

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4       SHADOW WOOD HOMEOWNERS  
5       ASSOCIATION, INC.,

6                                   Appellant,

7       vs.

8  
9       NEW YORK COMMUNITY BANK,

10                                  Respondents.  
11

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12                                  Appeal From the Eighth Judicial District Court, Clark County  
13                                  The Honorable Abbi Silver, District Judge

14                                  **APPELLANT SHADOW WOOD HOMEOWNERS ASSOCIATION, INC'S**  
15                                  **REPLY BRIEF**

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17  
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## **TABLE OF AUTHORITIES**

### **Cases:**

<i>Wood v. Safeway, Inc.</i>	
121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)	2
<i>Brunzell v Woodbury</i>	
85 Nev. 29, 31, 449 P.2d 158 (1969)	2, 4, 5

## **INTRODUCTION**

The answering brief filed by Plaintiff/Appellee, New York Community Bancorp, Inc. (“NYCB”), without any supporting reference to the record, expresses NYCB’s suspicion of “collusion” between Alessi & Koenig, LLC (“A&K”) and Gogo Way Trust. It states, again without reference to the record, that A&K “represented in Court that the Trustor of Gogo Way just so happens to be a regular client of Alessi & Koenig’s,” that this “raises additional questions,” and that “the potential for collusion does not seem far off base under these facts.” (Answering Brief, page 13, lines 11-14) NYCB’s suspicions of nefarious conduct – along with its failure to grasp the facts and issues involved in this case – also found their way into the Order Granting Summary Judgment that NYCB submitted to the Court and that the Court rubberstamped. Namely, the order states:

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 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.

(APP. Pg. 923) Evidently, NYCB hopes the Nevada Supreme Court will follow suit with the District Court and provide the ruling it seeks based on NYCB’s unsupported allegations of malfeasance.

A statement about what the Court “believes” is a curious thing to find in an

1 order granting a motion for summary judgment. Summary judgment may only be  
2 granted where “the pleadings, depositions, answers to interrogatories, admissions,  
3 and affidavits, if any, that are properly before the court demonstrate that no  
4 genuine issue of material fact exists, and the moving party is entitled to judgment  
5 as a matter of law.” (Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026,  
6 1029 (2005).) What the Court “believes” about a party’s motivations, especially  
7 without reference to undisputed facts, is irrelevant. The evidence is what matters.  
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10 Here, if there were collusion or other malfeasance involved in the  
11 foreclosure sale, such conduct could provide a basis to void the sale. (See Brunzell  
12 v Woodbury, 85 Nev. 29, 31, 449 P.2d 158 (1969).) However, NYCB does not  
13 refer to depositions, declarations, discovery responses or other evidence that might  
14 eliminate any material factual disputes regarding the alleged malfeasance. Instead,  
15 NYCB refers merely to “questions raised” and a “potential for collusion.” This is  
16 not material warranting summary adjudication.  
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20 Nor was the actual evidence NYCB provided in support of its motion.  
21 NYCB argues that summary judgment was justified because: (1) the statutory  
22 “super priority” lien does not include collection charges; (2) Shadow Wood’s  
23 contractual lien did not include collection charges incurred prior to the foreclosure  
24 sale where NYCB obtained title to the Property; and (3) the Property was sold at  
25 Shadow Wood’s foreclosure sale for a commercially unreasonable price, a sale that  
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1 was the result of “fraud, unfairness or oppression.” None of these points justify the  
2 summary judgment granted in this case.  
3

## 4 **ARGUMENT**

### 5 **A. The Court’s Order Is Based On The False Understanding That** 6 7 **NYCB Owed Only The Super Priority Portion Of The Assessment** 8 9 **Lien**

10 Shadow Wood will not reiterate the arguments regarding the interpretation  
11 of the “super priority” language of NRS 116.3116 contained in its opening brief.  
12 However, even if the super priority portion of Shadow Wood’s assessment lien did  
13 not include the collection charges incurred against the prior owner, the Court’s  
14 order was still fatally flawed. Namely, the Court failed to understand that in  
15 addition to the figure equalling nine months of assessments, Shadow Wood’s lien  
16 would include all assessments that had come due since NYCB acquired title to the  
17 Property. Under the CC&Rs, the lien would also include all late charges and  
18 reasonable attorney’s fees and costs Shadow Wood incurred as a result of NYCB  
19 failing to pay assessments after acquiring title to the Property. The Court made no  
20 findings of fact regarding what this total figure would be.  
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26 Furthermore, even if the facts were to show that NYCB’s payment of  
27 \$6,783.16 tendered prior to the foreclosure sale exceeded a super priority amount  
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1 as NYCB would calculate it, there is nevertheless grossly insufficient evidence to  
2 justify setting aside the subject foreclosure sale via summary judgment. As Gogo  
3 Way Trust thoroughly explains in its opening brief, there was simply no evidence  
4 presented to show Gogo Way Trust was anything other than a bona fide purchaser.  
5 Certainly, Gogo Way Trust's status as a bona fide purchaser was a material issue  
6 of fact precluding summary adjudication of this case.  
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8

