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7
8 SUPREME COURT

9
10 STATE OF NEVADA

11 BANK OF AMERICA, N.A.,
12 SUCCESSOR BY MERGER TO BAC
HOME LOANS SERVICING, LP,
13 F/K/A COUNTRYWIDE HOME
LOANS SERVICING, LP,

No. 70501

14 Appellant,

15 vs.

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

19 Respondent.
20

21 **BRIEF OF AMICUS CURIAE SATICOY BAY IN SUPPORT OF**
22 **RESPONDENT'S PETITION FOR REHEARING**

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1 At page 6 of the opinion, this Court states that “a plain reading of NRS
2 116.3116 indicates that at the time of Bank of America’s tender, tender of the
3 superpriority amount by the first deed of trust holder was sufficient to satisfy that
4 portion of the lien.” On the other hand, NRS 116.3116 does not include the word
5 “tender” or the word “satisfy.”
6

7
8 At page 8 of the opinion, this Court states that “[t]endering the superpriority
9 portion of an HOA lien does not create, alienate, assign, or surrender an interest in
10 land.” On the other hand, NRS 116.1108 expressly provides that “the law of real
11 property” supplements the provisions of NRS Chapter 116.
12

13
14 The established principles of real property law that govern performance or
15 tender by a subordinate lienholder appear in Sections 6.4 (e), (f), and (g) of
16 Restatement (Third) of Prop.: Mortgages (1997):
17

- 18
19 (e) **A performance in full of the obligation secured by a**
20 **mortgage**, or a performance that is accepted by the mortgagee in
21 lieu of payment in full, **by one who holds an interest in the real**
22 **estate subordinate to the mortgage but is not primarily**
23 **responsible for performance, does not extinguish the**
24 **mortgage**, but redeems the interest of the person performing
25 from the mortgage and **entitles the person performing to**
26 **subrogation to the mortgage under the principles of §7.6.** Such performance may not be made until the obligation secured
27 by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.

1 (f) Upon receipt of performance as provided in Subsection (e), **the**
2 **mortgagee has a duty to provide to the person performing,**
3 **within a reasonable time, an appropriate assignment of the**
4 **mortgage in recordable form.** If the mortgagee fails to do so
5 upon reasonable request, **the person performing may obtain**
6 **judicial relief ordering the mortgage assigned** and, unless the
7 mortgagee acted in good faith in rejecting the request, awarding
8 against the mortgagee any damages resulting from the delay.

9 (g) An unconditional tender of performance in full by a person
10 described in Subsection (e), even if rejected by the mortgagee, **if**
11 **kept good** has the effect of performance under Subsections (e)
12 and (f) above. (emphasis added)

13 Comment a to Restatement (Third) of Prop.: Mortgages §6.4 (1997) explains
14 the distinction between payment or tender by someone primarily liable for the debt,
15 and payment or tender by a party seeking to protect its subordinate interest in the
16 property:
17

18 Equitable redemption is ultimately accomplished by performance in full
19 of the obligation secured by the mortgage. **However, redemption has**
20 **two quite distinct results, depending on whether the performance**
21 **is made by a person who is primarily responsible for payment of**
22 **the mortgage obligation, or by someone else who holds an interest**
23 **in the land subordinate to the mortgage.** In the first of these
24 situations, the mortgage is simply extinguished, as provided in
25 Subsection (a) of this section. **In the second, the mortgage is not**
26 **extinguished, but by virtue of Subsection (e) is assigned by**
27 **operation of law to the payor under the doctrine of subrogation;** see
§7.6. Subrogation does not occur in the first situation, since one who
is primarily responsible for payment of a debt cannot have subrogation
by performing that duty; see §7.6, Comment b. (emphasis added)

1 Comment g to Restatement (Third) of Prop.: Mortgages, §6.4 (1997) also
2
3 explains the effect of a payment made by a subordinate lienholder:

4 The second distinction, mentioned above, is that redemption by a
5 person who is not primarily responsible for payment of the debt **does**
6 **not extinguish the mortgage, but rather assigns both the mortgage**
7 **and the debt to the payor by operation of law under the doctrine of**
8 **subrogation**; See §7.6. In cases of this sort, the payor has paid, not out
9 of duty, but to protect a real estate interest from foreclosure. Thus, the
10 payor is entitled to reimbursement from whomever is primarily
11 responsible for payment, and can enforce the mortgage against that
12 person to aid in collection of the reimbursement. Subrogation in this
13 context helps prevent the unjust enrichment of the party who is
14 primarily responsible at the expense of the payor. See §7.6,
15 Illustrations 1 and 2. (emphasis added)

16 Subsection (f) of Restatement (Third) of Prop.: Mortgages, §6.4 (1997)
17 provides that “[u]pon receipt of performance,” the mortgagee must provide to the
18 person performing “an appropriate assignment of the mortgage in recordable form.
19 Subsection (f) of Restatement (Third) of Prop.: Mortgages, §6.4 (1997) also provides
20 that “[i]f the mortgagee fails to do so upon reasonable request, the person performing
21 may obtain judicial relief ordering the mortgage assigned”

22 As a result, the law of real property, which supplements the provisions of NRS
23 Chapter 116 pursuant to NRS 116.1108, expressly contemplates that Bank of
24 America would record “an appropriate assignment” or “obtain judicial relief ordering
25
26
27

1 the mortgage [superpriority lien] assigned.”

