MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for defendants/appellants

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' REPLY BRIEF

Michael F. Bohn, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 Fax
Attorney for defendants/appellants,
9352 Cranesbill Trust, Teal Petals St.
Trust, and Iyad Haddad

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Nevada cases:

Federal and other cases:

/ / /

STATUTES AND RULES:

OTHER AUTHORITIES:

SUMMARY OF THE ARGUMENT

Alessi & Koenig, LLC (hereinafter "Alessi") provided all notices required by NRS Chapter 116.

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

The legislative history supports appellants' interpretation that only the holder of a first security interest described in NRS 116.3116(2)(b) can pay the superpriority lien.

Defendant Bank did not meet its burden of proof regarding payment of the HOA's superpriority lien.

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.

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.

ARGUMENT

1. Alessi & Koenig, LLC provided all notices required by NRS Chapter 116.

At page 6 of its Brief, defendant Bank states that the former owner did not receive either the notice of lien or notice of default, but the evidence proved that both notices were mailed to plaintiff by certified mail addressed to the Property. (JA2b, pgs. 418-419, 422) This Court has recognized 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 Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS 107.080(3)).

At page 7 of its Brief, defendant Bank states that "[t]he NOD was not sent to Wells Fargo. APP 314; see also 318-22." On the other hand, Alessi timely mailed copies of the notice of default to both the Lender, DHI Mortgage Company, and the beneficiary, MERS, identified in the deed of trust. (JA2a, pgs. 318-320)

Defendant Bank held no recorded interest in the Property on September 23, 2011. In particular, the assignment of the deed of trust to defendant Bank was not recorded until October 17, 2012. (JA1c, pgs. 193-194) By that date, the deed of trust

had already been extinguished by the public auction held on July 11, 2012.

Defendant Bank also states that "[t]he Notice of Sale was sent to NDSC, but not Wells Fargo. APP 314-15, 324-27." Again, Alessi timely mailed copies of the notice of trustee's sale to both the Lender, DHI Mortgage Company, and the beneficiary, MERS, identified in the deed of trust. (JA2b, pgs. 429-432) Defendant Bank still held no recorded interest in the Property on May 7, 2012.

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

At page 8 of its Brief, defendant Bank states that "neither the HOA's representative nor Mesa's representative could explain" the prior balance of $739.58 identified as "Balance Forward" and "prior management AMI" in the account history report. (JA3a, pg. 599) As quoted at page 4 of the Answering Brief, however, Traci Wozniak testified that Mesa would rely on reports by the prior management company and that "[i]f there is a dispute, then we'll discuss the dispute when they dispute it." (JA2a, pg. 281) Neither the deposition testimony by Traci Wozniak nor the deposition testimony by Mandy Endelman (JA2a, pg. 296) identified any dispute regarding the $739.58.

The former owner's "proof of payment" (JA3a, pg. 524) proves that the former owner started making untimely payments for assessments beginning in 2008.

At page 9 of its Brief, defendant states that Alessi never "contacted Abelard to tell her that the hold had been removed from her account," but defendant Bank does not cite any authority that any such notice is required. Furthermore, on June 4, 2012, Alessi provided the former owner with a full breakdown of all amounts owed to the HOA. See JA2a, pgs. 331-334. Defendant Bank did not prove that the former owner did not owe the amounts stated in this full breakdown.

At page 10 of its Brief, defendant Bank states that "[b]efore the sale, Abelard paid more than twice the amount of the nine months of assessments due prior to the initiation of the HOA foreclosure," but defendant Bank did not prove that these payments were applied to the superpriority component of the HOA's assessment lien.

At page 12 of its Brief, defendant Bank cites Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, National Association, No. 71246, 408 P.3d 558 (Table), 2017 WL 6597154 (Nev. Dec. 22, 2017)(unpublished disposition)(hereinafter "Golden Hill"), and states that "this Court has since declined to disturb that ruling despite challenges to it through a petition for rehearing, a petition for en banc reconsideration, and two amicus briefs."

