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SUPREME COURT

STATE OF NEVADA

9352 CRANESBILL TRUST; TEAL PETALS ST. TRUST; AND IYAD HADDAD,

Appellants,

vs.

WELLS FARGO BANK, N.A.,

Respondents.

No. 76017

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for defendants/appellants certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. 9352 Cranesbill Trust is a Nevada trust.

2. Teal Petals St. Trust is a Nevada trust.

3. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 9352 Cranesbill Trust and Teal Petals St. Trust.

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

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting defendant Bank's motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The findings of fact, conclusions of law and order granting defendant Bank's motion for summary judgment was filed on April 27, 2018. Notice of entry of the order was served and filed on April 30, 2018. Haddad, Teal Petals St. Trust and Cranesbill filed the notice of appeal on May 29, 2018.

On July 6, 2018, plaintiff filed a motion for reconsideration. On September 4, 2018, the court entered its order denying motion for reconsideration. Notice of entry of the order denying motion for reconsideration was served and filed on September 4, 2018.

An order granting motion for NRCP 54(b) certification was filed on October 3, 2018. Notice of entry of the order granting motion for NRCP 54(b) certification was served and filed on October 3, 2018.

(C) The appeal is from the findings of fact, conclusions of law and order granting defendant Bank's motion for summary judgment, filed on April 27, 2018.

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 defendants/appellants therefore believe that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished defendant Bank's deed of trust.

2. Whether the superpriority portion of the HOA's lien was paid prior to the public auction held on July 11, 2012.

3. Whether the superpriority portion of the HOA's lien can be paid by the unit owner.

4. Whether defendant Bank proved the element of fraud, unfairness or oppression required by the California rule.

5. Whether Teal Petals St. Trust is protected as the transferee of a bona fide purchaser from defendant's unrecorded claims and objections.

6. Whether defendant Bank is entitled to equitable relief against Teal Petals St. Trusts from the extinguishment of the deed of trust.

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

STATEMENT OF THE CASE

On November 6, 2012, Venise Abelard (hereinafter "plaintiff") filed a complaint to recover damages for wrongful foreclosure of an assessment lien

recorded on behalf of Fort Apache Square Homeowners Association (hereinafter "HOA") and for declaratory relief and quiet title that plaintiff still held title to the property commonly known as 9352 Cranesbill Court, Las Vegas, Nevada 89149 (hereinafter "Property") and that 9352 Cranesbill Trust (hereinafter "Cranesbill") acquired no interest in the Property by entering and paying the high bid at the HOA foreclosure sale held on July 11, 2012. (JA1a, pgs. 1-14)

On December 13, 2012, the HOA, Mesa Management and Alessi & Koenig, LLC (hereinafter "Alessi") filed an answer to complaint. (JA1a, pgs. 28-43)

On April 30, 2013, Iyad Haddad (hereinafter "Haddad") and Cranesbill filed an answer and counterclaim. (JA1a, pgs. 50-54)

On May 24, 2013, plaintiff filed a reply to counterclaim. (JA1a, pgs. 55-58)

On September 12, 2014, plaintiff filed an amended complaint. (JA1b, pgs. 59-88)

On October 27, 2014, Cranesbill and Haddad filed an answer to amended complaint and counterclaim. (JA1b, pgs. 89-94)

On November 20, 2014, plaintiff filed an answer to the counterclaim. (JA1b, pgs. 95-98)

On September 10, 2015, Wells Fargo Bank, N.A. (hereinafter "defendant

Bank") filed an answer in intervention to Cranesbill's counterclaim and counterclaims, cross-claims, and third-party complaint. (JA1b, pgs. 99-119)

On September 29, 2015, the HOA and Alessi filed an answer to defendant Bank's cross-claim. (JA1b, pg. 120-139)

On January 12, 2016, plaintiff filed a second amended complaint. (JA1b, pgs. 140-157)

On February 16, 2016, Cranesbill and Haddad filed an answer to second amended complaint and counterclaim. (JA1b, pgs. 158-163)

On January 31, 2018, defendant Bank filed a motion for summary judgment. (JA1c, pgs. 216-237)

On January 31, 2018, Haddad, Teal Petals St. Trust and Cranesbill filed a motion for summary judgment. (JA2b, pgs. 394-466)

On February 20, 2018, defendant Bank filed an opposition to the motion for summary judgment filed by Haddad, Teal Petals St. Trust and Cranesbill . (JA3a, pgs. 467-489)

On February 20, 2018, Haddad, Teal Petals St. Trust and Cranesbill filed an opposition to defendant Bank's motion for summary judgment. (JA3a, pgs. 490-506)

On February 23, 2018, plaintiff filed an opposition to the motion for summary

judgment filed by Haddad, Teal Petals St. Trust and Cranesbill and a joinder to defendant Bank's opposition to motion for summary judgment. (JA3a, pgs. 507-548)

On February 27, 2018, defendant Bank filed a reply in support of its motion for summary judgment. (JA3a, pgs. 549-563)

On February 27, 2018, Haddad, Teal Petals St. Trust and Cranesbill filed a reply in support of their motion for summary judgment. (JA3a, pgs. 564-599)

