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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 9050 W WARM SPRINGS 2079, Appellant, vs. DITECH FINANCIAL LLC; NEVADA ASSOCIATION SERVICES; and JAMES P. MARKEY, Respondent.	No. 74153

APPELLANT'S PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities 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.

1. Plaintiff/respondent, Saticoy Bay LLC, Series 9050 W Warm Springs 2079, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series 9050 W Warm Springs 2079 is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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APPELLANT'S PETITION FOR REHEARING

Pursuant to NRA P 40(b)(1), Saticoy Bay LLC, Series 9050 W Warm Springs 2019 (hereinafter "plaintiff") petitions the court for rehearing of its opinion, filed on July 3, 2019, on the grounds that the court has "overlooked or misapprehended a material fact in the record or a material question of law in the case."

ARGUMENT

1. Plaintiff did not waive the argument that Ditech had no authority to authorize NAS to use monies belonging to Quicken Loans to make the redemption payment.

At page 9 of its opinion, this Court states that "[t]his Court agrees with Saticoy Bay that the statute required NAS to distribute the proceeds of the sale to Ditech immediately following the sale."

On the other hand, at page 5 of its Reply Brief, plaintiff stated:

> **The record on appeal does not contain any evidence proving that Ditech had any interest in the sales proceeds.** The recorded deed of trust instead identified Quicken Loans Inc. as the Lender. No recorded document identified Ditech as having any interest in the Property on January 19, 2016. (emphasis added)

In footnote 7 at page 10 of its opinion, this Court states that plaintiff waived the argument that "Ditech was not the servicer of the loan at the time of the redemption period" because "Saticoy Bay failed to raise it below."

On the other hand, at page 2 of its opposition (JA1b, pg. 136), plaintiff stated that "MERS, as nominee for Quicken Loans, Inc., assigned the deed of trust to Ditech on April 28, 2016," and plaintiff also stated:

> As alleged in paragraph 17 of plaintiff's amended complaint, **Quicken Loans, Inc. did not tender any amount of money to plaintiff within the 60 day time period** provided by NRS 116.31166(3). (emphasis added)

At page 4 of its opposition, plaintiff stated that "Ditech and Markey, however, have not proved that Markey obtained the monies paid by NAS from 'surplus funds process.'" (JA1b, pg. 138)

In addition, the email from counsel for Ditech to NAS in which "Ditech authorizes NAS to tender any sales proceeds in which it may have an interest to the buyer at the HOA sale" was not filed with the district court until Thursday, June 15, 2017. *See* Exhibit J to Ditech Financial LLC's supplemental brief in support of its motion for summary judgment. (JA2, pg. 356) Consequently, plaintiff had no opportunity to respond in writing to this untimely pleading prior to the hearing held on Tuesday, June 20, 2017.

At the hearing held on Tuesday, June 20, 2017, however, counsel for plaintiff stated to the court:

MR. BOHN: The – but the statute says they don't belong to the owner.

> **It belongs to the next lienholder in line**. And that would be – **it was at the time Quicken**, now it's Ditech. **It belongs to them**. So if they had a written agreement or an email to NAS or between each other saying, Yes, you can use the proceeds to redeem the property, that would be one thing. **But we don't have that.** We have the statute that says the owner is not entitled to it until after the deed of trust is satisfied. (emphasis added)
>
> JA3, pg. 482, ll. 19-25.

As a result, plaintiff did timely identify and raise the objection that any redemption by "the holder of a recorded security interest on the unit" would have to be made by Quicken Loans, Inc. and not by Ditech. Plaintiff also raised the specific objection that defendants did not prove that NAS had authority from Quicken Loans, Inc. to have Mr. Markey use the proceeds that belonged to Quicken Loans, Inc. to redeem the Property for Mr. Markey's benefit.

In footnote 9 at page 11 of its opinion, this Court states: "We further conclude that NAS was permitted to tender the redemption amount on Markey's behalf." On the other hand, the record on appeal does not contain any writing by Quicken Loans, Inc. that authorized NAS to use the monies belonging to Quicken Loans, Inc. for any purpose.

Defendants failure to prove that Mr. Markey had authority to use monies that belonged to Quicken Loans, Inc. to redeem the Property alone creates a "genuine

issue" as to a material fact that makes entering summary judgment in favor of defendants improper.

At page 11 of its opinion, this Court also states that "Saticoy Bay received all to which it was entitled pursuant to the redemption statute," but NRS 116.31166(3)(a)(3) expressly provides that the redemption amount must include "[a]ny reasonable amount expended by the purchaser which is reasonably necessary to maintain and repair the unit in accordance with the standards set forth in the governing documents." The record on appeal does not contain any evidence that these required amounts were included in the either the January 15 check or the January 19 check that are not part of the record on appeal.

2. The mandatory requirements in NRS 116.31166(4) should be strictly construed, and defendants failed to substantially comply with the mandatory requirements in any event.