On the other hand, NRAP 36(c)(2) expressly provides that "[a]n unpublished disposition, while publicly available, **does not establish mandatory precedent**

except in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case." (emphasis added)

NRAP 36(c)(3) states in relevant part that "[a] party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."

Defendant Bank omits from its Brief the critical language quoted from Golden Hill at pages 20 and 21 of Appellants' Opening Brief 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)

As stated at page 21 of Appellants' Opening Brief, "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." Defendant Bank identifies no contrary evidence.

In particular, the account statement included with Alessi's fax to the former owner proves that from the four (4) payments identified by defendant Bank at page

5 of its Brief, only $281.83 (on October 24, 2011) and $284.00 (on February 13, 2012) was posted to the former owner's account. *See* JA2a, pgs. 333-334. Alessi applied the balance of the four payments to collection costs.

The former owner's account balance was $1,676.58 as of June 1, 2011 (JA2a, pg. 333), which proves that the notice of delinquent assessment (lien) for $2,337.58 mailed to the former owner on June 28, 2011 (JA2b, pgs. 418-419) included $661.00 in costs to which the former owner's payments were later applied.

Even after the two payments received by the HOA were posted, the former owner still owed $1,676.15 to the HOA as of February 13, 2012.

The account statement (JA2a, pgs. 333-334) begins with an "Initial Balance" of $1,204.58, and the account history report for the time period from May 31, 2009 to October 1, 2010 (JA3a, pg. 599) proves that because the former owner was consistently delinquent in making her monthly payments during that time period, the unpaid amount increased from $739.58 due on May 31, 2009 to $1,204.58 due on October 1, 2010.

As noted at pages 3 and 4 above, the former owner's "proof of payment" (JA3a, pg. 524) proves that the former owner started making untimely payments for assessments beginning in 2008.

As quoted at page 21 of Appellants' Opening Brief, in SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., No. 70471, 2018 WL 6609670 (Table) (Dec. 13, 2018)(unpublished disposition), this Court stated that "[a]ssuming 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. at *1. (emphasis added)

Defendant Bank does not cite any authority that required the HOA to allocate the former owner's payments solely to the superpriority portion of the lien. Because the former owner did not make sufficient payments to pay the full amount of the lien, defendant Bank did not prove that the superpriority portion of the lien was paid prior to July 11, 2012.

As quoted at pages 21 and 22 of Appellants Opening Brief, footnote 2 in SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., directly challenges the "persuasive value" of the unpublished order in Golden Hill.

At page 14 of its Brief, defendant Bank states that Golden Hill is "consistent with" the vacated order in Stone Hollow Avenue Trust v. Bank of America, N.A., No. 64955, 382 P.3d 911 (Table), 2016 WL 4543202 (Nev. Aug. 11, 2016)(unpublished disposition). In that case, however, Bank of America, N.A. tendered $198.00 that was

rejected by Heritage Estates. In the present case, defendant Bank's predecessor did not tender any amount to the HOA or Alessi.

At page 15 of its Brief, defendant Bank cites the unpublished order denying rehearing entered in Golden Hill on February 26, 2018, but that order also "does not establish mandatory precedent" and has no "persuasive value" regarding the facts of the present case. NRAP 36(c).

At page 16 of its Brief, defendant Bank states that "the Statute does not limit the ability to satisfy a superpriority lien to lenders or exclude homeowners," but defendant Bank did not prove that any payments made by the former owner were applied to pay the superpriority portion of the HOA's assessment lien in the present case.

Defendant Bank also states that "[t]here is no policy reason standing against homeowners paying the superpriority lien," but as recognized by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,130 Nev. 742, 748, 334 P.3d 408, 412 (2014), 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."

If a lender can claim that payments made by a unit owner must be applied to satisfy the superpriority portion of an HOA's assessment lien, while other portions of the lien remain unpaid, then the lender will benefit from the exact "unjust enrichment" that the superpriority lien was designed to prevent. In particular, the HOA and the other members of the community would be forced to preserve the value of the lender's security interest without requiring that the lender to share in the costs of maintaining the community.

