Case No. 73286

IN THE COURT OF APPEAL FOR THE STATE OF NEVADA

In the Matter of the Estates of Thelma Ailene Sarge and Edwin John Sarge.

ESTATE OF THELMA AILENE SARGE; ESTATE OF EDWIN JOHN SARGE; and BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE,

Plaintiff-Appellant,

v.

QUALITY LOAN SERVICE CORPORATION; and ROSE HILL, LLC,

Defendants-Appellees.

On Appeal from the First Judicial District Court, Carson City County
Case No. 16 RP 00009 1B, Honorable James T. Russell, presiding

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APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Table of Contents……. i-v

Table of Authorities……. iii-iv

Case Law……..…….…… iii-iv

State Statutes……..…….……. iv

Rules…….……. iv

Certification, Rule 26 Disclosure, Routing Statement…….. iv-v

I. JURISDICTIONAL STATEMENT……..... 1

II. ISSUES PRESENTED FOR REVIEW ……... 1-3

III. STATEMENT OF THE CASE……. 3-5

IV. STATEMENT OF FACTS…… 5-10

V. ARGUMENT……. 10-19

A. Standard of Review re Summary Judgment and Dismissal.. 10-11

B. Dismissal Order Should Have Been Order for Summary Judgment……..……. 11-12

C. Summary Judgment……. 12

1. Procedures re Non-Judicial Foreclosures..……. 12-14

2. Grantor/Trustor/Record Title Holder at Recording of NOD…… 14

3. Service of NOD to Known Addresses……. 14-15

a. The NOD Was Not Sent to the Known Address…… 15

1) Questions of Fact Exist Precluding Summary Judgment…….. 15-16

2) District Court's Decision Is Not Supported by Substantial Evidence…… 16-17

4. NRS 107.090 Requires NOD to be Mailed to Person with an Interest in the Property……. 17-18

a. Questions of Fact Exist Precluding Summary Judgment……. 18

b. District Court's Decision is Not Supported by Substantial Evidence…….. 18-19

5. Service of NOS to Known Addresses……. 19

a. District Court's Decision is Not Supported by Substantial Evidence ……. 19

VI. ARGUMENT…….. 20-23

A. Standard of Review re Interpretation of Law.....…….. 20

B. District Court's Legal Conclusions…….…… 20-21

1. Appellants Were Not Required to Record a Request for Notice…….…… 21

2. Appellants Were Not Required to Commence an Action to Stop the Foreclosure Sale…… 22

3. Appellants Written Notice to QLS Constituted Notice…. 22

4. Rose's Interpretation of NRS 107.080 Remains Applicable……. 22-23

VII. ARGUMENT…….. 23-

A. Standard of Review re Cancelation of Lis Pendens..……. 23

B. NRS 107.080 Lis Pendens……. 23-25

VIII. CONCLUSION……...……..... 25

CERTIFICATE OF COMPLIANCE.…….. 27

Table of Authorities

Case Law

***Borger v. Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004) 20**

***Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008)…… 10**

***Canarelli v. Dist. Ct.*, 127 Nev. 808, 813, 265 P.3d 673, 676 (2011) 20**

***Mallin v Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990)…….. 1**

***Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990)……... 14**

Oak Grove Inv. v. Bell & Gossett Co., 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983)…… 12

***Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009)….. 23**

***Rose v. First Fed. Sav. & Loan Ass'n*, 105 Nev. 454 (1989)…… 2, 21**

***Roy v. Lancaster*, 107 Nev. 460, 462, 814 P.2d 75, 76 (1991)…….. 12**

***Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994)…… 11, 12, 16, 18, 19**

***Thompson v. City of North Las Vegas*, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992)……... 11**

***Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994)……..**

10, 16, 18, 23, 24

***Vien-Phuong Thi Ho v. Recontrust Co.*, NA, 858 F.3d 568, 570 (9th Cir. 2017)……. 7**

***Walker v. Am. Bankers Ins. Grp.*, 108 Nev. 533, 536, 836 P.2d 59, 61 (1992)……. 10**

***Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)…….. 23**

***Yvanova v. New Century Mortg. Corp*., 62 Cal. 4th 919, 926-27, 199 Cal. Rptr. 3d 66, 365 P.3d 845 (Cal. 2016)…… 8**

State Statutes

Nevada Revised Statute § 14.010…….. 10

Nevada Revised Statute § 107.080, subdivisions (3), (4), (5)©, 2, 3, 5, 8, 9, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24, 25

Nevada Revised Statute § 107.090…… 2, 17, 19, 20

Nevada Revised Statute § 111.699…… 2, 14

Rules

Nevada Rules of Civil Procedure Rule 12(b)(5)…….. 10, 11, 12,

Nevada Rules of Civil Procedure Rule 56……..……. 11, 12,

Certification, Disclosure, Routing Statement

Certification of Compliance…….. 27

Rule 21.1 Disclosure ……. 28

Routing Statement……. 29

I.

