Case No. 74575

IN THE SUPREME COURT OF NEVADA

U.S. BANK N.A. N.D.,

Appellant,

v.

RESOURCES GROUP LLC,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Joanna S. Kisher, District Judge
District Court Case No. A-14-704414-C

RESPONDENT'S ANSWERING BRIEF

Richard Vilkin, Esq.
Nevada Bar No. 8301
E-mail: richard@gvattorneys.com
2470 St. Rose Parkway, Suite 309
Henderson, Nevada 89074
Telephone: (702) 873-5868

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Respondent Resources Group, LLC is a Nevada limited liability company ("LLC") and there is no publicly held company that owns 10% or more of its stock -- it has no stock as it is a series LLC. The manager of Resources Group, LLC is Iyad Eddie Haddad.

In the district court, respondent was represented initially by Michael F. Bohn, Esq. and Adam R.Trippiedi, Esq. of The Law Offices of Michael F. Bohn, Esq., Ltd. and later by Richard Vilkin, Esq. and Charles Geisendorf, Esq. of the law firm of Geisendorf & Vilkin, PLLC. Mr. Vilkin represents appellant on appeal.

Date: June 7, 2018

GEISENDORF & VILKIN, PLLC

By: /s/ Richard Vilkin

Richard Vilkin, Esq.
Nevada Bar No. 8301
2470 St. Rose Parkway, Suite 309
Henderson, NV 89074
Phone: (702) 873-5868
Attorneys for respondent Resources Group, LLC

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE …… ii

TABLE OF CONTENTS …… iii

TABLE OF AUTHORITIES ……..… v - viii

STATEMENT OF JURISDICTION ……. ix

RESPONDENT'S ROUTING STATEMENT …… ix - x

ISSUES PRESENTED …….. x

STATEMENT OF THE CASE …….. xi

FACTUAL BACKGROUND …… 1

SUMMARY OF ARGUMENT ……. 5

ARGUMENT …… 6

I. APPELLANT WAS MAILED THE NOTICE OF DEFAULT AND THE NOTICE OF SALE …… 6

II. NOTWITHSTANDING THAT NOTICES WERE MAILED TO APPELLANT, THERE WAS NO REQUIREMENT UNDER THE LAW AT THE TIME TO DO SO …… 7

III. FOR EQUITABLE RELIEF, THERE MUST BE A LOW SALES PRICE CAUSED BY FRAUD, UNFAIRNESS OR OPPRESSION –

AND FRAUD, OPPRESSION AND UNFAIRNESS – AND THERE WAS NONE ……. 13

IV. RESPONDENT'S PREDECESSOR WAS A BONA FIDE PURCHASER WITH NO KNOWLEDGE OF THE ISSUE REGARDING NOTICES AND IS PROTECTED AGAINST ANY ARGUMENT OF A DEFECT IN THE SALE …… 16

V. A MORTGAGE PROTECTION CLAUSE IN THE CC&RS DOES NOT PROTECT APPELLANT FROM AN NRS 116 FORECLOSURE ... 19

VI. APPELLANT FAILED TO EXHAUST ITS LEGAL REMEDIES AND THUS IS NOT ENTITLE TO EQUITABLE RELIEF ……..… 19

VII. THIS COURT'S HOLDING IN SFR IS RETROACTIVE …….. 20

VIII. CONCLUSION …….. 21

CERTIFICATE OF COMPLIANCE ……..… 22

CERTIFICATE OF SERVICE ……..... 24

TABLE OF AUTHORITIES

CASES

Davenport v. State Farm,
81 Nev. 361, 404 P.2d 10(1965) …….. 20

Golden v. Tomiyasu,
387 P.2d 989, 79 Nev. 503 (1963) ……..…..… 14

In re Vlasek,
325 F.3d 955 (7th Cir. 2003) ……..…. 17

K&P Homes v. Christiana Trust,
133 Nev., Advance Opinion 51 (filed July 27, 2017,
Nevada Supreme Court Case No. 69966) ……. 20

