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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 2021 GRAY EAGLE WAY,

Appellant,

vs.

JP MORGAN CHASE BANK, N.A.,

Respondent.

No. 68431

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order to dismiss with prejudice is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order to dismiss with prejudice was filed on June 22, 2015. Notice of entry of the order was served on appellant by electronic service on June 23, 2015. The notice of appeal from the order was filed on July 13, 2015.

(C) The appeal is from an order to dismiss with prejudice.

ISSUES PRESENTED ON APPEAL

1. Whether the district court abused its discretion by dismissing Saticoy's complaint in intervention with prejudice.

2. Whether the district court erred in finding that Saticoy's complaint in intervention lacked merit.

3. Whether the district court erred in finding that the three-year period in NRS 116.3116(6) barred the HOA from foreclosing its assessment lien.

4. Whether an HOA foreclosure sale can be set aside as commercially unreasonable without a showing of fraud, unfairness or oppression.

5. The district court's decision to dismiss Saticoy's complaint in intervention with prejudice is reviewed for an abuse of discretion.

STATEMENT OF THE CASE

Plaintiff, Susan Louise Hannaford (hereinafter "Hannaford"), filed a complaint against the Canyon Gate Master Association (hereinafter "HOA") on December 15, 2009 relating to the real property located at 2021 Gray Eagle Way, Las Vegas, Nevada (hereinafter "Property"). (JA1a, pgs. 1-5) In her prayer for relief, Hannaford requested that the court vacate an arbitration award entered against Hannaford in favor of the HOA and that the court award Hannaford judgment against the HOA for damages in excess of $10,000.00. (JA1a, pg. 5)

On August 5, 2013, Saticoy Bay LLC Series 2021 Gray Eagle Way (hereinafter "Saticoy") filed a motion to intervene in order to file a complaint in intervention seeking injunctive relief, quiet title, declaratory relief, and issuance of a writ of restitution against Hannaford, Parry Norma, JPMorgan Chase Bank, N.A. (hereinafter "JPMorgan"), and MTC Financial dba Trustee Corps. (JA1a, pgs. 17-25)

On September 16, 2013, the court entered an order granting motion to intervene. (JA1a, pgs. 38-39) On September 30, 2013, Saticoy filed it complaint in intervention. (JA1a, pgs. 44-50) On November 6, 2014, JPMorgan filed an answer to Saticoy's complaint in intervention. (JA1a, pgs. 51-66)

On March 17, 2015, the court entered an Order to Show Cause directing that the parties appear on April 16, 2015 and show cause why the case should not be dismissed pursuant to NRCP 41(e). (JA1a, pgs. 67-69)

At the hearing held on April 16, 2015, the court ordered that the case be dismissed pursuant to NRCP 41(e). When counsel for Saticoy asked that the court dismiss Saticoy's claims without prejudice, the court requested that the parties brief the issue. (JA1b, pgs. 168-181)

Saticoy filed a supplemental response to order to show cause on April 30, 2015. (JA1a, pgs. 70-74) JPMorgan filed a brief in support of dismissal with prejudice on April 30, 2015. (JA1b, pgs. 75-152)

On June 22, 2015, the court entered an order to dismiss with prejudice based on the court's findings that: (1) Saticoy had not taken affirmative steps to adequately prosecute the case; (2) Saticoy's excuse that it intervened in the case only nineteen months ago was an inadequate excuse for delay; (3) Saticoy's case lacked merit; and (4) the three-year statute of limitations in NRS 116.3116(6)for foreclosing the HOA's lien had run. (JA1b, pgs. 153-157)

Notice of entry of order to dismiss with prejudice was served and filed on June 23, 2015. (JA1b, pgs. 158-164) Saticoy filed its notice of appeal on July 13, 2015. (JA1b, pgs. 166-167)

STATEMENT OF FACTS

Saticoy is the owner of the Property and obtained title to the Property by way of a foreclosure deed recorded on August 26, 2013 (JA1b, pgs. 134-136) and a quitclaim deed recorded on December 3, 2013 (JA1b, pgs. 145-147).