JURISDICTIONAL STATEMENT

This is an appeal filed pursuant to Nevada Rule of Appellate Procedure 3A(b)(l). On December 6, 2016 the Honorable James T. Russell of the First Judicial District Court entered an order cancelling the notices recorded against the subject real property commonly described as 1636 Sonoma Street, Carson City, Nevada [ER 6-8], and on May 12, 2017 an order granting Respondents' motions to dismiss Appellants' complaint without leave to amend ("Order"). [ER 1-5] Moreover, on December 27, 2018 this Court overruled its decision in *Mallin v Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990) to the extent it holds that cases consolidated in the district court become a single case for all appellate purposes and ruled consolidated cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1). Thus, confirming the orders appealed herein are appealable.

II.

ISSUES PRESENTED FOR REVIEW

Did the district court erroneously granted the motion to dismiss after considering materials outside the pleadings?

Pursuant to NRS 107.080(3) and (4), did the trustee of the deed of trust have to give notice to the grantors of the recorded deed of trust and the heirs of a recorded deed upon death where it had actual knowledge of the death of the grantors' death and where an heir of the grantors had notified the beneficiary that all future correspondence and notices are to be sent to her home address and where the beneficiary did, in fact, begin sending correspondence and notices to the heir at her home address prior to the foreclosure sale?

Does service of a notice of default and election to sell real property ("NOD") and a notice of sale ("NOS") substantially comply with NRS 107.080(4) where the trustee admits it did not comply with the statute when it did not serve the NOD and NOS with a "return receipt requested"?

Does NRS 107.090 require heirs of an estate to record a notice in the county where the real property is situated to impart notice to a trustee and beneficiary of their interest claimed in it?

Whether the holding in *Rose v. First Fed. Sav. & Loan Ass'n*, (1989) 105 Nev. 454 regarding the notice requirements of NRS 107.080 is no longer applicable given the 1989 and 2005 amendments made to the statute?

Whether NRS 111.699 requires an affidavit of death and death certificate to be recorded in the county where the real property is situated in order to effectuate a transfer of the title to the beneficiaries of a recorded deed upon death?

Whether the district court erred ordering the notices of pendency of action canceled and expunged where NRS 107.080 explicitly requires a plaintiff to timely file a notice of pendency of action when filing an action for failing to give the required notices proscribed in the statute?

III.

STATEMENT OF THE CASE

The district court granted Respondents' motions to dismiss the complaint for failing to provide notice to the grantors as required by Nev. Rev. Stat. ("NRS") §§ 107.080(3) and (4)(a) [ER 19-24], without leave to amend, [ER 1-5] because it reasoned Appellants' did not: 1) comply with the recording statute i.e., NRS 107.090 [ER 203] by recording a request for notice;[1] 2) apply for an injunction to stop the foreclosure [Id.];[2] 3) that providing written notice [ER 180-81] to QLS prior to the foreclosure sale regarding its failure to comply with NRS 107.080(3) and (4) [ER 105-7] does not constitute notice [ER 203]; 4) Appellant's notification to Champion Mortgage Company[3] ("CMC"), shortly after the death of Thelma Sarge and prior to the recording of the NOD and NOS, of her mother passing,

[1] Nevada law does not require the recording of a request for notice.

[2] Nevada law does not require the filing of an application for an order to stop a foreclosure sale where a trustee has not provided the notice required by NRS 107.080(3) and (4).

[3] CMC is the Beneficiary of the subject deed of trust. [ER 71-2; 74-5; 77-83] CMC is a fictitious business name for Nationstar Mortgage, LLC. [Id.]

providing CMC with her current mailing address, and advising CMC that all communications regarding the grantors' mortgage were to be sent to her at her address also did not constitute notice [ER 168]; and Appellants written notice to QLS [ER 180-1] prior to the foreclosure sale did not constitute notice. [ER 203, lines 12-13] It reasoned further that QLS had substantially complied with the notice requirements of Section 107.080(3) and (4) [ER 203-4; 205].

Although the order dismissing the complaint was based upon motions to dismiss the complaint, the district court considered evidence outside of the pleading meaning it should have been construed as a motion for summary judgment. [ER 1]

The parties presented uncontroverted evidence that the QLS and CMC had actual knowledge both grantors, Edwin and Thelma Sarge[4] ("Grantors" or "Trustors"), were deceased prior to recording the notice of default and election to sell ("NOD"). [ER 77; 158; 160-61; 163; 168; 165-66; 208-09] Appellants presented uncontroverted evidence that CMC and QLS had actual knowledge of Grantors' notice address to wit 159 Empire Lane, Carson City, Nevada, 89706-0734. [ER 158; 160-61; 163; 168; 165-66; 208-09] Appellants presented uncontroverted evidence that Grantors were receiving notifications from CMC at the notice address. [Id.] QLS presented uncontroverted evidence that it did not