It is only when the unit owner has paid the entire amount of the lien that a court can conclude that "the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance." *See* Golden Hill, 408 P.3d 558 (Table) at *1. In the present case, the HOA's records prove that the five payments in the total amount of $1,164.50 identified at pages 5 and 6 of defendant Bank's Brief were not applied to pay the common assessments incurred during the time period defined in NRS 116.3116(2). *See* JA2a, pgs. 333-334.

3. The legislative history supports appellants' interpretation that only the holder of a security interest described in NRS 116.3116(2)(b) can pay the superpriority lien.

At page 18 of its Brief, defendant Bank states that the official comments to the 2014 version of the UCIOA and 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, should not be considered because they did not exist when NRS Chapter 116 was adopted in 1991.

On the other hand, as quoted in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 748, 334 P.3d at 412-413, comment 1 to the 1982 version of UCIOA § 3-116 stated that the split-lien approach was a "significant departure from existing practice" that was 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" and that "[a]s 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."

This Court also stated:

> "**An 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." *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995). The comments to the 1982 UCIOA were available to the 1991 Legislature when it enacted NRS Chapter 116. Even though the comments emphasize that the split-lien approach is "[a] significant departure from existing practice," **1982 UCIOA § 3-116 cmt. 1**, the Legislature enacted NRS 116.3116(2) with UCIOA § 3-116's superpriority provision intact. From this it follows that, however unconventional, the superpriority piece of the HOA lien carries true priority over a first deed of trust. (emphasis added)

334 P.3d at 413.

At page 19 of its Brief, defendant Bank cites Washoe Medical Center v. Second Judicial District Court, 122 Nev. 1298, 148 P.3d 790 (2006), and states that because the statute is "clear on its face," this Court "cannot go beyond the statute in determining legislative intent." This Court also stated, however, that "we consider 'the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.'" 122 Nev. at 1302,148 P.3d at 793.

Defendant states that "[t]he Statute does not restrict who may satisfy the superpriority lien," but the express language in NRS 116.3116(2)(b) only grants the HOA superpriority over "[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." Because the super priority lien relates only to the holder of a "first security interest," it logically follows that the holder of a "first security interest" should be required to make that payment if other portions of the lien remain unpaid.

As relates to the unit owner, because the entire assessment lien must be paid to prevent the extinguishment of the unit owner's interest, it makes no sense that a unit owner's payments would be applied only to the portion of the lien that affects the holder of a "first security interest" while other portions of the lien remain unpaid.

NRS Chapter 116 does not contain any specific language regarding how

payments made by the holder of a "first security interest" must be treated, but NRS 116.1108 supplements NRS Chapter 116 with "the law of real property." When NRS Chapter 116 was enacted, and during all time periods relevant to the present case, the law of real property provided that at the threat of foreclosure by a senior lien, a junior lienor was 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 (1997); 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).

The law of real property also recognized a clear distinction between the legal effect of a payment made by "one who is primarily responsible for performance of the obligation" (Restatement (Third) of Prop.: Mortgages, §6.4 (a)(1997)) and a payment made by "one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance." (Restatement (Third) of Prop.: Mortgages, §6.4 (e)(1997))

Comment a to Restatement (Third) of Prop.: Mortgages §6.4 (1997) explained the distinction between payment or tender by someone primarily liable for the debt

and payment or tender by a party seeking to protect its subordinate 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. (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, 55, 153 P. 250, 252 (1915).

In Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), this Court stated that "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication." NRS 116.1108 supplements NRS Chapter 116 with "the law of real property . . . except to the extent inconsistent with this chapter."

NRS Chapter 116 does not contain any language that is inconsistent with the

long-established principle of real property law that treats a payment made by a subordinate lienholder as creating an assignment that must be recorded.

As discussed at page 20 of Appellant's Opening Brief, the Legislature confirmed its original intent that the superpriority lien could only be paid by the holder of a first security interest by amending NRS 116.31164(2) in 2015 to state that if "the amount of the association's lien that is prior to its security interest" was paid by "the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116," a record of satisfaction must be recorded "not later than 2 days before the date of sale."

