Case No. 70501

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOME LOANS, LP, a national association, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Electronically Filed Jun 20 2017 09:38 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Department XXI, Clark County
The Honorable VALERIE ADAIR, District Judge
District Court Case No. A-13-684501-C

RESPONDENT'S PETITION FOR REVIEW BY THE NEVADA SUPREME COURT

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Docket 70501 Document 2017-20363

Respondent SFR Investments Pool 1, LLC hereby Petitions this Court for review of the Court of Appeals' Order of Reversal and Remand entered May 31, 2017. Pursuant to NRAP 40B(d), the Order is attached hereto as **Exhibit 1**.

QUESTIONS PRESENTED

1. Whether a letter accompanying a check alleged to be in the amount of nine months of budgeted assessments can be considered "conditions upon which the [Bank] had a right to insist" when requires agreement that the amount is acceptable for all purposes.

2. What constitutes the full amount that a first deed of trust holder must pay to release the superpriority portion of a homeowners association lien prior to foreclosure by the homeowners association or the bank.

3. Whether a review in hindsight should be allowed to negate a good faith basis for rejection by a homeowners association of a partial payment.

4. Whether the protections afforded to a bona fide purchaser ("BFP") should be defeated when the BFP did not cause the harm to the bank, who also failed to protect itself.

STANDARD FOR GRANTING REVIEW

This petition is brought pursuant to Nev. R. App. Proc. 40B. Review is warranted for the following reasons:

(1) The question presented is one of first impression of general statewide significance.

This is one of many cases arising out of NRS 116 non-judicial foreclosure sales. Among other issues, this case involves an alleged attempt to pay the super-priority amount by the Bank. What constitutes actual tender, the impact of a good faith rejection of tender, and what is required for a release of the super-priority portion of an association lien are issues of first impression.

(2) The decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court.

The Court of Appeals' Order is in conflict with this Court's rulings in *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC,* 373 P.3d 305 (Nev. 2016) and *Shadow Wood Homeowners Ass'n v. N. Y. Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105 (Nev. 2016). In particular, the Court of Appeals misapplied *Ikon* with regard to the calculation of the superpriority amount in the context of an association foreclosure. Additionally, the Court of Appeals overlooked this Court's recognition of the protections afforded to a BFP in *Shadow Wood*.

(3) This case involves fundamental issues of statewide public importance.

The same issues involved herein will assuredly impact resolution in countless cases before the state and federal district courts. Moreover, the protections afforded to a BFP will have a far-reaching impact on all foreclosure sales, beyond the scope of NRS Chapter 116.

RELEVANT BACKGROUND

The property in this case, 3617 Diamond Spur Avenue ("Property"), was the subject of an NRS Chapter 116 foreclosure. The homeowner fell into arrears on assessments owed to the Sutter Creek Homeowners' Association ("Association"). (2JA_306.) After issuing a series of notices and recordings, the Association's trustee, Alessi & Koenig ("Alessi" or "Trustee") held a foreclosure sale to recover the delinquent assessments on February 20, 2013. SFR Investments Pool 1, LLC ("SFR"), the highest bidder, took title to the Property. (2JA_312-13.)

The record shows this foreclosure sale was properly noticed and conducted. Consequently, the Association's sale transferred ownership to SFR and extinguished the First Deed of Trust ("FDOT").

The District Court properly rejected the Bank of America, N.A.'s ("BANA" or "Bank") "tender" argument, recognizing that the proffered payment was impermissibly conditional and acceptance of the payment required the Association potentially to waive its rights to its entire lien and to concede an undecided matter.

The District Court properly concluded the Bank's offer did not constitute a valid tender. Moreover, beyond this "One and Done," "non-negotiable" payment offer, the Bank could point to no further action it took to protect its interest or prevent the sale to a BFP. (2JA_312-13 at 24:19-25:25.) Additionally, the amount to pay off the lien was in dispute and the good faith basis for same was communicated to the Bank.[1] Lastly, even assuming valid tender were made, which there was not, SFR's status as a BFP renders it an inappropriate party from whom to seek relief.