[4] Grantors executed the deed of trust individually and in their capacities as trustees for The Sarge Family Trust dated March 28, 1988. [ER 45; 52-3; 55]

serve Grantors a copy of either the NOD or notice of sale ("NOS") at the notice address. [ER 85-8; 96-8] Moreover, QLS presented uncontroverted evidence that it did not send the NOD "return receipt requested" as required by NRS 107.080(3). [ER 85; 96] Finally, Appellants presented uncontroverted evidence QLS received notice prior to the foreclosure sale that it had failed to comply with NRS 107.080(3) and (4). [ER 180-81]

The district court also canceled the recorded notices of pendency of action and the recorded complaint all of which were recorded in compliance with NRS 107.080(5)(c). [ER 6-8]

IV.

STATEMENT OF FACTS

On April 26, 2006 Edwin and Thelma Sarge executed a deed of trust in their individually and their capacities as trustees of The Sarge Trust Dated March 28, 1988 ("Sarge Trust") ("Deed of Trust") secured on the real property commonly described as 1636 Sonoma Street, Carson City, Nevada ("Property"). [ER 45; 52-3; 55] In their individual capacities and their capacities as trustees, Edwin and Thelma Sarge are the grantors/trustors of the Deed of Trust. [ER 45-55]

On April 26, 2006 the record title owner of the Property was the Sarge Trust. [ER 45-55; 60-2] On May 8, 2008, Edwin and Thelma Sarge became the record title owner of the Property as joint tenants with rights of survivorship. [ER 60-2] Also

on May 8, 2008, Edwin and Thelma Sarge recorded a deed upon death transferring title to the Property upon the death of the surviving joint tenant to their children, Jill Sarge, Jack Sarge, and Sharon Hesla. [ER 63; 65-66]

Edwin Sarge died on August 13, 2011 ("Estate of Edwin Sarge"). [ER 305] An affidavit of death of Edwin Sarge was not and has not been recorded. [ER 149] Thelma Sarge died on April 28, 2015 ("Estate of Thelma Sarge") (collectively, "Estates"). [ER 168] An affidavit of death of Thelma Sarge was not and has not been recorded. [ER 149] Shortly after the death of Thelma Sarge and before the recording and service of the NOD and NOS, Appellant, Jill Sarge ("Jill Sarge" or "Appellant"), notified CMC of her passing. [Id.] CMC advised Jill Sarge it was the beneficiary of the deed of trust. [Id.] Jill Sarge advised CMC her mailing and physical address is 159 Empire Lane, Carson City, Nevada ("Empire Lane Address" or "Notice Address"), and that all communications regarding grantors' mortgage were to be sent to her at the Notice Address. [Id.] Thereafter, prior to the recording of the NOD and the NOS, Jill Sarge began receiving correspondence addressed to the Estates of Edwin Sarge and Thelma Sarge at the Notice Address she had given to CMC. [Id.]

On November 5, 2015 [ER 208-9], January 23, 2016 [ER 158; 168], June 6, 2016 [ER 160-1; 168] CMC sent monthly reversable mortgage statements addressed to the Estate of: Thelma A Sarge at the Notice Address.

Jill Sarge would contact CMC on a regular basis to ascertain what her options were for retaining and/or selling the Property. [ER 168] CMC advised Jill Sarge, among other things, she or another heir could sell the Property to another entity at a minimum sales price of 95% of the current appraised value of the Property, if less than the outstanding balance on the loan. [ER 168] On February 4, 2016 Jill Sarge notified CMC she acknowledged the "95% of Current Appraised Value Loss Mitigation Option" and advised CMC the heirs intended to sell the Property. [ER 163; 168] Thereafter, on March 8, 2016 CMC sent correspondence to the Estates of Edwin and Thelma Sarge at the Empire Lane Address acknowledging receipt of Jill Sarge's request for information regarding options for the Estates and the heirs of the Estates pertaining to the disposition of the Property. [ER 165-6; 168]

On August 18, 2015, CMC recorded a substitution of trustee in Carson City substituting QLS in as the trustee of the Deed of Trust. [ER 74-5] QLS is the agent for CMC.[5] On September 2, 2015, QLS recorded the NOD. [ER 77] The NOD states:

[5] A deed of trust involves three parties. *Vien-Phuong Thi Ho v. Recontrust Co.*, NA, 858 F.3d 568, 570 (9th Cir. 2017) citing *Yvanova v. New Century Mortg. Corp*., 62 Cal. 4th 919, 926-27, 199 Cal. Rptr. 3d 66, 365 P.3d 845 (Cal. 2016) (explaining California deeds of trust (Nevada deeds of trust are identical to California deeds of trust)). The first party is the lender (i.e., "CMC"), who is the trust beneficiary. Id. The second party is the borrower-trustor (i.e., the Estates), who holds equitable title to the property. The third party is the trustee (i.e., QLS), an agent for both the lender and the borrower who holds legal title to the property and is authorized to sell the property if the debtor defaults.