JPMorgan is the assigned beneficiary of a deed of trust recorded against the Property on January 4, 2007 (JA1b, pgs. 89-118) and assigned to JPMorgan on September 5, 2012. (JA1b, pgs. 120-121)

On April 20, 2009, the HOA's foreclosure agent recorded a notice of delinquent assessment lien against the Property in Book 20090420, Instrument No.

03813, of the Official Records of the Recorder for Clark County, Nevada. (JA1b, pgs. 123-124) On September 8, 2009, the HOA's foreclosure agent recorded a notice of default and election to sell real property to satisfy assessment lien in Book 20090908, Instrument No. 02294, of the Official Records of the Recorder for Clark County, Nevada. (JA1b, pgs. 126-128) On May 23, 2013, the foreclosure agent for the HOA recorded a notice of foreclosure sale in Book 20130523, Instrument No. 04946, of the Official Records of the Recorder for Clark County, Nevada. (JA1b, pgs. 130-132)

As reflected by the recitals in the foreclosure deed recorded on August 26, 2013, plaintiff in intervention Saticoy appeared at the public auction held on July 18, 2013 and entered the high bid of $81,000.00 to purchase the Property. (JA1b, pgs. 134-136)

On October 18, 2013, the foreclosure agent for the HOA recorded a second notice of foreclosure sale scheduling an auction of the property known as 2013 Gray Eagle Way, Las Vegas, Nevada on November 21, 2013. (JA1b, pgs. 138-139) As reflected by the foreclosure deed recorded on November 27, 2013, the HOA purchased the property at 2013 Gray Eagle Way, Las Vegas, Nevada at the public auction held on November 21, 2013. (JA1b, pgs. 141-143) On December 3, 2013, the HOA recorded a quitclaim deed conveying the property at 2013 Gray Eagle Way, Las Vegas, Nevada to Saticoy. (JA1b, pgs. 145-147)

On the date of each foreclosure sale, JPMorgan was the beneficiary by way of assignment of a deed of trust recorded on January 4, 2007.

SUMMARY OF THE ARGUMENT

Because Saticoy did not obtain its interest in the Property until July 18, 2013, the five year statute of limitations provided by NRS 11.080 for Saticoy's claims for quiet title and possession of the property had not yet expired when the court dismissed the case. Because Saticoy had been a party to the case for only 19 months, the district court abused its discretion in choosing to dismiss Saticoy's claims with prejudice.

Because NRS 116.3116(2) granted to the HOA a super priority lien that extinguished JPMorgan's first deed of trust when Saticoy and the HOA purchased the real property at the HOA foreclosure sales held on July 18, 2013 and November 21, 2013, the district court erred in finding that Saticoy's case lacked merit.

The record on appeal contains no evidence of "fraud, unfairness, or oppression" that would justify setting aside either of the foreclosure sales, and the recitals in the foreclosure deeds recorded on August 26, 2013 and November 27, 2013 prove that the HOA complied with all requirements to make each foreclosure deed "conclusive" against JPMorgan pursuant to NRS 116.31166(2).

The district court's finding that the three-year statute of limitations in NRS 116.3116(6) for foreclosing the HOA's lien had run is based on a misreading of the statute.

STANDARD OF REVIEW

The district court's decision whether to dismiss a case with or without prejudice is reviewed for an abuse of discretion. Schramm v. El-Khatib, 82 Nev. 22, 409 P.2d 888, 889 (1966).

ARGUMENT

1. The district court abused its discretion by dismissing Saticoy's complaint in intervention with prejudice.

In Great Western Land & Cattle Corp. v. Sixth Judicial District Court, 86 Nev. 282, 467 P.2d 1019 (1970), this Court held that the five year rule applied to a counterclaim as well as to the plaintiff's complaint. On the other hand, in a subsequent appeal involving the same claim, this Court held that it was appropriate for the district court to dismiss the counterclaim in the initial action without prejudice, so that the successor in interest to the counterclaimant could commence a new action asserting the identical claim. Lighthouse v. Great Western Land & Cattle Corp., 88 Nev. 55, 57, 493 P.2d 296, 297 (1972).