Lennartz v. Quilty,
191 Ill. 174, 60 N.E. 913, 914 (1901) …… 18

Long v. Towne
98 Nev. 11, 13 629 P.2d 520 (1982) …….. 13

Marcuse v. Del Webb Communities, Inc.,
123 Nev. 278, 163 P.3d 462 (2007) ……..….. 15

Moeller v. Lien,
25 Cal.App.4th 822, 30 Cal.Rptr. 777 (1994) …… 18

Munger v. Moore,
11 Cal.App.3d 1, 89 Cal.Rptr. 323 (1970) ……..…….. 18

Riganti v. McElhinney,
248 Cal.App.2d 116, 56 Cal.Rptr.195 (1967) ……... 17

Shadow Wood Homeowners Association v. New York Community Bancorp, Inc.
366 P. 3d 1105, 132 Nev. Adv. Rep. 5 (2016) …….. 13, 16, 17, 18

SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,
130 Nev. ____, _____, 334 P.3d 408 (2014) ……..… 19, 20

Smith v. United States,
373 F.2d 419 (4th Cir. 1966) …… 17

STATUTES

Nev. Rev. Stat. § 107.080 ……. 10

Nev. Rev. Stat. § 107.090 ……..… ix, 8, 9, 10

Nev. Rev. Stat. § 107.090(2) …… 11

Nev. Rev. Stat. § 107.090(3)(a) …… 11

Nev. Rev. Stat. § 107.090(3)(b) ……... 11

Nev. Rev. Stat. § 116 …… ix, x, xi, 1, 6

Nev. Rev. Stat. § 116.1104 …… 19

Nev. Rev. Stat. § 116.3116 …… 19

Nev. Rev. Stat. § 116.31163 ……..… 8, 9, 10, 12

Nev. Rev. Stat. § 116.31163(2) ……. Xi, 5, 10, 12

Nev. Rev. Stat. § 116.311635 …… 11, 12

Nev. Rev. Stat. § 116.311635(2) …… 12

Nev. Rev. Stat. § 116.31165(1)(b)(2) …… xi, 5

Nev. Rev. Stat. § 116.31168 ……... ix, 9, 10, 11

Nev. Rev. Stat. § 116.4109 …….. 8

Nev. Rev. Stat. § 21.130 …….. 11

RULES

NRAP 26.1 …….. ii

NRAP 26.1(a) …… ii

NRAP 28(a)(5) …… ix

NRAP 28(e) …… 22

NRAP 32(a)(4) ……. 22

NRAP 32(a)(5) ……. 22

NRAP 32(a)(6) ……... 22

NRAP 32(a)(7)(A)(i) ……... 22

NRAP 32(a)(7)(C) 22

NRAP 3A(b)(1) ix

NRCP 17(a)(14) ix

NRCP17(a)(13) ix

OTHER AUTHORITIES

19 Am Jur., Equity, Sec. 107..... 20

STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). After a two-day bench trial, the district court issued Findings of Fact and Conclusions of Law in favor of respondent. 7AA1559-1569.

RESPONDENT'S ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), respondent Resources Group, LLC states that this case contains "Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitution or common law." NRCP17(a)(13). Respondent also states that it contains "Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts." NRCP 17(a)(14).

In particular, the issues raised in this case apply to many properties purchased at NRS 116 HOA foreclosure sales in the time period from 2011-2014. Specifically, this appeal deals with whether a Notice of Default was required to be given to a first trust deed holder of record if it did not request such Notice pursuant to NRS 116.31168 or NRS 107.090 and, even if such Notice was required, is a Notice of Default properly addressed if it is sent to one of four addresses on a deed

of trust where the beneficiary did not specify on the deed of trust which of the four addresses Notices should be sent to?

ISSUES PRESENTED

1. Whether the mailing of notice of default is proper to one of four addresses included on a deed of trust where the deed of trust holder did not specify which of the four addresses notice should be sent to?
2. Whether notices of an NRS 116 foreclosure default and sale were required to be sent to a first trust deed holder when Nevada law at the time did not require such unless a first trust deed holder formally requested such notices in advance from the HOA?
3. Whether there was fraud, oppression and unfairness in this NRS 116 foreclosure and sale to justify equitable relief?
4. Whether a bona fide purchaser without inquiry notice is protected from a defect in NRS 116 foreclosure he did not know about?
5. Whether a first trust deed holder is protected from an NRS 116 foreclosure sale by virtue of a mortgage protection clause?
6. Whether a first trust deed holder is entitled to equitable relief from an NRS 116 foreclosure sale when it did not exhaust its legal remedies?

