Case No. 71325

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, Appellant, vs. FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, N.A., Respondent.	Electronically Filed Jan 25 2017 02:18 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Judge
District Court Case No. District Court Case No. A-13-679329-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 so the judges of this court may evaluate possible disqualification or recusal.

Appellant, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In District Court, SFR Investments Pool 1, LLC, was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana Cline Ebron, Esq., Karen L. Hanks, Esq., and Katherine C.S. Carstensen, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. Ms. Gilbert, Mr. Kim, and Ms. Ebron, of Kim Gilbert Ebron represent Appellant on appeal.

DATED this 25th day of January, 2017.

KIM GILBERT EBRON

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STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The District Court entered judgment in favor of First Horizon Home Loans on August 17, 2016, and the notice of entry of that order was entered on August 19, 2016. This order was a final order as it resolved all issue between all parties. SFR Investment Pool 1, LLC, timely noticed its appeal on September 16, 2016.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), SFR Investment Pool 1, LLC, ("SFR") states that this case contains "matters raising as a principal issue a question of statewide public importance." NRAP 17(a)(14). The issues raised in this case deals with properties purchased in NRS 116 foreclosure sales. Specifically, this appeal involves a unique question regarding whether a homeowners association must begin its foreclosure process anew if, after it has begun the foreclosure process, a bank with actual notice of the association foreclosure proceedings, forecloses and purchases the property, knowing it must pay the superpriority portion of the lien remaining to avoid foreclosure by the association.

ISSUES PRESENTED

1) Whether a homeowner association must restart its foreclosure process when the subject property is previously transferred in a foreclosure on a bank's mortgage.
2) Whether a homeowner association must restart the NRS 116 foreclosure process if the party who previously obtained a property interest at a bank foreclosure received actual notice of the pending association foreclosure.

STATEMENT OF THE CASE

The property in this case was subject to a NRS 116.3116 foreclosure. Unique to this case is that before the association foreclosure, First Horizon Home Loans ("the Bank") held its own foreclosure based on the homeowners' failure to pay the mortgage. At the Bank's foreclosure, the Bank placed a credit bid on the property. The Bank's bid was the highest and thus the Bank acquired the property.

Even before the Bank acquired ownership interest in the property, the Bank was actually aware of Squire Village at Silver Springs Community Association's ("Association's") intent to foreclose on the property. At no time before the association foreclosure sale, including before or after the Bank obtained title to the property, did the Bank pay any portion of the Association's superpriority lien. Thus, after the Bank's foreclosure, the issue for this Court was simply whether the superpriority portion of the Association lien remained and can an association continue with its foreclosure proceedings when a Bank with actual notice of an association's superpriority lien, forecloses on their mortgage prior to the association's foreclosure?

In regards to this issue, SFR Investments Pool 1, LLC ("SFR") and the Bank filed competing motions for summary judgment. The District Court granted judgment in favor of the Bank and ordered the association sale void and thereby voiding SFR's interest in the property. (*See* 4JA_796.) SFR now appeals this Order.

FACTUAL BACKGROUND

SFR presents the following factual and procedural background.

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
September 19, 2001	The "Association perfected and gave notice of its lien by recording its Declaration of Covenants, Conditions and Restrictions.[1]
July 25, 2008	Special Warranty Deed recorded transferring real property commonly referred to as 5069 Midnight Oil Dr., Las Vegas, NV 89122-8124; Parcel No. 161-26-111-017 (the "Property") to Anna Torres ("Torres"). [2] Deed of Trust in favor of the Bank as the lender was recorded.[3] Mortgage Electronic Registration Systems, Inc. ("MERS"), solely as nominee for the Bank, was named as the beneficiary under the deed of trust. The lender prepared and Torres signed, a Planned Unit Development Rider as part of the deed of trust, recognizing the need to pay assessments to the Association and the ability of the lender to pay the assessments should the Torres default.
September 1, 2011	Torres became delinquent on the loan secured by the First Deed of Trust.[4]
February 22, 2012	Notice of delinquent assessments recorded by the Association.[5]
April 20, 2012	Notice of Default and Election to Sell Under Homeowners Association Lien recorded by the Association via Alessi & Koenig, LLC ("Alessi") the Association's foreclosure agent.[6] Alessi mailed a copy of the Notice of Default to the Bank[7] The Bank admitted that it received the Notice of Default.[8]

[1] 2JA_383.
[2] 2JA_387.
[3] 2JA_392.
[4] 2JA_402.
[5] 2JA_415.
[6] 2JA_417.
[7] 2JA_419.
[8] 2JA_439 at 52:9-24.

