Case No. 76457

IN THE SUPREME COURT OF NEVADA

KENNETH BERBERICH,

Appellant,

vs.

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

Respondents.

Electronically Filed
Jan 14 2019 10:06 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

BRIEF OF AMICUS CURIAE SFR INVESTMENTS POOL 1, LLC, IN SUPPORT OF APPELLANT'S OPENING BRIEF

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@kgelegal.com
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: karen@kgelegal.com

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301

NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus SFR Investments Pool 1, LLC ("SFR") certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

SFR is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

Amicus SFR is represented by Jacqueline A. Gilbert, Esq., and Karen L. Hanks, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates.

DATED this 20th day of December, 2018.

KIM GILBERT EBRON

/s/ Karen L. Hanks
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE

SFR Investments Pool 1, LLC ("SFR") buys properties at association non-judicial foreclosure sales. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 409-10 (2014). Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

In cases where SFR has sought to bar a bank's challenge to an NRS 116 sale on the basis that the bank's claim was time-barred, SFR's opponents, relying on *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226 (2017) and/or *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016), have argued that the statute of limitations which applies to any "quiet title" claim is five-years. Some Courts have agreed with this, while others have adopted SFR's analysis that neither apply to the bank's claim. *See Christina Trust v. SFR Investments Pool 1, LLC*, Case No. 2:16-cv-1226-JCM-GWF, 2017 WL 663055 (D.Nev. February 17, 2017) (finding five-year statute of limitations based on NRS 11.070); *Deutsche Bank National Trust Company v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-2683-GMN-GWF, 2018 WL 3758569 (D. Nev. August 8, 2018) (finding five-year statute of limitations based on NRS 11.070); *Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan*

Servicing, LLC v. SFR Investments Pool 1, LLC, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

Such contentions prove that the reliance on *Gray Eagle*, like the District Court did in this case, has impacted SFR's interests.

DATED this 20th day of December, 2018.

KIM GILBERT EBRON

/s/ Karen L. Hanks, Esq.
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

SUMMARY OF ARGUMENT

The District Court improperly applied NRS 11.070 and NRS 11.080 as a statute of limitations against a purchaser at an NRS 116 sale. Neither statute is a time-bar statute. Instead, both statutes are standing statutes, and Appellant in this action satisfied both seisin and possession as required by NRS 11.070 and NRS 11.080. Therefore, it was error for the District Court to dismiss Appellant's claim.

Additionally, NRS 11.070 and 11.080 do not provide a five-year statute of limitations to a "quiet title" claim asserted by a bank in an NRS 116 case where the bank is challenging the sale as a mere lienholder. The appropriate statute of limitations is three-years as to a bank.

I. NRS 11.070 IS A STANDING STATUTE, NOT A TIME-BAR STATUTE

Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 305 P.3d 898, 902 (2013). If the statute's, "language is clear and unambiguous," the Court must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and "interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

Rather than define a time-period in which a party must file suit, "founded upon title to real property," NRS 11.070 sets a condition precedent which gives a party standing to bring an action **or** defend an action, and that condition is the party must have been seized i.e. ownership in fee[1] or possessed of the real property in question, five years prior to bringing the action **or** defending the action. Both the title of the statute and the language within, namely "no cause of action…unless" make it clear that the statute is a standing statute. The fact that the statute also limits the **defense** of such an action "unless" the condition precedent exists also makes it clear that NRS 11.070 is not a time-bar statute, but rather a standing statute.

In this regard, NRS 11.070, can never bar a claim or a defense by a party who is currently record title holder or who had title within the preceding five years of bringing the claim or asserting the defense. This is so because such party meets the condition precedent of NRS 11.070 in that the party is seized of the property. Even if the party was not seized, so long as the party currently has possession or had possession of the property within the preceding five years of the claim or defense, that party also cannot be barred from its claim or defense.