> "The reason why the deed of trust is in default and this foreclosure has commenced is as follows: Borrowers have died, and the property is not the principal residence of at least one surviving borrower and, as a result, all sums due under the note have become due and payable."
>
> [ER 77]

On the date the NOD was recorded the record title owner of the Property were decedents, Edwin and Thelma Sarge ("Decedents") i.e., their Estates. [ER 60-2] The Grantors/Trustors remained the Decedents in their individual capacities and their capacities as trustees of the Sarge Trust.

Despite QLS: 1) having actual knowledge of the deaths of the Grantors/Trustors [ER 77]; 2) CMC having been notified all communications pertaining to the mortgage were to be sent to the Notice Address [ER 168]; 3) and CMC having sent numerous communications to the Estates at the Notice Address [ER 158; 160-1; 163; 165-6; 208-9]; QLS, admittedly, did not serve the NOD to the Estates or the Sarge Trust at the Notice Address. [ER 85-8] QLS mailed the NOD to the Grantors/Trustors and record title holder at the Property address, 1636 Sonoma Street, Carson City, Nevada on September 10, 2015 ("Property Address"). [ER 84-8] Moreover, QLS did not serve the NOD "return receipt requested" as required by NRS 107.080(3). [ER 85]

QLS caused the NOS to be recorded on August 29, 2016. [ER 92-4] Again, despite the last known address of the Grantors/Trustors/Sarge Trust being the Notice Address, QLS, admittedly, did not serve the NOS to them at the Notice

Address. [ER 96-8] NRS 107.080(4)(a). Instead, QLS mailed the NOS to the Grantors/Trustors/Sarge Trust at the Property address on September 10, 2015, and August 31, 2016, respectively. [ER 96-8]

Given both Edwin Sarge and Thelma Sarge had died prior to the recordings of the NOD and NOS it was not possible for either of them to have received notice on their behalf or on behalf of the Sarge Trust because they were dead.

None of the Heirs were ever served with either the NOD or NOS. [ER 150]

On October 6, 2016, Appellants notified QLS it had failed to serve the NOD and NOS on the Grantors/Trustors and demanded it cease and desist from foreclosing on the Property until it had complied with NRS 107.080(3) and (4). [ER 180-1]

On October 13, 2016, QLS completed the foreclosure sale of the Property without having complied with NRS 107.080(3) and (4). [ER 104-107: 107]

On October 31, 2016, Appellants filed and recorded their complaint for QLS's failure to comply with NRS 107.080(3) and (4). [ER 19-24] They also filed and recorded their notices of pendency of action pursuant to NRS 107.080(5)(c). [ER 25-32]

On November 3, 2016 Respondent, Rosehill ("Rosehill"), recorded its Trustee's Deed. [ER 269-71]

On November 30, 2016, Rosehill moved, pursuant to NRS 14.010 to expunge the notices of pendency of action. [ER 250-63] On December 6, 2016 the district court entered its order expunging the notices of pendency of action and the recorded complaint. [ER 6-8]

V.

Argument

A. Standard of Review re Summary Judgment and Dismissal.

An order granting summary judgment is reviewed de novo. *Walker v. Am. Bankers Ins. Grp.*, 108 Nev. 533, 536, 836 P.2d 59, 61 (1992). An order granting dismissal of a complaint under NRCP 12(b)(5) "is subject to a rigorous standard of review on appeal." *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008). All factual allegations in the complaint are deemed to be true and all inferences drawn from those facts will be in favor of non-moving party. Id. at 228. A complaint will be dismissed only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle it to relief. Id. The district court's legal conclusions are reviewed de novo. Id.

A district court's decision is reviewed for an abuse of discretion. *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). The record considered by the district court is reviewed to determine whether its decision is supported by substantial evidence. Id. A decision that lacks support in

the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal. Id.

B. Dismissal Order Should Have Been Order for Summary Judgment.

The first question on appeal is whether the district court improperly granted QLS and Roseville's motions to dismiss rather than treating them as motions for summary judgment. If "matters outside the pleading are presented to and not excluded by the court," a motion to dismiss for failure to state a claim upon which relief can be granted "shall be treated as one for summary judgment and disposed of as provided in Rule 56." NRCP 12(b). *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994). A district court must treat a motion to dismiss as one for summary judgment "where materials outside of the pleadings are presented to and considered by the district court." *Schneider* citing *Thompson v. City of North Las Vegas*, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992).

Here, the district court's written decision did not exclude matters outside the pleadings; rather, it shows that the court considered exhibits which QLS submitted in support of its motion to dismiss and disregarded Appellants' uncontroverted evidence. [ER 1-4] Thus the district court erroneously granted the motion to dismiss after considering materials outside the pleadings. However, when a district court errs "in failing to expressly consider respondents' motions as one for summary judgment," the appellate court is "not obliged to reverse," but "simply reviews the

dismissal order as if it were a summary judgment." *Schneider* citing *Thompson*, 108 Nev. at 438-39, 833 P.2d at 1134.