August 13, 2012	Second Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") recorded by the Association via Alessi.[9] Alessi mailed a copy of the NOD to the Bank.[10] The Bank admitted that it received the NOD.[11]
August 17, 2012	MERS, as the nominee for the Bank, assigns and transfers to the Bank all beneficial interest under that deed of trust dated 07/15/2008. [12] Nationstar purporting to be the attorney in fact for the Bank recorded a Substitution of Trustee ("SOT") to substitute National Defaulting Servicing Corporation, ("NDSC')[13]
October 30, 2012	NDSC recorded its Notice of Default and Election To Sell Under Deed of Trust ("Bank's NOD").[14]
January 11, 2013	NDSC re- recorded the Deed of Trust.[15]
February 5, 2012	Association recorded Notice of Trustee's Sale ("NOS") which listed to date of sale as March 6, 2013. [16] Alessi mailed a copy of the NOS to the Bank.[17] The Bank admitted that it received the NOS.[18]
February 7, 2013	NDSC recorded Notice of Trustee's Sale under the Bank's Deed of Trust ("Bank's NOS").[19]
February 26, 2013	NDSC, under the Deed of Trust sold the Property at the foreclosure auction to the Bank for $151,283.09, effectively extinguishing the deed of trust.[20]
Prior to March 6, 2013	No payments were made by the Bank to the Association or Alessi **before** the Bank's foreclosure sale.[21]

[9] 2JA_457.
[10] 2JA_459.
[11] 2JA_439 at 51:1-12.
[12] 2JA_479.
[13] 2JA_481.
[14] 2JA_483.
[15] 3JA_492.
[16] 3JA_509.
[17] 3JA_511.
[18] 2JA_439 at 53:1-3.
[19] 3JA_518.
[20] 3JA_522.
[21] 2JA_439 at 28:1-6.

	No release of the super-priority lien was recorded.[22] No Trustee's Deed Upon Sale was recorded by the Bank. [23] No lis pendens was recorded by the Bank.[24] Nothing in the record indicates that a payment was made by the Bank to the Association or Alessi between February 26 and March 6, 2013. Nothing in the record indicates the Bank attempted to communicate with the Association or Alessi between February 26 and March 6, 2013.
March 6, 2013	The Association foreclosure sale took place and SFR placed the winning bid of $7,000.00.[25] The Bank did not attend or participate in the Association foreclosure sale. [26]
March 7, 2013	Bank recorded its Trustee's Deed Upon Sale from the Bank's Foreclosure.[27]
March 18, 2013	Foreclosure Deed vesting title in SFR is recorded.[28] As recited in the Trustee's Deed Upon Sale, All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the NOS have been complied with. SFR has no reason to doubt the recitals in the Foreclosure Deed — if there were any issues with delinquency or noticing, none of these were communicated to SFR.[29] Further, neither SFR, nor its manager, have any relationship with the Association besides owning property within the community and bidding on properties at auction.[30]

…

[22] 3JA_529 at ¶ 10.
[23] *Id.* at ¶ 10.
[24] *Id.* at ¶ 6.
[25] 3JA_526
[26] 2JA_439 at 63:14-20.
[27] 3JA_522.
[28] *Id.*
[29] 3JA_529 at ¶ 7.
[30] *Id.* at ¶ 8.

SUMMARY OF ARGUMENT

If an Association complies with NRS 116 when perfecting tis lien then the Association has a valid superpriority lien which can serve to extinguish all junior interest if that lien is foreclosed on. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 419 (2014). Nothing in NRS 116 requires an Association to restart its foreclosure proceedings if an interest in a property changes hands prior to the association's foreclosure. Since NRS 116.31162 requires the Association to record their NOD and NOS, any one acquiring property during the NRS 116 foreclosure process would be constructively aware of the association's lien and intent to foreclose by a casual scan of the recorded documents. The purchaser at the Bank's foreclosure sale would also know it had to pay all senior liens remaining on the property which could otherwise divest it of its title. That is exactly what the superpriority of the Association's lien could do—and did do in this case.

