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SUPREME COURT

STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE,

Appellant,

vs.

5316 CLOVER BLOSSOM CT TRUST, and COUNTRY GARDEN OWNERS ASSOCIATION,

Respondents.

No. 75861

RESPONDENT 5316 CLOVER BLOSSOM CT TRUST'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/respondent certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. 5316 Clover Blossom Ct Trust is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 5316 Clover Blossom Ct Trust.

3. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/respondent therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished the deed of trust assigned to U.S. Bank, National Association (hereinafter "defendant Bank").

2. Whether the superpriority lien held by Country Gardens Owners' Association (hereinafter "HOA") was extinguished when Alessi & Koenig, LLC (hereinafter "foreclosure agent") rejected the conditional tender of $1,494.50 made by Miles, Bauer, Bergstrom & Winters, LLP (hereinafter "Miles Bauer") on December 6, 2012.

3. Whether 5316 Clover Blossom Ct Trust (hereinafter "plaintiff") is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the HOA's rejection of the tender by Miles Bauer discharged the HOA's superpriority lien.

4. Whether the stipulated discovery deadline prevented the district court from granting plaintiff's motion.

5. Whether the district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment.

6. Whether judicial estoppel prevents plaintiff from claiming that the deed of trust was extinguished by the HOA foreclosure sale.

7. Whether defendant Bank is entitled to equitable relief against plaintiff from the extinguishment of the deed of trust.

8. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On April 23, 2015, plaintiff filed an amended complaint asserting three claims for relief: 1) entry of an injunction prohibiting defendant Bank and Clear Recon Corps (hereinafter "Clear Recon") from foreclosing the deed of trust recorded on June 30, 2004 against the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada (hereinafter "Property"); 2) for entry of a determination pursuant to NRS 40.010 that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) for entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (Appellant's Appendix (hereinafter "AA") Vol. I - 1, pgs. 1-4)

The amended complaint amended the allegations in plaintiff's verified complaint, filed on July 25, 2014. (AA Vol I-1, pgs. 5-9)

On September 25, 2014, defendant Bank filed an answer to complaint. (AA Vol. I-1, pgs. 10-15)

On May 18, 2015, plaintiff filed a motion for summary judgment. (AA Vol. I-1, pgs. 16-74)

On July 22, 2015, defendant Bank filed an opposition to plaintiff's motion and a countermotion for summary judgment. (AAI-1, pg. 75 to AAI-2, pg. 162)

On July 29, 2015, plaintiff filed a reply in support of plaintiff's motion for summary judgment and opposition to countermotion for summary judgment. (AAI-2, pgs. 163-183)

On August 13, 2015, defendant Bank filed a supplemental briefing in support of its countermotion and in opposition to plaintiff's motion. (AAI-2, pg. 184 to AAI-3, pg. 197)

On September 9, 2015, the court entered findings of fact, conclusions of law, and judgment granting quiet title to plaintiff. (AAI-3, pgs. 198-204)

On August 3, 2017, the court entered an order vacating judgment and setting further proceedings re: the court of appeals court order vacating judgment and remanding. (AAI-3, pg. 205)

On August 16, 2017, the parties filed a stipulation and order extending discovery that included a discovery cut-off date of January 24, 2018. (AAI-3, pgs. 206-209)

On October 10, 2017, defendant Bank filed an amended answer to plaintiff's amended complaint, counterclaims, and cross-claims. (AAII-1, pgs. 241 to AAII-3, pg. 323)

On October 23, 2017, plaintiff filed a motion to dismiss counterclaim. (AAII-3, pgs. 324 to AAII-4, pg. 379)

On November 9, 2017, defendant Bank filed an opposition to plaintiff's motion to dismiss counterclaim. (AAII-4, pgs. 380-484)

On November 21, 2017, plaintiff filed a reply in support of motion to dismiss counterclaim. (AAIII-1, pgs. 496-507)

On November 29, 2017, plaintiff filed supplemental authority in support of motion to dismiss counterclaim. (AAIII-2, pgs. 616-642)

On February 7, 2018, the court entered findings of fact, conclusions of law, and judgment in favor of plaintiff quieting title to the Property in plaintiff free of defendant Bank's deed of trust. (AAIII-2, pgs. 661-674)

Notice of entry of findings of fact, conclusions of law was served and filed on February 8, 2018. (AAIII-2, pgs. 680-695)

On February 26, 2018, defendant Bank filed a motion for reconsideration under NRCP 59. (AAIV-1, pg. 696 to AAIV-2, pg. 897)

On March 14, 2018, plaintiff filed an opposition to the motion for reconsideration under NRCP 59. (AAIV-2, pgs. 898-907)

On May 1, 2018, the court entered an order denying defendant Bank's motion for reconsideration under NRCP 59. (AAIV-2, pgs. 936-939)

Notice of entry of the order denying defendant Bank's motion for reconsideration under NRCP 59 was served and filed on May 1, 2018. (AAIV-2, pgs. 940-945)

Defendant Bank filed its notice of appeal on May 10, 2018. (AAV, pgs. 946-948)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $8,200.00 at a public auction held on January 16, 2013. See copy of foreclosure deed recorded on January 24, 2013. (AAII-3, pgs. 322-323)

The foreclosure deed arises from a delinquency in assessments due from Dennis L. Johnson and Geraldine J. Johnson (hereinafter "former owners") to the HOA pursuant to NRS Chapter 116.