C. Summary Judgment.

A district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Schneider* at 1272; NRCP 56(c). "A litigant has the right to trial whenever the slightest doubt as to remaining issues of fact exists." Id. citing *Roy v. Lancaster*, 107 Nev. 460, 462, 814 P.2d 75, 76 (1991) (citing *Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983)).

1. Procedures for Non-Judicial Foreclosures.

NRS 107.080 governs nonjudicial deed-of-trust foreclosure sales and sets forth the substantive requirements and procedures for such sales. *Las Vegas Dev. Grp., Ltd. Liab. Co. v. Blaha*, 416 P.3d 233, 236 (Nev. 2018).[6] NRS 107.080(5) only applies to actions challenging the procedural aspects of a nonjudicial deed-of-trust foreclosure sale.[7] Id. at 237.

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[6] This case refers to the version of NRS 107.080 in effect prior to 2011. However, the principal of the decision holds true in the current version of the statute applicable to the foreclosure sale herein.

[7] If this appeal were to be reviewed by the standard applied to a complaint dismissed pursuant to NRCP 12(b) i.e., all allegations of the complaint are deemed to be true,

Subsection 5(a) states that a sale under "this section may[8] be declared void" if the trustee "authorized to make the sale does not substantially comply with the provisions of this section." Id. at 236; NRS 107.080(5)(a). Subsection 5(b) requires that such an action be commenced "within 90[9] days after the date of the sale." Id.; NRS 107.080(5)(b). Subsection 6 allows 120[10] days to commence an action if proper notice is not given pursuant to NRS 107.080(3) and (4). Id.; NRS 107.080(6). Thus, if the trustee authorized to conduct the sale fails to substantially comply with NRS 107.080's provisions, the district court must declare the sale void. Id.; NRS 107.080(5). By the statute's plain language, challenges to those violations are subject to the time limitations in subsections 5 and 6. Id.; NRS 107.080(5) and

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then the complaint has alleged that QLS did not provide the Grantors notice. [ER 22 at paragraphs 8-12] Consequently, dismissal is improper.

[8] In 2011 Assembly Bill 284 amended NRS 107.080(5) by deleting the word "may" and adding the word "must." Consequently, the applicable version of NRS 107.080(5) to this foreclosure sale requires "a sale made pursuant to this section must be declared void by any court of competent jurisdiction in the county where the sale took place."

[9] In 2015, Senate Bill 239 amended NRS 107.080(5)(b) by shortening the period of time to commence an action from 90 to 30 days. At the same time, subsection 6 was amended by shortening the period of time to commence an action for failure to substantially comply with subsections (3) and (4) from 120 days to 90 days. The portion of the statute regarding receipt of actual notice of the sale was also deleted leaving "after the date of the sale." Consequently, the applicable version of NRS 107.080(5)(b) and (6) to this foreclosure sale requires an action must be commenced, respectively, within either "30 days after the date on which the trustee's deed is recorded" or within "90 days after the date of the sale."

[10] See preceding footnote regarding current time frame.

(6). Proper notice of a foreclosure sale is mandated by NRS 107.080. *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990).

2. Grantor/Trustor/Record Title Holder at Recording of NOD.

The Grantors of the Deed of Trust are the Sarge Trust and the Estates of Edwin and Thelma Sarge. [ER 45-55] The holders of the title of record on the date the NOD was recorded were the Estates of Edwin and Thelma Sarge.[11] [ER 60-62] The district courts finding of facts that the last known address of the Decedents and Jill Sarge is the Property address [ER 2 at paragraph 5] is not supported by substantial evidence. Nor is its conclusion that the heirs are the record title owner pursuant to the deed upon death. [ER 2 at paragraphs 2 and 6]

3. Service of NOD to Known Addresses.

NRS 107.080(3) required QLS to mail a copy of the NOD via registered or certified mail, return receipt requested and with postage prepaid to the grantor or to

[11] QLS has contended that the deed upon death [ER 65-66] Decedents had recorded made Decedents' adult children the record title owners at the time the NOD was recorded and, therefore, the Estates are not the real parties in interest and the complaint should be dismissed. [ER 37-39] (The district court did not dismiss the complaint based upon this contention [ER 1-4]) First, assuming for the sake of argument the Estates were not the record title owners, they remain the Grantors of the Deed of Trust and therefore have standing to bring the action. NRS 107.080(6). However, a recorded deed upon death does not effectuate the transfer of title to the heirs until an affidavit of death of the surviving joint tenant is recorded. NRS 111.699; Minutes of the Senate Committee on Judiciary, Seventy-sixth Session, Feb. 16, 2011, S.B. 88, Pg. 8 ("Minutes"). [ER 132] Here, an affidavit of death has not been recorded for either Decedent. [ER 149]

the person who holds the title of record on the date the NOD is recorded at their respective addresses, if known, otherwise to the address of the Property. NRS 107.080(3).

a. The NOD Was Not Sent to the Known Address.

