6, of its Answering Brief, Respondent NYCB argues (without

1 citing any authority) that “the price paid for the property is another point of consideration
2 when determining whether to extend bona fide purchaser protections.” The first element
3 of being a bona fide purchaser “does not require that the buyer’s consideration be the fair
4 market value of the property (or anything approaching it).” Melendrez v. D&I
5 Investment, Inc., 127 Cal. App. 4th 1238, 26 Cal. Rptr. 413, 424-425 (2005). The second
6 element requires that the buyer “have no knowledge or notice of the asserted rights of
7 another.” Id.

8 The record on appeal contains no evidence that Gogo Way had “actual” knowledge
9 **before** it purchased the Property at the sale held on February 22, 2012 that Respondent
10 NYCB had any right to object to the HOA sale. The record on appeal likewise contains
11 no evidence that Respondent NYCB provided any “constructive” notice of its objections
12 to the HOA sale. In the case of Adaven Management, Inc. v. Mountain Falls Acquisition
13 Corp., 124 Nev. 770, 191 P.3d 1189, 1195 (2008), this Court stated:

15 The county recorder maintains recorded deeds, including those transferring
16 water rights. By statute, a county recorder is required to keep indices of all
17 deeds arranged by the names of the grantors and grantees. A prospective
18 purchaser of land may search those indices to ensure that the person
19 attempting to sell the property has clear title to it. To search the indices, the
20 prospective purchaser would first search the grantee index for the purported
21 owner’s name to ascertain when and from whom the purported owner
22 received the property. Using that name the purchaser would check the
23 grantee index for the names of each previous owner, thus establishing the
24 “chain of title.” The purchaser must then search the grantor index, starting
with the first owner in the chain of title, to see whether he or she transferred
or encumbered the property during the time between his or her acquisition
of the property and its transfer to the next person in the chain of title.
Whether or not a purchaser of real property performs this search, he or she
is **charged with constructive notice of**, and takes ownership of the property
subject to, **any interest such a title search would reveal.** (emphasis added)

25 Respondent NYCB did not file its complaint challenging the validity of the HOA
26 sale until April 18, 2012. (APP. Pgs. 4-62) Respondent NYCB did not file its notice of
27 lis pendens until April 20, 2012. (APP. Pgs. 63-64) As a result, a search of the county
28 recorder’s records on the sale date on February 22, 2012 would not have provided Gogo

1 Way with “constructive notice” of any interest in the property claimed by Respondent
2 NYCB other than the ownership interest that was extinguished by the HOA sale.

3 **3. By allowing the HOA sale to Gogo Way to take place without objection,**
4 **Respondent NYCB cannot now claim that it tendered sufficient funds to the HOA**
5 **prior to the sale.**

6 At page 25, lines 4-6, of its Answering Brief, Respondent NYCB asserts that “by
7 alleging that NYCB did not make a proper tender of the lien amount,” Gogo Way has
8 raised “a second new argument on appeal that was not made to the District Court
9 below.”

10 To the contrary, Respondent NYCB raised the tender issue by arguing in its
11 motion for summary judgment (APP. Pgs. 258-491) that “the sale should not have gone
12 forward in the first place” (APP. Pg. 270, l. 23) because “Shadow Wood provided
13 conflicting payment information” (APP. Pg. 270, l. 13) and “Shadow Wood rejected
14 NYCB’s payment, claiming that NYCB now needed to pay Alessi & Koenig **\$9,017.39**
15 to avoid the HOA sale.” (APP. Pg. 273, ll. 21-22).

16 Similarly, defendants raised this issue in their motion for summary judgment, filed
17 on February 7, 2013 (APP. Pgs. 196-257) when they stated: “Furthermore, in response to
18 a request from Plaintiff’s representative, Alessi & Koenig, LLC emailed the payoff
19 information directly to Plaintiff’s representative on February 14, 2012, eight days prior
20 to the sale. Plaintiff did not make payment or take any form of legal action to stop the
21 sale.” (APP. Pgs. 208-209) These same statements are contained in defendants’
22 opposition to plaintiff’s motion for summary judgment, filed on March 1, 2013. (APP. Pg.
23 674)
24

25 Furthermore, defendants’ opposition to plaintiff’s motion for summary judgment
26 included the following argument at pages 9 and 10 (APP. Pgs. 676-677) regarding
27 Respondent NYCB’s failure to tender the cure amount demanded by the HOA:

28 Plaintiff claims that A&K’s foreclosure documents contain “varying
amounts,” such that Plaintiff was justified in not sending payment prior to

1 the foreclosure sale. First, if Plaintiff had a legitimate dispute regarding the
2 amount owed, Plaintiff could have sought court intervention to enjoin the
3 sale. Second, Plaintiff did not act in a reasonable manner with respect to the
4 payoff because Plaintiff (1) waited to the last minute before sending in
5 payment and (2) **chose to pay the amount shown on the Association's**
6 **history of the delinquent assessment balance rather than pay the**
amount shown on the breakdown, produced by A&K, showing the total
amount currently owed. When A&K informed Plaintiff about the error,
Plaintiff took no action and the foreclosure sale took place fourteen (14)
days later. (emphasis added)