By way of example, party A becomes record title holder and takes possession of Blackacre on January 1, 2000. Then on January 2, 2000, party B records a

---

[1] *South End Minding Co. v. Tinney*, 22 Nev. ___, ___, 35 P. 89, 92 (1894).

fraudulent deed transferring title to Blackacre to himself. In that scenario, party A has possession, and party B has title. Nothing under NRS 11.070 requires that party A or party B file an action against one another five years from January 2, 2000. Instead, both party A and party B have standing under NRS 11.070 to bring a claim or maintain a defense because party A has possession and party B is seized. If this scenario stayed the same, and we fast forward to today, some 18 years later, both parties would still have **standing** under NRS 11.070 to bring a claim or maintain a defense to an action "founded upon title to real property." Neither would be barred from brining such a claim or asserting such a defense. The statute of limitations would be determined by the actual claim asserted in the complaint.

NRS 11.070 makes no mention of an accrual of a claim "founded upon title;" instead, it only discusses the necessary condition a party must have in order to have standing to assert a claim or defense. In this regard, while NRS 11.070 may bar a claim/defense, it will not be because of any time-limitation; it will be because the party was not seized or possessed of the property i.e. the party lacks standing.

II. NRS 11.080 IS A STANDING STATUTE NOT A TIME-BAR STATUTE

Likewise, NRS 11.080 sets the same condition precedent for actions for the "recovery of real property" or the "recovery of the possession thereof." Again, the statute does not state the action must be filed within five years; instead, the statute states that "no action for the recovery of real property, or for the recovery of the

possession thereof… shall be maintained, unless…" the party bringing the action was seized or possessed of the premises five years before commencing the action. The terms "maintained" and "unless" make it clear, that NRS 11.080 is a standing statute.

By way of example, party A acquires 100 acres of real property on January 1, 2000. Party B takes possession of 10 acres of that same property on January 2, 2000. Nothing in NRS 11.080 requires party A to file an action against party B within five years of January 2, 2000. Instead, party A, so long as he maintains title to the property (i.e. seisin), can bring an action against party B even today, some 18 years past the date party B took possession. Party A will not be barred merely because he filed his action greater than five years; this is not the analysis under NRS 11.080. Instead, the analysis is did party A have title or possession of the property within five years prior to bringing the action. In this scenario, because party A persistently maintained title, it is inconsequential how many years have passed since party B took possession (in the example above 18 years ago). The question is not when the claim accrued, as NRS 11.080 makes no mention of accrual of a claim; instead, the sole focus is standing—whether party A had title or possession within five years of filing the action, not whether he filed his action within five years of party B taking possession.

III. NEITHER NRS 11.070 NOR NRS 11.080 APPLY TO BANK CHALLENGES TO NRS 116 SALES

In the plethora of NRS 116 cases, banks have consistently argued that the time-limitation in which to file their "quiet title" claims is five-years, citing NRS 11.070 and/or NRS 11.080. The banks further rely on cases such as *Gray Eagle* (noting in dicta that NRS 11.080 is a five-year statute of limitations),[2] *Weeping Hollow* (noting in dicta that NRS 11.070 is a five-year statute of limitations).[3] A plain reading of both statutes demonstrates, however, that neither statute can be construed as a statute of limitations, and do not apply to a bank's challenge, when it sits solely as a lienholder.

A. NRS 11.070 Does Not Apply.

NRS 11.070 states in relevant part

> No cause of action…founded upon the **title to real property**,…shall be effectual, unless it appears that **the person prosecuting the action…was seized or possessed of the premises in question within 5 years before the committing of the act** in respect to which said action is prosecuted…

NRS 11.070 (emphasis added.)

---

[2] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226 (2017).

[3] *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016).

When a bank, as a lienholder, challenges the effect of an NRS 116 sale, it seeks a declaration that the deed of trust remains a valid lien on the property or that the sale should be set aside. Simply because a bank uses the slang term "quiet title" or that it claims the deed of trust still clouds title does not morph the claim into one "founded upon title to real property." *See e.g. Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

As this Court has held, while a lien is a monetary encumbrance on property which clouds title, "it exists separately from that title," and therefore an action involving the lien does not relate to title. *Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. ___, ___, 183 P.3d 895, 902 (2008). In *Hamm*, this Court noted "a lien right alone does not give the lienholder right and title to the property." *Id.*, quoting *In re Marino*, 205 B.R. 897, 899 (Bankr.N.D.Ill.1997). Rather, "title 'which constitutes the legal right to control and dispose of property' remains with the property owner until the lien is enforced through foreclosure proceedings."' *Id.*, quoting BLACK'S LAW DICTIONARY 1522 (8th ed.2004).