The former owners were identified as the "Borrowers," Countrywide Home Loans, Inc. was identified as the "Lender," and MERS was identified as the

beneficiary in a deed of trust recorded against the Property on June 30, 2004. See copy of deed of trust at AAII-1, pgs. 261-292.

MERS assigned the deed of trust and the underlying note to plaintiff on June 20, 2011. See copy of assignment of deed of trust at AAII-1, pgs. 294-295.

On February 22, 2012, the foreclosure agent recorded a notice of delinquent assessment (lien) for $1,095.50 against the Property. (AAII-1, pg. 297)

On April 20, 2012, the foreclosure agent recorded a notice of default and election to sell for $3,396.00 against the Property. (AAII-1, pg. 301)

On October 31, 2012, the foreclosure agent recorded a notice of trustee's sale for $4,039.00 against the Property. (AAII-1, pg. 303)

On November 21, 2012, Miles Bauer sent a letter to the HOA c/o the foreclosure agent on behalf of BAC Home Loans Servicing, LP stating its position that "nine months' of common assessments pre-dating the NOD" was "the amount BANA should be required to rightfully pay to full discharge its obligations to the HOA per NRS 116.3102." (AAII-2, pgs. 309-310)

On November 27, 2012, the foreclosure agent faxed an amended demand for $4,186.00 to A. Bhame that included an account history report for the Property, dated August 6, 2012. (AAII-2, pgs. 312-314)

On December 6, 2012, Miles Bauer sent a letter to the foreclosure agent and enclosed a check for $1,494.50 drawn payable to the foreclosure agent from Miles Bauer's trust account. (AAII-2, pg. 316 to AAII-3, pg. 318)

The foreclosure agent returned this check to Miles Bauer. (AAII-2, pg. 307, ¶9)

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant Bank's first deed of trust when plaintiff purchased the real property at the public auction held on January 16, 2013.

The HOA's superpriority lien was not extinguished when the HOA or its foreclosure agent rejected the conditional tender made by Miles Bauer.

Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the superpriority portion of the lien was extinguished by Miles Bauer's conditional tender.

The stipulated discovery deadline did not prevent the district court from granting plaintiff's motion.

The district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment because defendant Bank presented "matters

outside the pleadings" to the district court.

The bankruptcy petition and other bankruptcy pleadings filed by River Glider Avenue Trust do not affect the rights obtained by plaintiff by paying the high bid made at the HOA foreclosure sale.

Defendant Bank is not entitled to equitable relief against plaintiff because it had an adequate remedy at law against the HOA and its foreclosure agent.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. The trust deed was extinguished by the HOA foreclosure sale.

NRS 116.3116(2) provides in part that the HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action

to enforce the lien . . . ."

The statute does not state that the superpriority amount is measured by the assessments which "are" past due or unpaid on the date that the action to enforce the lien is instituted. The superpriority amount is instead measured by the assessments "which would have become due" during the nine months prior to the enforcement of the lien. The amount of each of the assessments is measured by the HOA's "periodic budget."

The deed of trust, recorded on June 30, 2004, falls squarely within the language in NRS 116.3116(2)(b).

In the present case, the notice of delinquent assessment (lien) stated that the lien was recorded "[i]n accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) . . ." (AAII-1, pg. 297)

When the deed of trust was recorded on June 30, 2004, NRS 116.3116(5) stated:

> Recording of the declaration constitutes record notice and perfection of the lien. No recordation of any claim of lien for assessment under this section is required.

As recognized by this Court in SFR Investments Pool 1, LLC v. U.S. Bank,

N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014), and in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5, 388 P.3d 970, 975 (2017), both the CC&Rs and the statute enacted in 1991 provided defendant Bank with notice that the deed of trust was subordinate to the HOA's superpriority lien rights.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this Court stated that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." 334 P.3d at 419.

Each notice recorded and served by the HOA and its foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 418.

Because the high bid of $8,200.00 made by plaintiff to purchase the Property exceeded the full amount of the $4,039.00 stated in the notice of trustee's sale (IIAA-1, pg. 303), the HOA necessarily foreclosed its entire lien, including the unpaid superpriority portion, and extinguished the deed of trust assigned to defendant Bank.

2. The HOA's superpriority lien was not extinguished when the HOA or its foreclosure agent rejected the conditional tender made by Miles Bauer.

At page 14 of Appellant's Opening Brief, defendant Bank states that "BANA's offer and check for the superpriority portion of the lien were a sufficient tender that extinguished that part of the lien."