On April 27, 2018, the district court entered findings of fact, conclusions of law and order granting defendant Bank's motion for summary judgment. (JA3a, pgs. 600-607)

On April 30, 2018, defendant Bank served and filed notice of entry of the findings of fact, conclusions of law and order granting defendant Bank's motion for summary judgment. (JA3a, pgs. 608-618)

Haddad, Teal Petals St. Trust and Cranesbill filed the notice of appeal on May 29, 2018. (JA3b, pgs. 619-620)

On July 6, 2018, plaintiff filed a motion for reconsideration. (JA3b, pgs. 632-715)

On July 23, 2018, Haddad, Teal Petal St. Trust and Cranesbill filed an opposition to the motion for reconsideration. (JA3b, pgs. 716-722)

On September 4, 2018, the court entered its order denying motion for reconsideration. (JA3b, pgs. 723-724)

Notice of entry of the order denying motion for reconsideration was served and filed on September 4, 2018. (JA3b, pgs. 725-728)

An order granting motion for NRCP 54(b) certification was filed on October 3, 2018. (JA3b, pgs. 729-730)

Notice of entry of the order granting motion for NRCP 54(b) certification was served and filed on October 3, 2018. (JA3b, pgs. 731-734)

STATEMENT OF FACTS

Cranesbill obtained title to the Property by entering and paying the high bid of $4,900.00 at a public auction held on July 11, 2012. See copy of foreclosure deed recorded on July 18, 2012 at JA2b, pgs. 413-414.

Cranesbill conveyed all of its right, title and interest in the Property to Teal Petals St. Trust on July 27, 2012. See copy of grant, bargain, sale deed recorded on July 27, 2012 at JA2b, pgs. 439-442.

The public auction arose from a delinquency in assessments owed by plaintiff and Marcus Compere to the HOA pursuant to NRS Chapter 116.

Defendant Bank is the beneficiary by assignment of a deed of trust recorded as

an encumbrance against the Property on November 28, 2007. See deed of trust at JA1c, pgs. 170-182, and assignment of mortgage, recorded on October 17, 2012, at JA1c, pgs. 193-194.

The first page of the deed of trust (JA1c, pg. 170) identified plaintiff and Marcus Compere as the "Borrower" and DHI Mortgage Company, Ltd. as the "Lender." The deed of trust identified MERS, "solely as a nominee for Lender, hereinafter defined, and Lender's successors and assigns" as the beneficiary of the deed of trust.

On June 28, 2011, Alessi mailed a copy of a notice of delinquent assessment (lien) for $2,337.58 to plaintiff and Marcus Compere at the Property. (JA2b, pgs. 418-419)

On July 12, 2011, Alessi recorded the notice of delinquent assessment (lien) against the Property. (JA2b, pg. 416)

On September 15, 2011, Alessi recorded a notice of default and election to sell under homeowners association lien for $3,403.58 against the Property. (JA2b, pg. 421)

On September 23, 2011, Alessi mailed copies of the notice of default to plaintiff and Marcus Compere, to MERS, to Nevada Association Services, Inc., to

DHI Mortgage Company, Ltd., to City of Las Vegas Sewer, to Republic Services, and to North American Title. (JA2b, pgs. 422-425)

On May 7, 2012, Alessi recorded a notice of trustee's sale for $3,932.58 against the Property. (JA2b, pg. 427)

On May 7, 2012, Alessi mailed copies of the notice of trustee's sale to plaintiff and Marcus Compere, to defendant Bank, to MERS, to Nevada Association Services, Inc., to DHI Mortgage Company, Ltd., to City of Las Vegas Sewer, to Republic Services, to North American Title, to National Default Servicing Corp. and to the Ombudsman's Office. (JA2b, pgs. 429-432)

On May 9, 2012, a copy of the notice of trustee's sale was served upon plaintiff and Marcus Compere by posting of a copy of the notice in a conspicuous place on the Property. (JA2b, pgs. 434-435)

Copies of the notice of trustee's sale were also posted for 20 days consecutively in three public places in Clark County, Nevada. (JA2b, pg. 434)

The notice of trustee's sale was published in the Clark County Legal News on May 11, 2012, May 18, 2012 and May 25, 2012. (JA2b, pg. 437)

SUMMARY OF THE ARGUMENT

The first deed of trust was extinguished when Cranesbill purchased the

Property at the HOA foreclosure sale held on July 11, 2012.

Defendant Bank did not prove that the HOA's superpriority lien was paid prior to the public auction held on July 11, 2012.

The HOA's superpriority lien can only be paid by the holder of the security interest described in NRS 116.3116(2)(b).

Defendant Bank did not prove the element of fraud, unfairness or oppression required by the California rule.

As a transferee of a bona fide purchaser, Teal Petals St. Trust is protected from defendant Bank's unrecorded claim that the assessment lien did not include a superpriority portion.

The foreclosure sale did not violate defendant Bank's due process rights.

Because defendant Bank had an adequate remedy at law against the HOA and Alessi, defendant Bank was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale.

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. Defendant Bank's trust deed was extinguished by the HOA foreclosure sale held on July 11, 2012.