2
3 At pages 8 and 9 of the opinion, this Court states: “Rather, it *preserves* a pre-
4 existing interest, which does not require recording.” This statement, however, is
5 contradicted by the law of real property in Restatement (Third) of Prop.: Mortgages,
6 § 6.4 (1997). Although this Court refers to Section 6.4 of the Restatement at page 11
7 of the opinion, this Court does not discuss the language in Section 6.4 of the
8 Restatement that treats a tender made by a subordinate lienholder as an assignment.
9

10
11 In Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018
12 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), this Court stated that
13 the district court did not rule on the bona fide purchaser issue and that “it does not
14 appear that either party raised the subrogation issue at the district court.” Id. at *2.
15 This Court also stated that these issues “may warrant the district court’s
16 consideration in light of whether Bank of America sufficiently tendered the
17 superpriority portion of the lien.” Id.
18

19
20 At page 9 of the opinion in Bank of America, N.A. v. SFR Investments Pool
21 1, LLC, this Court quotes the following sentence: “[D]ocuments which do not create
22 or transfer interests in land are often held to be nonrecordable; the records, after all,
23 are not a public bulletin board.” *See Baxter Dunaway, Interests and Conveyances*
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1 *Outside Acts – Recordable Interests*, 4 L. of Distressed Real Est. § 40:8 (2018).

2
3 Section 40:8, however, does not identify a tender made by a subordinate
4 lienholder as a document that does not “create or transfer” an interest in land. The
5 examples discussed in Section 40:8 include “short term leases” for less than a year
6 and the contract that creates an installment land contract.
7

8 This Court also italicizes the words “in the manner prescribed in this chapter”
9 that appear in NRS 111.315. In order to be in “recordable form,” the assignment
10 required by Section 6.4(f) of the Restatement must necessarily be “proved,
11 acknowledged and certified” in the manner prescribed by NRS Chapter 111.
12

13
14 At page 10 of the opinion, this Court cites NRS 116.3116 to support the
15 statement that “Bank of America’s tender discharged the superpriority portion of the
16 HOA’s lien by operation of law,” but the word “discharge” does not appear
17 anywhere in NRS 116.3116. This Court also cites NRS 116.3116(1)-(3) to support
18 the statement that “NRS Chapter 116's statutory scheme allows banks to tender the
19 payment needed to satisfy the superpriority portion of the HOA lien and maintain its
20 senior interest as the first deed of trust holder.” No such language appears anywhere
21 in NRS 116.3116. NRS 116.3116(3) instead provides for the creation of an escrow
22 account or impound account to pay all of the assessments for common expenses.
23
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1 **2. Bank of America’s failure to record notice of its claim of tender**
2 **made that claim void as to SFR.**

3 At page 13 of the opinion in Bank of America, N.A. v. SFR Investments Pool
4 1, LLC, this Court cites Henke v. First Southern Properties, Inc., 586 W.W.2d 617
5 (Tex. App. 1979), where the foreclosing lender holding the first deed of trust agreed
6 with the property owner to reinstate the loan if \$2,156 was paid by September 30,
7 1974, and “the money was paid by the specified time (September 30, 1974) and
8 accepted with the advice that Henke’s loan had been reinstated.” Id. at 618. No such
9 agreement exists when an HOA rejects a lender’s demand that the HOA accept a
10 specific amount as “payment in full” of the HOA’s superpriority lien.
11

12 This Court also quotes from Section 7:21 in 1 Grant S. Nelson, Dale A.
13 Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law (6th
14 ed. 2014), that “[t]he most common defect that renders a sale void is that the
15 mortgagee had no right to foreclose” None of the examples discussed in
16 Section 7:21, however, involved a conditional tender made by a subordinate
17 lienholder that had been rejected in good faith.
18

19 At the bottom of page 13 of the opinion, this Court states that “[b]ecause Bank
20 of America’s valid tender discharged the superpriority portion of the HOA’s lien, the
21 HOA’s foreclosure on the entire lien resulted in a void sale as to the superpriority
22 portion of the HOA’s lien.”
23

1 portion.” On the other hand, Restatement (Third) of Prop.: Mortgages, § 6.4(a)
2
3 (1997) states that a mortgage is extinguished only if “one who is primarily
4 responsible for performance of the obligation” makes the payment.

5 In addition, comment d to Restatement (Third) of Prop.: Mortgages, §6.4
6
7 (1997) explains the significance of recording notice of the tender:

8 The rule extinguishing the mortgage when a tender is rejected has only
9 limited modern significance. The reason is that mortgages are virtually
10 always recorded, and the payor derives little benefit, merely from the
11 theoretical extinction of the mortgage if it is in fact still present, and
12 apparently undischarged in the public records.

13 This language contradicts this Court’s treatment of a rejected tender as a
14 document that does not require recording.

15 A tender or purported tender must be recorded in order to put third parties,
16
17 such as bidders at a foreclosure sale, on notice of any claimed payment of the super
18 priority portion of the lien. This is especially true when a lender tenders only the
19 super priority amount knowing that the property will be sold at a foreclosure sale.

20 Because a tender made by a subordinate lienholder acts as an assignment, it
21
22 is a “conveyance” that must be recorded prior to the foreclosure deed, or the tender
23
24 is “void” against the foreclosure sale purchaser pursuant to NRS 111.325.

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1 rejected an offer of payment violates the purpose of the recording laws.

2
3 **CONCLUSION**

4 By reason of the foregoing, Saticoy Bay respectfully requests that this Court
5 grant rehearing on the issue of whether a lender must record a claim of tender prior
6 to an HOA foreclosure sale.
7

8 DATED this 8th day of October, 2018.

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17 **CERTIFICATE OF COMPLIANCE**

18 1. I hereby certify that this brief complies with the formatting requirements
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10 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion
11
12 in the brief regarding matters in the record to be supported by a reference to the page
13
14 of the transcript or appendix where the matter relied on is to be found.

15 DATED this 8th day of October, 2018.

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