In Monroe v. Columbia Sunrise Hospital and Medical Center, 123 Nev. 96, 158

P.3d 1008, 1012 (2007), this Court recognized that the district court has the discretion to dismiss claims with or without prejudice:

> A district court has broad, but not unbridled, discretion in determining whether dismissal under NRCP 41(e) should be with or without prejudice. Factors relevant to the district court's exercise of that discretion include the underlying conduct of the parties, whether the plaintiff offers adequate excuse for the delay, whether plaintiff's case lacks merit, and whether any subsequent action following dismissal would not be barred by the applicable statute of limitations.

In Home Savings Ass'n v. Aetna Casualty & Surety Co., 109 Nev. 558, 854 P.2d 851 (1993), the plaintiff filed a declaratory action seeking a declaration of coverage and a duty to defend. The defendant filed a motion to dismiss pursuant to NRCP 41(e), and the court granted the motion. The plaintiff filed a motion to have the order amended to specify that the dismissal was without prejudice, and the district court denied the motion. Prior to the ruling on defendant's motion to dismiss, the plaintiff had filed a second action seeking both declaratory relief and damages for breach of contract and bad faith. The district court determined that both the NRCP 41(e) dismissal and the statute of limitations barred this second action. On appeal, this Court held that the district court should have dismissed plaintiff's initial complaint without prejudice, and this Court stated:

> **Because the law favors trial on the merits, however, dismissal with prejudice may not be warranted where such delay is justified by the circumstances of the case.** Circumstances which this court has considered in deciding whether to uphold a discretionary dismissal by a district judge include the conduct and good faith belief of the parties and whether the underlying action has merit. See Northern Ill. Corp. v. Miller, 78 Nev. 213, 216-17, 370 P.2d 955, 956 (1962). "[W]hen justice so requires the court may dismiss the action [pursuant to NRCP 41(e)] without prejudice." United Ass'n of Journeymen v. Manson, 105 Nev. 816, 821, 783 P.2d 955, 958 (1989)(holding that justice required the district court to exercise its discretion by dismissing the claim without prejudice and modifying the dismissal with prejudice to a dismissal without prejudice). Factors in determining whether dismissal should be with or without prejudice include whether plaintiff offers adequate excuse for the delay and whether plaintiff's case lacks merit. See Erickson, 104 Nev. At 758, 766 P.2d at 900; Monroe, Ltd. v. Central Telephone Co., 91 Nev. 450, 455-56, 538 P.2d 1542, 156 (1975). (emphasis added)
>
> 854 P.2d at 854.

In United Ass'n of Journeymen v. Manson, 105 Nev. 816, 821, 783 P.2d 955, 958 (1989), this Court held that the district court's misunderstanding that dismissal with prejudice under NRCP 41(e) was mandatory along with the district court's "failure to exercise the discretion given by the rule were plain error," and this Court modified the district court's order to be "without prejudice" instead of "with prejudice."

As evidenced by the foreclosure deed recorded on August 26, 2013 (JA1b, pgs. 134-136), Saticoy did not obtain its initial interest in the real property at issue until the public auction held on July 18, 2013. Saticoy promptly filed a motion to intervene on August 5, 2013, and its complaint in intervention was filed on September 30, 2013. As a result, when the five year period provided by NRCP 41(e) expired on December 15, 2014, Saticoy had held its interest in the Property for only 17 months, and Saticoy had been a party to the action for less than 15 months.

Regarding the statute of limitations for a quiet title action, this Court has recognized that the applicable statute of limitation to a quiet title action is governed by NRS 11.080, which specifies a 5-year limitation period. Lanigir v. Arden, 82 Nev. 28, 409 P.2d 891 (1966); Kerr v. Church, 74 Nev. 264, 329 P.2d 277, 281 (1958). NRS 11.080 provides:

> No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

Because Saticoy did not acquire its interest in the Property until July 18, 2013, the five year statute of limitations will not run until July of 2018, so Saticoy has more than enough time to file a separate complaint for quiet title to have a court determine its rights in the property on the merits.