NRS 116.3116(2) provides that an 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."

In Horizons at Seven Hills v. Ikon Holdings, 132 Nev., Adv. Op. 35, 373 P.3d 66, 73 (2016), this Court stated that the phrase "to the extent of" in NRS 116.3116(2) means "amount equal to." In other words, the super priority portion of the lien is a

sum equal to any charges incurred by the association on a unit pursuant to NRS 116.310312 and nine months of common expenses that must be paid by the first security interest holder in order for the first security interest not to be extinguished by foreclosure of the HOA's lien.

The first deed of trust, recorded on November 28, 2007, falls squarely within the language of NRS 116.3116(2)(b). The statutory language does not limit the nature of this priority in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742,758, 334 P.3d 408, 419 (2014), this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

Every notice recorded, mailed, posted and published 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. at 757, 334 P.3d at 418.

The foreclosure deed (JA2b, pg. 413) included the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by defendant Bank's subordinate deed of trust. Title to the real property was therefore vested in Cranesbill free of the extinguished deed of trust.

2. Defendant Bank did not prove that the HOA's superpriority lien was paid prior to the public auction held on July 11, 2012.

NRCP 8 (c) provides that "payment" is an affirmative defense that must be "set forth affirmatively" in a party's answer. Defendant Bank did not include any factual allegations in its answer in intervention and counterclaims, cross-claims, and third-party complaint (JA1b, pgs. 99-119) stating that the plaintiff had paid the superpriority portion of the HOA's assessment lien.

Under Nevada law, when "payment" is asserted as a defense, "each element of the defense must be affirmatively proved," and "[t]he burden of proof clearly rests with the defendant." Schwartz v. Schwartz, 95 Nev. 202, 206, n. 2, 591 P.2d 1137, 1140, n. 2 (1979); United States v. Truckee-Carson Irrigation District, 71 F.R.D. 10, 13 (D. Nev. 1975); Rosenbaum v. Rosenbaum, 86 Nev. 550, 552, 471 P.2d 254, 255 (1970).

In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the court of appeals stated:

> "The trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (4 Miller & Starr, Cal. Real Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn. omitted.)

105 Cal. App. 4th at 440,129 Cal. Rptr. 2d at 446.

Defendant Bank did not allege or prove that defendant Bank or its predecessor tendered any amount of money to the HOA or Alessi to pay the superpriority portion of the HOA's assessment lien.

Instead, at pages 5 and 6 of its motion for summary judgment (JA1c, pgs. 220-221), defendant Bank stated that plaintiff made inconsistent and untimely payments to the HOA of $366.00 on June 30, 2011, $142.00 on September 14, 2011, $284.00 on February 1, 2012, $223.50 on April 30, 2012, and $149.00 on June 20, 2012. At page 11 of its motion (JA1c, pg. 226), defendant Bank stated that the total payments of $1,164.50 was "***more than double*** the $539.00 which was owed for the nine months of assessments immediately preceding institution of the action on the HOA Lien." (emphasis by defendant Bank)

At page 12 of its motion (JA1c, pg. 227), defendant Bank also stated that "[f]or many of her payments, Abelard specifically indicated that those payments were intended to be applied to her monthly assessments." On the other hand, only check no. 1189 for $366.00 (JA2a, pg. 301) refers to the time period before June 28, 2011,

when Alessi mailed a copy of a notice of delinquent assessment (lien) for $2,337.58 to plaintiff and Marcus Compere at the Property. (JA2b, pgs. 418-419)

In paragraph 5 of its conclusions of law (JA3a, pg. 603, ¶5), the district court found that the superpriority portion of the HOA's assessment lien was equal to $534.00.

In paragraph 6 of its conclusions of law (JA3a, pg. 603, ¶6), the district court found that "[b]etween the recording of the HOA Notice of Lien on July 12, 2011 and the HOA foreclosure sale on July 1, 2012, Plaintiff made payments to the HOA totaling $798.50." This calculation excludes the payment for $366.00 made by plaintiff on June 30, 2011 before the notice of delinquent assessment lien was recorded on July 12, 2011.

The amended demand provided by Alessi to the plaintiff on June 4, 2012 (JA2a, pgs. 331–334) proved that from the payment of $366.00 made on June 30, 2011 and the payment of $142.00 made on September 14, 2011, only $281.43 was posted to the plaintiff's account on October 24, 2011. (JA2a, pg. 333)

The payment of $284.00 made on February 1, 2012 was posted to plaintiff's account on February 13, 2012. (JA2a, pg. 333) After both payments were applied, plaintiff still owed the HOA the amount of $1,676.15.

The payment of $223.50 made on April 30, 2012 was not posted to the plaintiff's account, which proves that the payment was applied to collection costs and not to the payment of common assessments.

The unpaid balance in plaintiff's account was $1,899.55 as of May 31, 2012, and defendant Bank did not prove that any part of the payment of $149.00 made on June 20, 2012 was applied to pay the superpriority portion of the HOA's assessment lien.

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1031 (2005), this Court stated that "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party" and that "the pleadings and other proof must be construed in a light most favorable to the nonmoving party."

