IN THE SUPREME COURT OF THE STATE OF NEVADA

WEST SUSNET 2050 TRUST, Appellant, vs. NEW FREEDOM MORTGAGE CORPORATION; BANK OF AMERICA, N.A.; NATIONSTAR MORTGAGE, LLC, Respondent.	Case No. 70754

APPEAL
from an order in favor of Respondent
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Valerie Adair, District Court Judge
District Court Case No. A-13-691323-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Plaintiff-appellant West Sunset 2050 Trust ("West Sunset") is a trust organized under the laws of Nevada. West Sunset does not have any parent corporations, nor do any publicly-held companies own 10% or more of West Sunset's stock. West Sunset has been represented throughout the litigation and appeal by Luis A. Ayon, Esq. of Maier Gutierrez Ayon, PLLC.

DATED this 5th day of April, 2017.

MAIER GUTIERREZ AYON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

This is an appeal from an order granting defendant/respondent Bank of America, N.A.'s ("BANA") countermotion for summary judgment pursuant to Nev. R. Civ. P. 56(b), which was entered on February 8, 2016 J.A. 0809-0812, and noticed on February 16, 2016 ("the Order"). J.A. 0813-0820.[1] West Sunset filed a motion for reconsideration of the court's February 16, 2016 order. J.A. 0909-0910. The motion for reconsideration was denied by the court. J.A. 0911-0916. Notice of the order denying reconsideration was filed on June 3, 2016. J.A. 0911-0916. The district court certified the Order as a final judgment on November 10, 2016 pursuant to Nev. R. Civ. P. 54(b). J.A. 1010-1014. West Sunset previously filed its notice of appeal on July 1, 2016 J.A. 0917-0935; however, "the notice of appeal shall be considered filed on the date of and after entry of the order, judgment or written disposition of the last-remaining timely motion." NRAP 4(a)(6). The Supreme Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1).

ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), Appellant states that this case raises as principal issues a question of statewide public importance, as the principal issue raised on appeal is whether or not a deed of trust is a property interest that would allow its beneficiary to maintain or defend against a quiet title action to determine the priority

[1] Joint Appendix ("J.A.").

and enforceability of its lien following a homeowner's association foreclosure sale pursuant to NRS Chapter 116 and whether the buyer at the association foreclosure sale is a bona fide purchaser for value.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by failing to consider West Sunset's status as a bona fide purchaser for value at the HOA foreclosure sale.

2. Whether the district court erred by finding that no genuine issues of material fact remained as to whether notice of the HOA foreclosure sale was properly provided and whether the deed in lieu of foreclosure was a false recording.

STATEMENT OF THE CASE

Plaintiff initiated the above-captioned lawsuit on November 6, 2013 in order to quiet title against the adverse interests in the Property of Defendants New Freedom, BANA, Nationstar, Cooper Castle, and Stephanie Tablante, and for injunctive relief preventing Defendants from continuing foreclosure proceedings on the Property. J.A. 0001-0007. On February 4, 2014, this Court dismissed Cooper Castle as a party. J.A. 0029-0032.

On December 19, 2013, BANA filed its Answer. J.A. 0012-0019. On May 20, 2014, Nationstar filed its Answer and Counterclaim against Plaintiff, and its Cross-Claim against Stephanie Tablante. J.A. 0033-0042. Plaintiff filed its Answer to Nationstar's Counterclaim on June 18, 2014. J.A. 0043-0053.

On May 22, 2015, Plaintiff filed its Motion for Summary Judgment, arguing that the Deed in Lieu of Foreclosure that was recorded on the Property, and which went uncontested by New Freedom, extinguished any interest Nationstar or BANA had in the Property, that the Association's foreclosure sale extinguished New Freedom's interest in the Property, and that regardless of whether or not the Deed in Lieu of Foreclosure was properly recorded, Plaintiff was a bona fide purchaser at the Association's foreclosure sale and now holds valid title to the Property. J.A. 0302-0477.