SUMMARY OF THE ARGUMENT

The Court of Appeals should have affirmed that the Association was within its rights to reject an offer of payment that included unreasonable demands to which the Bank had no right to insist. However, the Court of Appeals improperly concluded that the condition was one upon which the Bank had a right to insist. This conclusion is incorrect for the following reasons: (1) the Court of Appeals failed to avoid hindsight bias, (2) improperly broadened *Ikon*, (3) ignored this Court's recognition of the protections afforded to BFPs, and (4) inappropriately ignored the Association's good faith basis for rejection. Based thereon, this Court should review the Court of Appeals' Order of Reversal and Remand.

[1] On June 15, 2012, Alessi sent a letter with a ledger to the Bank's representative, Miles, Bauer, Bergstrom & Winters, LLP ("Miles Bauer"), stating the appropriate amount was $2,930.00. 4JA_790. In reply, Miles Bauer sent a check for $720.00 with improper conditions that were "non-negotiable."

ARGUMENT

I. THE COURT OF APPEALS FAILED TO AVOID HINDSIGHT BIAS

When analyzing past events, it is imperative that they be viewed through the appropriate lens. Specifically, hindsight bias must be avoided, as the parties experiencing the events in real time did not have the benefit of same. Instead, one must examine the events from the same perspective of those involved, noting the information available at the time, as well as the decisions based thereon. This is of particular importance when various actions or inactions surrounding those events must be weighed and balanced. *See, e.g., First Nat. Bank of Davis v. Britton*, 94 P.2d 896 (Okla. 1939) (concerning good faith basis for rejection). Here, the Court of Appeals improperly broadened the application of *Ikon* and then viewed the alleged tender through faulty hindsight. This resulted in an incorrect balancing, which completely disregarded SFR's BFP status. Thus, the Court of Appeals issued faulty rulings on issues of first impression, which should be reviewed and decided by this Court: (a) what constitutes valid tender and (b) the requirements to obtain a release of the superpriority portion of an association lien – neither of which have been decided by this Court. There are scores of cases involving one or more of these issues.[2]

[2] See **Exhibit 2**, which includes cases SFR is aware of pending before this Court.

II. THE COURT OF APPEALS IMPROPERLY BROADENED *IKON*

In order to reach its conclusion, the Court of Appeals applied *Ikon* to this matter as if the context was identical. However, this matter is in the context of an association foreclosure sale, not a Bank foreclosure sale. The distinction between these two scenarios was recognized by this Court in *Ikon*[3] and in *Shadow Wood.*[4] By ignoring context, the Court of Appeals effectively concluded that superpriority was expressly limited to an amount equal to nine months of assessments, without considering if the Bank had to pay more to obtain a release of the superpriority portion of the Association's lien. In conjunction with improperly viewing the Bank's tender in hindsight, rather than considering all of the factors present at the time of same, the Court of Appeals gave inappropriate weight to the Bank's purported tender and the conditions it insisted upon. This inappropriate weight wrongly diminished the Association's good faith basis for rejection of the Bank's tender to the point of being wholly ignored by the Court of Appeals.

[3] See footnote 4, indicating "When an HOA forecloses on a property, the pre-2015 amendments of NRS 116.31164(3)(c) and NRS 116.3116(8) allowed for the recoupment of fees and costs. However, because [the Association] did not foreclose on the property, NRS 116.31164(3)(c) and NRS 116.3116(8) are not implicated in this decision." 373 P.3d at 69 (2016).

[4] 366 P.3d at 1113.

III. BFP STATUS TRUMPS EQUITABLE CHALLENGES.

This Court recognized the protections afforded to a BFP when it stated,

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood, 366 P.3d at 1114, citing *Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

This Court further exhorted that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [the Bank] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." *Shadow Wood*, 366 P.3d at 1114 fn. 7 citing *Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) ("in the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a

position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

In other words, this Court recognized that when a BFP has no notice of a pre-sale dispute, such as an attempted tender, equity cannot be granted to the tendering party, particularly when the tendering party was in a position to seek relief earlier and defeat any BFP status by putting the world on notice of their attempts to pay.

