

1 MICHAEL F. BOHN, ESQ.  
Nevada Bar No.: 1641  
2 [mbohn@bohnlawfirm.com](mailto:mbohn@bohnlawfirm.com)  
LAW OFFICES OF  
3 MICHAEL F. BOHN, ESQ., LTD.  
376 East Warm Springs Road, Ste. 140  
4 Las Vegas, Nevada 89119  
(702) 642-3113/ (702) 642-9766 FAX  
5 Attorney for plaintiff/appellant  
6  
7  
8

Electronically Filed  
Nov 14 2017 08:23 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

9 SUPREME COURT

10 STATE OF NEVADA

11 RESOURCES GROUP, LLC AS  
12 TRUSTEE OF THE EAST SUNSET  
ROAD TRUST,

Case No. 71268

13 Appellant,

14 vs.

15 NEVADA ASSOCIATION  
16 SERVICES, INC.; and HYDR-O-  
DYNAMIC CORPORATION,

17  
18 Respondent.  
19

20 **APPELLANT'S REPLY BRIEF**  
21

22 Michael F. Bohn, Esq.  
23 Law Office of  
Michael F. Bohn, Esq., Ltd.  
24 376 East Warm Springs Rd., Ste. 140  
Las Vegas, Nevada 89119  
25 (702) 642-3113/ (702) 642-9766 Fax  
26 Attorney for plaintiff/appellant,  
27 Resources Group, LLC as Trustee  
of the East Sunset Road Trust  
28

1                                    **NRAP 26.1 DISCLOSURE STATEMENT**

2                    Counsel for defendant/appellant certifies that the following are persons and  
3 entities as described in NRAP 26.1(a), and must be disclosed. These representations  
4 are made in order that the judges of this court may evaluate possible disqualification  
5 or recusal.  
6

7                    1. Resources Group, LLC is a Nevada limited-liability company and is the  
8 trustee of the East Sunset Road Trust.  
9

10                   2. The East Sunset Road Trust is a Nevada trust.

11                   3. The manager for Resources Group, LLC is Iyad Haddad a/k/a Eddie  
12 Haddad.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

NRAP 26.1 DISCLOSURE STATEMENT. ....	ii
TABLE OF CONTENTS . ....	iii
TABLE OF AUTHORITIES . ....	iv
Cases . ....	iv
Statutes and rules.. ....	v
Other authorities. ....	v
I.    SUMMARY OF THE ARGUMENT. ....	1
II.   ARGUMENT. ....	1
1.    Title to the Property vested in plaintiff when plaintiff paid the purchase price. ....	1
2.    Defendant did not meet its burden to prove that the cure payment arrived before the public auction was held on February 13, 2015... .	5
3.    Plaintiff is entitled to receive a foreclosure deed signed by NAS . .	12
VII. CONCLUSION . ....	13
CERTIFICATE OF COMPLIANCE . ....	13
CERTIFICATE OF SERVICE. ....	15

///

## TABLE OF AUTHORITIES

### CASES:

#### **Nevada cases:**

<u>Brelia</u>	5
<u>Brunzell v. Woodbury</u>	3
<u>Fair v. Howard</u>	3
<u>Golden v. Tomiyasu</u>	2-3
<u>Long v. Towne</u>	3
<u>Matter of Frei Irrevocable Trust Dated October 29, 1996</u>	12
<u>Rosenbaum v. Rosenbaum</u>	6
<u>Ruppert v. Edwards</u>	2, 10
<u>Schwartz v. Schwartz</u>	6
<u>Shadow Wood Homeowners Association v. New York Community Bancorp, Inc.</u>	2, 3, 4
<u>Turner v. Dewco Services, Inc.</u>	3

///

**Federal and other cases:**

Deming National Bank v. Walraven,

133 Ariz. 378, 651 P.2d 1203 (1982)..... 10

In re Grant, 303 B.R. 205 (Bankr. D. Nev. 2003). .... 1

Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003)..... 6-7

Oller v. Sonoma County Land Title Co.,

137 Cal. App. 2d 633, 290 P.2d 880 (1955)..... 2-3

Poole v. Watts, 139 Wash. App. 1018 (2007) ..... 3

United States v. Truckee-Carson Irrigation District,

71 F.R.D. 10 (D. Nev. 1975)..... 6

**STATUTES AND RULES:**

N.R.C.P. 8. .... 5

NRS 47.250..... 1, 8

NRS 116.31164..... 13

**OTHER AUTHORITIES:**

4 Miller & Starr, Cal. Real Estate (3d ed. 2000),

Deeds of Trust and Mortgages, §10:72..... 6-7

Restatement (Third) of Prop.: Mortgages, § 8.3 (1997)..... 8-9

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

Defendant did not meet its burden to prove that the assessment lien was paid prior to the public auction.