The unique situation herein is that the party which acquired the property in the middle of the Association foreclosure process was the Bank who was also a previous junior lien holder. NRS 116.31162 requires that the NOD and NOS be sent to all junior lien holders, including the Bank. The Bank admits receipt of the NOD and NOS.[31] Thus, it not only had constructive notice it had actual notice that the Association foreclosure was imminent.

[31] 2JA_439 at 51:1-12; 53:1-3.

Even if extra notices were due to the Bank after it purchased the property at its own foreclosure, the Bank's title was unrecorded at the time of the Association foreclosure sale. NRS 111.315 requires every conveyance of property to be recorded to be effective against subsequent purchasers without notice. Nothing was recorded releasing the Association's superpriority portion of the lien.

ARGUMENT

I. STANDARD OF REVIEW

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." *Id.;* NRCP 56(c). All evidence and inferences must be viewed in a light most favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029.

II. THE ASSOCIATION FORECLOSURE COMPLIED WITH NRS 116 AND EXTINGUISHED THE BANK'S INTEREST IN THE PROPERTY.

This case involves the aftermath of two foreclosure sales; the Bank's foreclosure and the Association's foreclosure. As will be shown below, the Association foreclosure was validly noticed and took place after the Bank's foreclosure. The consequence of both foreclosures was that the Bank's title to the property was extinguished.

A. Time Frame of the Bank and Association Foreclosure.

Before any foreclosures took place, the Association mailed an NODA (Recorded February 22, 2012), NOD (recorded August 13, 2012), and an NOS (recorded February 6, 2013) to all appropriate parties.[32] The Bank admits receipt of the NOD and the NOS.[33] [34] Also, the Bank has produced the appropriate foreclosure notices for a Bank foreclosure, all of which have been recorded, but the Bank has failed to produce any evidence that the notices were received by the Association. The Banks NOD was recorded on October 30, 2012 and the Bank's NOS was recorded on February 7, 2013.[35] (*See* Bank's NOD at 2JA_483; *See also* Bank's NOS at 3JA_518.)

Since the Bank recorded the Bank's NOS a day after the Association's NOS, the Association was not made immediately aware of the Bank's plan to proceed to sale. The opposite is true for the Bank as when the Bank filed its NOS the Bank was at least constructively aware of the Association's intent to sell based on the Association's previously recorded NOS. However, the mere awareness of the

[32] 2JA_415(NODA); 2JA_417(NOD); 3JA_509(NOS).
[33] The NODA is not required to be sent to the Bank per NRS 116.31162(1)(a).
[34] 2JA_439 at 52:9-53:3.
[35] In 2013, NRS 116.31162 was revised to add subsection 5, which precluded an association from foreclosing if an owner-occupied unit encumbered by a deed of trust for which a Notice of Default had been recorded pursuant to NRS 107.080 without a recorded certificate from the foreclosure mediation program. 2013 Stat. Nev. Ch. 536, § 4 at 3484. This amendment does not affect this sale.

Association's intent to foreclose, does not invalidate the Bank's foreclosure, but instead serves as a frame of reference to the events that follow.

After both entities noticed their respective foreclosures, they both foreclosed in a fairly short amount of time; first the Bank foreclosed followed by the Association foreclosure. Contrary to the Bank's position, the Bank's act of foreclosing does not automatically invalidate the Association's foreclosure or the notices sent leading up to the foreclosure. But to understand the legal consequence of the foreclosure, it is important to track the changing property interests and the various liens on the property before and after the foreclosures.

Snapshot 1: Pre-Bank and Pre-Association Foreclosure.

Before any auction took place both the Association and the Bank had valid liens. The Association had a lien for past due assessments and the Bank had the First Deed of Trust. NRS 116.31162 made a portion of the Association's lien a "superpriority" which meant it was superior to the Bank's Lien. The remainder of the Association's lien was junior to the Bank's lien. Before any foreclosures, Torres, the original borrower on the property, was the property owner.

