IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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APPEAL

From the Eighth Judicial District Court, The Honorable Valerie Adair
Judge District Court Case No. A-13-61323-C

APPELLANT'S REPLY BRIEF

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A. Viewing the Evidence in the Light Most Favorable to West Sunset, the Deed in Lieu of Foreclosure was Valid

Nationstar Mortgage, LLC ("Nationstar") base nearly the entirety of its case on the assertion that the recorded deed in lieu of foreclosure was invalid, and therefore the notices provided in conjunction with the foreclosure sale were insufficient. However, neither Nationstar nor Bank of America provided the court with *any* e4vidence that New Freedom Mortgage did not authorize the deed in lieu.

Nationstar's brief ignores the fact that, under Nevada Law, foreclosure sales and the resulting deeds are presumed valid. NRS 47.250(16)-(18) (stating that there are disputable presumptions "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such a presumption is necessary to perfect the title of such a person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has ben followed."). Thus, Nationstar carries the burden of proving that title to the subject property, as recorded, was incorrect. They have presented no such proof.

"A presumption not only fixes the burden going forward with evidence, but it also shifts the burden of proof." *Yeager v. Harrah's Club Inc.*, 897 P.2d. 1093, 1095 (Nev. 1995). "These presumptions impose on the party against whom it is directed

the burden of proving that the nonexistence of the presumed fact is more probably than its existence." *Id.* (citing NRS 47.180). To have prevailed on summary judgment, Nationstar had the burden to prove that it is more probable than not that the deed in lieu was invalid and not accepted by New Freedom Mortgage. Further, Nationstar was required to meet that burden of proof with the Court construing the pleadings and proof in the light most favorable to West Sunset, and accept all evidence and reasonable inferences therefrom as true.

Nationstar produced no such evidence. New Freedom was the beneficiary at the time the deed in lieu was negotiated, executed, and recorded. The deed caused title to the property to transfer to New Freedom Mortgage. However, Nationstar produced no evidence to demonstrate that the deed in lieu was not accepted by New Freedom – there is no declaration, no business records, no shred of evidence to suggest that title to the property, as recorded, was incorrect. Nationstar did not even produce a declaration from its own custodian of records stating that its business records indicated that no deed in lieu had been accepted. Both BANA and Nationstar took their interest, if any, in the property *after* the deed in lieu had been recorded. Therefore, both Nationstar and BANA took their interest in the property (if any) with constructive knowledge that the deed in lieu had been recorded. Neither took any action to record a document to indicate to any subsequent purchaser that the deed in lieu as fraudulent or not accepted. Nationstar asks this Court to uphold a decision

that is based only on Nationstar's bald assertion that the deed in lieu was improper. This is simply not sufficient on a motion for summary judgment, especially where Nationstar bears the burden of overcoming the presumption that title, as recorded, is correct.

B. Whether or Not New Freedom Mortgage Accepted the Deed in Lieu is a Question of Material Fact

Nationstar's entire defense to the foreclosure – that the notice of default should have been provided to Bank of America – rests on its ability to prove that the deed in lieu of foreclosure is void. Thus, whether or not New Freedom authorized or otherwise accepted the deed in lieu of foreclosure is a question of material fact. Because Nationstar failed to present any evidence that new Freedom did not accept the deed in lieu of foreclosure, the district court erred in granting summary judgment in favor of Nationstar. Nev. R. Civ. P 56.

C. Nationstar Presented No Evidence of the Value of the Property at the Time of Foreclosure

Nationstar devotes much of its response brief to the assertion that the sale should be declared void because the price obtained was "grossly inadequate." This argument fails for two reasons: First, Nationstar presented no evidence of the value of the property at the time of foreclosure; Second, even if Nationstar had presented valuation evidence, a sale cannot be set aside based on the price obtained alone.

Nationstar has submitted no evidence to show that the price paid at the foreclosure sale was inadequate at all, let alone grossly inadequate. The only "evidence" submitted by Nationstar is apparently the transfer tax value listed on the deed in lieu of foreclosure (which Nationstar claims was fraudulently recorded). The deed in lieu was recorded over two years before the foreclosure sale at issue took place. (JA644-649). A declaration of value slip (which Nationstar itself disputed the validity of) is not an appraisal, and does not take into consideration contemporaneous sales, the property's square footage, age, features, etc. Nationstar cannot rely on information in the recorded deed in lieu when that information suits Nationstar's purposes, and then declare the document fraudulent when that suits its needs.

