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SUPREME COURT

STATE OF NEVADA

7510 PERLA DEL MAR AVE TRUST,

Appellant,

vs.

BANK OF AMERICA, N.A.,

Respondent.

No. 75603

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant 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. Plaintiff/appellant, 7510 Perla Del Mar Ave Trust, is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 7510 Perla Del Mar Ave Trust.

3. The manager for Resources Group, LLC is Iyad Haddad a/k/a Eddie Haddad.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The findings of fact, conclusions of law and judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The amended findings of fact, conclusions of law, and judgment was filed on March 21, 2018. Plaintiff filed its notice of appeal on April 12, 2018.

(C) The appeal is from findings of fact, conclusions of law and judgment entered after a bench trial.

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 plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished the deed of trust assigned to Bank of America, N.A. (hereinafter "defendant Bank").

2. Whether the assessment lien included a superpriority portion that was foreclosed by Mandolin (hereinafter "HOA").

3. Whether Nevada Association Services, Inc. (hereinafter "NAS") or the HOA wrongfully prevented defendant Bank from tendering the superpriority portion of the lien.

4. Whether defendant Bank kept the alleged tender "good."

5. Whether defendant Bank was required to record notice of its claim that the failure by NAS to respond to Miles Bauer's letter discharged the HOA's superpriority lien.

6. Whether 7510 Perla Del Mar Ave Trust (hereinafter "plaintiff") is protected as a bona fide purchaser from defendant Bank's unrecorded claim of tender.

7. Whether the record on appeal contains any evidence proving that fraud, unfairness or oppression accounts for or brought about the price paid by plaintiff.

8. Whether defendant Bank is entitled to equitable relief against plaintiff from the extinguishment of its deed of trust.

9. Following a trial, questions of law are reviewed de novo, but findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous.

STATEMENT OF THE CASE

On September 18, 2013, plaintiff filed an amended complaint asserting two claims for relief: 1) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the real property commonly known as 7510 Perla Del Mar Avenue, Las Vegas, Nevada 89179 (hereinafter "Property"); and 2) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (JA1a, pgs. 1-3)

On August 10, 2016, defendant Bank filed an amended answer to plaintiff's complaint, counterclaims against plaintiff, and crossclaims against the HOA and NAS. (JA1a, pgs. 7-87)

On July 3, 2017, plaintiff filed an answer to defendant Bank's amended counterclaim. (JA1b, pgs. 90-96)

On January 5, 2018, plaintiff and defendant Bank filed a joint EDCR 2.67 pre-trial memorandum. (JA1b, pgs. 97-109)

On February 8, 2108, plaintiff filed a pre-trial memorandum pursuant to EDCR 7.27. (JA1b, pgs. 153-178)

On February 9, 2018, defendant Bank filed a trial brief. (JA1b, pgs. 179-195)

On February 12, 2018, the parties filed stipulated facts. (JA1b, pgs. 196-200)

The court conducted a bench trial on February 12, 2018 and February 13, 2018 (JA2, pg. 239 to JA3, pg. 516)

On March 21, 2018, the court entered amended findings of fact, conclusions of law, and judgment in favor of defendant Bank. (JA1c, pgs. 220-236)

On April 12, 2018, plaintiff filed its notice of appeal. (JA1c, pgs. 237-238)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $14,600.00 at a public auction held on February 1, 2013. (JA1b, pg. 199, ¶¶27, 28) See copy of the foreclosure deed recorded on February 7, 2013 at JA1b, pgs. 111-113)

The public auction arose from a delinquency in assessments due from Dominic J. Nolan (hereinafter "former owner") 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 December 10, 2010. (JA1b, pg. 197, ¶5) The

deed of trust was assigned to defendant Bank on January 6, 2012. (JA1b, pg. 199, ¶23)

On December 8, 2011, acting on behalf of the HOA, NAS mailed a pre-lien letter to the former owner. (JA1b, pg. 197, ¶10)

On January 4, 2012, NAS recorded a notice of delinquent assessment lien for $987.44 against the Property. (JA1b, pg. 197, ¶11)

On February 27, 2012, NAS recorded a notice of default and election to sell under homeowner association lien for $1,992.87 against the Property. (JA1b, pgs. 197-198, ¶12)

On March 7, 2012, NAS mailed copies of the notice of default to the former owner, defendant Bank, MERS, and other interested parties. (JA1b, pg. 198, ¶13)

Miles, Bauer, Bergstrom & Wingers, LLP (hereinafter "Miles Bauer") sent a letter, dated March 16, 2012, to the HOA c/o NAS regarding the superpriority amount of the HOA's lien. (JA1b, pg. 198, ¶17) See copy of the letter at JA1b, pgs. 151-152.

No check for any amount was enclosed with the letter, dated March 16, 2012.

The first page of the letter stated that Miles Bauer was acting on behalf of "MERS as nominee for Bank of America, N.A., as successor by merger to BAC

Home Loans Servicing, LP." (JA1b, pg. 151)

The second page of the letter stated:

> It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

(JA1b, pg. 152)

On November 15, 2012, NAS recorded the notice of foreclosure sale for $3,954.62 against the Property. (JA1b, pg. 199, ¶23)

On November 13, 2012, NAS mailed copies of the notice of foreclosure sale to the former owner, defendant Bank and other interested parties. (JA1b, pg. 199, ¶24)

NAS also caused copies of notice of foreclosure sale to be posted on the Property and in three locations in Clark County, Nevada. (JA1b, pg. 199, ¶25)

NAS also caused the notice of foreclosure sale to be published in the Nevada Legal News on November 21, 2012, November 30, 2012 and December 7, 2012. (JA1b, pg. 199, ¶26)

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SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant Bank's first deed of trust when plaintiff purchased the Property at the HOA foreclosure sale held on February 1, 2013.