## ARGUMENT

At page 4 of Respondent’s Answering Brief, Hydr-O-Dynamic Corporation (hereinafter “HODC”) states that the holding in In re Grant, 303 B.R. 205, 209-210 (Bankr. D. Nev. 2003), is based on the assumption of a valid foreclosure sale.

Respondent's Answering Brief does not cite any authorities that disagree with

1 these presumptions.

2 At page 4 of Respondent's Answering Brief, HODC cites Ruppert v. Edwards,  
3  
4 67 Nev. 200, 216 P.2d 616 (1950), but that case did not involve a tender made to  
5  
6 prevent a foreclosure sale. This Court instead adopted the following rule:

7  
8 As a general proposition, the majority view is that, in the event payment  
9 is conditional, the discharge is not actually to become effectual until the  
10 check is paid. It is equally true that upon such condition being fulfilled,  
11 by the check having been paid upon presentation, such payment,  
12 theretofore conditional becomes absolute.

13 216 P.2d at 624.

14 HODC states that "[i]f HODC's check was received by NAS prior to the sale,  
15 the debt would have been discharged, making the sale improper." In Ruppert v.  
16 Edwards, this Court did not adopt a rule that makes a payment effective before it is  
17 actually received.  
18

19 At page 5 of Respondent's Answering Brief, HODC states that Shadow Wood  
20 Homeowners Association, Inc. v. New York Community Bancorp. Inc., 132 Nev.  
21 Adv. Op. 5, 366 P.3d 1105 (2016), "holds that the Court has equitable authority to set  
22 aside a foreclosure sale." This Court instead applied the California rule first adopted  
23 by this Court in Golden v. Tomiyasu, 79 Nev. 503, 387 P.2d 989 (1963), cert. denied,  
24 382 U.S. 844 (1965), by quoting from Oller v. Sonoma County Land Title Co., 137  
25  
26  
27  
28

1 Cal. App. 2d 633, 290 P.2d 880 (1955):

2 “However, even assuming that the price was inadequate, that fact  
3 standing alone would not justify setting aside the trustee's sale. ‘In  
4 California, it is a settled rule that inadequacy of price, however gross, is  
5 not in itself a sufficient ground for setting aside a trustee's sale legally  
6 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.**” (emphasis added)

7 79 Nev. at 514, 387 P.2d at 995.

8  
9 This Court applied the same California rule in Brunzell v. Woodbury, 85 Nev. 29,  
10 449 P.2d 158, 159 (1969); Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462,  
11 465 (1971); Long v. Towne, 98 Nev. 11, 639 P.2d 528, 530 (1982).

13 If this Court had intended in Shadow Wood not to apply the California rule to  
14 HOA foreclosure sales, this Court would not have cited the California rule found in  
15 Long v. Towne, 98 Nev. 11, 639 P.2d 528 (1982), and Golden v. Tomiyasu in Section  
16  
17 II (C) of the Shadow Wood opinion just before quoting the Restatement.

19 In Shadow Wood, this Court stated that the consideration paid by a bona fide  
20 purchaser need only be “valuable” (quoting Fair v. Howard, 6 Nev. 304, 308 (1871))  
21 and “that the fact that the foreclosure sale purchaser purchased the property for a ‘low  
22 price’ did not in itself put the purchaser on notice that anything was amiss with the  
23 sale.” (quoting Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished  
24 disposition)) 366 P.3d at 1115. The \$350,000.00 paid by plaintiff satisfies these  
25  
26  
27  
28



standards.

In addition, the record on appeal does not contain any evidence of “some element of fraud, unfairness, or oppression as accounts for and brings about” the high bid of \$350,000.00 paid by plaintiff on February 13, 2015.

HODC nevertheless claims that completion of the sale and payment of the bid amount does not necessarily vest title in plaintiff “where the validity of the sale is subject to challenge or equitable considerations.” On the other hand, as discussed at pages 16 and 17 of Appellant’s Opening Brief, HODC is not entitled to equitable relief from the foreclosure sale because HODC has an adequate remedy at law against the HOA and its foreclosure agent if there was an error in the foreclosure process. Respondent’s Answering Brief cites no contrary authority.

Furthermore , in Shadow Wood, this Court stated :

This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief. 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.”); *see also* 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, 248 Cal. App. 2d 116, 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.”).