STATEMENT OF THE CASE

This case involves an NRS 116 non-judicial foreclosure and sale of a piece of residential real property. Respondent's predecessor, Iyad Eddie Haddad, bought the property at an HOA foreclosure sale and then vested title immediately in a trust which later conveyed the property to respondent. Respondent believes all requirements of NRS 116 were met in the foreclosure and sale.

Although appellant argues that it was not mailed the Notice of Default, the evidence at trial shows it was mailed by the sales trustee to one of the four addresses that appellant included on its deed of trust – and appellant did not specify on its deed of trust to which address notices should be sent. In addition, the Notice of Default was not required to be mailed to appellant because it never requested such Notice from the HOA pursuant to NRS 116.31163(2) and NRS 116.31165(1)(b)(2).

Respondent also believes there was no fraud, oppression or unfairness connected with the sale, that respondent's predecessor was a bona fide purchaser without inquiry notice, and that appellant failed to exhaust its legal remedies.

FACTUAL BACKGROUND

Appellant did not include the trial exhibits in the Appellant's Appendix. Respondent has filed herewith true copies of selected trial exhibits which comprise Respondent's Appendix, referred to herein as "1RA" (there is only one volume).

On January 25, 2012, Iyad Eddie Haddad bought the subject property at 4254 Rollingstone Drive, Las Vegas, NV 89103 at an NRS 116 foreclosure sale conducted by sales trustee Alessi & Koenig, LLC ("Alessi") on behalf of Glenview West Townhomes Association ("HOA"). 1RA2-11 (a true copy of Trial Exhibit 4 – the deed of trust); He paid the purchase price of $5,331 (8AA1830(lines 13-22) and had title vested in 4254 Rolling Stone Dr. Trust. 1RA36-38 (a true copy of Trial Exhibit 9 – the Trustee's Deed Upon Sale).

At the time of the sale Mr. Haddad had no information about the property other than what was contained in the recorded documents on the property – he received no information from either Alessi or the HOA, he had no information about whether Notices were sent, he had no information about any dispute as to title by the holder of the first deed of trust, he did not speak to anyone about the property, and he did not inspect it. 8AA1839, line 5 to 1840, line 16.

In a Grant, Bargain and Sale Deed for the property recorded on May 29, 2012, title was passed from Rollingstone Drive Trust to Resources Group, LLC.

1RA40 (a true copy of an excerpt from Trial Exhibit 12 – the Grant, Bargan and Sale Deed).

The deed of trust for the property recorded on March 28, 2009 included four parties with four addresses: Southwest Financial Services, Ltd., US Recordings, US Bank Trust Company, National Association, and U.S. Bank National Association ND. 1RA3. The deed of trust did not contain any information about which one of the four to send notices or communications to, other than the following statement with regard to "US Recordings": "Return to (name and address): US Recordings, 2925 Country Drive STE 201, St. Paul, MN 55117." 1RA3. The representative of the bank who testified at trial could not explain why the deed of trust didn't specify which of the four addresses notices should be sent to. 7AA1698(lines 9-18). The deed of trust does contain a provision on "NOTICE" in Para. 16 but the bank witness agrees that that provision only applies to notices as between the parties to the deed of trust. 1RA8; 7AA1701, line 12 to 1702, line 4. The bank witness at trial did not know why the deed of trust did not specify who to send notices to. 7AA1698, lines 9-18.

The sales trustee Alessi mailed the Notice of Default and Election to Sell Under Homeowners Association Lien by regular and certified mail to US Recordings at the St. Paul, Minnesota address from the deed of trust on April 5, 2011. 8AA1785, line 25 to 1786, line 13; 1RA14-16; 17, 21-23 (a true copy of

excerpts from Trial Exhibit 7). He believes based upon the deed of trust that US Recordings is an agent of the beneficiary, and his company's policy was to mail to at least one of the parties listed on the deed of trust. 8AA1755, line 23 to 1756, line 20.