Lien Interest by Priority (highest priority on top)	**Property Owners**
Association's lien – superpriority portion First Deed of Trust Association's lien - subpriority portion	Torres

Snapshot 2: Post Bank Foreclosure but Pre-Association Foreclosure.

Despite the Association recording it's NOS first, the Bank proceeded to foreclosure on February 26, 2013, prior to the Association's foreclosure. (3JA_522.) Given that this was a foreclosure of the First Deed of Trust, this sale extinguished both the Bank's First Deed of Trust and the subproprity portion of the Association's lien. The Bank won this auction at foreclosure with a credit bid of $151,283.09 and thus took ownership of the property. *Id.* The Bank's foreclosure did not extinguish the Association's superpriority portion of its lien which was senior to the Bank's lien, and remained on the property.

Lien Interest by Priority (highest priority on top)	**Property Possessory Interest Holder**
Association's lien – superpriority portion ~~First Deed of Trust~~ ~~Association's lien - subpriority portion~~	The Bank

Snapshot 3: Post Bank and Association Foreclosure.

The Association foreclosed on March 6, 2013, on the surviving portion of the Association's lien, being the only lien left on the property. At the auction SFR bid $7,000 dollars, prevailed and became the new property owner. As the Bank's ownership interest in the property was extinguished in the foreclosure, any excess proceeds from the auction are likely owed to the Bank.

Lien Interest by Priority (highest priority on top)	Property Possessory Interest Holder
~~Association's lien – superpriority portion~~	SFR

This is truly a simply matter of lien priority and basic foreclosure law. The end result shows that SFR is property owner clear of all other interest. However, the Bank has presented a variety of arguments at the District Court level that unnecessarily conflates the issues. As discussed below these arguments fail.

B. The Association complied with all aspects of NRS 116 when foreclosing on the property including giving proper notice.

The Association foreclosure was a valid sale that complied with all aspects of NRS 116. However, it is anticipated that the Bank will argue that the Bank did not receive an NODA, NOD or NOS after the Bank's foreclosure. Without these notices, it is likely the Bank will claim that it lacked proper notice of the Association's foreclosure making this foreclosure void. This assertion is wrong for multiple reasons: 1) NRS 116 does not require an association to restart its foreclosure if the property ownership changes during the foreclosure process; 2) the Bank received the notices due to a property owner; and 3) the Bank failed to record its foreclosure deed before the Association foreclosure sale and, therefore, was ineffective against SFR.

1. NRS 116 does not require an association to restart its foreclosure every time a property interest changes.

Nothing in NRS 116 requires an association to restart its foreclosure process if property ownership changes during the foreclosure process. A finding to the contrary would mean that an association must expend additional monies to mail and record a new NODA, NOD and NOS every single time property ownership changes during the foreclosure process. If associations were compelled to do this, than a foreclosure could easily be defeat by an unrecorded quitclaim of the property. That is why there are provisions in NRS 116.31163 and NRS 116.31165(1)(b)(2)(1)-(2) that provide for new and unrecorded owners or lienholders to request notice or otherwise notify the association of an interest.

But a purchaser of a property, even at foreclosure, is not left in the dark regarding the various liens on a property. NRS 116.31162 requires that an association's NOD and NOS be recorded. Further, "[u]nder Nevada law, a purchaser of real property with notice of a prior interest takes subject to that interest." *In re Crystal Cascades Civil, LLC*, 398 B.R. 23, 29 (Bankr. D. Nev. 2008), aff'd, 415 B.R. 403 (B.A.P. 9th Cir. 2009) *citing* NRS 111.320. This Court has also said that "we recognized the well-known principle that the public recording of real estate deeds constitutes constructive notice of the transaction." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1026 fn. 2, 967 P.2d 437, 441 fn.2 (1998). Thus it logically follows, that a properly recorded notice of foreclosure would give constructive notice of such an

intent to foreclose. Before foreclosure, any prospective purchaser interested in the property only had to review the recorded documents to see if an association intended to foreclosure on its lien based on a previously recorded NOS. In fact, an association's NOS is required by law to contain the time, place of foreclosure and who to contact regarding the foreclosure. NRS 116.31165.