On June 10, 2015, Defendants Nationstar and BANA filed their Opposition and Countermotion to the Motion for Summary Judgment, arguing that Nationstar was never provided notice of the Association's foreclosure of the Property, that Appellant split the payment rights from the security interest and satisfied the super-priority portion of the HOA's lien, that Nationstar was denied its due process rights, and that the sale was commercially unreasonable. J.A. 0600-0737.

On June 18, 2015, Plaintiff filed its Reply in support of the Motion for Summary Judgment, and Opposition to Defendants' Countermotion for Summary Judgment, arguing that Defendants had **not** previously disclose many of their exhibits submitted in support of their Opposition and Countermotion, that the recordation of the Deed in Lieu of Foreclosure satisfied the underlying debt and extinguished the Deed of Trust on the Property, that Defendants have no evidence

the Deed in Lieu was fraudulent, and that Plaintiff's title is protected under the bona fide purchaser doctrine. J.A. 0738-0759.

Following the hearing on the matter, the Court denied Plaintiff's motion for summary judgment, and granted Defendants' countermotion for summary judgment. The Order was entered on February 8, 2016, J.A. 0809-0812, and notice of entry of order was entered on February 16, 2016. J.A. 0813-0820.

On March 4, 2016 Appellants filed a motion for reconsideration of the district court's order granting Respondents' countermotion for summary judgment arguing that the district court erred in its analysis of the deed in lieu of foreclosure and its analysis of Appellant's bona fide purchaser status. J.A. 0821-0890. On March 22, 2016 Respondents filed an opposition to the motion for reconsideration claiming that Respondents did not receive statutory notice of the HOA foreclosure sale and that Appellant was not a bona fide purchaser. J.A. 0891-0898. On March 28, 2016 Appellant filed its reply to the motion for reconsideration. J.A. 0899-0908.

Following a hearing on the matter, the Court denied Plaintiff's motion for reconsideration. J.A. 0909-0910. The notice of entry of order was entered on June 3, 2016. J.A. 0911-0916.

STATEMENT OF FACTS

The property at issue in this case is commonly known as 7255 W. Sunset Road, Unit 2050, Las Vegas, NV 89113, and bears Assessor's Parcel Number 176-

03-510-102 (the "Property"). The Property is within a common-interest community governed by non-party Tuscano Homeowners Association (the "Association"), a common-interest community association created pursuant to NRS Chapter 116. J.A. 0002-0003.

Stephanie Tablante purchased the Property on or about December 2, 2005. J.A. 0036. Ms. Tablante borrowed money from New Freedom Mortgage Corporation ("New Freedom"), in the amount of $176,760.00. J.A. 0036. A deed of trust securing the loan was recorded on December 7, 2005, in the Official Records of the Clark County Recorder as Instrument Number 20051207-0002367 (the "Deed of Trust"). J.A. 0376-0394. The Deed of Trust listed Mortgage Electronic Registration Systems, Inc. ("MERS"), as the beneficiary. J.A. 0377.

Five years later, on or about March 1, 2011, the Property records show that Ms. Tablante transferred the Property to New Freedom in "full satisfaction of all obligations secured by the Deed of Trust," by executing a Deed in Lieu of Foreclosure ("Deed in Lieu"). J.A. 0396-0400. A few months later, the Deed in Lieu was corrected to include the legal description of the Property and was re-recorded on June 21, 2011. J.A. 0402-0407. A letter from the Clark County Assessor's Office dated March 18, 2011, shows that New Freedom was notified of the recording of the Deed in Lieu and provided with a copy of the document. J.A. 0630-0632.

New Freedom—as the owner of record following the Deed in Lieu—failed to pay the Property's HOA dues, and the Association through its agent recorded a Lien for Delinquent Assessments on April 4, 2012. J.A. 0409. More than thirty (30) days later, on May 29, 2012, the Association recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments. J.A. 0411. More than ninety (90) days following the recording of the Notice of Default and Election to Sell Under Homeowners Association Lien, May 29, 2013, the Association recorded a Notice of Foreclosure Sale Under the Lien for Delinquent Assessments, setting the foreclosure sale for June 22, 2013. J.A. 0413. On that day, the Association sold the Property at public auction to Appellant. J.A. 0044-0046.