On the other hand, as discussed at pages 18 to 20 of plaintiff's motion to dismiss counterclaim (IIAA-3, pgs. 341-343) and at page 6 of plaintiff's reply in support of motion to dismiss counterclaim (IIIAA-1, pg. 501), the rules regarding payment and discharge when a payment is tendered by a person who is "not primarily responsible for performance" of a debt or obligation are stated in subsections e, f and g of Restatement (Third) of Prop.: Mortgages, § 6.4 (1997), as follows:

> **§ 6.4 Redemption from Mortgage by Performance or Tender**
>
> . . .
>
> (e) A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, **by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance, does not extinguish the mortgage**, but redeems the interest of the person performing from the mortgage and entitles the person performing to subrogation to the mortgage under the principles of §7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.
>
> (f) Upon receipt of performance as provided in Subsection (e), the

mortgagee has **a duty to provide to the person performing, within a reasonable time, an appropriate assignment of the mortgage in recordable form.** If the mortgagee fails to do so upon reasonable request, the person performing may obtain judicial relief ordering the mortgage assigned and, unless the mortgagee acted in good faith in rejecting the request, awarding against the mortgagee any damages resulting from the delay.

(g) An **unconditional tender of performance in full by a person described in Subsection (e),** even if rejected by the mortgagee**, if kept good** has the effect of performance under Subsections (e) and (f) above. (emphasis added)

At the threat of foreclosure by a senior lien, a junior lienor is entitled, even without express contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay off the senior lien and become subrogated to the rights of the senior lienholder as against the owner of the property. See Restatement (Third) of Prop.: Mortgages §7.6; American Sterling Bank v. Johnny Management LV, Inc., 126 Nev. 423, 245 P.3d 535 (2010); Houston v. Bank of America 119 Nev. 485, 78 P.3d 71 (2003).

Comment a to Section 6.4 of the Restatement (Third) of Prop.: Mortgages explains the distinction between payment or tender by someone primarily liable for the debt, and payment or tender by a party seeking to protect its interest in the property. It states in part:

Equitable redemption is ultimately accomplished by performance in full of the obligation secured by the mortgage. **However, redemption has**

> **two quite distinct results, depending on whether the performance is made by a person who is primarily responsible for payment of the mortgage obligation, or by someone else who holds an interest in the land subordinate to the mortgage**. In the first of these situations, the mortgage is simply extinguished, as provided in Subsection (a) of this section. **In the second, the mortgage is not extinguished, but by virtue of Subsection (e) is assigned by operation of law to the payor under the doctrine of subrogation;** see §7.6. Subrogation does not occur in the first situation, since one who is primarily responsible for payment of a debt cannot have subrogation by performing that duty; see §7.6, Comment b. (emphasis added)

Subrogation is a device adopted by equity which applies in a great variety of cases and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915).

Comment g to Section 6.4 of the Restatement further explains the distinction when redemption is made by a subordinate lienholder:

> The second distinction, mentioned above, is that redemption by a person who is not primarily responsible for payment of the debt **does not extinguish the mortgage, but rather assigns both the mortgage and the debt to the payor by operation of law under the doctrine of subrogation**; See §7.6 (emphasis added)

Paragraph F on page 3 of 4 of the Planned Unit Development Rider to the deed of trust (AAII-1, pg. 291) states:

> If Borrower does not pay PUD dues and assessments when due, then

> Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

This language is consistent with Restatement (Third) of Prop.: Mortgages §6.4(e) and (f) that treat any payment offered by Miles Bauer as creating an assignment.

At the bottom of page 14 and top of page 15 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 117 (2018), that "[a] valid tender of payment operates to discharge a lien." As amended by this Court on November 13, 2018, this line now reads: "A valid tender of payment operates to discharge a lien or cure a default."

On the other hand, the law of real property in Restatement (Third) of Prop.: Mortgages, §§ 6.4 (a) and 6.4(b) provides that a lien is discharged only if the payment is made "by one who is primarily responsible for performance of the obligation." In the present case, defendant Bank was not primarily responsible for payment of the HOA's common assessments – the former owners were. Likewise, the law of real property does not provide that a conditional offer of payment made

by one who is "not primarily responsible for performance" could "cure a default."

Even if the HOA had accepted the conditional tender made by Miles Bauer on December 6, 2012 (AAII-2, pg. 316 to AAII-3, pg. 318), the conditional payment could not "discharge" or "cure" the former owners' default in payment. It could only "assign" the HOA's superpriority lien rights to the subordinate lienholder making the payment.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court quoted from Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13, 16 (Wis. 1972), that "[a] lien may be lost by . . . payment or tender of the proper amount of the debt secured by the lien." In that case, however, Power Transmission was the person "primarily responsible" for payment of the lien asserted by Beloit, so the Supreme Court of Wisconsin did not discuss in any way the effect of a payment offered by a subordinate lienholder like defendant Bank.

The Wisconsin Supreme Court also stated that "an excessive demand does not waive the lien" if the demand is "made in good faith and in belief that the person making the demand is entitled to such sum and that he has a general lien upon the specific goods." Id. at 544-545.