366 P.3d at 1115.

1 In the present case, the evidence in the record on appeal proves that plaintiff  
2 is an “innocent third party.” As an innocent third party, plaintiff should not be  
3 penalized because HODC failed to make sure that its cure payment was delivered to  
4 the foreclosure agent before the public auction was held on February 13, 2015.  
5

6  
7 Because the evidence is undisputed that Eddie Haddad delivered to NAS four  
8 cashier’s checks for the purchase price of \$350,000.00, title to the Property vested in  
9 plaintiff immediately after the public auction held on February 13, 2015.  
10

11  
12 **2. Defendant did not meet its burden to prove that the cure payment**  
13 **arrived before the public auction was held on February 13, 2015.**

14 At page 6 of Respondent’s Answering Brief, HODC cites Breliant v. Preferred  
15 Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996), as authority that  
16 “Appellant had the burden of proof regarding the propriety of the sale and the right  
17 to title.” On the other hand, Breliant v. Preferred Equities Corp. did not involve a  
18 nonjudicial foreclosure sale or a property owner claiming that he had tendered a cure  
19 payment before the sale.  
20  
21

22  
23 N.R.C.P. 8 (c) provides that “payment” is an affirmative defense that must be  
24 “set forth affirmatively” in a party’s answer. HODC’s answer to plaintiff’s amended  
25 complaint (JA1a, pg. 20-22) does not contain an affirmative defense or any factual  
26  
27  
28

1 allegations stating that HODC paid any amount to the foreclosure agent prior to the  
2 public auction held on February 13, 2015.  
3

4 Even if HODC's answer had included such allegations, "each element of the  
5 defense must be affirmatively proved," and "[t]he burden of proof clearly rests with  
6 the defendant." Schwartz v. Schwartz, 95 Nev. 202, 206, n. 2, 591 P.2d 1137, 1140,  
7 n. 2 (1979); United States v. Truckee-Carson Irrigation District, 71 F.R.D. 10, 13 (D.  
8 Nev. 1975); Rosenbaum v. Rosenbaum, 86 Nev. 550, 552, 471 P.2d 254, 255 (1970).  
9  
10

11  
12 At page 12 of Respondent's Answering Brief, HODC attempts to distinguish  
13 the present case from Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d  
14 436 (2003), by stating that "Nguyen was the plaintiff bringing an action to quiet title"  
15 and not a defendant asserting tender like HODC in the present case. On the other  
16 hand, the court of appeals stated:  
17  
18

19  
20 "The trustor-mortgagor or the person who alleges that a debt has been  
21 paid has the burden of proving payment." (4 Miller & Starr, Cal. Real  
22 Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn.  
omitted.)

23 105 Cal. App. 4th at 440, 129 Cal. Rptr. 2d at 446.  
24

25 The court also stated that "depositing a check in the mail (or, as in this case,  
26 with a courier) does not constitute payment," and the court quoted from 4 Miller &  
27  
28

1 Starr, Cal. Real Estate (3d ed. 2000) Deeds of Trust and Mortgages, §10:72, p. 225,  
2 that “the payment is not effective until received by the creditor.” 105 Cal. App. 4th  
3 at 443, 129 Cal. Rptr. 2d at 448-449.

4  
5 The plaintiff in Nguyen v. Calhoun did not have the burden of proof because  
6 he was the plaintiff – he had the burden of proof because he alleged that payment had  
7 been made before the sale. In the present case, because HODC claims that payment  
8 was made before the public auction was held, HODC had the burden to allege and  
9 prove that the payment was received before the auction was completed.  
10  
11  
12

13 In the present case, the record on appeal does not contain “substantial  
14 evidence” proving that the cure payment was received by NAS before plaintiff paid  
15 the purchase price for the Property. The only direct evidence on this issue is the  
16 testimony by Eddie Haddad that the check mailed by defendant could not have  
17 arrived before the sale because Mr. Haddad saw the mailman coming into NAS’s  
18 office building as Mr. Haddad was leaving the building. (JA2a, pg. APP000360, ll.  
19 1-12)  
20  
21  
22  
23

24 At page 7 of Respondent’s Answering Brief, HODC states that “[t]he entirety  
25 of the circumstances in this case weigh the equities in favor of HODC.” Yet, by  
26 HODC’s own admission, HODC arranged its affairs so that no person retrieved the  
27  
28

1 mail addressed to the onsite mailbox for the Property. HODC's failure to check its  
2 mailbox for the notices mailed by the foreclosure agent is not the fault of the HOA,  
3  
4 the foreclosure agent, or the plaintiff.