In emphasizing "the legal remedies available to prevent the property from being sold to a third party," this Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. If that party's inaction allows a purchaser to become a BFP, then equity cannot be granted to the detriment of the innocent third party. Put another way, BFP status trumps equitable relief.

This seemingly harsh result is reinforced by the fact that not even a due process violation is sufficient to overcome an individual's status as a BFP. *Swartz v. Adams*, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977) (finding that where notice of sale was not given to owners, property still could not be returned to owners because property was purchased by a BFP). This Court remanded *Swartz* to allow the owners to seek compensatory relief against the person who initiated the sale rather than harm an innocent third party. *Id*. Therein lies the correct form of relief. The so-called harmed party (Bank) can seek money damages against the party who caused the

harm (Association/Collection Company). But under no set of circumstances can equitable relief, to the detriment of the innocent purchaser, be granted to a party (Bank) who ignored earlier remedies and allowed a BFP to purchase the property.

This Court summed up this idea when it stated

> 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 normally not interfere, especially where the rights of third parties might be prejudiced thereby.

Shadow Wood, 366 P.3d at 1116.

One of the most fundamental principles of law, whether it be civil or criminal, is that only the party that caused or contributed to the harm can be held responsible. If BFP status is treated as a mere consolation, then all sales lack finality and all statutory foreclosures schemes are jeopardized; effectively morphing a non-judicial foreclosure into a judicial foreclosure. *See Moeller v. Lien*, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777, 782 (1994); *Melendrez v. D & I Investment, Inc.*, 26 Cal.Rptr.3d 413, 428 (Cal.Ct.App. 2005)(Creating finality to BFPs 'was to promote certainty in favor of the validity of the private foreclosure sale because it encouraged the public at large to bid on the distressed property…'")(internal citation omitted); *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. 2003);

In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210.

Treating BFP status as a consolation effectively rewards the alleged harmed party for its failure to protect itself. It is a maxim, "he who seeks equity must do equity." No one is entitled to the aid of the court when that aid is only made necessary by that party's own inactions or self-created hardship. This maxim holds true in this case and the Court of Appeals' Order should be reversed.

IV. THE BANK'S UNRECORDED, NON-NEGOTIABLE OFFER DOES NOT CONSTITUTE VALID TENDER.

A. Offers to Pay Containing Improper Conditions are not Valid Tender.

Nevada has not defined the term "tender," but other states within the Ninth Circuit have determined that "tender" means the actual unconditional production of money. *See, e.g., Bembridge v. Miller,* 385 P.2d 172, 175 (Or. 1963) (tender requires the unconditional offer to pay the full amount of the debt and actual presentment of money); *Equitable Life Assur. Soc. of United States v. Boothe*, 86 P.2d 960, 962 (Or. 1939) (tender means "an unconditional offer of payment, consisting in the actual production, in current coin of realm, of a sum not less than the amount due."). Courts have elaborated that a tender must be "an offer of payment with no conditions *or only with conditions upon which the tendering party has a right to insist*." *Fresk v. Kraemer*, 377 Or. 513, 522, 99 P.3d 282, 287 (2004) (emphasis added).

Any analysis related to the Bank's purported tender must avoid hindsight bias, as the relevant weight must be determined as if done so concurrently with the actions and/or inactions of the parties involved. Here, the Bank conditioned its proposed payment through a letter from Bank representative Miles Bauer as follows:

> This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations toward the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full."