At the bottom of page 15 and top of page 16 of Appellant's Opening Brief, defendant Banks states that the tender for $1,494.50 made by Miles Bauer included

"$495.00 for delinquent assessments and $999.50 in 'reasonable collection costs' to satisfy the superpriority lien." On the other hand, instead of including the full amount of the fees and costs of $2,850.00 identified by the foreclosure agent in its facsimile cover letter, dated November 27, 2012 (AAII-2, pgs. 312-313), Miles Bauer arbitrarily divided that amount by three and included only $950.00 for collection costs in the check for $1,494.50. (AAII-2, pg. 314)

Page two of the cover letter by Rock K. Jung, Esq. stated that the check for $1,494.50 was a "non-negotiable amount" that the HOA must agree "paid in full" both "9 months worth of common assessments **as well as reasonable collection costs** to satisfy its obligations to the HOA as a holder of the first deed of trust against the property." (AAII-3, pg. 317) (emphasis added) The cover letter also included a specific reference to "the Nevada Real Estate Division's Advisory Opinion of December 2010, which was recently ratified in the Nevada Supreme Court's *non-published* opinion on May 23, 2012." (AAII-3, pg. 317)

The check for $1,494.50 was not a "cashier's check" as represented by Mr. Jung, but only a check drawn on Miles Bauer's "Trust Account" at Bank of America. (AAII-3, pg. 317)

As acknowledged in the cover letter by Rock K. Jung, Esq., on December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels

(hereinafter "CCICCH") issued Advisory Opinion 2010-01 that stated:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.
>
> Id. at 1.

In the conclusion to Advisory Opinion 2010-01, the CCICCH stated:

> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien**. (emphasis added)
>
> Id. at 12.

Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) included "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

In addition, this Court stated on August 2, 2012 in State Dep't of Business & Industry, Financial Institutions Div'n v. Nevada Ass'n Services, Inc., 128 Nev. Adv. Op. 54, 294 P.3d 1223, 1227-1228 (2012): "We therefore determine that the plain language of the statute requires that the CCICCH and the Real Estate Division, and

no other commission or division, interpret NRS Chapter 116."

At page 16 of Appellant's Opening Brief, defendant Bank states that in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court "considered a nearly identical tender." The record on appeal, however, does not include any evidence proving that the terms, conditions, timing or amount of the tender made in Bank of America, N.A. v. SFR Investments Pool 1, LLC are "nearly identical" to the conditional tender made by Miles Bauer in the present case.

Furthermore, in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court did not address the "good-faith rejection argument" because "SFR did not present its good-faith rejection argument to the district court." 427 P.3d at 118. In footnote 1 of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 427 P.3d at 117, n. 1, this Court stated that "SFR argues for the first time in its petition for review that Bank of America's tender was insufficient because it did not include collection costs and attorney fees." This Court also stated that "SFR waived this argument, both by failing to raise it timely in district court and by failing to cogently distinguish the statutory and regulatory analysis in *Horizons at Seven Hills*."

In footnote 3 at page 15 Appellant's Opening Brief, defendant Bank cites

BAC Home Loans Servicing LP v. Aspinwall Court Trust, No. 69885, 2018 WL 3544962 (Nev. July 20, 2018)(unpublished disposition), but in footnote 2, this Court stated that "[w]e decline to consider Aspinwall's arguments, raised for the first time on appeal, that BAC's tender imposed improper conditions and that BAC was required to keep the tender good."

I In footnote 3 at page 15 Appellant's Opening Brief, defendant Bank also cites 2713 Rue Toulouse Trust v. Bank of America, N.A., No. 68206, 2018 WL 3545359 (Table) (Nev. July 20, 2018)(unpublished disposition), but this Court declined to consider "appellant's argument that Bank of America imposed improper conditions on its tender" because "that argument was not coherently made in district court." Id. at *1.

In the present case, on the other hand, plaintiff timely raised this argument at pages 6 to 8 of plaintiff's reply in support of motion to dismiss counterclaim. (IIIAA-1, pgs. 501-503)

At page 17 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC that "[a] plain reading of NRS 116.3116 indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that

portion of the lien." 427 P.3d at 118.

The law of real property provides, however, that the issue is not whether Miles Bauer tendered an amount that was later determined to be correct, but whether the foreclosure agent "wrongfully rejected" the offer based on the state of the law at the time the tender was made.

In Bank of America, N.A. v. Rugged Oaks Investments, LLC, No. 68504, 383 P.3d 749 (Table), 2016 WL 5219841 (Nev. Sept. 16, 2016) (unpublished disposition), this Court quoted from 59 C.J.S. Mortgages § 582 that "[i]t has been held . . . that a good and sufficient tender on the day when payment is due will relieve the property from the lien on the mortgage, except where the refusal [of payment] was . . . grounded on an honest belief that the tender was insufficient."

At page 18 of Appellant's Opening Brief, defendant Bank quotes from Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), where this Court cited Hohn v. Morrison, 870 P.2d 513 (Colo. App. 1993), as authority that "[w]hen rejection of a valid tender is unjustified, the tender effectively discharges the lien."