5         At page 8 of Respondent's Answering Brief, HODC states that Mr. Guzman  
6 testified that he mailed the cure payment on February 6, 2015 "expecting it to be  
7 delivered the next business day." HODC also cites the disputable presumption that  
8  
9 "a letter duly directed and mailed was received in the regular course of the mail."  
10  
11 NRS 47.250 (13). HODC, however, did not prove the expected delivery date "in the  
12 regular course of the mail." HODC also did not prove that the envelope was properly  
13 addressed. Any presumption of delivery on a specific date is directly rebutted by the  
14  
15 date stamp on the check proving that it was not received by NAS until February 13,  
16  
17 2015. (JA2a, pg. 387, l. 15 to pg. 388, l. 6)

18  
19         At page 9 of Respondent's Answering Brief, HODC states that plaintiff's high  
20 bid of \$350,000.00 was "more than \$650,000.00 less than the lowest valuation of the  
21  
22 Property at the time of the sale." Paragraph 29 of the findings of fact states that "[t]he  
23 fair market value of the property as the time of sale was between one million and 1.2  
24  
25 million dollars." (JA2a, pg. APPP0000327, ¶29) Even using the higher value of  
26  
27 \$1,200,000.00, the amount paid by plaintiff exceeded the 20 percent of fair market  
28

1 value used to define “gross inadequacy” in comment b to Restatement (Third) of  
2 Prop.: Mortgages, § 8.3 (1997). Because the amount paid by plaintiff was not  
3 “grossly inadequate,” the California rule does not support granting equitable relief t  
4 HODC setting the sale aside.  
5

6  
7 At page 10 of Respondent’s Answering Brief, HODC states that “[t]he trial  
8 court determined that HODC’s check arrived between 9:30 a.m. and 11:30 a.m. on  
9 February 13, 2015.” As stated at page 19 of Appellant’s Opening Brief, this finding  
10 of fact is not supported by “substantial evidence” because no person testified that the  
11 check actually arrived during that time frame. Mr. Yergensen also testified that “[t]he  
12 mail usually arrives anywhere from 9:30 in the morning to 11 o’clock **or even**  
13 **possibly noon.**” (JA2a, pg. APP000391, ll. 9-11) (emphasis added)  
14  
15  
16  
17

18 HODC does not explain how the district court can ignore Mr. Yergensen’s  
19 testimony that the check could have arrived as late as noon.  
20

21 At page 10 of Respondent’s Answering Brief, HODC repeats its argument that  
22 “Appellant failed to demonstrate that the check did not arrive prior to the sale.” As  
23 discussed above, the presumption that “the law has been obeyed” protects plaintiff  
24 from the inconclusive testimony offered at trial. In particular, no person testified at  
25 trial that the check in fact arrived before the sale was completed. Mr. Yergensen  
26  
27  
28

1 testified instead that “[n]obody could say with reasonable certainty, to me, at least  
2 when the mail had arrived.” (JA2a, pg. APP000391, ll. 2-4)  
3

4 HODC cites Ruppert v. Edwards, 67 Nev. 200, 216 P.2d 616 (1950), but that  
5 case did not involve a tender made to prevent a nonjudicial foreclosure sale, and there  
6 was no issue regarding the time of day that the settlement payment of \$1,900.00 was  
7 tendered to the attorneys for the defendant.  
8  
9

10 HODC also quotes from Deming National Bank v. Walraven, 133 Ariz. 378,  
11 651 P.2d 1203 (1982), but that case did not involve a tender made by the owner  
12 before a foreclosure sale. The junior lien holder instead argued that the senior lien  
13 had been satisfied when the senior lien holder bid the full amount of its debt at an  
14 execution sale held pursuant to a domesticated New Mexico judgment before filing  
15 its mortgage foreclosure action in Arizona.  
16  
17  
18

19 At the bottom of page 10 and top of page 11 of Respondent’s Answering Brief,  
20 HODC states that “even if the check was delivered after the sale, the time of delivery  
21 would have been no more than one hour following the sale.” According to the  
22 testimony by Mr. Yergensen, however, the check could have arrived as much as two  
23 (2) hours after the scheduled sale time of 10:00 a.m. (JA2a, pg. APP000391, ll. 9-11)  
24 HODC does not cite any authority holding that a sale can be affected by a cure  
25  
26  
27  
28

1 payment delivered after the sale is completed.