(2JA_412.) The check also included language that could be construed to mean it was meant to pay the entirety of the Association's lien: "To Cure HOA Deficiency." (1JA_101.) The Bank did not have a right to insist that the Association accept a partial payment as payment in full. In fact, "[w]here a larger sum than that tendered is in good faith claimed to be due, **the tender is ineffectual as such if its acceptance involves the admission that no more is due**." *Britton*, 94 P.2d at 898 (emphasis added). Further, the restrictive language accompanying the payment attempt stated that acceptance of the check would force the Association to accept all of the facts and arguments posited by the Bank in its letter, and the Bank would never again have to pay the Association. (2JA_411-12.) In other words, "One and Done," whether there were delinquencies in the future or even if the Bank were to purchase the property at its own sale; something expressly rejected by this Court in *Shadow Wood*.

Furthermore, tender by a junior lien interest holder is only effective in redeeming that holder's interest when it is both "unconditional" and, if rejected, the tender is "kept good." Restatement (Third) of Property: Mortgages § 6.4, cmt. g (the "Restatement"). The Restatement contemplates that, after rejection by a senior interest holder, the junior interest holder deposits the funds into an escrow account and advises senior interest holder that the funds are being held for payment. *Id.* Alternatively, "segregation of the funds is not essential if [junior interest holder] can show that he or she continues to be ready, willing and able to pay." *Id.* Here, the Bank did nothing after its check was rejected. The Bank provided no evidence that it communicated to the Association that its offer to pay was kept open.

The district court properly found that the offer to pay "was conditional, requiring the Association to waive its rights as to a currently undecided matter – namely, what amounts are included in a super-priority lien pursuant to NRS 116 – this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property." (4JA_794.) However, the Court of Appeals improperly concluded that this condition was one upon which the Bank had a right to insist. Again, this conclusion is incorrect due the failure to avoid hindsight bias, the improper broadening of *Ikon*, which inappropriately diminished the Association's good faith basis for rejection and resulted in a failure to recognize the protections afforded to BFPs.

B. Changes in Lien Priority Must be Recorded Under NRS Chapter 111.

Under Nevada law, every interest in property must be recorded. NRS 111.315 states in relevant part, "…every instrument of writing…whereby any real property may be affected…shall be recorded." NRS 111.325 further provides that failure to record such conveyance "shall be void as against any subsequent purchaser, in good faith and for valuable consideration…" NRS 111.001 broadly defines "conveyance" as "**every instrument in writing**, …, **whatever may be its form**, and by whatever name it may be known in law, by which any…interest in lands is **created, alienated, assigned or surrendered**." (emphasis added) There can be no doubt that a payment, which discharges the super-priority portion of the Association's lien, constitutes an instrument or conveyance that affects the property. *See*, Restatement (Third) of Property: Mortgages § 6.4 cmt. (g) at pg. 431; see also Black's Law Dictionary 971 (7th ed. 1999) (defining "release" as: "5. The act of conveying an estate… 6. A deed or document effecting a conveyance. …") The Bank's failure to record its attempted payment invalidates the attempt as against SFR. The District Court properly weighed this factor and the Court of Appeals ignored it.

C. Changes in Lien Priority Must be Recorded Under NRS 106.220.

Because any purported payment of the super-priority portion of the lien changes the priority of the Association's lien versus the FDOT, it is required to be recorded. NRS 106.220 states in relevant part, "[a]ny instrument by which any…lien

upon…real property is subordinated or waived as to priority, must…be recorded…" NRS 106.220 further states, "[t]he instrument is not enforceable… unless it is recorded." Here, the Bank argued that its attempted payment cured the super-priority portion of the Association's lien. Accepting, for the sake of argument, this is true, then under NRS 106.220, this payment would be an interest in property that subordinated the Association's lien, and therefore Nevada law required the Bank to record it. Failure to record makes it unenforceable against third parties like SFR.

It is undisputed that the Bank failed to record any document indicating its attempted payment. (4JA_791). As such, this payment, even if valid, is unenforceable against SFR. Put another way, SFR, as a matter of law, did not take the Property subject to the FDOT. The District Court properly weighed this factor and the Court of Appeals ignored it.