The sales trustee Alessi mailed the Notice of Sale by regular and certified mail on October 25, 2011 to US Recordings at the St. Paul, Minnesota address and to US Bank National Association, N.D. and U.S. Bank Trust Company at the addresses listed on the deed of trust. 8AA1785, line 25 to 1786, line 13; 8AA 1786, line 14 to 1787, line 20: 1RA17, 24-27 (a true copy of an excerpt of Trial Exhibit 7).

Alessi also mailed the Notice of Delinquent Assessment Lien certified mail to the homeowner on December 20, 2010. 7AA1740, line 23 to 1741, line 25; 1RA19-20 (a true copy of excerpts from Trial Exhibit 7). Alessi published the Notice of Sale and posted it on the property and at three locations in the county. 8AA1776, line 6 to 1777, line 18.

The HOA foreclosed on the superpriority lien because the owner first became delinquent in February of 2010 and remained delinquent until the sale on January 25, 2012, except for one payment of $414. 8AA1789, line 5 to 1792, line 2. The Notice of Delinquent Assessment Lien was recorded January 4, 2011,

meaning the nine-month period prior to same began on April 4, 2010. 1RA41. The monthly assessment was $130. 1RA32. Nine months of assessments was $1,170 (9 X $130). He only paid $414, so an amount of $756 was unpaid of the superpriority amount as of the time of sale and this was collected from the proceeds paid by the buyer. 8AA1789, line 5 to 1792, line 2.

The bank never requested of the HOA that Notices be sent to it. 7AA1689, lines 17-25; 7AA1690, line 19 to 1691, line 2.

In a lawsuit filed on January 18, 2012 (one week before the sale in this case), Resources Group was sued by an entity represented by attorney Ryan Kerbow and Resources Group was represented by attorney Michael Bohn, and Mr. Haddad had no relationship with Mr. Kerbow as of the date of the sale. 8AA1834, line 22 to 1838, line 13. The first time that Mr. Kerbow represented Mr. Haddad was April 9, 2012. 8AA1834, line 22 to 1838, line 13.

In a bankruptcy filing concerning the property five months after the sale, Mr. Haddad listed the claim of the first trust deed holder as "disputed." 8AA1825(lines 19-22); 8AA1814(lines 2-14). The bankruptcy case was dismissed. 8AA1812 (lines 19-20).

The court found for respondent. In its Findings of Fact and Conclusions of Law, the court found that all Notices were sent to the right addresses, that the bank

never requested notice from the HOA pursuant to NRS 116.31163(2) and NRS 116.311635(1)(b)(2) and therefore notices were not required to the bank, and that plaintiff was a bona fide purchaser without inquiry notice. The court also found no fraud, unfairness or oppression. The court found that the bankruptcy filings do not warrant application of the doctrine of judicial estoppel. It also found that the bank had failed to pursue all of its legal remedies and thus is not entitled to equitable relief. 7AA1559-1569.

SUMMARY OF ARGUMENT

Appellant was mailed the Notice of Default and the Notice of Sale. Notwithstanding this, there was no requirement at the time of the sale in early 2012 that such notices be mailed to a first trust deed holder, unless it formally requested such notices from the HOA and, in this case, there were no such requests.

For equitable relief, there must be a low sales price caused by fraud, oppression and unfairness – and fraud, oppression and unfairness, and there was none in this foreclosure and sale.

Respondent's predecessor was a bona fide purchaser without inquiry notice of any issues with regard to the notices and is therefore protected, and any remedy for appellant is with the HOA.

A mortgage protection clause does not protect appellant in a NRS 116 foreclosure and sale.

Appellant failed to exhaust its legal remedies and is therefore not entitled to equitable relief.

This court should affirm the Judgment of the lower court.

ARGUMENT

I.