7 The cases cited at pages 13 to 15 of Gogo Way's Opening Brief relate to this issue
8 that was raised and argued below. At page 25 of its Answering Brief, Respondent
9 NYCB argues that the decisions in Gaffney v. Downey Savings & Loan Ass'n, 200 Cal.
10 App. 3d 1154, 246 Cal. Rptr. 421 (1988), and Nguyen v. Calhoun, 105 Cal. App. 4th
11 428, 129 Cal. Rptr. 436 (2003), can be distinguished from the present case because
12 Respondent NYCB claims that in this case, the HOA demanded "a tender of an amount
13 *greater* than the amount the creditor is owed" (Pg. 25, ll. 23-24) and that "Shadow Wood
14 was owed far less than it claimed." (Pg. 25, l. 27)

15 This argument, however, does not rebut the statement by the court in Moeller v.
16 Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994), that:

17
18 The conclusive presumption **precludes an attack by the trustor on the**
19 **trustee's sale to a bona fide purchaser even where the trustee wrongfully**
20 **rejected a proper tender of reinstatement by the trustor.** Where the
21 trustor is precluded from suing to set aside the foreclosure sale, the trustor
may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal.
App. 3d 1, 9, 11 [89 Cal. Rptr. 323]) (emphasis added)

22 As a result, even if the HOA rejected a proper tender by Respondent NYCB, the
23 rights of Gogo Way are protected from a suit by Respondent NYCB to set aside the sale.
24 In its Answering Brief, Respondent NYCB cites no authority that contradicts this
25 principle recognized by the court in Moeller v. Lien. Respondent NYCB merely argues
26 that "such a notion would be absurd and is ripe for abuse from creditors." (Answering
27 Brief, Pg. 25, l. 25) This argument fails to recognize that Gogo Way is not a "creditor."
28 Gogo Way is a bona fide purchaser. As a matter of public policy, if the rights of bona

1 fide purchasers are not protected, then purchasers will be discouraged from appearing and
2 bidding at public auctions.

3 Respondent NYCB has failed to identify a single case where a court set aside a
4 foreclosure sale where the property owner allowed the foreclosure sale to a bona fide
5 purchaser to proceed without objection after a trustee returned a properly tendered cure
6 payment.

7 At pages 15 and 16 of its Opening Brief, Gogo Way identified the difference
8 between NRS 107.080(5) (which provides for a 45 day period to challenge a foreclosure
9 sale held pursuant to a deed of trust) and NRS 116.31166 (which does not provide any
10 time period to challenge a foreclosure sale by an HOA). Respondent NYCB simply
11 ignores this critical distinction. If the Nevada legislature wanted to provide unit owners
12 with a judicial remedy to challenge an HOA foreclosure sale, NRS Chapter 116 would
13 include a counterpart to NRS 107.080(5). In addition, even if NRS 107.080(5) had such
14 a counterpart, Respondent NYCB waited longer than 45 days after the HOA sale to file
15 its complaint.
16

17 At page 26 of its Answering Brief, Respondent NYCB argues that allowing Gogo
18 Way to prevent the HOA sale from being set aside would serve “only to offer safe harbor
19 for other unscrupulous collectors who use similar ‘unreasonable and oppressive tactics.’”
20 To the contrary, in the case of Munger v. Moore, 11 Cal. App. 3d 1, 89 Cal. Rptr. 323
21 (1970), the court recognized that a “trustee or mortgagee may be liable to the trustor or
22 mortgagor for damages sustained where there has been an illegal, fraudulent or willfully
23 oppressive sale of property under a power of sale in a mortgage or deed of trust.” 11 Cal.
24 App. 3d at 7.
25

26 Respondent NYCB’s remedy for its claim of wrongful foreclosure lies against the
27 HOA and its agent, but not against the innocent purchaser, Gogo Way. The record on
28 appeal contains no evidence that Gogo Way took any improper action relating to the
HOA sale. Gogo Way is a bona fide purchaser that paid \$11,018.39 at a validly noticed

1 trustee's sale that extinguished Respondent NYCB's ownership interest in the Property.
2 The district court acted improperly in setting aside the sale to Gogo Way and restoring
3 title to the Property to Respondent NYCB.

4 **CONCLUSION**

5 The bona fide purchaser doctrine clearly applies to appellant Gogo Way Trust.
6 This Court should enter an Order reversing the Order by the district court granting
7 Respondent NYCB's motion for summary judgment.

8 It is respectfully submitted that this Court remand this case to the district court with
9 directions to enter judgment in favor of Gogo Way on its counterclaim quieting title to
10 the real property in Gogo Way's name.

11 DATED this 13th day of February, 2014.

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2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 3,838 words.

DATED this 13th day of February, 2014.

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