With this principle in mind, NRS 11.070 does not apply to a bank claim challenging an NRS 116 sale because the claim is not one "founded upon title to real property." The bank, as mere lienholder, claims a lien right, and nothing more. The claim is an attempt to obtain a determination that the lien survived the sale; it is not a claim founded upon title.

If that was not enough, as discussed above in Section I, NRS 11.070 is not a time-bar statute, it is a standing statute; a bank as mere lienholder would never have standing to assert a claim or defend a claim founded upon title to real property because it was neither seized nor possessed of the property. Recently, banks have attempted to argue that they can "piggy-back" on the borrower/former homeowners' possessory rights in order to establish seisin/possession, but this is unavailing. Nevada is not a common law theory of mortgage state where the lender holds title until the debt is paid off. *See*, *Flyge v. Flynn*, 63 Nev. ___, ___, 166 P.2d 539, 550 (1946). Rather, Nevada is a lien theory state in which the lender cannot take possession of the real property without a foreclosure and sale. *Id.* at 224, 166 P.2d at 550. This fact is confirmed by this Court's holding in *Hamm*. Thus, a plain reading of NRS 11.070 shows that this statute has no application whatsoever to a bank's "quiet title" claim challenging an NRS 116 sale.

B. NRS 11.080 Does Not Apply.

NRS 11.080 states in relevant part

> No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement.

NRS 11.080 (Emphasis added.)

Again, when a bank, as a lienholder, challenges the effect of an NRS 116 sale, it seeks a declaration that the deed of trust remains a valid lien on the property or that the sale should be set aside. By way of this claim, the bank does not seek "recovery" or "recovery of possession" of the property. *Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

Even if a bank succeeds on its claim, it would still have to foreclose on the deed of trust to get possession of the property. *Hamm*, 124 Nev. at 298, 183 P.3d at 902. Also, just like NRS 11.070, NRS 11.080 likewise requires that before a party can maintain an action to recover real property it must have been seized or possessed of the property. In the context of challenging an NRS 116 sale as a lienholder, a bank

would not have standing to assert a claim because it cannot establish it was seized or possessed of the property. As such, NRS 11.080 has no application whatsoever to a bank's "quiet title" claim challenging an NRS 116 sale.

IV. THREE-YEAR STATUTE OF LIMITATIONS APPLIES TO BANK CHALLENGES TO NRS 116 SALES

A. NRS 11.190(3)(a) Applies to a Bank Claim.

Having now established that there is no five-year statute of limitations that applies to a bank's "quiet title" claim challenging an NRS 116 sale, the question becomes what statute of limitations does apply. The answer is three-years under NRS 11.190(3)(a). In every case where a bank, as lienholder, challenges an NRS 116 sale, whether the allegations sound in tender, fraud, unfairness or oppression, lack of compliance or constitutionality,[4] all the allegations challenge how the Association conducted the foreclosure.

NRS 11.190(3)(a) provides that an "action upon a liability created by statute, other than a penalty or forfeiture" must be commenced within three years. "The phrase 'liability created by statute' means a liability which *would not exist but for the statute*." *Torrealba v. Kesmetis*, 124 Nev. ___, ___, 178 P.3d 716, 722 (2008).

[4] The one exception to this rule is where a bank asserts 12 U.S.C. § 4617(j)(3). But this claim carries its own three-year statute of limitations pursuant to 12 U.S.C. § 4617(b)(12).

Regardless of how the allegations and causes of action are labeled, "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *Id*. at 723. *See also*, *Stalk v. Mushkin,* 125 Nev. ___, ___, 199 P.3d 838, 841 (2009) (noting that the nature of the claim, not its label, determines what statute of limitations applies).