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11 **B. Material Issues Of Fact Remain Concerning The Commercial**

12 **Reasonableness Of The Price Paid At The Sale**

13 NYCB argues:

14  
15 Finally, the shockingly low purchase price Gogo Way paid for the  
16 Subject Property confirms that the district Court correctly set the  
17 HOA Sale aside. At the HOA Sale, the Subject Property sold for  
18 \$11,018.39. (APP00000019). However, only nine months before, the  
19 same Subject Property sold for more than four hundred percent  
20 (400%) of that price, \$45,900.00. (APP00013)

21 (Answering Brief, page 29, lines 2-6)

22 In Brunzell v Woodbury, 85 Nev. 29, 31, 449 P.2d 158 (1969), the Court  
23 explained the standard for setting aside foreclosure sales on the basis of an  
24 inadequate price. It stated:

25  
26 In Golden v. Tomiyasu, supra, this court held that a sales price  
27 representing 28.5% of the value of the property was not inadequate  
28

1 and went on to adopt the rule laid down in Oller v. Sonoma County  
2 Land Title Company, 137 Cal.App.2d 633, 290 P.2d 880 (1955), that:  
3 ‘\* \* \* inadequacy of price, however gross, is not in itself a sufficient  
4 ground for setting aside a trustee's sale legally made; there must be in  
5 addition proof of some element of fraud, unfairness, or oppression as  
6 accounts for and brings about the inadequacy of price.’  
7

8 In Brunzell, the Court held that a price of 28.5% of the property value was not  
9 inadequate for purposes of setting aside a foreclosure sale. Here, NYCB alleges  
10 that the property value was \$45,900.00, while the price paid was \$11,018.39, or  
11 24% of the supposed value. If 28.5% was not sufficiently low to set aside a sale in  
12 Brunzell, 24% is clearly not low enough either.  
13  
14

15 Furthermore, there is insufficient evidence for purposes of summary  
16 adjudication that the Property’s value was in fact \$45,900.00. While NYCB  
17 acquired the Property for a credit bid of \$45,900.00 at its foreclosure sale, no  
18 professional appraisal has been performed or made part of the evidence in this  
19 case. No evidence is present regarding the number of bidders at either foreclosure  
20 sale. Simply put, there is insufficient evidence to support a ruling as a matter of  
21 law that \$11,018.39 was a sufficiently low price for purposes of setting aside the  
22 sale. In any case, “inadequacy of price, however gross, is not in itself a sufficient  
23 ground for setting aside a trustee's sale legally made; there must be in addition  
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1 proof of some element of fraud, unfairness, or oppression as accounts for and  
2 brings about the inadequacy of price.”  
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5 **C. Material Issues Of Fact Remain Concerning Whether The Supposed**  
6 **“Inadequacy Of Price” At The Sale Was The Result Of Fraud,**  
7 **Unfairness Or Oppression**  
8

9 NYCB attempts to support its argument that indisputable evidence shows  
10 “fraud, unfairness or oppression” resulted in an “inadequate price” by alleging  
11 (without reference to the record) that Gogo Way Trust purchased the Property “at a  
12 discount.” (Answering Brief, page 29 line 25 – page 30 line 1) There is simply  
13 nothing in the record to support NYCB’s allegation, and nothing in existence to  
14 support the completely fictional notion that Gogo Way Trust purchased the  
15 Property for anything other than the highest bid at a foreclosure sale conducted  
16 fairly. In fact, the admissible evidence on the subject indicates that no collusion  
17 occurred. The declaration of Naomi Eden, employee at A&K, states as follows:  
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22 Alessi & Koenig, LLC routinely conducts foreclosure sales for its  
23 home owners association clients where investors routinely buy  
24 properties. There was no collusion or any other impropriety involved  
25 between Alessi & Koenig, LLC, the Association, the buyer or any  
26 other parties. Alessi & Koenig, LLC’s records show that Gogo Way  
Trust purchased the Property. Gogo Way Trust has no affiliation to  
the Association or to Alessi & Koenig, LLC.

27 ///  
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1 (App. Pg. 679) No evidence has been provided to contradict Ms. Eden's  
2 declaration.