A Foreclosure Deed Upon Sale was properly recorded on June 24, 2013. J.A. 0044-0046. The Foreclosure Deed recited, in part, that the sale complied with all requirements of law including proper notice. J.A. 0044-0046.

This conveyance is made pursuant to the powers conferred upon Agent by NRS Chapter 116, the foreclosing Association's governing documents (CC&R's), and the notice of the Lien for Delinquent Assessments, recorded on April 4, 2012 as instrument 201204040001017 in the Official Records of the Recorder of Clark County, Nevada. J.A. 0411. Default occurred as set forth in the Notice of Default and Election to Sell, recorded on May 29, 2012 as instrument 201205290001690 in the Official Records of the Recorder of Clark County, Nevada. J.A. 0413. All

requirements of law have been complied with, including, but not limited to, the elapsing of the 90 days, the mailing of copies of the notice of Lien of Delinquent Assessment, and Notice of Default, and the mailing, posting, and publication of the Notice of Foreclosure Sale. J.A. 0044-0046. The HOA agent, in compliance with the Notice of Foreclosure Sale and in exercise of its power under NRS § 116.31164, sold the property at public auction on June 22, 2013. *Id*. J.A. 0044-0046. Robert Atkinson, the attorney responsible for conducting the foreclosure auction, testified that his firm had mailed notice of the Foreclosure Sale to New Freedom, BANA, Nationstar, and Cooper Castle; and he provided documentation of certified mailing in his deposition. J.A. 0077.

Meanwhile, notwithstanding the fact that all obligations secured by the Deed of Trust had been satisfied and the Deed of Trust consequently extinguished, on or about July 29, 2011, MERS purportedly assigned the Deed of Trust to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP ("BANA"). J.A. 0457-0458. BANA substituted The Cooper Castle Law Firm, LLP ("Cooper Castle"), as the Trustee, J.A. 0460, and then on March 20, 2013, BANA purportedly assigned the deed of trust to Nationstar. J.A. 0462-0463. At the time of the assignment to Nationstar, Nationstar was on record notice of the Deed in Lieu of Foreclosure, as well as the Association's pending foreclosure sale.

On September 18, 2013, Cooper Castle, as Trustee of the Deed of Trust,

instituted foreclosure proceedings by filing a Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust. J.A. 0467-0469.

SUMMARY OF ARGUMENT

One of the main issues before the district court was whether the Deed in Lieu was fraudulently recorded, and if so, whether Appellant as a subsequent bona fide purchaser at the HOA Foreclosure Sale is entitled to have its interest in the Property protected. First, the district court incorrectly concluded that Nationstar was a legitimate holder of the First Deed of Trust and did not receive notice of the HOA delinquency. J.A. 0819. Second, the district court found that the rogue filing of a Deed in Lieu of Foreclosure to Defendant New Freedom Mortgage Co. ("New Freedom") did not divest Nationstar of its interest in the property, meaning Appellant purchased the property subject to the First Deed of Trust even though Appellant was a bona fide purchaser. J.A. 0819. Due to the fact there was a change in controlling law when the Nevada Supreme Court entered its decision in *Shadow Wood Homeowners Ass'n, Inc., et al. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5 (2016) ("*Shadow Wood*"), which settles that a third party purchaser who qualifies as bona fide is protected from any latent interest of which he had no notice, the district court erred in granting summary judgment in favor of Respondent.

