

Case No. 75890

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC,
A NEVADA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC, A
DELAWARE LIMITED LIABILITY
COMPANY,

Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable MICHAEL VILLANI, District Judge
District Court Case No. A-13-684715-C

**APPELLANT’S MOTION TO SUPPLEMENT THE RECORD ON APPEAL
PURSUANT TO NRAP 27**

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I. INTRODUCTION

SFR Investments Pool 1, LLC (“SFR” or “Appellant”) hereby moves this Court (the “Motion”) for entry of an order permitting SFR to supplement the record in this appeal with the exhibit items attached hereto as Exhibits A through D, respectively, pursuant to NRAP 27(a)(2). SFR alerts this Court that the items which SFR seeks to make part of the record were not introduced by SFR in the District Court. SFR respectfully submits, however, that the items attached hereto should be made part of the record here as SFR was not given the opportunity to address the factual basis upon which the District Court ultimately concluded in error that the government sponsored entity (“GSE”) Federal Home Loan Mortgage Corporation (“Freddie Mac”) held a property interest at the time of the homeowners’ association foreclosure sale at issue here. Indeed and as SFR will demonstrate below, the District Court’s entry of summary judgment for Nationstar Mortgage, LLC (the “Bank”) is predicated on facts *not even alleged* by the Bank in its statement of undisputed facts included in the Bank’s motion for summary judgment. What necessitates the relief now sought by SFR through the Motion was not brought about by the failure of SFR to preserve its record for appeal; rather, SFR was blindsided in the District Court below on summary judgment through the District Court

Making matters worse still and contrary to the District Court’s basis for finding a property ownership interest on the part of Freddie Mac, the Bank

predicated its claims of a property interest on the part of Freddie Mac on a declaration that was the subject of a countermotion to strike by SFR. SFR's motion to strike was predicated upon the Bank's failure to disclose either Freddie Mac or the declarant's identity during either the original or extended discovery periods leading up to the parties' dispositive motion practice. The District Court's minute order specified that SFR's request to strike the Bank's tardily produced declaration was denied as "moot." As a result of the District Court's stated bases for (i) granting the Bank's motion for summary judgment coupled with (ii) the District Court's denial of SFR's countermotion to strike as "moot," SFR was not given the opportunity to address the factual basis upon which the District Court found a property interest on the part of Freddie Mac or to submit evidence that expressly contradicts the factual predicate upon which the District Court's finding of a property interest on the part of Freddie Mac is now predicated.

Had SFR received timely notice of the basis of the District Court's finding in this regard, SFR would have submitted for the District Court's consideration and review the exhibit items which SFR now seeks to make part of the record on appeal here through the Motion. SFR respectfully submits that the introduction of Exhibits A through D attached to the Motion following timely notice in the District Court below would have created genuine issues of material fact that would have precluded entry of summary judgment in favor of Nationstar. The Motion should be granted.

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

On January 31, 2018, the District Court entered its minute order (i) granting the Bank's motion for summary judgment and denying SFR's countermotion to strike as "moot." (5JA_1109). The District Court's finding of a property interest on the part of GSE Freddie Mac was set forth in its minute order as follows, "The Court FIND [*sic*] ownership of the property in question was established in the Deed of Trust recorded on 7/20/05, attached as Exhibit A to Nationstar's instant motion, identifies Freddie Mac (at the bottom of each page) and puts all parties on notice of Freddie Mac's interest." (*Id.*). In connection with this finding, the District Court found it significant that Deed of Trust including the form type disclosing *both* Fannie Mae and Freddie Mac was produced by the Bank during discovery.

With respect to SFR's countermotion to strike the Bank's tardily disclosed evidence that allegedly established an ownership interest on the part of Freddie Mac in the property, the District Court's minute order provides, "Finally, SFR's Countermotion to Strike the declaration from the Freddie Mac employee is denied as MOOT." (*Id.*).