In the case herein, the Bank was the purchaser of property at its own foreclosure. Regardless of the notices it admits receiving from the Association, the Bank would have been at least constructively aware of the recorded documents including the Association's NOS. Upon discovery of the NOS, a prudent purchaser would have sought to protect their interest by satisfying the Association's lien before the Association's sale. Instead the Bank did nothing and allowed the foreclosure to proceed despite being aware of the fact that an Association foreclosure was going to take place. The recording statutes provide all the required notice to a third party seeking to obtain in interest in the property. The Bank simply ignored these notices and now is using creatively lawyering to cover-up its past actions.

2. ***The Bank admits actual notice of the NOD and NOS relating to the Association foreclosure sale of the property.***

The Bank admits to receiving the NOD and NOS regarding the association foreclosure. (2JA_439 at 52:9-53:3.) These notices were received when the Bank only held the mortgage. However, the Bank has taken issue that it did not receive a

new set of notices in it short time as a property owner following its own foreclosure.

However, the Association did send the Bank the NOD and NOS before the Association's foreclosure as the Bank was a junior interest holder. Further the NOD and NOS sent to junior interest holders are the same exact notices that are sent to the delinquent homeowner. The fact the Bank was only the mortgage holder when it received the notice is unimportant as the NOD and NOS sent to the homeowner are the same exact notices. Thus, the Bank had actual notice of the Assoication's foreclosure sale.

3. The Bank's interest was unrecorded at the time of the Association Foreclosure.

The interest the Bank received in the property was unrecorded at the time of the Association's foreclosure. Under Nevada law, every interest in property must be recorded as set forth NRS 111.315, which reads:

> **NRS 111.315 Recording of conveyances and instruments: Notice to third persons.** Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

If a "conveyance" is not recorded, it will have no effect on a subsequent purchaser. This is confirmed by NRS 111.325 which reads:

> **NRS 111.325 Unrecorded conveyances void as against a subsequent bona fide purchaser for value when conveyance recorded.**
>
> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly.

(emphasis added).

A Bona Fide Purchaser ("BFP") is one who "takes the property 'for a valuable consideration and without notice of the prior equity. . .'" *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. __, 366 P.3d 1105, 1115 (2016) (internal citations omitted). SFR paid $7,000.00 for the property thus the fact that SFR "paid 'valuable consideration' cannot be contested.'" *Id*. Furthermore, when "the foreclosure sale complie[d] with the statutory foreclosure rules, as evidenced by the recorded notices, … and without any facts to the contrary," then the mere knowledge that an interested party could bring a suit in equity does not defeat SFR's BFP status. *Id*. at 1115-1116.

This Court's high standard to granting equity in cases involving a BFP is reinforced by the fact that not even a due process violation was sufficient to overcome an individual's status as a BFP. *Swartz v. Adams*, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977). In *Swartz*, this Court held that a sale of property was done without giving the owners notice. *Id*. The Court further held that returning the property to the original owners could not be done as the property had been purchased by a BFP. *Id. See Moeller v. Lien*, 25 Cal. App. 4th 822, 832, 30 Cal. Rptr. 2d 777

(1994). Any other policy would chill participation at foreclosure sales and result in depressing sales prices. *Melendrez*, 26 Cal.Rptr. at 426.

If this Court is to take into consideration SFR's BFP status than it must also weigh the "entirety of the circumstances that bear upon the equities." *Shadow Wood* at 1115. "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* at 1115, citing ***Riganti v. McElhinney***, 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties."). In other words, it is not the amount of the liens or the price paid at auction, but the actions or inactions of the parties in creating the alleged inequity that must be considered. This is particularly important where the Bank had all the facts and failed to avail itself of the legal remedies available to it to prevent the foreclosure sale to a third party. *Shadow Wood,* 366 P.3d at 1115, n.7.

This is also consistent with the Restatement approach which states:

> If the real estate is unavailable because title has been acquired by a bona fide purchaser, the issue of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgage for damages for wrongful foreclosure.

Restatement (Third) of Property: Mortgages § 8.3, cmt. b; *see Melendrez v. D&I Investment, Inc.*, 26 Cal.Rptr. 3d 413, 428 (Cal. Ct. App. 2005) (stating absent fraud, the sale to a BFP cannot be set aside "based on irregularities in the foreclosure sale").