Respondents Nationstar Mortgage LLC ("Nationstar") and Bank of America, N.A. ("BANA") (collectively "Respondents") convinced the district court that the

Deed in Lieu to New Freedom Mortgage Corporation ("New Freedom") was a "rogue document" not accepted by New Freedom – despite the fact the evidence showed that New Freedom was provided notice of the recording of the Deed in Lieu, was provided with a copy of the Deed in Lieu, and still took no action. J.A. 0630-0632. Respondents convinced the district court that they did not receive statutorily required notices, but the Nevada Supreme Court's decision in *Shadow Wood Homeowners Ass'n, Inc., et al. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5 (2016) ("*Shadow Wood*") definitively reaffirmed that the recitals in an Association's deed are "conclusive" as to default, notice, and publication of the Notice of Sale. Thus Respondents cannot argue that the district court's decision was correct merely because they alleged they did not receive the statutory notices of the HOA sale, when in fact, they did.

Respondents also convinced the district court that Appellant failed to present evidence that Appellant was a bona fide purchaser, but the recorded documents for the Property themselves serve as evidence that Appellant purchased the Property in good faith for valuable consideration and could not have possibly known of any defects in the HOA sale. This alone should merit this court to remand this matter back to the district court, reversing the district court's order granting summary judgment in favor of Respondents.

Finally, Respondents distorts the *Shadow Wood* decision by claiming that "the

Shadow Wood Court explained that inadequate price alone can be sufficient to set aside an HOA foreclosure sale if the price is 'grossly inadequate,'" when in fact the *Shadow Wood* decision indicates no such thing. *Shadow Wood* specifically states that a sale may be set aside "upon a showing of grossly inadequate **plus** 'fraud, unfairness, or oppression'" and Respondents did not dispute that Appellant was neither involved in nor aware of any fraud, unfairness, or oppression surrounding the HOA foreclosure sale in June of 2013. *Id.* at 9-10 (emphasis added).

LEGAL ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo an order granting summary judgment, without deference to the findings of the lower court. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d at 1029 (2005). All evidence favorable to the party against whom summary judgment was entered must be accepted as true on appeal. *Villescas v. CAN Ins. Companies*, 109 Nev. 1075, 1078, 864 P.2d 288, 290 (1993). Furthermore, a district court's statutory interpretation is also reviewed de novo. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P. 3d 1032, 1041 (2008).

A motion for summary judgment may only be granted upon the showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Nev. R. Civ. P. 56(c). The party seeking summary judgment always bears the initial burden of persuasion to the court. *See Celotex*

Corp. v. Catrett, 477 U.S. 317, 330-31, 106 S. Ct. 2548, 2556-57, 91 L. Ed. 2d 265 (1986). The moving party must identify those parts of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *See id*. The evidence presented, as well as reasonable inferences drawn from the evidence, must be viewed in the light most favorable to the non-moving party. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009).

"[C]onclusory statements along with general allegations do not create an issue of fact." *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1095 (1995). Rather, "[a] genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Valley Bank of Nevada v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

II. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER THAT APPELLANT WAS A BONA FIDE PURCHASER FOR VALUE AT THE HOA FORECLOSURE SALE

Despite Appellant's briefing of the issue in the summary judgment pleadings and for the motion for reconsideration, the district court's order failed to properly address Appellant's status as a bona fide purchaser and the rights that accompany that status. J.A. 0813-0820. NRS 111.180(1) defines a bona fide purchaser as a

purchaser who "purchases an . . . interest in any real property in good faith and for valuable consideration and who does not have actual knowledge, constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title or interest to, the real property." *See also Hewitt v. Glaser Land & Livestock Co.*, 97 Nev. 207, 208, 626 P.2d 268, 269 (1981) (holding that a bona fide purchaser is someone who purchases a property without notice of outstanding equities).

What cannot be disputed is that Appellant purchased the Property at the HOA foreclosure sale without any notice or reasonable cause to suspect any defect in New Freedom's title as record owner, and Respondents provided no evidence to the district court to dispute this contention. Even if the Deed in Lieu is somehow invalid, that dispute is immaterial as Appellant was a bona fide purchaser for value at the Association's foreclosure sale, and its title should not have been attacked. *See Buhecker v. R.B. Petersen & Sons Const. Co.*, 112 Nev. 1498, 1501, 929 P.2d 937, 939 (1996) ("[W]e conclude that it would be unfair to impute to [the bona fide encumbrancer] constructive notice of the fraud.").