On November 15, 2017, the Bank filed its renewed motion for summary judgment. In its motion for summary judgment, the Bank included a statement of undisputed facts. The Bank's motion for summary judgment references the Deed of Trust solely for the proposition that the original borrowers allegedly granted a

consensual security interest to the KB Home Mortgage Company. The Bank, however, did not cite the Deed of Trust as the factual predicate allegedly establishing an ownership interest in the property on the part of Freddie Mac. The factual predicate upon which the Bank actually relied in its renewed motion for summary judgment was the declaration of Dean Meyer attached to the Bank's motion as *Exhibit B*. Indeed, this was the very declaration that was the subject to SFR's countermotion to strike which, again, the District Court denied as "moot." Finally, the form language from the deed of trust attached to the Bank's renewed motion for summary judgment upon which the District Court predicated its finding of an ownership interest on the part of Freddie Mac reads as follows, "Nevada—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS."

On April 11, 2018, the District Court entered its findings of fact and conclusions of law granting the Bank's renewed motion for summary judgment. The District Court's findings regarding Freddie Mac's alleged ownership interest in the property track, nearly verbatim, the factual contentions made by the Bank in the statement of undisputed facts included in its motion for summary judgment, with one notable exception being a reference to the Meyer declaration. SFR maintains that its countermotion to strike the Meyer declaration was denied as "moot" because the District Court identified a basis upon which it could predicate entry of summary judgment in favor of the Bank—a basis upon which the Bank itself did not rely.

III. ARGUMENT

The District Court's entry of summary judgment in favor of the Bank and its finding of a property interest on the part of Freddie Mac based on a factual argument or theory not even advocated by the Bank in its summary judgment motion clearly prejudiced SFR's ability to marshal and present evidence establishing that the preprinted form language on the deed of trust is simply that: nothing more than preprinted form language that has no legal significance in terms of establishing an ownership interest on the part of Freddie Mac—or any other entity, for that matter. Had SFR been provided timely notice of such a contention, it would have introduced Exhibits A-D in the District Court. And the introduction of these exhibits as part of the summary judgment record below would have established genuine issues of material fact precluding entry of summary judgment in favor of the Bank.

Indeed, the summary judgment record compiled by the District Court is already insufficient to support entry of summary judgment in favor of the Bank. Had SFR not been blindsided by the District Court's asserted factual basis for finding an ownership interest on the part of Freddie Mac in the subject property, SFR's introduction of Exhibits A-D in the District Court below would have established either (i) a genuine issue of material fact precluding entry of summary judgment in favor of the Bank or (ii) would have made for a much stronger case for SFR here that the District Court's finding in this regard is clearly erroneous.

For instance, the form language relied upon by the District Court actually identifies three separate entities: Fannie Mae, Freddie Mac, and MERS. Now, while an inference *could* potentially be drawn that Freddie Mac had an ownership interest in the subject property if that was the only entity expressly identified in the form, boilerplate language included on the deed of trust, the form actually identifies the *three* aforementioned entities. Since the District Court entertained this line of reasoning, notwithstanding the Bank's failure to make any such argument along these lines, in the context of a motion for summary judgment, SFR, as the non-moving party, was entitled by operation of law to have all of the evidence and factual inferences based on this form, boilerplate language drawn and viewed in a light favoring SFR—meaning that the alleged property interest resided in either Fannie Mae or MERS, and not in Freddie Mac. *See, e.g., Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716 (2008).