In paragraph 8 of its conclusions of law (JA3a, pg. 603, ¶8), the district court found that "[b]ecause Plaintiff's payments to the HOA exceeded the super-priority component of the HOA's lien, the super-priority component of the lien was satisfied prior to the HOA foreclosure sale."

On the other hand, because the total amount of the $1,164.50 in payments made by the plaintiff was less than the $2,337.58 claimed in the notice of delinquent

assessment (lien) recorded on July 12, 2011, and because the HOA did not apply the payments made by the plaintiff to pay the superpriority portion of the HOA's assessment lien, paragraph 8 of the district court's conclusions of law is not supported by any admissible evidence.

3. The HOA's superpriority lien can only be paid by the holder of the security interest described in NRS 116.3116(2)(b).

In paragraph 7 of its conclusions of law (JA3a, pg. 603, ¶7), the district court found that "Nevada Revised Statutes 116.3116(2) states that the HOA lien is prior to first deeds of trust, **but it does not limit who can satisfy the superpriority portion of this lien**." (emphasis added)

On the other hand, as stated at page 5 of Cranesbill's opposition to defendant Bank's motion for summary judgment (JA3a, pg. 494), "the official comments prove that the drafters of the UCIOA intended that the super priority portion of the lien be paid by the trust deed holder and not the unit owner."

At page 6 of Cranesbill's opposition (JA3a, pg. 495), Cranesbill also quoted this Court's reference in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 748, 334 P.3d 408, 413 (2014), to the official comments to the UCIOA:

> The comments continue: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, *see supra* note 1] months' assessments demanded by the association *rather than having the association foreclose on the unit*." *Id.* (emphasis added). If the

> superpriority piece of the HOA lien just established a payment priority, the reference to a first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.

Likewise, if payments made by a unit owner can be applied to satisfy the HOA's superpriority lien, then "the reference to a first security holder paying off the superpriority piece of the lien" makes no sense.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this Court stated that the superpriority lien is "a specially devised mechanism designed to strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." 130 Nev. at 748, 334 P.3d at 412.

This Court quoted from Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995), that "[a]n official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction."

Comment 2 to UCIOA § 3-116 at 189-191 (2014) describes purpose of the "specially devised mechanism" as follows:

> The six-month limited priority for association liens constituted a significant departure from pre-existing practice, and was viewed as striking an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders in order to facilitate the availability of first mortgage credit to unit owners in common interest communities. **This equitable**

> **balance was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessment (up to six months' worth) to the association to satisfy the association's limited priority lien**. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale - **a sale that was expected to be completed within six months** (in jurisdictions with non-judicial foreclosure) **or a reasonable period of time thereafter**, thus minimizing the period during which unpaid assessment would accrue for which the association would not have first priority. Likewise, it was expected that in the typical situation a unit would have a value sufficient to produce a sale price high enough for the foreclosing lender to recover both the unpaid mortgage balance and six months assessments.
>
> . . . .
>
> If other unit owners have to pay the burden of increased assessments to preserve community services or amenities, **the delaying lender receives a benefit in that the value of its collateral is preserved while the lender waits to foreclose**. Yet this preservation comes through the community's imposition of assessments that the lender does not have to pay or reimburse. **This benefit constitutes unjust enrichment of the mortgage lender**, particularly to the extent that the lender enjoys this benefit by virtue of conscious decision to delay completing a foreclosure sale.
>
> . . . .
>
> By allowing the association to extend its priority for six months per year throughout any period of delay by a foreclosing lender, subsection (c)(1) strikes a more appropriate and equitable sharing of the costs of preserving the value of the mortgagee's security.

In footnote 3 at page 13 of its motion (JA1c, pg. 228, n. 3), defendant Bank stated that "[a]llowing the HOA to choose whether to apply any payments first to the subpriority amount, such as late fees or legal expenses, would in essence transform the entire lien into a superpriority lien because it would allow an HOA to prioritize the repayment of its own costs and expenses above the monthly assessments." On the other hand, the comments to the UCIOA prove that the superpriority lien was created

to require that a lender pay nine months of assessments to cover the costs of maintaining the community while the lender forecloses its deed of trust. That purpose is not served by allowing a lender to wait until after a lien is foreclosed to claim that the unit owner made payments after the "institution of an action to enforce the lien" that should have been applied to pay the superpriority portion of the lien and not other components of the lien.

The Report of the Joint Editorial Board for Uniform Real Property Acts, The Six-Month Limited Priority Lien for Association Fees Under the Uniform Common Interest Ownership Act, dated June 1, 2013, also discusses the policy behind UCIOA § 3-116, which is to ensure that associations have a mechanism to enforce their assessment liens without bearing the full costs of maintaining a community prior to the sale. As stated in the JEB report, the six months of super-priority (later amended to nine months in Nevada) is based on the amount of time that it typically takes a bank to foreclose and strikes "a workable and functional balance between the need to protect the financial integrity of the association and the legitimate expectations of the first mortgage lenders." Id. at pp. 3-4.