D. Even if the Tender is Valid, the Association Rejected the Offer in Good Faith.

As discussed above, it is imperative that any analysis be done in a manner that avoids hindsight bias. Here, the Bank's purported tender came with unjustified conditions that extended beyond the superpriority amount, potentially affecting the entire lien and the Association's ability to collect it. However, assuming *arguendo*, the amount was appropriate and that the Court of Appeals' hindsight application of a broadened *Ikon* were accurate, even "an actual tender of the proper amount due

and owing will not operate to discharge a lien where the lienholder in good faith believes that a greater sum is due." *See Segars v. Classen Garage & Service Co*., 612 P.2d 293, 295 (Okla. Ct. App. 1980). "Where a larger sum than that tendered is in good faith claimed to be due, the tender is ineffectual as such if its acceptance involves the admission that no more is due." *Britton*, 94 P.2d at 898; see also *Smith v. School Dist. No. 64 Marion County*, 89 Kan. 225, 131 P. 557, 558 (1913)("Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions"); *Hilmes v. Moon*, 11 P.2d 253, 260 (Wash. 1932)("In order to discharge the lien of the mortgage, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary, and unaccompanied by any bona fide, though mistaken, claim of right); *Lanier v. Mandeville Mills*, 183 Ga. 716, 720, 189 S.E. 532, 535 (1937)("The refusal of a tender, however, must have been unqualified and unaccompanied by any bona fide claim of right. If the creditor honestly believes that the tender is not legally sufficient because of a mistake as to his legal rights, and refuses it for that reason, such refusal does not operate as a discharge of the security conveyed."); *Reynolds*, 71 S.E. at 53 ("if a mortgagee refuses a tender, not arbitrarily or for a wrongful purpose, but in good faith, under the honest belief, based upon reasonable grounds, that more is due him than has been tendered, refusal of the tender will not operate to discharge his lien.") *citing Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. Rep. 458; *Union*

Mutual L. Ins. Co. v. Union Mills Plaster Co. (C. C.) 37 Fed. 286, 3 L. R. A. 90; *Hartley v. Tatham*, 2 Abb. Dec. (N. Y.) 333; Id., *40 N. Y. 222; *Moore v. Norman*, 51 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526; 27 Cyc. 1408, 1409; 1 Jones on Mortgages (6th Ed.) § 893, p. 955.

Whether or not a lender had to pay nine months assessments plus collections costs to obtain a release of the superpriority portion of the Association's lien is still open to dispute today, even post *Ikon*. This open question along with the "One and Done," "non-negotiable" nature of the purported tender gave the Association a good faith basis for rejection.

Here, the Association, through Alessi, established its good faith belief that a greater sum was due.[5] Alessi identified the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") Advisory Opinion No. 2010-01 and indicated that, "[i]n the opinion, the [CCICCH] concluded that associations may collect, as part of the super priority lien, the costs of collecting as authorized by NRS 116.310313." *Id*. Alessi also noted the Commission's amendment to NAC 116 concerning same. *Id*. Based on the authority laid out, Alessi stated that, "[a]s such, please be advised that [Alessi], on behalf of the [Association], will continue the foreclosure process unless $2,930.00 is paid…" *Id*. The amount listed represented

[5] *See* 1JA_199.

the greater sum that Alessi had a good faith belief was due. This Court addressed a similar situation in *Clark County v. Blanchard Const. Co.*, 98 Nev. 488 (1982) (holding that a party did not act unreasonably in refusing a "payment in full" condition in conjunction with a partial payment where that same party believed it was owed a greater amount.) This factor was improperly ignored by the Court of Appeals, as even if the Bank's purported tender were valid, the Association's good faith rejection renders the tender ineffective to discharge the lien. As such, a finding related to the sufficiency of the amount tendered and/or reweighing of the equities based thereon is unnecessary.

E. If a Rejection of Tender is Unjustified, then the Proper Remedy is for Money Damages Against the Party Who Caused the Damages.