The district court was presented with uncontroverted evidence that the known address of the Estates and Jill Sarge was 159 Empire Lane i.e., the Notice Address. [ER 158; 160-61; 163; 168; 165-66; 208-09] The evidence was uncontroverted that Jill Sarge communicated the Notice Address to CMC shortly after Thelma Sarge's death and prior to QLS recording of the NOD. [ER 167-9] Furthermore, the evidence was uncontroverted that notices regarding the Deed of Trust were being sent to the Notice Address. [ER 158; 160-61; 163; 168; 165-66; 208-09] QLS admitted that it had mailed the NOD to Decedents and Jill Sarge at the address of the Property rather than the known address. [ER 85-8] QLS also admitted it did not send the NOD via return receipt corrected. [Id. at 85]

1) Questions of Fact Exist Precluding Summary Judgment.

Given the district court disregarded Appellants' undisputed facts that: 1) Jill Sarge notified CMC shortly after the death of Thelma Sarge and prior to the recording of the NOD that the Estates and her Notice Address was the Empire Lane

Address;[12] and 2) thereafter, multiple notices were sent to the Notice Address; a question of fact exists as to whether Jill Sarge notified CMC and whether CMC began sending notices to the Notice Address. Appellants have the right to trial whenever the slightest doubt as to any remaining issues of fact exists. *Schneider*.

So, if this Court were to give the proper weight to Appellants' evidence that it deserves, the order should be reversed and remanded with directions to the district court to enter summary judgment for the Estates. Alternatively, the order should be reversed and remanded because of the existence of questions of fact.

2) District Court's Decision is Not Supported by Substantial Evidence.

The district court's decision that QLS substantially complied with the notice requirements of NRS 107.080(3) is not supported by substantial evidence and is, therefore, an abuse of discretion. *Tighe* at 634. Moreover, the record lacks any evidence to support its decision. The uncontroverted evidentiary record established: 1) the known address of the Estates and Jill Sarge to be the Empire Lane Address; 2) QLS did not mail the NOD to the Empire Lane Address; and 3) QLS did not mail the NOD via return receipt requested.[13] Given the district court's decision lacks any

[12] QLS concedes that there may have been a different address for the Estates other than the Property address. [ER 210 at lines 12-19] QLS wrongly concludes that NRS 107.080(3) and (4) only require it to provide notice to "the people with a recorded interest."

[13] The order granting dismissal of the complaint wrongly states QLS sent the Grantors a copy of the NOD via "return receipt requested." [ER 2 at paragraphs 2-3] This finding of fact is contrary to the affidavit of mailing made under penalty of

evidentiary support, its decision is arbitrary and capricious, and thus an abuse of discretion. Id. Therefore, the order dismissing the complaint is an abuse of discretion and must be reversed and remanded. Id.

4. NRS 107.090 Requires NOD to be Mailed to Person with an Interest.

NRS 107.090(3)(b) requires QLS to, within 10 days after the NOD is recorded and mailed pursuant to NRS 107.080, mail a copy of the NOD via registered or certified, return receipt requested and with postage prepaid addressed to each other "person with an interest" whose interest or claimed interest is subordinate to the Deed of Trust. NRS 107.090(3)(b). NRS 107.090(1) defines "person with an interest" as any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which the real property is situated. NRS 107.090(1). As QLS has acknowledged [ER 37-9], Decedents' adult children had an interest in the Property which was subordinate to the Deed of Trust via the recorded deed upon death. [ER 65-6]

Here, it is undisputed the known address of Jill Sarge was the Empire Lane Address (discussed supra).[14] It is undisputed that QLS served Jill Sarge at the

perjury presented by QLS which specifically states a "copy of the NOD was sent via by certified or registered mail and first class, with postage prepaid."

[14] At this time no discovery has been conducted regarding whether the addresses of the remaining to heirs was known. Consequently, there was no evidence presented as to their known addresses. Therefore, a conclusion cannot be reached as to

Property address rather than the Empire Lane Address and did not mail it return receipt requested (discussed supra).

a. Questions of Fact Exist Precluding Summary Judgment.

Given the district court disregarded Appellants' undisputed facts that: 1) Jill Sarge notified CMC shortly after the death of Thelma Sarge and prior to the recording of the NOD that Notice Address was the Empire Lane Address; and 2) thereafter, multiple notices were sent to the Notice Address; a question of fact exists as to whether Jill Sarge notified CMC and whether CMC began sending notices to the Notice Address. Appellants have the right to trial whenever the slightest doubt as to any remaining issues of fact exists. *Schneider*.