APPELLANT WAS MAILED THE NOTICE OF DEFAULT AND THE NOTICE OF SALE

The evidence was undisputed that the Notice of Default was mailed regular mail and certified mail to US Recordings at its address in St. Paul, Minnesota. This was one of four parties and addresses that respondent included on its deed of trust. Respondent did not specify on its deed of trust which of the four addresses notices should go to, but US Recordings was the only one of the four that invited mailing to by stating "Mail to". Appellant's representative witness at trial could not explain why the deed of trust did not specify which of the four to mail to. The

sales trustee Alessi believed – reasonably – from the deed of trust that US Recordings was an agent of the beneficiary and therefore mailed to that address.

There is no requirement in the law that a foreclosure notice be mailed to every address on a deed of trust, particularly where the drafter of the deed of trust does not specify on the document where to mail notices to. Appellant is solely at fault for the lack of clarity in the deed of trust.

Appellant's claim that it never got the Notice of Default nor the Notice of Sale was not credible to the court, even though the law only requires mailing, not receipt. The Notice of Sale was mailed to three addresses on the deed of trust – US Recordings, US Bank National Association and US Bank Trust Company. This was at eight separate mailings based on regular and certified mail (two for the Notice of Default and six for the Notice of Sale) and yet appellant claimed it never got any of them. Respondent believes the district court did not find appellant's claim it did not get notice credible and this was one of the reasons it found there was no fraud, unfairness or oppression in this foreclosure.

II.

NOTWITHSTANDING THAT NOTICES WERE MAILED TO APPELLANT, THERE WAS NO REQUIREMENT UNDER THE LAW AT THE TIME TO DO SO

Respondent argues that mailing of the Notice of Default ("NOD") and the Notice of Sale ("NOS") to the recorded holder of the deed of trust in 2011 was required by Nevada statutory law. Nevada statutory law at the time did not require mailing to the recorded holder of the Deed of Trust. Mailing of the notices would have been required if respondent had requested such notice of the HOA prior to the recording of the NOD or NOS or recorded a request for such notice, but the evidence showed it never made or recorded such a request.

In order to determine whether or not the NOS was required to be mailed, one must examine the relevant statutes in effect in 2011. Appellant believes those are accurately quoted below in pertinent part. NRS 116.31163, which governs notices of default, stated in pertinent part:

> NRS 116.31163 Foreclosure of liens: Mailing of notice of default and election to sell to certain interested persons. The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:
>
> 1. Each person who has requested notice pursuant to NRS 107.090 or 116.31168;
>
> 2. *Any holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest* (emphasis added); and
>
> 3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.

(Added to NRS by 1993, 2355; A 2005, 2609)

Thus, according to NRS 116.31163 (which pertains only to a Notice of Default ("NOD"), the NOD was required to be given to trust deed holders of record who notified the association of its interest 30 days prior to recording of the NOD. Respondent never gave such notice.

Notice of the NOD was also required per NRS 116.31163 at that time to any person who has requested notice pursuant to NRS 107.090 or NRS 116.31168. NRS 116.31168 provided in pertinent part:

> NRS 116.31168 Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.
>
> 1. *The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed*. The request must identify the lien by stating the names of the unit's owner and the common-interest community (emphasis added).

NRS 107.090 provides in pertinent part:

> NRS 107.090 Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.
>
> 1. As used in this section, "person with an interest" means 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 any part of the real property is situated.

2. A person with an interest or any other person who is or may be held liable for any debt secured by a lien on the property desiring a copy of a notice of default or notice of sale under a deed of trust with power of sale upon real property *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.* The request must state the name and address of the person requesting copies of the notices and identify the deed of trust by stating the names of the parties thereto, the date of recordation, and the book and page where it is recorded (emphasis added).

3. The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:

(a) *Each person who has recorded a request for a copy of the notice*; and

(b) *Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust* (emphasis added).

4. The trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice of time and place of sale, addressed to each person described in subsection 3.