Even if the purported tender was valid and improperly rejected, which it was not, SFR should still take title free and clear of the FDOT. It is important to clarify that lenders were in a position to prevent any purchaser from being a BFP. A BFP is one who "takes the property 'for a valuable consideration and *without notice* of the prior equity...'" *Shadow Wood*, 366 P.3d at 1114 (emphasis added). Thus, all a lender has to do to defeat BFP status is to put purchasers on notice of their claim to the property. This Court suggested various actions that a lender could take, such as "seeking a temporary restraining order and preliminary injunction and filing a lis

pendens on the property." *Id.* Additionally, lenders could have announced their tenders at the sales. Here, no such action was taken.

Notwithstanding their inaction, a lender is not without a remedy, even when tender is rightfully made but wrongfully rejected. **To the extent that an association wrongfully rejects tender, a lender's remedy is against the parties who harmed it, in lieu of displacing a BFP.**

A lender's right to recover from a wrongful foreclosure is consistent with this Court's precedent in *Swartz* when it held:

> …the ideal remedy would be to return that property to the former owner pending constitutionally sufficient proceedings. Unfortunately, this may no longer be done without injury to innocent third parties who are [BFPs] of the property. However, (the homeowner) has also sought compensatory relief in her complaint. We therefore reverse and remand the case to the court below for appropriate proceedings consistent with this opinion.

Swartz, 563 P.2d at 77. Further, *Swartz* dealt with a party without notice, meaning that the former owner was not even afforded the opportunity to put potential buyers on notice of the defects in the sale. *Id.*

Other courts have consistently found that a BFP is protected even when there is a wrongful rejection of tender. *See Moeller*, 25 Cal.App.4th at 831-32 (precluding an attack by the trustor on the trustee's sale to a BFP even where the trustee wrongfully rejected a proper tender by the trustor).

Given that lenders simply had a collateral interest in the property, a remedy for monetary damages is a perfect substitute. *Munger v. Moore,* 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323 (Ct. App. 1970) ("a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust") (citations omitted).

Protecting BFPs in this context is sound policy. In a foreclosure proceeding with a wrongfully rejected tender, the only party with truly clean hands is the BFP. Every other party – i.e., the lender and the foreclosure agent – was directly involved in the rejection of the tender. It was the lender who knew of the sale, made the alleged tender, and failed to inform anyone of that tender or attend the sale. If a tender was wrongfully rejected, some of the blame rests with the Association. Regardless, the BFP could have done nothing to prevent the situation and should not be held hostage by same.

Here, as in *Swartz*, the proper remedy is for compensatory damages from Alessi or the Association and not negatively impacting the BFP's title.

…

…

CONCLUSION

Based on the foregoing, this Court should review the Court of Appeals' Order of Reversal and Remand.

DATED this 19th day of June, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40B(d) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 21 pages long, and contains 4,644 words.
3. I hereby certify that I have read this 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), 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.

…

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

Dated this 19th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of June, 2017. Electronic service of the foregoing **Respondent's Petition for Review** shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title:	70501 – BANK OF AMERICA, N.A., v. SFR INV.'S POOL 1, LLC
Case Category	Civil Appeal
Information current as of:	Jun 19 2017 06:08 p.m.

Electronic notification will be sent to the following:

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Dated this 19th day of June, 2017.

/s/Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON

EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOMES LOANS SERVICING, LP,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 70501

FILED
MAY 31 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Appellant Bank of America, N.A., appeals from a district court summary judgment in a real property action.[1] Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

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[1]Upon initial review of this appeal, the court directed appellant to show cause why the appeal should not be dismissed as a timely-filed reconsideration motion remained pending in the district court. *See* NRAP 4(a)(4), (6) (listing motions that toll the time to file an appeal and providing that a premature notice of appeal does not divest the district court of jurisdiction); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010) (explaining that a timely filed motion for reconsideration that states with particularity the grounds for relief sought and seeks a "substantive alteration of the judgment" will be treated as a tolling motion (internal quotation marks omitted)). Bank of America responded to the order to show cause by filing a copy of a written, file-stamped district court order denying reconsideration, and because the entry of that order has vested jurisdiction in this court, this appeal may now proceed. *See* NRAP 4(a)(6) (providing that if a written-file stamped order resolving a tolling motion is filed before a premature appeal is dismissed, "the notice of appeal shall be considered filed on the date of and after entry of the order . . . of the last-remaining timely motion").

