

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH BERBERICH,

Appellant,

vs.

BANK OF AMERICA, N.A.; AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

Respondents.

Supreme Court Case No. 76457

District Court Case No. 17-00018
Electronically Filed
Dec 27 2018 04:23 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**OPPOSITION TO MOTION FOR
LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF
APPELLANT'S OPENING BRIEF**

This court should deny SFR Investments Pool 1, LLC's motion for leave to file an *amicus* brief. SFR did not purchase the property at the foreclosure sale. SFR has no interest, nor has it ever had any interest, in the property. SFR's "interest" is the same as appellant Kenneth Berberich's interest—a request to sidestep this court's decision in *Saticoy Bay LLC 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226, 232 (2017). The court should not allow SFR to masquerade as a "friend of the court" when it is really just a friend of Berberich. SFR cannot add to what Berberich has already said.

I. SFR DOES NOT HAVE ANY INTEREST IN THIS APPEAL.

As set forth in Bank of America's dismissal motion filed in the district court, borrower Connie Fernandez purchased property located at 8735 Mount Mira Loma Avenue, Las Vegas, Nevada 89178 in June 2009. AA 31. Bank of America loaned Fernandez \$197,359.00 to purchase the property, and secured the loan with a deed

of trust recorded against the property. *Id.* at 31-32. Bank of America is the current beneficiary of record of the deed of trust. *Id.* at 32.

Via Valencia / Via Ventura Homeowners Association (**HOA**) foreclosed on the property on August 11, 2011. *Id.* Kenneth Berberich purchased the property at the foreclosure sale for \$4,101.00. *Id.* Berberich delayed for more than six years before filing a complaint for quiet title and declaratory relief against Bank of America, seeking a declaration that Bank of America's interest was extinguished as a result of the sale. *Id.* Berberich filed his complaint on January 31, 2008. *Id.*

SFR alleges it has an interest in this appeal because it "buys properties at association non-judicial foreclosure sales." Mot. at 3. But SFR did not buy the property at issue in this appeal at an HOA foreclosure sale, nor does it allege it has or had any interest in the property. The court should not allow SFR to file an amicus brief for this reason alone.

Instead, SFR argues it has an "interest" because SFR routinely argues, in defense that a deed of trust remains against properties it owns post-foreclosure, that a deed of trust beneficiary's claims against SFR are time barred. *Id.* at 2-3 (collecting cases). Bank of America has not asserted *any* claim against Berberich (or SFR) in this litigation; it is impossible that any claim by Bank of America is outside the statute of limitations. Simply because SFR asserts the same statute of limitations

arguments Bank of America asserts against Berberich in this case does not give it an interest to appear as an *amicus* party.

II. WITHOUT AN INTEREST IN THE APPEAL, SFR IS NOT ENTITLED TO FILE AN AMICUS BRIEF.

"There is no inherent right to file an *amicus curiae* brief with the court. It is left entirely to the discretion of the Court." *Long v. Coast Resorts, Inc.*, 49 F.Supp.2d 1177, 1178 (D. Nev. 1999). "This is true notwithstanding the fact that the parties may have consented, or do not object . . . *particularly where the applicant's only concern is the manner in which this Court will interpret the law.*" *Id.* (internal citations omitted) (emphasis added).

"The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term '*amicus curiae*' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J.). SFR has no interest in this appeal, and files its motion as a "friend of a party"—Berberich. *See id.* Berberich filed his opening brief arguing, *inter alia*, that NRS 11.080 and NRS 11.070 do not bar him from seeking declaratory relief. *See* Opening Br. SFR's motion alleges its proposed amicus brief "shows how neither NRS 11.070 nor 11.080 are time-bar statutes that would bar a title holder or

possessor of real property from asserting a claim that is either founded upon title or for the recovery of real property." Mot. at 5.¹

SFR's motion asserts the same arguments as Berberich in the opening brief. The court should not allow SFR's attempt to duplicate Berberich's arguments, and extend the length of Berberich's brief, out of concern for how this court will interpret the law. *See Ryan*, 125 F.3d at 1064 ("The bane of lawyers is prolixity and duplication In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.").

CONCLUSION

SFR has appeared in 158 appellate cases before this court, including three others as an *amicus* party—the court has already heard plenty from SFR. SFR is not

¹ Any attempt by SFR to expand the issues in this appeal is improper. An argument not raised in the district court is not properly raised for the first time on appeal, particularly by SFR, an entity with no interest in the subject property. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); *Hill v. State*, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

entitled to file a brief in every single case that may affect it. This is Berberich's case, and he can defend himself without SFR's help

If the court does allow SFR to file a brief, the brief should be limited to the arguments raised by the parties below. Bank of America requests the opportunity to fully respond to any brief filed by SFR.

DATED this 27th day of December, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 27th day of December, 2018, and pursuant to NRCP 5, I served a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT'S OPENING BRIEF**, via this court's Electronic Filing System to the following:

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