In Hohn v. Morrison, 870 P.2d 513, 517-518 (Colo. App. 1993), the court stated:

> Although this is an issue of first impression in Colorado, other jurisdictions which have adopted the lien theory of real estate mortgages have also adopted the rule that an unconditional tender of the amount due by the debtor releases the lien of the mortgage **unless the creditor establishes a justifiable and good faith reason for the rejection** of the tender. Moore v. Norman, 43 Minn. 428, 45 N.W. 857 (1890); Renard v. Clink, 91 Mich. 1, 51 N.W. 692 (1892); Easton v. Littooy, 91 Wash. 648, 158 P.531 (1916) (tender of the full amount due operates to discharge the lien of the mortgage **if the tender is refused without adequate excuse**.) (emphasis added)

In First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court stated:

> "To constitute a sufficient tender, it must be unconditional. *Where a larger sum than that tendered is in good faith claimed to be due*, the tender is ineffectual as such if its acceptance involves the admission that no more is due." (Emphasis ours.)

In Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913), the Kansas Supreme Court stated:

> A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. Moore v. Norman, 52 Minn. 83, 53 N.W. 809, 18 L.R.A. 359, 38 Am. St. Rep. 526, and not page 529; 38 Cyc. 152, and cases cited in note 152, 153.

Because the Nevada Real Estate Division did not issue its Advisory Opinion No. 13-01 until December 12, 2012, the only authority that existed to guide the HOA on December 6, 2012 was Advisory Opinion No.2010-01 and NAC 116.470.

Furthermore, even though Advisory Opinion No. 13-01 adopted a different method of calculating the HOA's superpriority lien than Advisory Opinion No.2010-01, the conflict between the two methods of calculating the amount of the superpriority lien was not resolved by this Court until the opinion in Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016), was issued on April 28, 2016. This is a date more than three years after Miles Bauer made its "non-negotiable" offer of only $1,494.50 on December 6, 2012 and after the public auction held on January 16, 2013.

Furthermore, the interpretation of the statute in Horizons at Seven Hills v. Ikon Holdings, LLC, did not involve a tender made by a subordinate lienholder prior to an HOA foreclosure sale. This Court instead determined how to calculate the amount of the HOA's assessment lien that survived a lender's foreclosure of its deed of trust.

Again, the issue in the present case is whether the HOA and its foreclosure agent had a "good faith" reason to believe that collection costs and reasonable attorneys' fees were part of the HOA's superpriority lien and not whether that belief turned out to be correct.

In this regard, the Oklahoma Supreme Court stated in First Nat. Bank of Davis

v. Britton that:

> **The lien is not released** as a result of a tender **if the creditor in good faith, even though erroneously, claims a greater amount due than is later found to be actually due and owing**, where the acceptance of the lesser amount involves an admission that the amount tendered is sufficient.
>
> 94 P.2d at 898.

When the authorities that existed on December 6, 2012 are considered, defendant Bank did not prove that the HOA and its foreclosure agent wrongfully rejected the non-negotiable amount of $1,494.50 offered by Miles Bauer as payment "in full."

At page 18 of Appellant's Opening Brief, defendant Bank states that "[t]he district court's reasoning would put obligors completely at the mercy of lienholders" who "would be able to wipe out other property interests **for any reason whatsoever**." (emphasis added) This is not plaintiff's argument, and this is not what the "good faith" standard discussed above provides.

Defendant Bank also objects to having to pay "the entire HOA lien" or "seeking to enjoin the HOA's sale" as suggested by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014). However, because defendant Bank cannot and did not prove that the HOA wrongfully rejected the conditional tender of only $1,494.50 made by Miles Bauer,

the HOA necessarily foreclosed the superpriority portion of its lien that remained unpaid on January 16, 2013. By permitting the HOA to foreclose the superpriority portion of its lien without objection, defendant Bank allowed the subordinate deed of trust to be extinguished.

3. Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim that the superpriority portion of the lien was extinguished by Miles Bauer's conditional tender.

At page 19 of Appellant's Opening Brief, defendant Bank cites Bank of America, N.A. v. SFR Investments Pool 1, LLC, as authority that "when the superpriority portion of the lien has been discharged, 'a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.'" 427 P.3d at 121.

As noted above, however, the law of real property provides that a tender made by "one who holds an interest in the real estate subordinate to the mortgage [superpriority lien] but is not primarily responsible for performance, does not extinguish the mortgage [superpriority lien]," but instead entitles the person making payment to receive an assignment of the superpriority lien rights. Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court quoted from NRS 111.315 and italicized the words "in the manner prescribed in this

chapter." 427 P.3d at 119. The words "in the manner prescribed in this chapter" in NRS 111.315 refer to how the conveyance or instrument in writing is "proved, acknowledged and certified." In this regard, Section 6.4(f) of the Restatement requires that the person accepting payment from a subordinate lienholder provide "the person performing, within a reasonable time, an appropriate assignment of the mortgage [super priority lien] in recordable form." The "assignment" required by the law of real property falls squarely within the language used in NRS 111.315.