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Bank of America, N.A., held a first deed of trust on the subject property, which respondent SFR Investments Pool 1, LLC, purchased at a homeowners' association (HOA) foreclosure sale conducted pursuant to NRS Chapter 116 after the homeowner failed to pay HOA assessments. *See* NRS 116.3116[2]-.31168; *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. ___, ___, 388 P.3d 970, 971 (2017) (recognizing that the statutory scheme grants HOAs superpriority liens for unpaid assessments and allows HOAs to nonjudicially foreclosure on those liens). After SFR purchased the property, litigation ensued with Bank of America and SFR both claiming title to the property. The district court ultimately granted summary judgment in SFR's favor, finding that the sale was conducted properly and that the HOA's foreclosure on its superpriority lien extinguished Bank of America's deed of trust on the property. This appeal followed.

Bank of America first argues that the statutory scheme allowing HOA foreclosures to extinguish first deeds of trust is facially unconstitutional because it allows parties like Bank of America to be deprived of their property without due process. However, the Nevada Supreme Court's recent opinion in *Saticoy Bay* specifically addressed this argument and held that the statutory scheme does not implicate due process because no state actor is involved in the HOA's foreclosure of its superpriority lien. *See* 133 Nev. at ___, 388 P.3d at 972-73 (recognizing that for due process to apply a state actor must be involved and concluding that the nonjudicial foreclosure process in NRS Chapter 116 does not

[2]Any discussion of NRS 116.3116 in this order refers to the version prior to the amendments adopted in 2015. 2015 Nev. Stat., ch. 266, § 1, at 1333-36.

include any state actor, thus the statutory scheme does not violate due process). Accordingly, this argument does not provide a basis to overturn the grant of summary judgment in SFR's favor.

Next, Bank of America argues that it provided appropriate tender of the superpriority lien amount to protect its first deed of trust and that the HOA improperly rejected that tender. SFR responds that the tender was not proper because it was conditional in nature. The district court agreed with SFR and concluded that the tender was conditional in nature, requiring the HOA to waive its possible right to additional amounts when the applicable law regarding what could be included in a superpriority lien was unsettled, and therefore was not sufficient to protect Bank of America's interest in the property.

Having reviewed the tender given by Bank of America, we conclude that, to the extent it was conditional, Bank of America had a right to insist on the given condition. *See, e.g., Dull v. Dull*, 674 P.2d 911, 913 (Ariz. Ct. App. 1983) ("A tender is not conditional . . . if the condition is one which the person making the tender has a legal right to insist upon."); *McGehee v. Mata*, 330 So. 2d 248, 249 (Fla. Dist. Ct. App. 1976) (same); *Fresk v. Kraemer*, 99 P.3d 282, 286-87 (Or. 2004) (same).[3] Bank of America's tender indicated that it represented nine months' worth of HOA assessments and that the HOA's acceptance of the tender would act as a complete resolution of the HOA's superpriority lien. And the supreme court has confirmed that the pre-2015 version of NRS 116.3116 limited the

[3]When Nevada has no law on point, we may look to other jurisdictions for guidance. *See Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 642, 289 P.3d 201, 205 (2012) (looking to other jurisdictions for guidance when Nevada has no law on the issue at hand).

HOA's superpriority lien amount to the amount which Bank of America offered: "an amount equal to the common expense assessments due during the nine months before foreclosure." *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. ___, ___ n.2, 373 P.3d 66, 67 n.2, 72 (2016).[4] Thus, Bank of America had a right to insist that acceptance of the nine months' worth of HOA assessments would result in the satisfaction of the HOA's superpriority lien as that condition comported with the law. *See Dull*, 674 P.2d at 913; *McGehee*, 330 So. 2d at 249; *Fresk*, 99 P.3d at 286-87. Accordingly, the district court's finding that Bank of America's tender was insufficient solely because it was conditional is incorrect.