So, the order should be reversed and remanded with directions to the district court to enter summary judgment for the Estates. Alternatively, the order should be reversed and remanded because of the existence of questions of fact.

b. District Court's Decision is Not Supported by Substantial Evidence.

For the same reasons discussed in the preceding section the district court's decision that QLS substantially complied with the notice requirements of NRS 107.080(3) is not supported by substantial evidence and is, therefore, an abuse of discretion. *Tighe* at 634. Moreover, the record lacks any evidence to support its

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whether service of the NOD on the remaining heirs at the Property address complied with NRS 107.080(3).

decision. Given the district court's decision lacks any evidentiary support, its decision is arbitrary and capricious, and thus an abuse of discretion. Id. Therefore, the order dismissing the complaint is an abuse of discretion and must be reversed and remanded. Id.

5. Service of NOS to Known Addresses.

For the same reason set forth above, the NOS was not sent to the known addresses of the Estates and Jill Sarge as required by NRS 107.080(4). [ER 96-8] Likewise the same questions of fact discussed above exist regarding the service of the NOS and whether it should have been sent to the Notice Address. Appellants have the right to trial whenever the slightest doubt as to any remaining issues of fact exists. *Schneider*.

So, the order should be reversed and remanded with directions to the district court to enter summary judgment for the Estates. Alternatively, the order should be reversed and remanded because of the existence of questions of fact.

a. District Court's Decision is Not Supported by Substantial Evidence.

For the same reasons discussed in the preceding section the district court's decision that QLS substantially complied with the notice requirements of NRS 107.080(4) is not supported by substantial evidence and is, therefore, an abuse of discretion. *Tighe* at 634. Therefore, the order dismissing the complaint is an abuse of discretion and must be reversed and remanded. Id.

VI.

Argument

A. Standard of Review Re Interpretation of Law.

Issues involving statutory interpretation are legal issues subject to de novo review. *Canarelli v. Dist. Ct.*, 127 Nev. 808, 813, 265 P.3d 673, 676 (2011) (declaring that "[w]e review the 'district court's conclusions of law, including statutory interpretations, de novo'" (quoting *Borger v. Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004))).

B. District Court's Legal Conclusions.

The district court granted the motion to dismiss because he did not think Appellants complied with the recording statute i.e., NRS 107.090, or filed a complaint prior to the foreclosure sale to preclude it. [ER 203, lines 8-11; 204, lines 10-11]. It reasoned NRS 107.090 required Appellants to record a request for notice. [203 at lines 17-19] It reasoned that had Appellants recorded a request for notice it would have precluded the filing of their present action. [Id.] Moreover, Appellants did nothing.[15] [Id.] It concluded that Appellants' written notice[16] to QLS prior to

[15] Contrary to the district court's assertion and, as discussed above, the uncontroverted facts it reviewed, Jill Sarge had provided the Empire Lane Address as the correct notice address prior to the recording of the NOD.

[16] The district court misstates the fact regarding Appellants' notice to QLS in that it states Appellants' notice was via telephone. The notice was written and sent via facsimile and FedEx overnight delivery. [ER 180-1]

the foreclosure sale that it had not complied with NRS 107.080(3) and (4) "doesn't constitute notice or anything else." [Id. at 12-13] Finally, the district court concluded that *Rose v First Fed. Sav. & Loan Ass'n's*, 105 Nev. 454 (1989) interpretation of NRS 107.080 was no longer applicable because NRS 107.080 had been amended in 1989 by deleting "his successor in interest" and adding "to the person who holds the title of record on the date the notice of default and election to sell is recorded." [ER 3-4 at paragraph 14].

1. Appellants Were Not Required to Record a Request for Notice.

There is no requirement in NRS 107.090 requiring a person with an interest in real property to record a request for notice.[17] NRS 107.090. Nor is there a requirement in NRS 107.080(5) or (6) that a person who did not receive notice pursuant to NRS 107.080(3) or (4) must record a request for notice prior to commencing an action pursuant to subsections (5) and (6). NRS 107.080.

Neither statute supports the district court's interpretation. Based thereon the order must be reversed and remanded.

[17] The statute states in part: "a person……may at any time after recordation of the deed of trust record in the office of the county recorder of the county in which any part of the real property is situated an acknowledged request for a copy of the notice of default or of sale….." NRS 107.090(2).

2. Appellants Were Not Required to Commence an Action to Stop the Foreclosure Sale.

There is no requirement in NRS 107.080 to commence and action to stop a foreclosure sale prior to filing a complaint for a trustee failing to comply with NRS 107.080(3) or (4).

The statue does not support the district court's interpretation. Based thereon the order must be reversed and remanded.

3. Appellants Written Notice to QLS Constituted Notice.

The district court arbitrarily and capriciously concluded that Appellants written notice [ER 180-1] to QLS prior to the foreclosure sale did not constitute notice to it. The district court offered no authority to support its conclusion. Moreover, QLS actually postponed the foreclosure sale as a direct result of the written notice it received. [ER 152] This fact is undisputed.