The 2015 amendment made clear what "the law of real property" already required because the "appropriate assignment of the mortgage [superpriority lien] in recordable form" described in Section 6.4(f) of the Restatement falls within the definition of the word "conveyance" in NRS 111.010(1), which includes "every instrument in writing" by which an "interest in lands" is "assigned."

NRS 111.315 in turn required that this "conveyance" be recorded, and NRS 111.325 made the conveyance "void" as to the foreclosure sale purchaser if it was not recorded prior to the foreclosure deed. Because NRS 111.315 and NRS 111.325 each use the word "shall," the recording of the "assignment in recordable form"

required by the Restatement was mandatory. *See* Pasillas v. HSBC Bank USA, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011).

At page 20 of its Brief, defendant Bank states that this Court should ignore any "[p]ostenactment legislative history," but as quoted at page 20 of Appellant's Opening Brief, this Court has recognized 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." Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 157, 179 P.3d 542, 554-555 (2008).

At page 21 of its Brief, defendant Bank also states that this Court should ignore the comments to the 2014 version of UCIOA § 3-116, but plaintiff's interpretation of the statute is also supported by comment 1 to the 1982 version of UCIOA § 3-116.

At page 23 of its Brief, defendant Bank also states that this Court should not consider 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, but this Court stated in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 749 n. 4, 334 P.3d 408, 413, n. 4 2014), that relying on the report "as persuasive, though not mandatory, precedent"

was "consistent with the mandate that we interpret the UCIOA , like other Uniform Acts, 'to make uniform the law with respect to the subject of [the act] among states enacting it.'"

At page 24 of its Brief, defendant Bank highlights in bold the words "and the unit/parcel owner failed to cure its assessment default" from the Report as evidence that "either the homeowner or a lender may cure." On the other hand, because the unit owner's interest in a property can be extinguished by a foreclosure of the subpriority portion of an "assessment default," for a unit owner "to cure its assessment default," the unit owner would have to pay the entire amount of the assessment lien.

In the present case, the evidence proves that even after the HOA gave the former owner credit for every payment made by her as of June 4, 2014, the former owner remained in default for $1,899.65. (JA2a, pgs. 331-334) Even if the former owner is also given credit for the check for $149.00, dated June 20, 2012 (JA2a, pg. 309), the former owner did not pay enough to cure her "assessment default."

Because the former owner did not cure her entire "assessment default," the assessment lien was not released, and defendant Bank's deed of trust was extinguished by the foreclosure of the HOA's superpriority lien.

At page 25 of its Brief, defendant Bank states that "[i]t is undisputed that Abelard paid $1164.20 toward HOA assessments between June 2011 and July 2012." On the other hand, the HOA's records proved that the account balance of $1,676.58 owed to the HOA on June 1, 2011 included unpaid assessments dating back to June 1, 2009.

Defendant Bank has not cited any authority that required the HOA to apply the payments made by the former owner after June 28, 2011 only to the common assessments that accrued during the nine months prior to June 28, 2011 and not to the assessments and late fees dating back to June 1, 2009. Defendant Bank also did not prove that the HOA applied the partial payments only to the common assessments that accrued during the nine months prior to June 28, 2011.

As a result, no admissible evidence supports defendant Bank's statement in the last paragraph at page 25 of its Brief that "[t]hose payment amounts must have been applied to the monthly assessments, as that is the only applicable portion of the HOA's lien that could obtain superpriority." As discussed above, paying the "superpriority" portion of an assessment lien does not matter to the unit owner because foreclosure of the nonpriority portion of an assessment lien will also "vest in the purchaser the title of the unit's owner without equity or right of redemption."

NRS 116.31166(3).

Again, because the superpriority lien only relates to priority granted to the HOA over the holder of a "first security interest," requiring that partial payments made by the former owner be credited in a way that protects defendant Bank is not logical and violates the purpose for which the superpriority lien was designed – to compel a lender like defendant Bank to share in the costs of maintaining the community in which its real property interest is located.