3 Further, NYCB insinuates that A&K somehow misappropriated the amount  
4 Gogo Way Trust paid at the sale, pointing to the fact that Shadow Wood wrote off  
5 approximately \$3,000.00 from the assessment account as bad debt. However, the  
6 clear explanation for the write off is the fact that NYCB's foreclosure of the  
7  
8 Property wiped out a portion of the Shadow Wood's lien, leaving only the "super  
9 priority" portion intact as of the date of that sale. Further, NYCB points out that  
10 the Trustee's Deed Upon sale that A&K generated shows an apparent "jump" in  
11 the lien amount of approximately \$2,000. However, A&K has explained that the  
12 amount of the lien on the sale date was actually \$9,017.39, Gogo Way Trust paid  
13 \$11,018.39 as the highest bidder, and \$2,001.00 have been held in A&K's trust  
14  
15 account pending the results of this litigation. (APP. Pg. 908) Further, even if there  
16  
17 were an as-yet unexplained jump in the alleged amount of the assessment lien, this  
18  
19 fact would have no bearing on the issue of whether the *price paid* at the sale was  
20  
21 artificially depressed as a result of fraud, unfairness or oppression.  
22

23 NYCB states perhaps its main argument for "fraud, unfairness or  
24  
25 oppression" as follows:

26 After NYCB's third request for a payoff statement, Alessi & Koenig  
27 provided a ledger on January 23, 2012 showing an outstanding  
28 balance of \$6,445.54. The ledger specifically indicated that it was

1 good through February 28, 2012. However, when Alessi & Koenig  
2 provided the ledger, it knew that this was not an amount that Shadow  
3 Wood would accept; five days previous, Alessi & Koenig had  
4 executed (but had not recorded) the HOA OS, claiming Shadow  
5 Wood was now owed \$8,539.77.

6 (Answering Brief, page 29, lines 4-10) This description of the facts is not  
7 supported by undisputed evidence. Rather, the Affidavit of Naomi Eden indicates  
8 that, in response to NYCB's payoff request, on November 15, 2011, she faxed  
9 NYCB an assessment ledger showing the total history of delinquent assessments  
10 (i.e. showing a history that extends further back than the nine-month super priority  
11 period) along with a breakdown showing the *full amount* of Shadow Wood's lien  
12 (including collection charges and excluding assessments prior to the nine-month  
13 super priority period) good through December 15, 2011. Ms. Eden also emailed  
14 these documents to NYCB, although there exists a possibility the email was  
15 erroneously addressed. (APP. Pg. 706-714) In any case, it appears NYCB made  
16 the payment of \$6,783.16 in response to the amount shown on the *assessment*  
17 *ledger* showing the full history of the assessment delinquency rather than the  
18 breakdown showing the full amount of Shadow Wood's lien. In any case, the  
19 allegation of price switching has no bearing on the issue of whether the *price paid*  
20 at the sale was artificially depressed as a result of fraud, unfairness or oppression.  
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26 In sum, issues of fact clearly exist in this case. Setting aside the foreclosure  
27 sale on the basis of a commercially unreasonable price requires that the low sale  
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price resulted from “fraud, unfairness or oppression,” and nothing in the record supports such a ruling as a matter of law. Furthermore, no facts in the record indicate that Gogo Way Trust was not entitled to bona fide purchaser protections.

### **CONCLUSION**

The Court’s granting summary judgment in favor of NYCB was based entirely on a flawed premise. Namely, the Court reasoned that the Association’s assessment lien – in its entirety – was limited to the “super priority” amount equal to nine months of assessments, and NYCB’s tender of \$6,783.16 on January 31, 2012 exceeded that amount. However, the Court erred by failing to consider that the Association’s assessment lien also included (1) the reasonable attorney’s fees incurred in addressing the prior owner’s failure to pay assessments, (2) all the assessments that came due while NYCB owned the property, and (3) all reasonable attorney’s fees the Association incurred in addressing NYCB’s failure to pay assessments. Further, no evidence provided in support of NYCB summary judgment motion showed that the price paid at the sale was artificially low as a result of fraud, unfairness or oppression.

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1 Summary judgment for Plaintiff was not warranted and the Court's ruling should  
2 be overturned.

3  
4 DATED this 14th day of February, 2014.

5 ALESSI & KOENIG, LLC  
6

7 /s/ Ryan Kerbow

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1 I understand that I may be subject to sanctions in the event the  
2 accompanying brief is not in conformity with the requirements of the Nevada  
3 Rules of Appellate Procedure.  
4

5 DATED this 14th day of February, 2014.

6  
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