The JEB report recognizes that the UCIOA contemplates that the lender's foreclosure will take six months to complete. In other words, the language in the

statute can only be understood in the context for which it was designed. The drafters anticipated that the lender would pay an amount equal to six months of periodic assessments and then proceed to foreclose on its deed of trust. While the lender's foreclosure was proceeding, the association would draw from the amount paid by the lender until the end of the foreclosure when a new homeowner bought the property and started paying the HOA assessments.

Based on the language in the JEB report, it does not matter that a unit owner has made payments on its account either prior to or after proceedings to enforce the lien are instituted because only the holder of a first security interest can pay the superpriority lien. The superpriority lien does not matter to the unit owner because foreclosing even a nonpriority lien will divest the unit owner of his or her interest in the property. Because the superpriority lien only affects the holder of a first deed of trust, the argument that payments by a unit owner can pay the superpriority portion of a lien is not logical.

According to the JEB report, defendant Bank's predecessor was obligated to pay the superpriority lien regardless of any payments made by the plaintiff. Because defendant Bank's predecessor failed to make the required payments, the superpriority lien remained unpaid on the date of the HOA foreclosure sale, and the first deed of

trust was extinguished when the HOA foreclosed its lien.

The amendments made to NRS 116.31164(2) in 2015 confirm the intent of the Nevada Legislature that "the amount of the association's lien that is prior to its security interest" be paid by "the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116."

In Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 179 P.3d 542 (2008), this Court stated that "when a statute's 'doubtful interpretation' is made clear through subsequent legislation, we my consider the subsequent legislation persuasive evidence of what the Legislature originally intended." 124 Nev. at 157, 179 P.3d at 554-555.

In paragraph 8 of its conclusions of law (JA3a, pg. 603, ¶8), the district court cited Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, National Association, 408 P.3d 558 (Table), 2017 WL 6597154 (Nev. Dec. 22, 2017)(unpublished disposition), as authority for its conclusion that payments made by the plaintiff satisfied the super-priority component of the lien prior to the HOA foreclosure sale.

In that case, however, this Court stated that "[t]he record contains undisputed evidence that the homeowner made payments sufficient to satisfy the superpriority

component of the HOA's lien **and that the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance**." 408 P.3d 558 (Table) at *1. (emphasis added)

No such evidence exists in the present case. In the present case, the statement prepared by Mesa Management on May 31, 2012 (JA2a, pgs. 333-334) proved that the partial payments made by plaintiff were not applied to pay the superpriority portion of the HOA's assessment lien.

In SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., No. 70471, 2018 WL 6609670 (Table) (Dec. 13, 2018)(unpublished disposition), the lender argued that "because the former homeowners $1,115.79 payment exceeded the defaulted superpriority portion of the HOA's lien, that portion of the lien was satisfied, thereby rendering the ensuing sale a subpriority-only sale." Id. at *1. This Court rejected that argument and stated:

> The record does not support affirming on this basis. Assuming a homeowner can satisfy the default as to the superpriority portion of an HOA's lien, the record does not establish that the HOA in this case allocated or had an obligation to allocate the former homeowner's payment in that matter.

Id.

In footnote 2 of the order in SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., this Court also stated that the order entered in Saticoy Bay LLC Series

2141 Golden Hill v. JPMorgan Chase Bank, National Association "was premised on this assumption, but the issue was undeveloped in that it had not been timely and coherently briefed." 2018 WL 6609670 (Table) at *1, n. 2.

In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115, n. 7 (2016), 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. *See* NRS 14.010; NRS 40.060. *Cf.* Barkley's Appeal. Bentley's Estate, 2 Monag. 274, 277 (Pa.1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day."). (emphasis added)

This Court thereby recognized that a lender must actively protect its interest in the property before an HOA foreclosure sale and not wait until after a property is sold to raise its objections.

Furthermore, in Bank of America, N.A. v. SFR Investments Pool 1, LLC, No. 69323, 420 P.3d 559 (Table) (Nev. June 15, 2018) (unpublished disposition), and The Bank of New York Mellon v. SFR Investments Pool 1, LLC, No. 68165 (Nev. June 15, 2018) (unpublished disposition), this Court stated that a lender must actually submit a payment for a tender to be valid.

Both of the orders cited Southfork Investment Group, Inc. v. Williams, 706 So.

2d 75 (Fla. Dist. Ct. App. 1998), where the court stated: "To make an effective tender, the debtor must actually attempt to pay the sums due; mere offers to pay, or declarations that the debtor is willing to pay, are not enough." Id. at 79.

Both of the orders also cited Cochran v. Griffith Energy Serv., Inc., 993 A.2d 1153, 168 (Md. Ct. Spec. App. 2010), where the court stated that the offer must be "coupled with the **present** ability of **immediate** performance." (emphasis added.

Both of the orders also cited Graff v. Burnett, 414 N.W.2d 271, 276 (Neb. 1987), where the Nebraska Supreme Court stated:

> One claiming an adequate and proper tender of payment has the burden to prove both the offer to pay **and the present ability of immediate performance at the time of the tender**. Cf. Hanson v. Duffy, 106 Ill.App.3d 727, 62 Ill.Dec. 401, 435 N.E.2d 1373 (1982).