Even if Nationstar had submitted evidence of "fair market value" of the property at the time of foreclosure, it would be insufficient. In *BFP v. Resolution Trust Corp.*, 512 US 1247 (1994) the United States Supreme Court held that a non-forced sale "fair market value" had no place in the analysis of the reasonableness of a forced sale. The *BFP* Court held that, in a forced sale situation, "fair market value cannot – or at least cannot always – be the benchmark []" used to determine reasonably equivalent value. *Id.* at 537. "[A] reasonably equivalent value" for foreclosed real property is the price in fact received at foreclosure sale, so long as

all the requirements of the State's foreclosure law have been complied with." *Id.* at 545.

D. Price Alone is Insufficient to Set Aside a Foreclosure Sale

There is no requirement in NRS 116.3116 through 116.31168 that a foreclosure sale price be "Commercially Reasonable." This Court has held when interpreting a statute: "where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *ProMax*, 16 P.3d at 1077. Here, the pre-2015 version of NRS 116's foreclosure statue described exactly how a non-judicial foreclosure sale of a delinquent assessment lien must be carried out. The court can not read into the statute a non-existent requirement that the sale yield a price similar to what would be achieved in a non-forced sale situation. Indeed, the "commercial reasonableness" argument is a creature of the uniform commercial code that banks, like Nationstar here, created in retrospect in an effort to save themselves from their prior inaction. The UCC, codified as NRS Ch. 104 states that:

> 1. **The fact that a greater amount could have been obtained by a collection, enforcement, disposition or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to**

preclude the secured party from establishing that the collection, enforcement, disposition or acceptance was made in a commercially reasonable manner.

2. A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(a) In the usual manner on any recognized market;

(b) At the price current in any recognized market at the time of the disposition; or

(c) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

NRS 104.9627 (emphasis added). Here, the HOA used a method nearly identical to a bank foreclosure to foreclose its lien. The property was sold at a public, publicized sale, after notice to all junior lienholders, by a licensed collection agency that regularly sells properties at public auction. Nationstar has offered no viable alternatives as to what it believes would constitute a "commercially reasonable" foreclosure sale, or identified any part of the sale here that was not in accordance with usual non-judicial foreclosure methods for real property liens. Additionally, this Court has made it clear that inadequacy of price alone is insufficient grounds for setting aside a trustee's sale legally made. There must also be a showing of fraud,

unfairness or oppression. *Shadow Wood Homeowners Association v. NY Community Bancorp, Inc.,* 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1110. Indeed, Nationstar must also affirmatively establish a causal connection between the alleged fraud, unfairness, or oppression and the alleged low price. *Golden v. Tomiyasu*, 79 Nev. 503, 515 (1963). Nationstar has made no attempt to do so.

E. The Sale was Valid Irrespective of the Validity of the Factoring Agreement

Nationstar argues that the First100 factoring agreement was invalid because the applicable CC&Rs did not authorize such agreements to be entered in to "assign [the association's] right to future income…" (Response Brief at p.7). However, the factoring agreement assigned the payment right to *past due* amounts, not future income. That aside, whether or not the factoring agreement was valid has no bearing on the validity of the HOA's foreclosure sale and the title purchased by West Sunset. Even assuming, *arguendo*, that the factoring agreement is void, the past-due assessments were still owed, and the HOA still had a perfected lien to foreclose upon. The validity of the factoring agreement merely effects the relationship and obligations that exist between the HOA and First 100.

Finally, Nationstar is neither a party nor a third-party beneficiary to the contract between the HOA and First 100, and therefore lacks standing under Nevada

law to challenge its validity. *Wood v. Germann*, 130 Nev. Adv. Op. No. 58, 331 P.3d 859 (August 7, 2014).

F. Even if this Court Finds the Sale was Improper, the Correct Result is that the Sale Should Be Void.

If this court is inclined to agree with the district court's ruling that notice was not proper in this case, the result should be that the sale should be declared void, not that the sale should be subject to the deed of trust. It offends the traditional notions of equity to suggest that, because a defect, which was unknown to the purchaser at the time of sale existed, the effect should be to force the purchaser to bear the consequences of the HOA or its collection agent's failures. Essentially, the district court's order forces West Sunset into an agreement it did not bargain for – a property with a foreclosing mortgage lien on it. There is simply no way that West sunset could have been on notice that the sale was anything but regular and customary. If this Court finds that the sale was ineffective for any reason, the proper result is to declare the sale void, and require the purchaser to be made whole in accordance with Nevada law, not to require the purchaser to be stuck in a relationship with the bank it did not bargain for.

CERTIFICATE OF COMPLIANCE

I HEREBY 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and 2,241 words.

FINALLY, I CERTIFY that I have read this Appellant's Reply 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 answering 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.

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

DATED this 31st day of July, 2017.

/s/ Luis A. Ayon

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of July, 2017, I served via this Court's electronic filing system (e-flex) a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to all parties entitled to notice

/s/ Luis A. Ayon

An Employee of AYON LAW PLLC