Thus, under NRS 116.31163, NRS 116.31168 and NRS 107.090, in order to be statutorily entitled to receive the NOS, a trust deed holder of record was required to either: 1) notify the association 30 days before the recording of the NOD of its interest (NRS 116.31163(2); or 2) record a request for notice of default

or notice of sale (NRS 116.31168 and NRS 107.090(2)). NRS 107.090(3)(a) requires notice to anyone who has recorded such a request for notice. However, NRS 107.090(3)(b) requires notice to: "Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust." That does not include by its plain language and meaning, the trust deed holder – it only applies to interests "subordinate to the deed of trust" and a deed of trust can't be subordinate to itself.

Now, NRS 116.311635, which governs notices of sale, states in pertinent part:

> NRS 116.311635 Foreclosure of liens: Providing notice of time and place of sale; service of notice of sale; contents of notice of sale; proof of service.
>
> 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:
>
> (a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:
>
> (1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and
>
> (2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

> (b) *Mail, on or before the date of first publication or posting, a copy of the notice by first-class mail to*:
>
> *(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;*
>
> *(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable (emphasis added);* and
>
> (3) The Ombudsman.

Thus, NRS 116.311635 only required the notice of sale be mailed the trust deed holder notified the HOA of its interest per NRS 116.31163(2) or it notified the association of its interest before the mailing of the notice of sale per NRS 116.311635(2).

Respondent never did any of those things, nor did it record a request for the notice of sale. No such evidence was provided to the lower court. It has only itself to blame. The law was clear that it could have requested notice of the HOA or it could have recorded a request for notice. It didn't do so.

Any argument that the deed of trust in this case constitutes a request for notice is spurious, as there is nothing in the document that requests such notice in compliance with the Nevada statutes, and any statutorily-compliant request would have to be clear as to its purpose.

III.

FOR EQUITABLE RELIEF, THERE MUST BE A LOW SALES PRICE CAUSED BY FRAUD, UNFAIRNESS OR OPPRESSION – AND FRAUD, OPPRESSION AND UNFAIRNESS – AND THERE WAS NONE

Although appellant focuses on the sales price of the property, there must also be fraud, unfairness or oppression in order to provide an equitable basis to avoid extinguishment.

In the *Shadow Wood* case, this Court made clear that even if there were an inadequate price, that *is not enough to justify equitable relief*. It stated:

> "[D]emonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside the sale; there must also be a showing of fraud, unfairness, or oppression."
>
> *Shadow Wood v. N.Y. Cmty. Bancorp*., 366 P.3d 1105, 1112 (2016).

Whatever the fair market value of the subject property may have been, inadequacy of price is not – by itself – enough to justify equitable relief to a first trust deed holder – there must also be evidence of fraud, unfairness or oppression.

For a sale to be set aside for equitable reasons, it must have an inadequate price *and* have an element of fraud, unfairness, or malice leading to the inadequate price. *Shadow Wood Homeowners Association, et. al. v. New York Community Bancorp, Inc.* 366 P. 3d 1105, 132 Nev. Adv. Rep. 5 (2016), citing *Long v. Towne* 98 Nev. 11, 13 629 P.2d 520,528 (1982). Absent "oppression, fraud, or malice" a

foreclosure sale cannot be set aside for price inadequacy alone. *See Golden v. Tomiyasu, 387 P.2d 989, 79 Nev. 503. 504 (1963)* ("mere inadequacy of price, without proof of some element of fraud, unfairness or oppression as *accounts for and brings about the inadequacy of price* is not sufficient to support a judgment setting aside the sale (emphasis added).").

In this case, appellant argued that, in addition to the notice issue, there was unfairness in that there was a relationship between someone who worked for the sales trustee Alessi at the time of the sale (Ryan Kerbow) and respondent. The argument was that respondent's manager (Mr. Haddad) hired attorney Kerbow to represent him in a case. Aside from the fact that appellant never provided evidence of what Mr. Kerbow did to advantage Mr. Haddad with regard to the sale, the evidence showed that, one week prior to the sale (January 18, 2012), Mr. Kerbow was actually representing a party in a case *against* Mr. Haddad and that Mr. Haddad did not first retain Mr. Kerbow as an attorney until April 9, 2012 – ten weeks after the sale on January 25, 2012.