This Court also quoted the definition of the word "instrument" from Black's Law Dictionary (10th ed. 2014), but the "appropriate assignment in recordable form" provided by Section 6.4(f) of the Restatement falls within the definition of the word "instrument."

The definition of the word "conveyance" in NRS 111.010(1) includes "every instrument in writing" by which an "interest in lands" is "assigned." Because a tender made by a subordinate lienholder creates an "assignment," such a tender also falls squarely within the definition of the word "conveyance" in NRS 111.010(1).

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court also cited NRS 116.3116 as support for the statement that "Bank of America's tender cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law." 427 P.3d at 120. On the other hand, the words

"cured the default" do not appear anywhere in NRS 116.3116. As provided by Section 6.4 of the Restatement, a proper tender could at most "assign" the superpriority portion of the HOA's assessment lien.

This Court also cited NRS 116.3116(1)-(3) as support for the statement that "NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder." 427 P.3d at 120. No such language appears anywhere in NRS 116.3116. NRS 116.3116(3) instead provides for the creation of an escrow account or impound account to pay all of the assessments for common expenses.

This Court also quoted from the official comments to § 3-116 of the Uniform Common Interest Ownership Act, but the official comments do not state that a tender made by a lender "cures" the default or "prevents foreclosure" of the lien "by operation of law." The law of real property instead provides that such a payment, if accepted, "assigns" the superpriority lien rights to the subordinate lienholder. Comments a and g to Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

This Court also stated that "[b]ecause the lien is not discharged using an instrument, NRS Chapter 106 does not apply." 427 P.3d at 120. Again, however, the law of real property states that the tender by the subordinate lienholder does not "discharge" the mortgage [superpriority lien], but "entitles the person performing to

subrogation." Restatement (Third) of Prop.: Mortgages, § 6.4(e)(1997). Section 6.4(f) of the Restatement in turn requires that the assignment be proved by "an appropriate assignment of the mortgage in recordable form" or that the person performing "obtain judicial relief ordering the mortgage assigned."

The law of real property does not allow the HOA's superpriority lien to be discharged or satisfied by an unrecorded tender made by the holder of a subordinate deed of trust. No language in NRS 116.3116 contradicts the established principles of real property law in Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

At pages 27 and 28 of its motion to dismiss (AAII-3, pgs. 350-351), plaintiff also discussed defendant Bank's failure to allege or prove that Miles Bauer kept the rejected tender "good." In Bank of America, N.A. v. SFR Investments Pool, this Court quotes the following language from comment d to Restatement (Third) of Prop.: Mortgages, § 6.4, pg. 427 (1997): "The tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment." 427 P.3d at 120.

In the present case, defendant Bank did not allege or prove that BAC Home Loans Servicing, LP was ready, willing or able to pay the superpriority portion of the assessment lien after the HOA rejected the conditional tender of only $1,494.50 made by Miles Bauer on December 6, 2012.

In Section E of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court stated that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." 427 P.3d at 121. This Court cited Henke v. First Southern Properties, Inc., 586 S.W.2d 617 (Tex. App. 1979), where the foreclosing lender holding the first deed of trust agreed with the property owner to reinstate the loan if $2,156 was paid by September 30, 1974, and "the money was paid by the specified time (September 30, 1974) and accepted with the advice that Henke's loan had been reinstated." Id. at 618. The lender then assigned the note and deed of trust to Continental Bank, and Continental Bank assigned the note and deed of trust to Harold E. Bro who sold the property at a trustee's sale on October 1, 1974 even though the loan was not in default. Id.

Under these facts, the court found:

> Substitute trustee Hedblom in the case at bar had no power to convey because the note was not in default; the substitute trustee's deed was void; First Southern acquired no title to the property, and the trial court correctly rendered judgment for plaintiffs for the property.

Id. at 620.

In the present case, on the other hand, defendant Bank did not allege or prove that the HOA agreed to reinstate the former owner's account in return for the payment of $1,494.50 offered by Miles Bauer on December 6, 2012.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this Court also

quoted from Section 7:21 in 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law (6th ed. 2014), that "[t]he most common defect that renders a sale void is that the mortgagee had no right to foreclose . . . ." None of the examples discussed in Section 7:21, however, involved a conditional tender made by a subordinate lienholder that had been rejected in good faith.

Section 7:21 instead discusses the distinction between defects in the exercise of a power of sale that render a sale void, voidable, or inconsequential. Section 7:21 also states: "Most defects render the foreclosure *voidable* and not void" and that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at pgs. 956-957.

This Court also stated that "[b]ecause Bank of America's valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion." 427 P.3d at 121.

Again, however, because the law of real property provides that a tender made by a subordinate lienholder acts as an "assignment" and not as a "discharge" or "satisfaction," the superpriority portion of the assessment lien remained unpaid on the date of the HOA foreclosure sale. Because the "assignment" was not recorded,

NRS 111.325 expressly provides that the "assignment" created by such a tender is void against plaintiff because the foreclosure deed was first recorded.