Both of the orders also cited McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co., 139 P.3d 9, 20 (Ore. 2008), where the Oregon Supreme Court quoted from Bembridge v. Miller, 385 P.2d 172 (Ore. 1963), that "[t]o constitute a tender of money, however, the money 'must actually be produced and made available for the acceptance and appropriation of the person to whom it is offered.'"

In the present case, because neither defendant Bank nor its predecessor actually attempted to make any payment to the HOA or its foreclosure agent, defendant Bank did not prove that the superpriority portion of the HOA's assessment lien was

tendered before the HOA foreclosure sale.

The super priority lien was designed to compel the lender holding a first deed of trust to take action to protect its subordinate deed of trust and not to reward the lender with a windfall created by taking credit for payments made by the unit owner that were not disclosed to bidders prior to the auction.

Because the summary judgment entered by the district court in favor of defendant Bank gives defendant Bank credit for doing nothing to prevent the HOA from foreclosing its superpriority lien, the order should be reversed.

4. Defendant Bank did not prove the element of fraud, unfairness or oppression required by the California rule.

At page 13 of its motion (JA1c, pg. 228), defendant Bank stated that "[t]he failure to sell property in a commercially reasonable manner renders an HOA foreclosure sale voidable." On the other hand, in Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, 405 P.3d 641 (2017), this Court stated:

> As to the "commercial reasonableness" standard, which derives from Article 9 of the Uniform Commercial Code (U.C.C.), we hold that it has no applicability in the context of an HOA foreclosure involving the sale of real property.

133 Nev., Adv. Op. 91, at *2, 405 P.3d at 642.

This Court instead applied the California rule to an HOA foreclosure sale:

> As to the Restatement's 20-percent standard, we clarify that *Shadow Wood* did not overturn this court's longstanding rule that "'inadequacy of price, however, gross, is not in itself a sufficient ground for setting aside a trustee's sale'" absent additional "'proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price,'" 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)).

133 Nev., Adv. Op. 91, at *2, 405 P.3d at 643-644.

At page 14 of its motion (JA1c, pg. 229), defendant Bank stated that the high bid of $4,900.00 paid by Cranesbill was less than 5.2% of the $94,000.00 value assigned to the Property by defendant Bank's appraiser. See residential appraisal report at JA2a, pgs. 344-368.

In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115 (2016), this Court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

The $4,900.00 paid by Cranesbill satisfies this standard.

Page #3 of the residential appraisal report prepared by defendant Bank's appraiser (JA2a, pg. 347) included two extraordinary assumptions. Because defendant Bank's motion was not supported by any evidence proving that the

"extraordinary assumptions" were true, the retrospective appraisal report is not competent evidence of the fair market value of the Property on the date of the HOA foreclosure sale.

The appraisal report also failed to mention the Detrimental Condition that distinguishes the Property in the present case from the six comparable sales (four traditional sales and two REO sales) listed at pages 4 and 6 of the appraisal report (JA2a, pgs. 348, 350). Unlike the six comparable sales, Cranesbill did not receive insurable clear title to the Property because no title company in Southern Nevada is willing to issue title insurance following an HOA foreclosure sale.

The Appraisal of Real Estate, 14th Edition, p. 406 (Chicago: Appraisal Institute, 2013) states: "Before a comparable sale property can be used in sales comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to **property rights that are similar** to those being appraised." (emphasis added) Because the appraisal report prepared by defendant Bank's appraiser violated this standard, the value assigned to the Property by defendant Bank's appraiser is merely hypothetical.

Page 5 of the report (JA2a, pg. 349) also stated that the "Exterior Only" inspection took place on December 4, 2015 which is more than three (3) years after

the public auction held on July 11, 2012.

In an attempt to prove the "element of fraud, unfairness, or oppression" required by the California rule, defendant Bank stated that "[i]n the eighteen months preceding the foreclosure sale, Abelard paid $1,164.00 in assessments and late fees against the $1,119.00 in assessments that accrued during the same period." (JA1c, pgs. 229-230) Defendant Bank also stated that plaintiff denied owing the "initial balance" of $1,204.58 shown on the account statement by Mesa Management. (JA2a, pg. 333)

Defendant Bank, however, did not prove that the plaintiff did not owe the "initial balance" of $1,204.58.

Defendant Bank also stated that Alessi told the plaintiff that her account had been placed on hold, and Alessi held the public auction without informing plaintiff that the hold had been removed. On the other hand, defendant Bank did not dispute that after the foreclosure agent mailed the notice of trustee's sale for $3,932.58 to plaintiff on May 7, 2012 (JA2b, pgs. 429-432) and posted a copy of the notice of trustee's sale on the Property on May 9, 2012 (JA2b, pgs. 434-435), plaintiff only made a single payment of $149.00 to the HOA on June 20, 2012.

Defendant Bank also did not prove that any representations were made to

defendant Bank's predecessor about delaying the auction.

Furthermore, because defendant Bank did not allege or prove that any of these claimed defects were made known to Cranesbill or the other bidders who attended the public auction held on July 11, 2012, it is impossible for these undisclosed objections to account for or have brought about the high bid of $4,900.00 paid by Cranesbill.