If the significance of a bona fide purchaser's status was ever in doubt in the lower courts, the Nevada Supreme Court's decision in *Shadow Wood Homeowners Ass'n, Inc., et al. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5 (2016) ("*Shadow Wood*"), which affirmatively settles that a third party purchaser who qualifies as bona fide is protected from any latent interest of which he had no notice, cleared up

any uncertainty or ambiguity. "A subsequent purchaser is bona fide under common-law principles if it takes property 'for a valuable consideration and without notice of prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry.'" *Shadow Wood* at 22 (quoting *Bailey v. Butner*, 64 Nev. 1, 19 (1947)).

Moreover, if there were any question as to Appellant's ability to rely on the recitals set forth in the Association's foreclosure deed, which stated that that the sale complied with all requirements of law including proper notice, *Shadow Wood* also effectively confirmed the Nevada Supreme Court's previous holding in *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. ___, 334 P.3d 408 (2014), *reh'g denied* (Oct. 16, 2014) ("*SFR Investments*"), which stated that the foreclosure deed's recitals are conclusive as to notice.

The Nevada Supreme Court held in *SFR Investments* that a foreclosure deed "reciting compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or her heirs and assigns and all other persons.'" *SFR Investments*, 334 P.3d at 411-412 (citing NRS 116.31166(2)). Thus, a purchaser at an HOA foreclosure sale may rely on specific recitals in the foreclosure deed as "conclusive proof of the matters recited" as follows: "(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." NRS 116.31166(1).

This ruling was reaffirmed in *Shadow Wood*, wherein the Nevada Supreme Court, quoting *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 80 F. Supp. 3d 1131, 1135 (D. Nev. 2015), stated that "under NRS 116.31166, when a foreclosure deed recited that there was a default, the proper notices were given, the appropriate amount of time elapsed between notice of default and sale, and the notice of sale was given, it was 'conclusive proof' that the required statutory notices were provided." *Shadow Wood* at 10. While the *Shadow Wood* court declined to extend NRS 116.31166 as "conclusively establishing a default," the court did not take issue with the recitals pertaining to notice. *Id*. Thus, Appellant had a right to rely on the recitals contained in the foreclosure deed that the sale was properly noticed and Respondents provided no evidence to the district court indicating Appellant had any notice that the Association's foreclosure sale was in any way improper.

In reality, Appellant was on notice of three things: (i) that the Association was foreclosing on a lien which included assessments accruing prior to its enforcement; (ii) that foreclosure of such a lien extinguished any other lien on the property, including a first deed of trust; and (iii) that no recorded document indicated any dispute, defect, or challenge to the Foreclosure Sale. As such, Appellant justifiably inferred that the sale was proper and purchased the Property without notice or cause to believe that anyone still claimed an adverse interest in the

Property.

When sitting in equity, courts must consider the entirety of the circumstances which bear upon the equities, and consideration of harm to a potentially innocent third party is especially pertinent where the lender failed to use legal remedies to prevent the sale. *Shadow Wood*, 366 P.3d at 1114–15. Here, Respondents undisputedly failed to make any effort to record a document notifying a potential purchaser of a dispute or to stop the HOA foreclosure sale from proceeding. Respondents had more than ample time to seek any redress it choose in court, instead, they decided to do nothing while the Association foreclosed on the HOA Lien and passed the Property onto an innocent third party.

Moreover, Appellant had no part in or knowledge of any alleged defect in the HOA foreclosure sale prior to purchasing the Property. Thus, in considering the equities between the parties, Appellant would not be at risk of being injured by the relief Respondents was seeking if Respondents had protected their security interest prior to foreclosure or applied for any relief at an earlier time. *Shadow Wood*, 366 P.3d at 1115, n. 7. The equities cannot permit Respondents to deprive Appellant of its property rights based on such facts.