Nevada law requires that interests in real property be recorded. An unrecorded interest in property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tai-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

NRS 111.315 states:

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

Because defendant Bank did not record any claim that the superpriority lien was paid, NRS 111.325 provides that defendant Bank's unrecorded claim of tender is void against the innocent purchaser–plaintiff. NRS 111.325 states:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, **shall be void as against any subsequent purchaser**, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded. (emphasis added)

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016), this Court stated that the purchaser at an HOA sale is entitled to rely on the recorded notices as proof that the HOA foreclosed a superpriority lien:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.,* 334 P.3d at 412–13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, **as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary,** the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser**.** (emphasis added)

In the present case, each of the notices recorded by the foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014), and none of the notices indicated that the superpriority lien had been paid.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d

765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, and because defendant Bank did not record any document stating that the HOA's lien did not include a superpriority amount, plaintiff is protected as a bona fide purchaser from that unrecorded claim.

Public policy is not served by allowing a lender to wait until after a

foreclosure sale to assert an unrecorded claim or objection that alters the rights acquired by the high bidder. The statute must instead be interpreted to protect the foreclosure sale purchaser's expectations based on the documents recorded prior to the sale. If this court permits the expectations of a high bidder like plaintiff to be frustrated by information that did not appear in the public record prior to the sale, bidding at HOA foreclosure sales will be chilled, and the nonjudicial foreclosure process created by the Nevada Legislature will become useless.

In Melendrez v. D&I Investment, Inc.,127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (2005), the court discussed the benefits of encouraging experienced buyers to bid at foreclosure sales:

> A holding that an experienced foreclosure buyer perforce cannot receive the benefits of the law as a BFP if he or she buys property for substantially less than its value would chill participation at trustee's sales by this entire class of buyers, and, **ultimately, could have the undesired effect of reducing sales prices at foreclosure**. (emphasis added)
>
> 26 Cal. Rptr. at 426.

In Homestead Savings v. Darmiento, 230 Cal. App. 3d 424, 434, 281 Cal. Rptr. 367, 372 (1991), the court stated that "[t]he statute was clearly designed to provide incentives to the public at large to attend the sales in order to obtain a better price at the sale."

Because defendant Bank did not record any document disclosing the assignment allegedly created by Miles Bauer's conditional tender before the foreclosure deed was recorded, the unrecorded claim the HOA wrongfully rejected the conditional tender is void as to plaintiff.

4. The stipulated discovery deadline did not prevent the district court from granting plaintiff's motion.

At pages 20 and 21 of Appellant's Opening Brief, defendant Bank states that "the district court granted summary judgment to Clover Blossom only a few months after the Court of Appeals' decision" and that "[s]ignificantly, the stipulated discovery period was still open."

On the other hand, neither NRCP 12 nor NRCP 56 contains any language that requires that the discovery be closed before the district court can grant a motion to dismiss or a motion for summary judgment.

NRCP 56(f) permits a party to state by affidavit the reasons why a party cannot "present by affidavit facts essential to justify the party's opposition," but defendant Bank did not provide the district court with such an affidavit or make such request until defendant Bank filed its motion for reconsideration under NRCP 59.

5. The district court properly treated plaintiff's motion to dismiss counterclaim as a motion for summary judgment because defendant Bank presented "matters outside the pleadings" to the district court.

At page 22 of Appellant's Opening Brief, defendant Bank stated that the district court violated NRCP 12(b) by treating plaintiff's motion to dismiss counterclaim as a motion for summary judgment and not giving defendant Bank a "reasonable opportunity to present all material pertinent to such a motion by Rule 56."

In the present case, however, it was defendant Bank that supported its opposition to plaintiff's motion to dismiss with "matters outside the pleadings." *See* Exhibits A to defendant Bank's opposition, filed on November 9, 2017, at AAII-4, pgs. 402-460, and *see* Exhibits A to F to defendant Bank's motion for reconsideration at AAIV-1, pg. 714 to AAIV-2, pg. 897.

If defendant Bank did not want the district court to treat plaintiff's motion as a motion for summary judgment, defendant Bank should have relied only on matters in the pleadings, which would include the exhibits to defendant Bank's counterclaim.

In Baxter v. Dignity Health, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015), this Court stated:

> But "the court is not limited to the four corners of the complaint." 5B Charles Alan Wright & Arthur Miller, Federal Practice & Procedure: Civil § 1357, at 376 (3d ed.2004). Under NRCP 10(c), "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." A court "may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." United States v.

> Corinthian Colleges, 655 F.3d 984, 999 (9th Cir.2011) (internal quotation omitted); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (in evaluating a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on [Fed.R.Civ.P.] 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference") (citing 5B Charles Alan Wright & Arthur Miller, supra, § 1357).

In the present case, Exhibits A to H to defendant Bank's amended answer to plaintiff's amended complaint, counterclaims, and cross-claims (AAII-1, pgs. 260 to AAII-3, pg. 323) prove that the HOA and its foreclosure agent timely recorded every notice required to properly foreclose the HOA's assessment lien and that the HOA properly rejected the conditional tender made by Miles Bauer.