Based thereon the order must be reversed and remanded.

4. Rose Interpretation of NRS 107.080 Remains Applicable.

The *Rose* interpretation of NRS 107.080(3) and (4) remain applicable as to the notice requirements. The only relevant change to the statute since the holding in Rose is the 1989 amendment deleting "his successor in interest" and adding "to the person who holds the title of record on the date the notice of default and election to sell is recorded." The amendment specified that the person who holds the title on

the date the NOD is recorded must receive notice of the NOD and NOS prior to conducting a foreclosure sale. Consequently, the only difference is, other than the grantor, the only persons entitled to notice of an NOD and NOS are the record title holders at the time the NOD is recorded.[18]

But for this distinction between successor in interest and record title owner, Rose remains applicable as to the interpretation of NRS 107.080 currently in effect.

Based thereon the order must be reversed and remanded.

V.

ARGUMENT

A. Standard of Review re Cancelation of Lis Pendens.

The district court's factual findings[19] . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

A district court's decision is reviewed for an abuse of discretion. *Tighe supra*. The record considered by the district court is reviewed to determine whether its decision is supported by substantial evidence. Id. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141

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[18] This statement only considers the persons entitled to notice pursuant to NRS 107.080.

[19] The district court did not make any findings of fact pertaining to its entry of order expunging the lis pendens.

(2008). A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal. *Tighe*.

B. NRS 107.080 Lis Pendens.

The district court canceled the recorded notices of pendency of action and recorded complaint for the same reasons it dismissed the complaint (see discussion supra. [ER 203, lines 8-9]

As a consequence of QLS's failure to serve the Estates with either the NOD or NOS, the Estates timely filed and recorded their complaint [ER 19-24] and recorded a notice of pendency of action [ER 25-32] pursuant to the requirements stated in NRS 107.080(5) and (6). Here, as Appellants have alleged, QLS failed to substantially comply with NRS 107.080. Consequently, Appellants had until 30 days after the trustee's deed was recorded to file their complaint. See NRS 107.080(5)(b). Appellants also alleged QLS failed to give the required notice proscribed by NRS 107.080(3) or (4)(a) to the Estates. Consequently, Appellants had until 90 days after the date of sale to file their complaint. See NRS 107.080(6). The trustee's deed was recorded November 2, 2016. [ER 105-7] Plaintiffs' complaint was filed October 31, 2016, before the recording of the trustee's deed which means the complaint was timely filed. [ER 19-24]

More importantly, NRS 107.080(5)(c) requires the recording of a notice of

pendency of action within 5 days of the filing of the complaint. NRS 107.080(5)(c). Here, two notice of pendency of actions have been filed on October 31, 2016. [ER 25-32] Thus, the recording of the notice of pendency of action is timely and in compliance with NRS 107.080(5)(c).

Given the district court ordered the recorded complaint and recorded notices of pendency of action expunged and/or canceled for the same reasoning it applied to granting the motions to dismiss the complaint (see discussion supra), the order must be reversed and remanded.

VIII.

CONCLUSION

Based upon the foregoing, the district court's order dismissing the complaint must be reversed and an order for summary judgment entered in favor of Appellants given the uncontroverted evidence. Alternatively, the order should be reversed and remanded.

The district court’s order canceling/expunging the recorded complaint and recorded notices of pendency of action must also be reversed and remanded.

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the social security number of any person.

Dated: April 10, 2019

By: s/Tory M. Pankopf
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CERTIFICATE OF COMPLIANCE

1. 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 14 and Times New Roman.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more and contains 6,132 words; and does not exceed 25 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This 10th day of April 2019. **Tory M Pankopf, Ltd**

s/ TORY M. PANKOPF
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IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Estates of Thelma Ailene Sarge and Edwin John Sarge.	NO. 73286
ESTATE OF THELMA AILENE SARGE; ESTATE OF EDWIN JOHN SARGE; AND BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE, Appellants, vs. QUALITY LOAN SERVICE CORPORATION; and ROSE HILL, LLC, Respondents.	DISTRICT COURT NO. 16 RP 000091B

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.

The appellants are not a corporation nor is there a parent corporation to disclose.

Undersigned counsel, Tory M Pankopf of the Law Offices of Tory M Pankopf, Ltd, is the only counsel and law firm having appeared on behalf of Appellants in the underlying matter.

Dated: April 18, 2019

s/Tory M Pankopf
TORY M. PANKOPF
Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Estates of Thelma Ailene Sarge and Edwin John Sarge.	NO. 73286
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ROUTING STATEMENT

This appeal remains with the Supreme Court given none of the presumptions of NRAP 17(b) are applicable.

Dated: April 18, 2019

s/Tory M Pankopf
TORY M. PANKOPF
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