At page 16 of its Brief, defendant Bank states that "Appellants have not established that the payment was not applied to the superpriority lien or should not have been applied to the superpriority lien." In SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., No. 70471, 432 P.3d 172 (Table), 2018 WL 6609670 (Table) (Dec. 13, 2018)(unpublished disposition), however, this Court stated that "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 manner." (emphasis added)

As stated above, the HOA's statements (JA2a, pgs. 333-334, 336) prove that the partial payments made by the former owner were not applied to pay the common assessments that became due during the nine months prior to June 28, 2011. Defendant Bank also did not prove that the HOA had any obligation to apply the

former owner's payments in that manner.

4. Defendant Bank did not meet its burden of proof regarding payment of the HOA's superpriority lien.

At page 26 of its Brief, defendant Bank states: "Appellants assert that 'payment' is an affirmative defense that must be pled in Wells Fargo's answer, the exclusion of which is fatal." Defendant Bank misstates Appellants' argument, which did not focus on defendant Bank's failure to plead tender, but defendant Bank's failure to meet its burden of proof regarding payment of the superpriority lien.

Defendant Bank states that "Appellants waived this argument by not raising it before the district court," but Appellants raised defendant Bank's failure to meet its burden of proof at page 5 of their opposition, filed on February 20, 2018. (JA3a, pg. 494)

As quoted at pages 11 and 12 of Appellant's Opening Brief, in Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the court stated that "the person who alleges that a debt has been paid has the burden of proving payment." In Resources Group, LLC, as Trustee of the East Sunset Road Trust v. Nevada Association Services, Inc., 135 Nev. Adv. Op. 8, 437 P.3d 154, 158-159 (2019), this Court cited Nguyen v. Calhoun and held that the property owner in that case failed to meet his burden to prove that the cure payment mailed by the property

owner was received by the foreclosure agent before the purchaser at the foreclosure sale paid the high bid.

At page 27 of its Brief, defendant Bank cites Williams v. Cottonwood Cove Development Co., 96 Nev. 857, 619 P.2d 1219 (1980), as authority that it is acceptable to raise a statutory defense for the first time in a motion for summary judgment. Defendant Bank also states that "Appellants had been on notice of Wells Fargo's position **for significant time** as Wells Fargo's discovery efforts focused in large part on the homeowner's payment of the HOA assessments and superpriority lien amount." (emphasis added)

Defendant Bank does not cite any evidence in the record on appeal that proves this statement is true.

At page 28 of its Brief, defendant Bank also cites NRCP 15(b), but defendant Bank did not file the required motion to amend its pleadings "to conform to the evidence" upon which defendant Bank based its motion for summary judgment.

At the bottom of page 28 and top of page 29 of its Brief, defendant Bank also states that "Wells Fargo filed counterclaims against Appellants that specifically alleged the commercial unreasonableness of the HOA Sale, challenged Appellant's status as a bona fide purchaser, and requested that the court enter an order declaring

that the HOA Sale did not extinguish the Deed of Trust, **all of which are based, in part, on Wells Fargo's tender**." (emphasis added)

In the present case, however, defendant Bank did not make a tender to the HOA for any amount. In addition, defendant Bank's motion for summary judgment was based solely on defendant Bank's claim that payments made by the former owner must be applied to the superpriority portion of the HOA' s assessment lien even though defendant Bank's predecessor did not make a tender to the HOA for any amount.

Furthermore, defendant Bank's answer in intervention did not include any of the factual allegations regarding payment upon which defendant Bank based its motion for summary judgment. (JA1b, pgs. 99-119)

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)

In the present case, defendant Bank's predecessor knew that it had not tendered

any amount to pay the superpriority portion of the HOA's assessment lien, and defendant Bank's predecessor allowed the HOA foreclosure sale to be completed without objection.

Because defendant Bank waited until after the Property was sold to an innocent purchaser before raising its objections, the harm to appellants prevents defendant Bank from raising those claims and objections after the sale.

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

At page 29 of its Brief, defendant Bank states that "[t]he HOA sale was commercially unreasonable because the grossly inadequate price was combined with the unfairness arising from Abelard's satisfaction of the lien amount."

First, as quoted at page 24 of Appellants' Opening Brief, the "commercial reasonableness" standard, which derives from Article 9 of the Uniform Commercial Code, does not apply to an HOA foreclosure sale. Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, at *2, 405 P.3d 641, 642 (2017).