Here, reasonable minds could certainly have differed on which of the three entities identified in the form, boilerplate language, if any, had a property interest in the subject property. SFR's introduction of Exhibits A-D attached to the Motion would have greatly strengthened SFR's case here that the language relied upon by the District Court actually lacks any legal significance in terms of establishing an ownership interest in the subject property on the part of Freddie Mac—or any of the other entities mentioned in the deed of trust's boilerplate language. The manner in

which the District Court reached this finding effectively deprived SFR of its right to notice of a motion seeking relief against SFR and the alleged basis for such relief. *See, e.g., Schoen v. SAC Holding Corp.*, 122 Nev. 621, 644 n. 71, 137 P.3d 1171, 1186 n. 71 (2006). SFR's right to adequate notice of the factual basis for the Bank's request for relief against SFR exists under governing Nevada law independently from the merits of the underlying case. *See Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). Indeed, the District Court's finding of an ownership interest on the part of Freddie Mac based upon a factual contention not even advanced by the Bank, and its concurrent denial of SFR's countermotion to strike the Bank's declaration as moot, functionally constitutes the equivalent of a prohibited *sua sponte* summary judgment. *See id.* (reversing summary judgment order entered *sua sponte*); *see also Horvath v. Gladstone*, 97 Nev. 594, 596 n.1, 637 P.2d 531, 533 n.1 (1981) (*sua sponte* amended judgment is void).

Indeed, the District Court's finding of a property interest on the part of Freddie Mac on such a basis is not consistent with its duty to exercise great care in adjudicating motions for summary judgment. *See, e.g., Posadas v. City of Reno*, 109 Nev. 448, 851 P.3d (1993). Nor does the District Court's finding in this regard demonstrate that it discharged its duty to review the record searchingly for the existence of material disputes and issues negating the propriety of disposing of this action on a summary judgment record. *See, e.g., Charles v. J. Stevens Lemons &*

Assocs., 104 Nev. 388, 760 P.2d 118 (1988); *see also*, *Mullis v. Nev. Nat'l Bank*, 98 Nev. 510, 630 P.2d 258 (1981). Based on the summary judgment record compiled by the District Court below as it presently stands, one would be hard pressed to say that no reasonable person could conclude that factual issues necessitating a trial exist. *See, e.g., Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 378 P.2d 979 (1963). Had SFR been given timely notice of the factual theory upon which the District Court would predicate its finding of an ownership in interest in the subject property on the part of Freddie Mac, SFR would have introduced Exhibits A through D attached hereto in the District Court, thereby bolstering its opposition to the Bank's motion for summary judgment and case on appeal that the District Court's entry of summary judgment was made in error.

In making this Motion, SFR is cognizant of the authorities that are generally cited for the proposition that matters not introduced in the trial court may not generally be considered as part of the record on appeal. *See, e.g., Carson Ready Mix v. First Nat'l Bank of Nevada*, 97 Nev. 474, 635 P.2d 276 (1981). However, the manner in which SFR was blindsided by the District Court's finding in this regard—especially considering its importance in terms of triggering 12 U.S.C. § 4617(j)(3)—along with the established case law discussed above highlighting the procedural and substantive irregularities in the District Court's entry of summary judgment make this case distinguishable and demonstrate that SFR should benefit from a limited

exception from the general rule. This is especially so as attached Exhibits A-D demonstrate clearly that the form language upon which the District Court's finding is based is clearly erroneous. SFR should not be barred from advancing such arguments here in light of the lack of notice and an opportunity to be heard with respect to this matter. In addition, the Bank cannot credibly claim that it will be prejudiced in this regard as the Bank did not rely on the form, boilerplate language on the deed of trust form to establish an ownership interest on the part of Freddie Mace.

For the foregoing reasons, SFR respectfully submits that the Motion should be granted and that SFR be permitted to supplement the record in this appeal with Exhibits A-D attached hereto.

DATED this 21st day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of November, 2018 and refiled on the 26th day of November. Electronic service of the foregoing **Appellant's Motion to Supplement the Record on Appeal Pursuant to NRAP 27** shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title:	75890 - SFR INV.'S POOL 1, LLC VS. NATIONSTAR MORTG. LLC
Case Category	Civil Appeal
Information current as of:	Nov 21 2018 10:26 p.m.

Electronic notification will be sent to the following:

Ariel Stern
Melanie Morgan
Tenesa Powell

Dated this 26th day of November, 2018.

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