Appellant also sought to show unfairness in that Mr. Haddad sought relief as to the property in a bankruptcy case. However, the evidence showed that Mr. Haddad only listed the deed of trust as a "disputed" claim, something he was required to do in the bankruptcy forms. Also, the bankruptcy case was dismissed without relief.

As to this issue, the lower court considered the doctrine of judicial estoppel (i.e., whether respondent should be precluded from claiming in the case at bar that he was not subject to the deed of trust based on what he said in the bankruptcy filing) and concluded based on the case of *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 163 P.3d 462, 468-469 (2007) that the doctrine did not apply to the case at bar because the five requirements to apply the doctrine were not met, including that respondent was not successful in the bankruptcy court, the two positions taken in the bankruptcy court and the case at bar were not totally inconsistent, and the conduct of respondent did not sabotage the judicial process. 7AA1564-1565, paras. 13-15.

In this case, appellant argues that the fair market value of the property was $48,000, while an expert for respondent testified that it was roughly the sales price at the sale ($5,331). Respondent's expert found the appellant's methodology flawed because it did not take into consideration the impaired factors affecting a property being sold at an NRS 116 foreclosure sale and that certain factual assumptions made by appellant's expert cannot occur in a foreclosure sale. See 8AA1909, line 2 to 1931, line 18. But the district court did not determine which evaluation was correct, given that there was no fraud, unfairness or oppression. 7AA1159-1569.

IV.

RESPONDENT'S PREDECESSOR WAS A BONA FIDE PURCHASER WITH NO KNOWLEDGE OF THE ISSUE REGARDING NOTICES AND IS PROTECTED AGAINST ANY ARGUMENT OF A DEFECT IN THE SALE

Appellant argues that plaintiff's precedessor, Mr. Haddad (the person who bought the property at the sale) was not a bona fide purchaser. This is irrelevant to whether the purchaser was a bona fide purchaser. "A subsequent purchaser is bona fide under common law principles if it takes the property 'for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry.'" *Shadow Wood, supra*, 366 P.3d at p. 1115 (citation to quoted case omitted).

The undisputed evidence at trial was that Mr. Haddad did not have any information about the property prior to sale, including about notices. There was therefore nothing to put him on inquiry notice of any defect in title or of whether the notices were properly mailed.

Appellant argues that Mr. Haddad knew about the recorded documents and the first deed of trust prior to the sale. But this is not enough to destroy bona fide purchaser status. Quiet title is an action in equity. In *Shadow Wood Homeowners Association, Inc. v. N.Y. Cmty. Bancorp, Inc.*, *supra*, 366 P.3d at 1111-1112, the

Court stated: "When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities. " *Id*. 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," *Ibid*., citing *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 (1967)("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties."). *Ibid*.

In *Shadow Wood*, the Nevada Supreme Court vacated the district court's grant of summary judgment for quiet title in favor of a bank and remanded because the district court did not take into account the harm that would occur to a bona fide purchaser after an HOA foreclosure sale. *Shadow Wood v. N.Y. Cmty. Bancorp*., *supra*, 366 P.3d at 1115. The Court went on to say that the fact the bank retained the right to bring a quiet title action "is not enough in itself to demonstrate that [subsequent purchaser] took the property with notice of any potential future dispute as to title. And [bank] points to no other evidence that [subsequent purchaser] had notice before it purchased the property, either actual, constructive, or inquiry, as to

[bank's] attempts to pay the lien and prevent the sale." *Id*. at 1116, citing *Lennartz v. Quilty*, 191 Ill. 174, 60 N.E. 913, 914 (1901) "(finding a purchaser for value protected under the common law who took the property without record or other notice of an infirmity with the discharge of a previous lien on the property.)" *Ibid*.

In *Shadow Wood*, the Court rejected this very same argument – that a recorded deed of trust was sufficient to put a purchaser on notice or that it had the ability to bring a quiet title action. *Id*. at 1115-1116. It added: "And NYCB points to no other evidence indicating that Gogo Way [purchaser] had notice before it purchased the property, either actual, constructive , or inquiry, as to NYCB's attempts to pay the lien and prevent the sale, or that Gogo Way knew or should have known that Shadow Wood claimed more in its lien that it actually was owed . . . " *Id*. at 1116. The same is true in the case at bar.