Second, the former owner did not satisfy "the lien amount." After giving the former owner credit for every payment made by the former owner prior to the public auction, the former owner still owed the HOA more than $4,000.00. (JA3a, pgs. 595-

599)

Third, as quoted at page 25 of Appellants' Opening Brief, the California rule required that defendant Bank provide "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." Shadow Wood, 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)).

In First Mortgage Corp. v. Saticoy Bay LLC Series 1828 La Calera, No. 70994, 432 P.3d 189 (Table), 2018 WL 6617714 (Nev. Dec. 11, 2018)(unpublished disposition), this Court stated that "[m]ore importantly, appellant did not introduce evidence that it or any of the prospective bidders were actually misled by any of these purported shortcomings such that there might be fraud, unfairness or oppression." Id. at *1.

In the present case, defendant Bank did not prove that its predecessor or any person that attended the public auction held on July 11, 2012 believed that the former owner had paid the superpriority portion of the HOA's assessment lien. As a result, it is impossible for this unknown claim (that defendant Bank did not raise until defendant Bank filed its motion for summary judgment on January 31, 2018) to have affected the amounts bid more than five (5) years earlier on July 11, 2012.

Furthermore, in its Brief, defendant Bank does not address the defects identified at pages 25 and 26 of Appellants' Opening Brief that make the retrospective value assigned to the Property by defendant Bank's appraiser unreliable.

At page 30 of its Brief, defendant Bank cites Hines v. National Default Servicing Corp., No. 62128, 2015 WL 4611941 (Table) (Nev. July 31, 2015)(unpublished disposition), which may not be cited even for its persuasive value. NRAP 36(c)(3). In addition, the language quoted out of context by defendant Bank appears in a sentence stating: "To prevail on a wrongful foreclosure tort claim, a plaintiff must prove that the foreclosing party did not have the legal right to foreclose on the property." 2015 WL 4611941 (Table) at *2.

Moreover, in the Hines case, this Court held that "the Hineses fail to establish that they were not in default" and that "the Hineses were in default because they missed multiple payments that were not subsequently made." Id.

The same is true in the present case. The former owner failed to pay her common assessments on a timely basis, including common assessments that fell due during the time period described in NRS 116.3116(2), and the former owner did not pay those assessments prior to the public auction held on July 11, 2012.

/ / /

6. 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 31 of its Brief, defendant Bank states that "Appellants could not and cannot show that Cranesbill lacked notice of the Deed of Trust at the time it purchased the Property." As stated at page 30 of Appellants' Opening Brief, however, constructive notice of the subordinate deed of trust is not relevant because every recorded document showed that the deed of trust was subordinate to the HOA's superpriority lien and would be extinguished by the HOA foreclosure sale. Restatement (Third) of Prop.: Mortgages, § 7.1 (1997).

Defendant Bank does 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. Furthermore, even if Cranesbill had made an inquiry of the HOA, Alessi or defendant Bank's predecessor, Cranesbill could only have discovered that the HOA was foreclosing a superpriority lien that would extinguish the subordinate deed of trust.

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 discussed at pages 36 and 37 of Appellants' Opening Brief, if the HOA and

its foreclosure agent wrongfully foreclosed the HOA's superpriority lien, defendant Bank had an adequate remedy at law against the HOA and its foreclosure agent that deprived the court of jurisdiction to grant defendant Bank equitable relief altering the legal effect of the HOA foreclosing its superpriority lien on July 11, 2012.

In its Brief, defendant Bank does not identify any contrary authority.

CONCLUSION

By reason of the foregoing, appellants respectfully request that this Court reverse the order granting defendant Bank's motion for summary judgment.

DATED this 16th day of May, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for defendants/appellants

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 6,206 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 16th day of May, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Las Vegas, Nevada 89119
Attorney for defendants/appellants

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 16th day of May, 2019, a copy of the foregoing **APPELLANTS' REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

Andrew M. Jacobs, Esq.
Kelly H. Dove, Esq.
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, NV 89169

/s/ /*Marc Sameroff /*
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.