Just as the Nevada Supreme Court recognized the purchaser's probable bona fide status in *Shadow Wood* due to the evidence suggesting a lack of notice, this Court should reverse the district court's order granting Respondents' countermotion

for summary judgment because any actual defects in the Association sale were entirely unknown to Appellant. *Id.* ("Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law.").

III. THE DISTRICT COURT ERRED BY FINDING THAT THERE WAS NO GENUINE ISSUES OF MATERIAL FACTS THAT REMAINED AS TO WHETHER NOTICE OF THE HOA FORECLOSURE SALE WAS PROPERLY PROVIDED AND WHETHER THE DEED IN LIEU OF FORECLOSURE WAS A FALSE RECORDING

A. The District Court Erred in Finding That The Notices Regarding The Foreclosure Sale Were Improper

NRS 116 clearly establishes that a foreclosure deed "reciting compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or her heirs and assigns and all other persons.'" *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) (citing NRS 116.3116.31166(2)). This sentiment was recently reaffirmed in *Shadow Wood*, wherein the Court stated that the deed recitals are conclusive as to "default, notice, and publication of the [Notice of Sale], all statutory prerequisites to a valid HOA lien foreclosure sale as stated in NRS 116.31162 through NRS 116.31164 . . . ." *Shadow Wood*, at 1110.

Respondents claimed that they did not receive statutory notice of the HOA

sale, however, the recitals in the HOA foreclosure deed are conclusive as to notice, and Appellant had a right to rely on their accuracy when purchasing the Property at the public auction.

Moreover, Appellant did established that the foreclosure agent mailed notice of the foreclosure sale to New Freedom, BANA, Nationstar, and Cooper Castle. J.A. 0425.

Therefore, any claim by Respondents that the notice of the foreclosure sale was insufficient under the law must be disregarded by this Honorable Court.

B. The District Court Erred In Finding That The Deed In Lieu Of Foreclosure Was A False Recording

The district court held that the "rogue filing of a Deed in Lieu of Foreclosure to New Freedom did not divest Nationstar of its interest in the property. J.A. 0811. This reasoning led the district court to conclude that because the Association's agent never provided any foreclosure notices to Nationstar, the "foreclosure sale did not extinguish the senior deed of trust." J.A. 0812.

However, Deed in Lieu of Foreclosure (Deed in Lieu) has the same effect as any other foreclosure, thus recordation of the Deed in Lieu provided formal record notice to the world, most importantly the Association and its agent, that Stephanie Tablante had conveyed absolute title to the Property to New Freedom in full satisfaction of the debts secured by the Property.

For a great many purposes, a deed in lieu is the functional equivalent of a formal foreclosure. A deed in lieu essentially involves an alternate method of the collection of security. The lender accepting a deed in lieu, just like the lender exercising strict foreclosure, has the security interest mature into real ownership without any requirement of public sale. *See Moloney v. Boston Five Cents Sav. Bank FSB*, 422 Mass. 431, 433, 663 N.E.2d 811, 813 (1996). *See also, FH Partners, LLC v. Leany*, No. 2:11-CV-0796-LRH-NJK, 2014 WL 3853806, at *2 (D. Nev. Aug. 6, 2014) (a deed in lieu is the functional equivalent of a duly noticed foreclosure sale). In accordance with this case law, the Deed in Lieu expressly conveyed the Property to New Freedom with the consideration being "full satisfaction of all obligations secured by the Deeds of Trust executed by the party of the first part to New Freedom Mortgage Corporation …" J.A. 0396-0400. Thus, the district court erred in holding that the recording of the deed in lieu of foreclosure did not divest Nationstar of its entire interest in the Property.