At page 16 of its motion (JA1c, pg. 231), defendant Bank also stated that "[t]he HOA and A&K failed to serve a copy of the Notice of Default on a party whose interest A&K and the HOA had notice of well in advance of the foreclosure proceedings." In particular, defendant Bank stated that "Wells Fargo's interest in the Property was disclosed in the Notice of Default and Election to Sell recorded by NDSC on Wells Fargo's behalf on November 1, 2010." See copy of notice of default and election to sell under deed of trust at JA1c, pgs. 184-187.

As noted at page 6 above, the assignment of mortgage (JA1c, pgs. 193-194) granting defendant Bank an interest in the Property was not signed until October 17, 2012 and was not recorded until October 17, 2012. October 17, 2012 is a date more than one year after September 23, 2011, when Alessi mailed copies of the notice of default to all interested parties, including MERS and DHI Mortgage Company, Ltd. (JA2b, pgs. 422-425), and more than five (5) months after May 7, 2012, when Alessi

mailed copies of the notice of trustee's sale to defendant Bank, to MERS and to DHI Mortgage Company, Ltd. (JA2b, pgs. 429-432)

The certified mail receipt proves that a copy of the notice of trustee's sale was mailed to Wells Fargo Bank N.A. c/o National Default Servicing Corporation, 7720 No. 16th Street, Suite 300, Phoenix, AZ 85020 (JA2b, pgs. 430), which is the exact address identified for Wells Fargo Bank, N.A. at page 2 of the notice of default and election to sell under deed of trust. (JA1c, pg. 185)

In addition, the notice of default and election to sell under deed of trust did not identify defendant Bank as the owner of the deed of trust, but only identified defendant Bank as the person to contact "[t]o find out the amount you must pay, or to arrange for payment to stop foreclosure, or if your property is in foreclosure for any other reason." (JA1c, pg. 185)

As stated at page 13 of the opposition filed by Haddad, Teal Petals St. Trust and Cranesbill (JA3a, pg. 502), "DHI Mortgage Company was the holder of the recorded security interest at the time of the sale, not Wells Fargo," and "Wells Fargo's never requested notice pursuant to NRS 107.090 or 116.31168, and did not record its assignment of mortgage until after the foreclosure sale took place."

As a result, defendant Bank did not prove that "some element of fraud,

unfairness, or oppression" accounts for or brought about the high bid of $4,900.00 paid by Cranesbill on July 11, 2012.

5. As a transferee of a bona fide purchaser, Teal Petals St. Trust is protected from defendant Bank's unrecorded claim that the assessment lien did not include a superpriority portion.

At page 17 of its motion for summary judgment (JA1c, pg. 232), defendant Bank stated that "Cranesbill cannot assert the bona fide purchaser defense in this matter because it had constructive, if not actual, notice of the Deed of Trust and because it did not provide valuable consideration for the Property."

On the other hand, constructive notice of the subordinate deed of trust is not relevant because the deed of trust was subordinate to the HOA's superpriority lien. This Court held in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." 130 Nev. at 758, 334 P.3d at 419.

Because the $4,900.00 paid by Cranesbill exceeded the full amount of the $3,932.58 stated in the notice of trustee's sale recorded on May 7, 2012, the HOA necessarily foreclosed the entire amount of the lien stated in the recorded notice and extinguished the subordinate deed of trust.

In Shadow Wood, this Court state that in the absence of "facts to indicate the

contrary," a purchaser is entitled to rely on the recorded notices as evidence that a superpriority lien is being foreclosed:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.,* 130 Nev. at —, 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.
>
> **That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself** to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title. (emphasis added)

366 P.3d at 1116.

In Shadow Wood, this Court also stated:

> 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." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that **the bona fide purchaser of a legal title is not affected by any latent equity** founded either on a trust, [e]ncumbrance, or otherwise, **of which he has no notice, actual or constructive."**). (emphasis added)

366 P.3d at 1115.

Defendant Bank did not identify any recorded document that provided Cranesbill with notice of defendant Bank's unrecorded claim that the HOA's assessment lien did not contain a superpriority portion.

In his declaration, Iyad Haddad stated that "[p]rior to and at the time of the foreclosure sale, there was nothing recorded in the public record to put me on notice of any claims or notices that any portion of the lien had been paid." (JA2b, pg. 465, ¶9) Mr. Haddad also stated that "[a]t no time prior to the foreclosure sale did I receive any information from the HOA or the foreclosure agent about the property or the foreclosure sale." (JA2b, pg. 466, ¶12)

"[A] title or lien held by a bona fide purchaser. . . can be conveyed to a grantee or assignee free and clear of a prior unknown interest even if the grantee or assignee does not fulfill the requirements of a bona fide purchaser. . . ." Carr v. Rosien, 238 Cal. App. 4th 845, 856, 190 Cal. Rptr. 3d 245, 252 (2015) (*quoting* 5 Miller & Starr, Cal. Real Est. § 11:52, at pp. 11-189-11-190, fns. omitted (3d ed. 2011)). In March v. Pantaleo, 4 Cal. 2d 242, 244, 48 P.2d 29, 30 (1935), the court stated that "a bona fide purchaser may clothe his transferee with a good title, regardless of whether the transferee had notice." A bona fide purchaser "may transfer a perfect title even to volunteers." Los Angeles Inv. Co. v. Torchia, 106 Cal. App. 21, 27, 288 P. 810, 813 (1930).