2. The district court erred in finding that Saticoy's complaint in intervention lacked merit.

NRS 116.3116 (2) provides that the HOA's super-priority lien for 9 months of

charges is "prior to all security interests described in paragraph (b)." The first deed of trust, recorded on January 4, 2007, falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court stated:

> NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.
>
> 334 P.3d at 409.

At the conclusion of its opinion, this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.
>
> Id. at 419.

Because the facts in the present case are substantially the same as the facts in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., the district court should have found that the nonjudicial foreclosure of the HOA's super priority lien at the public auctions held on July 18, 2013 and November 21, 2013 extinguished the "first security interest" held by JPMorgan.

3. JPMorgan failed to produce evidence of the element of fraud, unfairness or oppression necessary to obtain equitable relief from the conclusive recitals in the foreclosure deeds.

The detailed and comprehensive statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App.

4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2033); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210. In the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this Court described the non-judicial foreclosure provisions of NRS Chapter 116 as "elaborate," and therefore supported the public policy favoring the finality of a foreclosure sale.

Additionally, there is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A. Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

Under Nevada law, the recitals in the foreclosure deed are sufficient and conclusive proof that a default occurred and that the required notices were mailed by the HOA. The first and second pages of the foreclosure deed recorded on July 18, 2013 includes each of the five recitals required by NRS 116.31166(1): (1) default, (2) mailing of the delinquent assessment, (3) recording of the notice of default and election to sell, (4) the elapsing of the 90 days, and (5) the giving of the notice of sale. (JA1b, pgs. 134-135) The first and second pages of the foreclosure deed recorded on November 27, 2013 contain the same five recitals. (JA1b, pgs. 141-142)

The controlling statute, NRS 116.31166, provides:

> **Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption**.
>
> 1. **The recitals in a deed** made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,

are **conclusive proof of the matters recited**.

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

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

In its brief in support of dismissal with prejudice (JA1b, pgs. 75-87), JPMorgan did not produce any evidence disputing the conclusive presumption that the HOA's agent mailed copies of both of the required notices to JPMorgan.

In Shadow Wood Homeownwers Association v. New York Community Bank, 132 Nev. Ad. Op. 5 (2016), this Court discussed the "conclusive recital language" in NRS 116.31166 and restated the rule that a foreclosure sale will not be set aside without "proof of some element of fraud, oppression or unfairness as accounts for and brings about the inadequacy of price." Id. at *13. This Court stated:

> While not directly addressing the preemption argument Shadow Wood and Gogo Way make as to NRS 116.31166, our post-NRS 107.030(8) cases reaffirm that courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds. *See Golden v. Tomiyasu,* 79 Nev. at 514, 387 P.2d at 995 (adopting the California rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (quoting *Oller v. Sonoma Cty. Land Title Co.,* 137 Cal.App.2d 633, 290 P.2d 880, 882 (Cal.Ct.App.1955))); *McLaughlin v. Mut. Bldg. & Loan Ass'n,* 57 Nev. 181, 191, 60 P.2d 272, 276 (1936) (noting that, in the context of an action to recover possession of a property after a trustee sale, "[h]ad the conduct of the trustee and respondent, in connection with the sale, been accompanied by any actual fraud, deceit, or trickery, a more serious question would be presented"); *see also Nev. Land & Mortg. Co. v. Hidden Wells Ranch, Inc.,* 83 Nev. 501, 504, 435 P.2d 198, 200 (1967) ("In the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness.").
>
> Id. at *13.

In the present case, JPMorgan failed to allege or produce evidence of the "fraud, unfairness, or oppression" that this Court has required in order for a court to grant equitable relief overturning a foreclosure sale. The district court therefore erred

in dismissing Saticoy's claims against JPMorgan with prejudice.

4. The district court erred in finding that the three-year period in NRS 116.3116(6) prevented the HOA from foreclosing its lien.