Defendant Bank cannot object to an action taken by the district court that was created solely by defendant Bank's decision to introduce matters outside the pleadings in support of its opposition.

6. The bankruptcy petition and other bankruptcy pleadings filed by River Glider Avenue Trust do not affect the rights obtained by plaintiff by paying the high bid made at the HOA foreclosure sale.

At page 23 of Appellant's Opening Brief, defendant Bank states that bankruptcy pleadings filed by an entity that is separate and independent from plaintiff (i.e. River Glider Trust) prove that plaintiff could not be a bona fide purchaser in the present case. The Chapter 11 petition was filed by River Glider

Trust on July 3, 2012. See voluntary petition at AAIV-1, pgs. 744-782.

Defendant Bank misstates the meaning attributed to River Glider Trust listing certain creditors in Schedule D of the bankruptcy schedules. Listing a creditor is not an admission by the debtor that the creditor's claim is valid. 11 U.S.C. § 101(10)(A) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," and 11 U.S.C. § 101(5)(A) defines a "claim" to be a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, **disputed**, undisputed, legal, equitable, **secured, or unsecured** . . . ." (emphasis added) 11 U.S.C. § 521(a)(1) requires that the debtor file "a list of creditors" and "a schedule of assets and liabilities."

By complying with the requirements of the Bankruptcy Code, River Glider Trust did not admit that any of the deeds of trust were not affected by the foreclosure of the HOA's superpriority lien. Because no court had yet resolved the issue, the debtor was required to list each lender as a creditor even though River Glider Trust believed that each deed of trust had been extinguished.

Similarly, the motions filed with the bankruptcy court on July 5, 2012 (AAIV-1, pgs. 784-794) and November 8, 2012 (AAIV-1, pgs. 796-801) were necessary because on that date, this Court had not yet entered its decision in SFR Investments

Pool 1, LLC v. U.S. Bank, N.A., which adopted River Glider Trust's understanding that the HOA's foreclosure of its superpriority lien extinguished the prior recorded deeds of trust.

The same is true of the omnibus response to orders to show cause filed on November 5, 2012 by four trusts other than plaintiff. (AAIV-1, pg. 803 to AAIV-2, pg. 897)

This Court discussed the doctrine of judicial estoppel in NOLM, LLC v. County of Clark, 120 Nev. 736, 100 P.3d 658 (2004), and this Court stated:

> However, judicial estoppel should be applied only when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." Judicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process.
>
> > [T]he doctrine generally applies "when "`(1) **the same party has taken two positions**; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) **the party was successful in asserting the first position** (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'"" (emphasis added)

100 P.3d at 663.

Defendant Bank did not prove the elements of judicial estoppel because none of the bankruptcy pleadings were filed by plaintiff or involved the Property. There is also no "risk of inconsistent court determinations" because the Bankruptcy Court

did not make a final determination regarding whether or not each deed of trust was not extinguished by an HOA foreclosure sale.

7. Defendant Bank is not entitled to equitable relief against plaintiff because defendant Bank has an adequate remedy at law against the HOA and the foreclosure agent.

As stated at pages 7 to 10 of plaintiff's motion to dismiss counterclaim (AAII-3, pgs. 330-333), even if the HOA and its foreclosure agent wrongfully rejected the conditional offer made by Miles Bauer, defendant Bank had legal remedies available to it that prevent defendant Bank from obtaining equitable relief against plaintiff.

According to the United States Supreme Court, equitable relief is not available when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992).

This same limitation on the availability of equitable relief has consistently been applied by this Court. Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982); County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961); State v. Second Judicial District Court, 49 Nev. 145, 241 P. 317, 321-322 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568, 574 (1909); Conley v. Chedic, 6 Nev. 222, 224 (1870); Sherman v.

Clark, 4 Nev. 138 (1868).

In County of Washoe v. City of Reno, this Court stated that "our concern is with the existence of a remedy and not whether it will be unproductive in this particular case [citation omitted], or inconvenient [citation omitted], or ineffectual [citation omitted]." 360 P.2d at 604.

In Shadow Wood, this Court stated:

> Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property.

366 P.3d at 1115, n. 7.

In Shadow Wood, this Court also stated that Gogo Way's "putative status as a bona fide purchaser" had a bearing on the bank's request for equitable relief and that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." 366 P.3d at 1115 (quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)).

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court stated:

> The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser **even where the trustee wrongfully rejected a proper tender of reinstatement by the**

> **trustor**. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].) (emphasis added)

Although the district court held that defendant Bank's legal remedy against the HOA is barred by the statute of limitations, plaintiff is not responsible for defendant Bank 's failure to timely assert the legal remedies available to defendant Bank if it could prove that the HOA wrongfully rejected the conditional tender made by Miles Bauer. In addition, these legal remedies may still exist if this Court adopts any of the arguments made by defendant Bank at pages 26 to 43 of Appellant's Opening Brief.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court affirm the findings of fact, conclusions of law and judgment that quieted title to the Property in favor of plaintiff.

DATED this 26th day of November, 2018.

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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 9,821 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 26th day of November, 2018.

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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 26th day of November, 2018, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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