The rights held by Teal Petals St. Trust are measured by what claims were made known to Cranesbill on the date of the HOA foreclosure sale. On that date,

every recorded document proved that the HOA was foreclosing an assessment lien that had priority over and would extinguish the subordinate deed of trust.

At page 18 of its motion for summary judgment (JA1c, pg. 233), defendant Bank stated that Mr. Haddad "is an experienced real estate broker" and that "he knew buying this Property likely meant he was 'buying a lawsuit.'"

In Melendrez v. D&I Investment, Inc.,127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (2005), the court discussed the benefits of treating an experienced buyer who bids at a foreclosure sale as a BFP:

> 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 Shadow Wood, this Court stated that "the fact that the foreclosure sale purchaser purchased the property for a 'low price' did not in itself put the purchaser on notice that anything was amiss with the sale." 366 P.3d at 1115. (citing Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition))

6. The foreclosure sale did not violate defendant Bank's due process rights.

At page 19 of defendant Bank's motion for summary judgment (JA1c, pg. 234),

defendant Bank admitted that "Wells Fargo was not the beneficiary of record of the Deed of Trust when A&K recorded and mailed the Notice of Default," but defendant Bank nevertheless stated that Alessi was required to mail a copy of the notice of default to defendant Bank pursuant to NRS 107.090(3)(b), as incorporated by NRS 116.31168(1).

On the other hand, the notice of default and election to sell under deed of trust (JA1c, pgs. 184-187) did not state that defendant Bank held or claimed any interest in the Property. The notice only identified defendant Bank as the person to contact "[t]o find out the amount you must pay, or to arrange for payment to stop foreclosure, or if your property is in foreclosure for any other reason." (JA1c, pg. 185)

At page 20 of its motion (JA1c, pg. 235), defendant Bank stated that "Wells Fargo's due process rights were violated because it did not receive the notices, as just described."

On the other hand, in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, 133 Nev. Adv. Op. 5, 388 P.3d 970, 973 (2017), this Court interpreted the provisions of NRS 116.3116 *et seq*. to determine "whether 'the party charged with the deprivation' may be characterized as a state actor," and this Court concluded that no "state actor" participates in the nonjudicial foreclosure process

provided by NRS 116.31162 to 116.31168, and by incorporation, NRS 107.090.

In addition, defendant Bank did not dispute that Alessi mailed a copy of the notice of trustee's sale to defendant Bank at the address stated in the notice of default and election to sell under deed of trust. This Court has stated that a nonjudicial foreclosure agent's only duty is to mail the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual notice is not necessary as long as the statutory requirements are met." Hankins v. Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v. Dewco, 87 Nev. 14, 479 P.2d 462, 464 (1971) (applying NRS 107.080(3)).

Defendant Bank also stated that "[n]othing in the notice informs a lender that the HOA was foreclosing on a superpriority lien." (JA1c, pg. 235) In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742,757, 334 P.3d 408, 418 (2014), this Court stated that "it was appropriate to state the total amount of the lien" and that a lender was obligated to exercise due diligence to determine "the precise superpriority amount in advance of the sale" or pay "the entire amount" and request a refund of the difference.

7. Because defendant Bank had an adequate remedy at law against the HOA and Alessi, defendant Bank was not entitled to equitable relief against Teal Petals St. Trust altering the legal effect of the HOA foreclosure sale.

As stated at page 15 of the opposition filed by Haddad, Teal Petals St. Trust and Cranesbill (JA3a, pg. 504), this Court has recognized that a district court does not have jurisdiction to grant equitable relief to a party that has an adequate remedy at law. 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, Hughes v. Newcastle Mutual Insurance Co., 13 U.C.Q.B. (Ont.) 153, or inconvenient, Gulf Research & Development Co. v. Harrison, 9 Cir., 185 F.2d 457, or ineffectual, United States ex rel. Crawford v. Addison, 22 How. 174, 63 U.S. 174, 16 L. Ed. 304." 360 P.2d at 604.

The United States Supreme Court has also stated that 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).

In Shadow Wood, this Court 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 held that a bona fide purchaser is protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption:

> Thus, as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale. (Homestead Savings v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. Homestead v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) 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].)

Because defendant Bank had an adequate remedy at law against the HOA and Alessi for any defects in the foreclosure process, the district court improperly granted equitable relief in favor of defendant Bank altering the legal effect of the HOA foreclosing its superpriority lien on July 11, 2012.

/ / /

CONCLUSION

By reason of the foregoing, Haddad, Teal Petals St. Trust and Cranesbill respectfully request that this Court reverse the order granting defendant Bank's motion for summary judgment and remand this case to the district court with directions to enter judgment in favor of Haddad, Teal Petals St. Trust and Cranesbill.

DATED this 28th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(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 9,114 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 28th day of January, 2019.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 28th day of January, 2019, a copy of the foregoing **APPELLANTS' OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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