At page 9 of its brief in support of dismissal with prejudice (JA1b, pg. 83), JPMorgan argued that pursuant to NRS 116.3116(6), "[a] lien for unpaid assessments is extinguished unless **proceedings to enforce the lien are instituted** within 3 years after the full amount of the assessments become due." (emphasis added)

For the foreclosure on Lots 21 and 26, JPMorgan argued that the notice of delinquent assessment lien was recorded on April 20, 2009, but the public auction was not held until July 18, 2013. For the foreclosure on Lot 22, JPMorgan argued that the notice of delinquent assessment lien was recorded on April 20, 2009, but the public auction was not held until November 21, 2013.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 415 (2014), this Court interpreted the words "institution of an action to enforce the lien" found in NRS 116.3116(2) and stated:

> *Black's Law Dictionary* 869 (9th ed.2009) defines "institution" as "[t]he commencement of something, *such as* a civil or criminal action." (Emphasis added.) As *Blacks* recognizes, "foreclosure" proceedings are "instituted" and include both "judicial foreclosure" and "nonjudicial foreclosure" methods. *Id.* at 719 (defining "foreclosure," "judicial foreclosure," and "nonjudicial" or "power: of-sale foreclosure"). And in the context of foreclosures, "action" appears to be commonly used in connection with nonjudicial as well as judicial foreclosures.

Applying this definition to the word "instituted" used in NRS 116.3116(6), the proper focus must be on the "commencement" of the nonjudicial foreclosure process and not upon the public auction that is the final step at the end of foreclosure process.

Earlier in the SFR opinion, this Court also stated that "[t]o initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments. NRS 116.31162(1)(a)." 334 P.3d at 411.

Later in the SFR opinion, this Court adopted the Nevada Real Estate Division's interpretation of when the nonjudicial foreclosure process is initiated:

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> Elaborating, the NRED opinion states, "NRS 116 does not require an association to take any particular action to enforce its lien, but [only] that it institutes 'an action,' " which includes the HOA taking action under NRS 116.31162. *Id.* at 17–18. NRED's interpretation is persuasive, as it comports with both the statutory text and the JEB's interpretation of the UCIOA. *See* Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006)

334 P.3d at 417.

As proved by the recitals in the first foreclosure deed, the notice of delinquent assessment lien was recorded on April 20, 2009 and was "mailed by certified mail to the owners of record." (JA1b, pg. 134) JPMorgan produced no evidence that any of the assessments contained in the notice of delinquent assessment lien became due more than three years before April 20, 2009. Consequently, the district court erred in finding that NRS 116.3116(6) barred the HOA from foreclosing its assessment lien.

5. The "commercial reasonableness" requirement contained in the Uniform Commercial Code did not apply to the foreclosure sales in this case.

At page 10 of its brief in support of dismissal with prejudice (JA1b, pg. 84), JPMorgan claimed that the obligation of good faith in NRS 116.1113 and the definition of good faith contained in the Comment to Section 1-113 of the Uniform Common Ownership Act required that the HOA's foreclosure sales be commercially reasonable.

On the other hand, NRS Chapter 116 does not contain any language that requires that an HOA foreclosure sale be "commercially reasonable," and no provision requires that a sale be found "void" if the property is not sold for a specific percentage of its fair market value. The reported Nevada decisions that discuss "commercially reasonable" sales involve the repossession and sale of personal property pursuant to Article 9 of the Uniform Commercial Code.

NRS 104.9109(4)(k) provides, however, that Article 9 of the Uniform Commercial Code does not apply to "[t]he creation or transfer of an interest in or lien on real property" except for four instances. An HOA assessment lien is not one of the

four instances.

NRS 116.1108 expressly provides that "the law of real property . . . supplement the provisions of this chapter, except to the extent consistent with this chapter." The Uniform Commercial Code is not one of the areas of law included in NRS 116.1108.

At page 10 of its brief in support of dismissal with prejudice (JA1b, pg. 84), JPMorgan cited Levers v. Rio King Land & Investment Co., 93 Nev. 95, 560 P.2d 917 (1977), where this Court applied the language in NRS 104.9504(3) that now appears in NRS 104.9610(2) to a secured party that mailed a letter to the debtor only 8 days before a sale that was attended only by the secured party and a former employee. There was no evidence that the sale was publicized in any manner, and the secured party purchased the collateral for $100 at the sale and re-sold the collateral to a third party for $10,000. Although this Court found that the sale in Levers was not commercially reasonable, this Court reversed the district court's judgment setting aside the sale and held that it was enough that the secured party's judgment be reduced by the $10,000 fair market value of the collateral.

In Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989, 995 (1963), cert. denied, 382 U.S. 844 (1965), this Court chose to adopt the rule from California requiring that even where a sale price is inadequate, "there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." This Court applied this same rule in Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971); and Brunzell v. Woodbury, 85 Nev. 29, 449 P.2d 158 (1969).

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev., Adv. Op. 5 (2016), this Court repeated the rule that in order to set aside an association's nonjudicial foreclosure sale, there must be a showing of "grossly inadequate price plus 'fraud, unfairness, or oppression.'" Id. at *9-10. This Court applied the same rule at page 13 of its opinion where it quoted both the rule adopted in Golden v. Tomiyasu and language found in McLaughlin v. Mut. Bldg.

L & Loan Ass'n, 57 Nev. 181, 191, 60 P.2d 272, 276 (1936), that required that the sale "be accompanied by any actual fraud, deceit, or trickery." This Court also referred to "the foreign precedent cited under which equitable relief may still be available in the face of conclusive recitals, **at least in cases involving fraud** . . ." Id. at *14. (emphasis added)

At page 15 of its opinion in Shadow Wood, this Court again repeated the rule adopted in Golden v. Tomiyasu and Long v. Towne:

> As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression. *Long*, 98 Nev. at 13, 639 P.2d at 530.

132 Nev., Adv. Op. 5, at *15.

Later in its opinion, this Court stated that "conduct that, if it rose to the level of misrepresentations and nondisclosures that indeed prevented NYCB's ability to cure the default, might support setting aside the sale. Cf. *In re Tome*, 113 B.R. 626, 636 (Bankr. C.D. Cal. 1990)" Id. at *19.

At page 10 of its brief in support of dismissal with prejudice (JA1b, pg. 84) JPMorgan asserted that "the Association purportedly foreclosed on a lien that was extinguished," so "Chase should be able to demonstrate fraud, unfairness, or oppression." As discussed at pages 10 and 11above, JPMorgan's claim that the HOA's assessment lien was extinguished is based on a misreading of NRS 116.3116(6), so JPMorgan's objection to the HOA's foreclosure sale rests entirely upon its claim that "the sale was also commercially unreasonable due to the fact that Saticoy only paid $81,000 for the Property, but the Property is worth in excess of $4,000,000." (JA1b, p. 85)

In Shadow Wood, this Court directed that "[w]hen sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities." 132 Nev., Adv. Op. 5, at *20. As a result, in addition to the price paid, the court must consider "whether an innocent party may be harmed by granting the desired

relief." Id. at *21.

This Court also directed that a court must consider the defendant's failure to "use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." Id. at *21, n. 7.

In the last section of its opinion in Shadow Wood, this Court included the following quote:

> "Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should not normally interfere especially where the rights of third parties might be prejudiced thereby." *Nussbaumer v. Superior Court in & for Yuma Cty.*, 589 P.2d 843, 846 (Ariz. 1971).

Id. at *24.

In the present case, JPMorgan did not produce arguments or evidence regarding these issues, and the district court did not consider all of the facts before finding that Saticoy's case "lacked merit." Because JPMorgan did not produce the necessary proof of fraud, unfairness, or oppression, the district court erred in dismissing Saticoy's complaint in intervention with prejudice. Saticoy should instead have the opportunity to timely file a new action in order to have its claims for injunctive relief, quiet title, declaratory relief, and issuance of a writ of restitution determined on the merits.

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CONCLUSION

By reason of the foregoing, it is respectfully submitted that this Court should reverse the order by the district court dismissing Saticoy's complaint in intervention with prejudice and remand this case to the district court with instructions to enter an order that dismisses Saticoy's complaint in intervention without prejudice.

DATED this 19th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

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

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 5,426 words.

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

DATED this 19th day of February, 2016.

LAW OFFICES OF
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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 19th day of February, 2016, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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/s/ /*Marc Sameroff /*
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