Despite our conclusion that the conditional nature of Bank of America's tender did not render it insufficient, that does not end our inquiry. Rather, to conclude that Bank of America's tender was sufficient, we must also be able to determine that the *amount* of the tender was sufficient to fully satisfy the superpriority lien. *See generally* 15 Richard A. Lord, *Williston on Contracts* § 47:1 (4th ed. 2017) (providing that valid tender in a contract scenario requires an offer to pay the amount due). Because the district court stopped its inquiry once it found that the tender

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[4]We recognize that the district court did not have the benefit of the *Horizons* decision at the time it granted summary judgment. We may still use the supreme court's later interpretation of the statute, however, to determine whether the district court's legal conclusions were correct. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) (providing that a court's interpretation of a statute "is explaining its understanding of what the statute has meant continuously since the date when it became law"); *Davidson v. Davidson*, 132 Nev. ___, ___, 382 P.3d 880, 883 (2016) ("This court's goal in construing statutes is to uphold the intent of the Legislature . . . .").

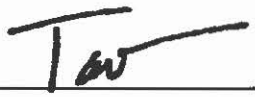
was conditional, it did not reach the issue of whether the amount of the tender was sufficient to satisfy the superpriority portion of the lien.

Without a finding regarding the sufficiency of the amount of the tender, a genuine issue of material fact remains as to whether Bank of America's tender was proper and the HOA's rejection of the offered tender was improper, such that the offer of tender satisfied the superpriority lien. *See, e.g., Hohn v. Morrison*, 870 P.2d 513, 516-17 (Colo. App. 1993) (providing that a proper tender that is rejected without justification may invalidate a lien on real property); *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, ___, 334 P.3d 408, 414 (2014) (providing that a holder of the first deed of trust can pay off the superpriority lien to avert its loss of security under the HOA foreclosure statutes); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing the standard for summary judgment). We therefore must reverse and remand that issue to the district court for it to decide in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). And based on the district court's determination as to tender, the court may need to reweigh the remaining equitable considerations. *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1114 (2016) (recognizing that one of the relevant considerations in deciding an equitable challenge to an HOA foreclosure sale is the purported tender of the superpriority lien and providing that "courts must consider *the entirety of the circumstances* that bear upon the equities" (emphasis added)); *see also La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (cited with approval in *Shadow Wood* for the

proposition that remand to the district court for reconsideration of its decision regarding an equitable remedy was appropriate when the district court failed to consider a fact relevant to the weighing of equities). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Akerman LLP/Las Vegas
Kim Gilbert Ebron
Eighth District Court Clerk

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[5]As to Bank of America's argument that the deed recitals cannot conclusively establish compliance with the foreclosure statutes, we decline to consider that argument as the district court did not rely solely on the recitals being conclusive in its order granting summary judgment. And to the extent this order does not address all of the issues raised by Bank of America, we decline to address those issues at this time because the district court's decision may change on remand such that Bank of America is no longer aggrieved by it.

EXHIBIT 2

NRS 116 Cases on Appeal Involving Tender*

Case No.	Caption
68165	BNY Mellon v. SFR Investments Pool 1, LLC ("SFR")
69323	BANA v. SFR
70060	BANA v. SFR
70501	BANA v. SFR (COA)
70903	BANA v. SFR (consolidated w/64468)
71176	SFR v. Green Tree Servicing (Ditech)
71248	Green Tree Servicing v. SFR
71781	BANA v. SFR
72010	SFR v. Green Tree Servicing
72221	US Bank v. SFR
72222	SFR v. MERS
72702	SFR v. BNY Mellon
71864	Fiducial LLC v. The Bank of New York Mellon

* SFR acknowledges this list is non-exhaustive. This list includes only those cases before this Court, personally known by SFR's counsel to include "tender" issues. This list does not include the scores of cases pending in both the state and federal trial courts or the Ninth Circuit Court of Appeals which involve these same issues.