Respondents offers nothing to refute Appellant's contention that the district court erred in its analysis of the Deed in Lieu recording, and simply urged the district court to continue to excuse Respondents for ignoring the recorded notices which indicated that not only was a Deed in Lieu recorded conveying the Property to New Freedom, but an HOA sale was imminent based on New Freedom's failure to pay the Property's HOA assessments. J.A. 0600-0737. Respondents successfully

convinced the district court that: 1) the Deed in Lieu was a fraudulently recorded "rogue" document not accepted by the lender; and 2) Defendants did not receive the required statutory notices. J.A. 0602. However, New Freedom did accepted the Deed in Lieu and title was conveyed to New Freedom. Therefore, any argument by Respondents on this issue should have been ignored by the district court.

Respondents insisted that "New Freedom was no longer the lender at the time of the purported conveyance" and "New Freedom was no longer in existence at the time of the purported conveyance." J.A. 0602. As Respondents should have been aware, the only "evidence" that loosely supported Respondents' theory that New Freedom did not accept the conveyance were documents which went **undisclosed** by Respondents during the discovery period and which were unilaterally attached to Respondents' opposition to Appellant's motion for summary judgment and countermotion for summary judgment. J.A. 0623-0660; 0734-0737. Exhibit A consisted of several documents, which Respondents implied constitute the entire records of John Peter Lee, Ltd., regarding the Deed in Lieu. J.A. 0602. Exhibit B consists of a printout of a webpage, which Respondents claimed demonstrates that New Freedom Mortgage merged into iFreedom Direct Corporation in 2008. J.A. 0658-0660. That assertion was not supported by the printout; but in any case, Respondents never previously asserted that New Freedom ceased to exist in 2008 or that it merged into iFreedom Direct Corporation in that year. Exhibit E consists of

a two-page document purporting to be Red Rock Financial Services Records, along with a custodian's certificate. J.A. 0734-0737.

Respondents revived their failing arguments that John Peter Lee did not produce any evidence of acceptance of the Deed in Lieu pursuant to a subpoena and the Deed in Lieu was not signed by New Freedom. J.A. 0602. The district court should have given no weight to these arguments, as Appellant previously addressed those issues and explained that 1) the nonappearance of a witness for a deposition does not signify fraud in the underlying subject of the deposition, and 2) the Deed in Lieu, pursuant to NRS 111.105, did not require New Freedom's signature. See Plaintiff's Reply in Support of Motion for Summary Judgment and Opposition to Countermotion for Summary Judgment, on file. J.A. -742-0749.

In actuality, Respondents' own documents showed that the Clark County Assessor's Office sent a copy of the Deed in Lieu to New Freedom by letter dated March 18, 2011. J.A. 0630-0632. New Freedom received a copy of the recording and would have received copies of tax bills, as well as HOA notices; yet, New Freedom never once contested the validity of the Deed in Lieu by notifying the Assessor's Office of any fraud or other error relating to the Deed in Lieu.

Thus, aside from the improperly submitted documents which the district court should not have considered, Respondents produced absolutely no evidence indicating that New Freedom did not accept the Deed in Lieu. Accordingly, pursuant

to *Moloney v. Boston Five Cents Sav. Bank FSB*, 422 Mass. 431, 433, 663 N.E.2d 811, 813 (1996), because it is undisputed that the Deed in Lieu was accepted by the lender, the district court erred in not concluding that the recording of the Deed in Lieu divested Respondents of their interest in the Property.

Therefore, this court should reverse the district court's findings of fact and conclusions of law that the Deed in lieu was a fraudulent recorded that did not strip Respondents of their interest in the Property.

CONCLUSION

Based on the foregoing, the district court erred in granting Respondents' countermotion for summary judgment. This Court should reverse and remand with instructions to vacate the Order granting judgment in Respondents' favor.

DATED this 5th day of April, 2017.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this opening 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 Rules of Appellate Procedure, and 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. I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because it does not exceed 30 pages. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of April, 2017.

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I certify that on the 5th day of April, 2017, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: APPELLANT'S OPENING BRIEF and VOLUMES I-V of the JOINT APPENDIX shall be made in accordance with the Master Service List as follows:

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