If, *arguendo*, the notices were defective, appellant may have a remedy against the sales trustee and the HOA but not against the bona fide purchaser. In two California appellate cases, the courts held that a bona fide purchaser is protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption. *Moeller v. Lien*, 25 Cal.App.4th 822, 831-832, 30 Cal.Rptr. 777 (1994). That court also referenced in support of its decision the case of *Munger v. Moore*, 11 Cal.App.3d 1, 9, 11, 89 Cal.Rptr. 323 (1970), where the court found that the conclusive presumption of a valid sale protected the bona fide

purchaser "even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor."

V.

A MORTGAGE PROTECTION CLAUSE IN THE CC&RS DOES NOT PROTECT APPELLANT FROM AN NRS 116 FORECLOSURE

The mortgage protection clause in the HOA's CC&Rs does not protect appellant. This Court expressly rejected that argument in the *SFR* decision. The Court stated: "NRS 116.1104 defeats this argument. It states that Chapter 116's "'provisions may not be varied by agreement, and rights conferred by it may not be waived … [e]xcept as expressly provided in Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien.'" *SFR Investments Pool 1 v. U.S. Bank, supra*, 334 P.3d at 419 (case quoted omitted).

VI.

APPELLANT FAILED TO EXHAUST ITS LEGAL REMEDIES AND THUS IS NOT ENTITLE TO EQUITABLE RELIEF

Appellant had numerous options to avoid the foreclosure on its first deed of trust which it did not utilize. It could have paid off the superpriority portion of the

lien prior to the sale. It could have also, as stated by this Court, paid off the entire HOA lien or established an escrow account for such payments. It could also have filed a court action to enjoin the sale and recorded a lis pendens on the subject property. Thus, the inequity of which U.S. Bank complains is "of its own making." See *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ____, _____, 334 P.3d 408, 414 (2014).

Because appellant did not pursue any of its legal remedies to stop the sale or inform potential purchasers prior to the sale as to a dispute as to title, it is not entitled to equitable relief. *Davenport v. State Farm*, 81 Nev. 361, 404 P.2d 10, 14 (1965); 19 Am Jur., Equity, Sec. 107, p. 107 and Sec. 119, pp. 120-121.

VII.

THIS COURT'S HOLDING IN SFR IS RETROACTIVE

The holding of this Court IN *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ____, _____, 334 P.3d 408 (2014) that foreclosure on a homeowner's lien extinguishes a first deed of trust is retroactive. *K&P Homes v. Christiana Trust*, 133 Nev., Advance Opinion 51 (filed July 27, 2017, Nevada Supreme Court Case No. 69966).

VIII.

CONCLUSION

It is respectfully requested that appellant's appeal be denied and that the Judgment of the district court be affirmed.

Date: June 7, 2018

GEISENDORF & VILKIN, PLLC

By: /s/ Richard Vilkin

Richard Vilkin, Esq.
Nevada Bar No. 8301
2470 St. Rose Parkway, Suite 309
Henderson, NV 89074
Phone: (702) 873-5868
Attorneys for respondent Resources Group, LLC

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 page 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 the 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.
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.

Date: June 7, 2018 GEISENDORF & VILKIN, PLLC

By: /s/ Richard Vilkin

Richard Vilkin, Esq.
Nevada Bar No. 8301
2470 St. Rose Parkway, Suite 309
Henderson, NV 89074
Phone: (702) 873-5868
Attorneys for respondent Resources Group, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of June, 2018.

Docket Number and Case Title:	Case No. 74575 (*U.S. Bank, N.A. N.D., appellant v. Resources Group, LLC, respondent*)
Case Category	Civil Appeal
Information current as of:	June 7, 2018

Electronic notification will be sent to the following: Richard Vilkin
Kristin Schuler-Hintz
Thomas Beckom

Dated this 7th day of June, 2018

/s/ Stacie Geisendorf
An employee of Geisendorf & Vilkin, LLC