Under Nevada law, there is a presumption that the Association sale was properly conducted, and a properly conducted Association foreclosure sale extinguishes all junior interests, including deeds of trust. *Nationstar Mortgage, LLC v. Saticoy Bay Series 2227 Shadow Canyon,* 133 Nev. ___, 405 P.3d 641, 646 (2017) ("[The Bank] has the burden to show that the sale should be set aside in light of [the purchaser's] status as the record title holder." (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. ___, ___, 918 P.2d 314, 318 (1996)); NRS 47.250(16); NRS 116.31166; and *Shadow Wood Homeowners Ass'n Inc. v. New York Community Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105, 1111 (2016) (observing that NRS 116.31166's language was taken from NRS 107.030(8), which governs power-of-the sale foreclosures))). *See also*, *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 419. Thus, any challenge to the presumptive extinguishment of the deed of trust is, by its very nature, a challenge to the Association's actions under the statute in conducting the foreclosure. And this is evident by the countless complaints banks have filed. All of the allegations involve complaints as to how the Association failed

to comply with NRS 116 or failed to conduct the foreclosure in a way that was consistent with NRS 116.

This is true even where a bank alleges tender, despite the fact that NRS 116 does not discuss tender. As this Court recently recognized, any allegation that the super-priority portion was paid, is challenging the fact that a default existed thereby challenging the Association's authority to foreclose. *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 121 (Nev. 2018) (noting a trustee has no power to convey an interest in land where the obligation is not in default). This is consistent with other opinions from this Court on wrongful foreclosure. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. ___, ___, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale."). *See also, McKnight Family, LLP v. Adept Management Services, Inc.*, 129 Nev. ___, ___, 310 P.3d 555, 559 (2013) ("A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.").

Because any challenge to an NRS 116 sale raised by a bank as a lienholder, challenges the conduct of the Association under NRS 116, a bank's claim, no matter

how titled, is an "action upon a liability created by statute," and therefore carries a three-year statute of limitations.

B. The Analogous Limitations Periods for Challenges to Foreclosure Sales Do Not Exceed Three Years.

Typically, "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." *Perry v. Terrible Herbst, Inc.*, 132 Nev. ___, ___, 383 P.3d 257, 260 (2016) (quoting *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 518 (Tex. 1998)); citing *Bellemare v. Wachovia Mortg. Corp.*, 284 Conn. 193, 931 A.2d 916, 921 (2007) ("[W]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon.").

In Nevada, the following limitations apply to challenges to foreclosure sales:

TYPE OF LIEN	TYPE OF FORECLOSURE	STATUTE OF LIMITATIONS	STATUTE
Deed of Trust	Non-Judicial	90 days – for Noticing	NRS 107.080
Deed of Trust	Non-Judicial	3 years – for Other	NRS 11.190(3)(a)
Deed of Trust	Judicial	1 year	NRS 21.210
Utility	Judicial	1 year	NRS 21.210

Mechanic	Judicial	1 year	NRS 21.210
Property Tax	Non-Judicial	2 years	NRS 361.600

There is no basis to deviate from the above-analogous limitations periods, and the same limitations periods should apply to actions challenging an NRS 116 sale. Because the longest limitations period recognized is three-years, there is no basis to extend any longer period for a bank's claim challenging an NRS 116 sale.

CONCLUSION

This Court should reverse, and remand with instructions to enter judgment in favor of Appellant.

DATED this 20th day of December, 2018.

KIM GILBERT EBRON

/s/ Karen L. Hanks, Esq.
Jacqueline A. Gilbert, Esq.
Nevada Bar No. 10593
Karen L. Hanks, Esq.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief is 24 pages and contains 3064 words (3397 with interest of amicus statement).
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), 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.

…

…

…

…

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of December, 2018.

KIM GILBERT EBRON

/s/ Karen L. Hanks, Esq.
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of December, 2018. Electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Appellant's Opening Brief** was made pursuant to the Master Service List.

Dated this 20th day of December, 2018.

/s/ Karen L. Hanks
An employee of KIM GILBERT EBRON