Here, the Bank points to no evidence indicating that SFR knew of the Bank's ownership interest prior to the foreclosure or why this ownership would have survived the Association's foreclosure. In fact, the Bank's entire argument rest on the misconduct of the Association, not SFR. However, SFR has no relationship with the Association or the foreclosure agent that would preclude it from being a BFP. (JA_319 at ¶ 8-9.) SFR also had no duty to inquire further than the recorded documents, because there was no release of the super-priority portion of the lien. Thus, no matter who purchased the property at the Bank's foreclosure sale, nothing was recorded that released the Association's lien. In sum, the Bank provided no evidence that SFR was anything other than a BFP.

Despite being aware of the Association foreclosure, the Bank chose to do nothing to actually stop the sale. This not not because the Bank lacked notice of the sale as the Bank admits notice of the sale. This is because the Bank willfully chose to ignore the Assoication's foreclosure and not contact the Association immediately to pay off the superpriorty portion of the lien. Regardless of the Bank's blantant inaction in repsonse to the Association's foreclosure, the Bank's unrecorded interest in the property should not be effective in defeating SFR claim to the property if a procedural defect existed in the foreclosure that required this Court to balance the equities under *Shadow Wood.*

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C. Neither this Court nor the District Court has jurisdiction to interpret the CC&Rs relating to the property until after an NRED mediation.

It is likely that the Bank will try to rely on an interpretation of the CC&Rs relating to the property since the District Court relied on its interpretation of the CC&R in its order Granting Summary Judgement in favor the Bank. (*See* Order *citing* CC&Rs § 7.7 at 4JA_795:1-2). Yet, the order regarding the interpretation of the CC&Rs was improper for this Court's consideration. NRS 38.310 states as follows:

> 1. No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property ...
> ....
> may be commenced in [state court] unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive....

"NRS 38.310(2)'s language does not determine when a court can dismiss a civil action; rather, it mandates the court to dismiss any civil action initiated in violation of NRS 38.310(1)." *McKnight Family, L.L.P. v. Adept M*gmt., 310 P.3d 555, 558 (2013).

The District Court found that the Association had breached the CC&Rs when it failed to provide 30 days of notice to the Bank that it was taking actions to collect past due assessments. (*See* 4JA_782 *citing* CC&Rs § 7.7.) However, this order requires an interpretation and application of the CC&Rs, specifically § 7.7. As such,

this Court lacks the subject matter jurisdiction to address such an argument. Therefore, any argument relying on the CC&Rs must be dismissed and any portion of the order relying on the CC&Rs must be vacated.

To the degree this Court disagrees with SFR's analysis that this Court lacks jurisdiction over question relating to the interpretation of provisions in the CC&Rs, the arguments presented above that prove the Bank actually did receive notice of the Association intent to foreclosure, are equally persuasive in proving that the Association gave more than 30 days notices before collecting on its lien. Additionally, since the Bank failed to contact the Association or record its ownership interest in the property prior to the Association's foreclosure, the Bank failed to put the Association on notice of it property interest as required by § 6.9 of the CC&Rs. *See* 3JA_641. As such, the Association complied with the provisions of the CC&R before it proceeded to foreclosure.

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CONCLUSION

Based on the foregoing, this Court should reverse the District Court's Order Granting the Bank's Motion for Summary Judgment and Remand back to the District Court to Grant Judgment in Favor of SFR as the Association foreclosed on a valid superpriority lien.

DATED this 25th day of January, 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 32(a)(7)(A)(i) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.
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), 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.

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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 25th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of Januaru, 2017. Electronic service of the foregoing **Appellant's Opening Brief** and **Joint Appendices Vol. 1-4**, filed concurrently herewith, shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title: 71325 - SFR INV.'S POOL 1, LLC VS. FIRST HORIZON HOME LOANS
Case Category Civil Appeal
Information current as of: Jan 24 2017 12:15 p.m.

Electronic notification will be sent to the following:

Jacqueline Gilbert
Melanie Morgan
Brett Coombs
Christine Parvan

Dated this 25th day of January, 2017.

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