2 HODC also does not dispute that after Mr. Guzman mailed the cure payment,  
3  
4 he made no attempt to confirm that NAS received the payment.

5 HODC also does not identify a single wrongful act by plaintiff in entering the  
6  
7 high bid at the duly noticed sale. HODC instead claims that equitable relief should  
8  
9 be granted against plaintiff because of “the inordinate amount of time between  
10 mailing the check and delivery at NAS’ offices.” It is not plaintiff’s fault that HODC  
11  
12 chose to use a payment method that did not guarantee that the check would be  
13 delivered before the sale.  
14

15 At pages 13 and 14 of Respondent’s Answering Brief, HODC states that the  
16  
17 trial court had the prerogative to disbelieve the testimony by Mr. Haddad that the  
18 mailman arrived after Mr. Haddad paid the purchase price for the Property. Even  
19  
20 without the testimony by Mr. Haddad, however, HODC did not meet its burden to  
21  
22 prove that the cure payment arrived before Mr. Haddad paid the purchase price for  
23 the Property.

24 Again, no witness testified that the payment in fact arrived before the sale was  
25  
26 completed – Mr. Yergensen only testified that it was possible that the mail was  
27 delivered before the sale was completed. In addition, it is more probable that the mail  
28



1 was delivered after the sale than before the sale because the larger portion of the time  
2 range from 9:30 a.m. to noon is after the 10:00 a.m. sale time. The testimony by Mr.  
3 Yergensen is not “substantial evidence” upon which a reasonable mind could  
4 conclude that the cure payment arrived before the sale was held. Matter of Frei  
5  
6 Irrevocable Trust Dated October 29, 1995, 133 Nev. 8, 390 P.3d 646, 649 (2017).  
7

8  
9 Because no person testified that the mail actually arrived before the auction  
10 was held, the trial court’s finding that the mail arrived between 9:30 a.m. and 11:30  
11 a.m. on February 13, 2015 is based on speculation.  
12

13 At page 15 of Respondent’s Answering Brief, HODC points out minor  
14 inconsistencies in the testimony by Mr. Haddad, but Mr. Yergensen confirmed that  
15 he contacted Mr. Haddad on the next business day after the sale. Mr. Yergensen did  
16 not deny that Mr. Haddad told him about seeing the mailman arrive after plaintiff  
17 purchased the Property. Mr. Yergensen only stated: “I don’t recall that being in our  
18 conversation” and that “what was sticking out in my mind was that this was a million-  
19 dollar piece of property and that we were going to go to litigation.” (JA2b, pg. 394,  
20  
21  
22  
23  
24 ll. 2-10)  
25

26 **3. Plaintiff is entitled to receive a foreclosure deed signed by NAS.**

27 Because the sale is presumed to be valid, and because no admissible evidence  
28

1 proves that the cure payment was received before the public auction was completed,  
2 judgment must be entered in favor of plaintiff requiring that NAS make and deliver  
3 to plaintiff a deed that complies with NRS 116.31164(3)(a).  
4

5  
6 **CONCLUSION**

7 By reason of the foregoing, plaintiff respectfully requests that this Court  
8 reverse the judgment entered by the district court and remand this case to the district  
9 court with directions to enter judgment in favor of plaintiff requiring NAS to deliver  
10 to plaintiff a foreclosure deed and quieting title to the Property in plaintiff's name.  
11

12  
13 DATED this 13th day of November, 2017.  
14

15 LAW OFFICES OF  
16 MICHAEL F. BOHN, ESQ., LTD.

17 By: / s / Michael F. Bohn, Esq. /  
18 Michael F. Bohn, Esq.  
19 376 East Warm Springs Road, Ste. 140  
20 Las Vegas, Nevada 89119  
Attorney for plaintiff/appellant

21 **CERTIFICATE OF COMPLIANCE**

22 1. I hereby certify that this brief complies with the formatting requirements of  
23 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has  
24 been prepared in a proportionally spaced typeface using Word Perfect X6 14 point  
25 Times New Roman.  
26  
27  
28

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 3,275 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 13th day of November, 2017.

LAW OFFICES OF  
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /  
Michael F. Bohn, Esq.  
376 East Warm Springs Rd, Ste. 140  
Las Vegas, Nevada 89119  
Attorney for defendant/appellant

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

Christopher V. Yergensen, Esq.  
Nevada Association Services, Inc.  
6224 W. Desert Inn Road  
Las Vegas, NV 89146

/s/ /Marc Sameroff/  
An Employee of the LAW OFFICES OF  
MICHAEL F. BOHN, ESQ., LTD.