At the bottom of page 10 and top of page 11 of Respondent's Answering Brief, Ditech quoted from Einhorn v. BAC Home Loans Servicing, LP, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012), that "[i]n general, 'time and manner' requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements."

At page 13 of its opinion, this Court quotes the same language from this

Court's opinion in Leven v. Frey, 123 Nev. 399, 408,168 P.3d 712, 718 (2007).

In the present case, however, plaintiff's objection that NAS did not produce the documents required by NRS 116.31166(4) is not a "form and content" objection. It is a "time and manner" objection.

In Leven v. Frey, the creditor argued that he had substantially complied with the mandatory requirements in NRS 17.214 even though he failed to serve the affidavit of renewal until twelve days after filing the affidavit (instead of the three days required by NRS 17.214(3)) and he failed to record the affidavit of renewal until seventeen days after filing the affidavit (instead of the three days required by NRS 17.214(1)(b)).

In rejecting the creditor's argument that he had substantially complied with the statute, this Court stated:

> This court, however, has never indicated that substantial compliance with specific timing requirements is sufficient in the context of recording and service under NRS 17.214. To the contrary, since the statute includes no built-in grace period or safety valve provision, **its explicit three-day language leaves little room for judicial construction or "substantial compliance" analysis**. (emphasis added)

123 Nev. at 407, 168 P.3d at 717-718.

Like the mandatory provisions in NRS 17.214, the mandatory requirements in NRS 116.31166(4) are "time and manner" requirements that have "no built-in grace

period or safety valve provision" and leave no room for judicial construction or "substantial compliance" analysis.

At the bottom of page 13 and top of page 14 of its opinion, this Court distinguishes the "strict compliance" required in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275 (2011), by stating that "the bank attempting to participate in the mediation was not the original named beneficiary on the deed of trust and did not provide a written assignment but was nonetheless attempting to foreclose on the property."

The same defect appears in the present case because the bank (i.e. Ditech) attempting to aid Mr. Markey in the redemption process did not hold any assignment of the deed of trust or have any authority to control the disposition of the monies belonging to Quicken Loans, Inc. that were used to redeem the Property.

Because the monies used to redeem the Property belonged to Quicken Loans, Inc., NRS 116.31166(4)(b)(1) required production of "[a]n original or certified copy of the deed of trust securing the unit or a certified copy of any other recorded security interest of the holder."

In the alternative, because defendants did not prove that Quicken Loans, Inc. authorized any person to use its funds to redeem the Property, NRS

116.31166(4)(b)(2) required that Ditech produce "[a] copy of any assignment necessary to establish the claim of the person redeeming the unit, verified by the affidavit of that person, or that person's agent, or of a subscribing witness thereto." On the other hand, it was impossible for Ditech to produce the required assignment or affidavit on January 19, 2016 because the assignment of deed of trust to Ditech was not signed by MERS until April 21, 2016. (JA1b, pgs. 172-175)

The mandatory requirements in NRS 116.31166(4)(a) and (4)(b) serve the essential purpose of enabling the person from whom the property is being redeemed to know: (1) who is making the redemption, and (2) that the person making the redemption is qualified by the statute to make the redemption. In the present case, Ditech had no authority to participate in the redemption process because it held no interest in the Property on January 19, 2016.

At page 15 of its opinion, this Court states that "Saticoy Bay does not argue on appeal that Markey is not the unit owner of the property" and that "Saticoy Bay also has not demonstrated that it was prejudiced by Markey's failure to provide a certified copy of the deed." On the other hand, no authority requires that plaintiff make such a showing before it is entitled to receive the benefit of the mandatory requirements enacted by the Nevada Legislature in NRS 116.31166.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 755, 334 P.3d 408, 417 (2014), this Court stated that "the choice of foreclosure method for HOA liens is the Legislature's" and that "[i]f revisions to the foreclosure methods provided for in NRS Chapter 116 are appropriate, they are for the Legislature to craft, not this court." The same is true of the redemption procedures adopted by the Nevada Legislature.

Moreover, because defendants failed to produce any of the documents required by NRS 116.31166, defendants' failure cannot be characterized as a failure to meet a "form and content" requirement.

At page 16 of its opinion, this Court states that "successful redemption by Markey resulted in Saticoy Bay receiving all the benefits of redemption pursuant to NRS 1116.31166, namely the payment of the purchase price and interest at the rate of one percent per month." As discussed at page 4 above, however, no person ever offered to pay to plaintiff the amounts expended by plaintiff "to maintain and repair the unit in accordance with the standards set forth in the governing documents" as required by NRS 116.31166(3)(a)(3).

/ / /

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that the court grant rehearing, withdraw its opinion, filed on July 3, 2019, and enter a new order reversing the judgment of the district court and remanding this case to the district court for further proceedings.

DATED this 22nd day of July, 2019.

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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)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(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 2,239 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 22nd day of July, 2019.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 22nd day of July, 2019, a copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** was served electronically through the Court's electronic filing system to the following individuals:

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