Defendant Bank did not prove that the HOA's superpriority lien was paid prior to the public auction held on February 1, 2013.

Defendant Bank did not make a valid tender of any amount to pay the HOA's superpriority lien prior to the public auction held on February 1, 2013.

Defendant Bank did not prove that it kept the alleged tender good.

Defendant Bank's failure to record its claim that the superpriority lien had been discharged makes that claim void as to plaintiff.

As a bona fide purchaser, plaintiff was entitled to rely on the recorded notices as proof that the HOA was foreclosing its superpriority lien.

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

Defendant Bank is not entitled to equitable relief against plaintiff because defendant Bank has an adequate remedy at law against the HOA and NAS if they wrongfully prevented defendant Bank from tendering the superpriority amount of the

lien.

STANDARD OF REVIEW

Following a trial, questions of law are reviewed de novo. Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043, 1048 (2000).

Findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous. May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

ARGUMENT

1. Defendant Bank's trust deed was extinguished by the HOA foreclosure sale held on February 1, 2013.

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 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."

As recognized by this Court in Horizons at Seven Hills v. Ikon Holdings, 132 Nev., Adv. Op. 35, 373 P.3d 66, 73 (2016), 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 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 December 10, 2010, 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., Adv. Op. 75, 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. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.

Because 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., Adv. Op. 75, 334 P.3d 408, 418 (2014), the HOA necessarily foreclosed the entire amount of its lien including the superpriority portion of the lien.

The first page of the foreclosure deed (JA1b, pg. 111) included the following recitals:

> This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the Mandolin governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 02/27/2012 as instrument # 0002448 Book 20120227 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment Lien and Notice of Default and the posting and publication of the Notice of Sale.

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. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014).

Title to the real property was therefore vested in plaintiff 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 February 1, 2013.

NRCP 8 (c) provides that "payment" is an affirmative defense that must be "set

forth affirmatively" in a party's answer. Defendant Bank alleged in its fourth affirmative defense that "[t]he super-priority lien was satisfied prior to the homeowner's association foreclosure under the doctrines of tender, estoppel, laches, or waiver." (JA1a, pg. 9)

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.

Paragraph 28 of the findings of fact in the court's findings of fact, conclusions of law and judgment (JA1c, pg. 206, ¶28) states in part:

> This court is satisfied that Miles Bauer would have issued a payment of at least the super-priority component of the lien if NAS had responded with this information or if Miles Bauer otherwise had the information reasonably available from another source.

The simple fact, however, is that Miles Bauer did not issue a check for any amount of money to the HOA or its foreclosure agent.

In its unpublished orders 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 payment must actually be submitted to make a tender valid. In the present case, because no payment was actually submitted, it is impossible for Miles Bauer to have made a valid tender of any amount to pay the HOA's superpriority lien.

Both of the unpublished orders cite 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 unpublished orders also cite 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) The letter by Miles Bauer in the present case did not offer "immediate" payment. The letter instead stated that "MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP" offered to pay an unspecified amount "upon presentation of adequate proof" at some unidentified date in the future. (JA1b, pgs. 151-152)

Both of the unpublished orders also cite Graff v. Burnett, 414 N.W.2d 271 (Neb. 1987), where the defendant "took out his checkbook" and "was prepared to write his check for $687" and pick up two mares, but plaintiff demanded payment of the entire account, including charges for a third horse. Id. at 274. 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).
>
> To determine whether a proper tender of payment has been made, we have stated that a tender is more than a mere offer to pay. A tender of payment is an offer to perform, **coupled with the present ability of immediate performance**, which, were it not for the refusal of cooperation by the party to whom tender is made, would immediately satisfy the condition or obligation for which the tender is made. (emphasis added)

In rejecting the defendant's argument that he had made a proper tender, the Nebraska Supreme Court stated:

> An additional absence in the record is more important and crucial in Burnett's appeal, namely, the absence of any evidence that Burnett, when he offered to pay by check, had sufficient funds on deposit at the bank on which such check would have been drawn. Although Burnett acknowledged that he would have to "run home and stop payment" of a check given to pay for the entire account at Graffs' farm, **Burnett offered no evidence that he had sufficient funds deposited in his checking account to cover the check he would have delivered to Graffs. As a consequence of such absent evidence, Burnett failed in his burden to show that he had the present ability of immediate performance, an element required for an effective tender, when the claimed tender was made.** (emphasis added)

In the present case, defendant Bank did not prove that Miles Bauer had "the present ability of immediate performance at the time of the tender" when Mr. Jung sent his letter. No details were provided as to how long it would take for BANA to make the payment or even if BANA would agree to pay the amount requested.

Both of the unpublished orders also cite 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.'"

Paragraph 8 of the conclusions of law in the court's findings of fact, conclusions of law and judgment (JA1c, pg. 210, ¶8) states in part:

> BANA's offer to pay coupled with NAS's refusal to accept, acknowledge, or even respond, was sufficient to redeem the seniority for the first deed of trust.

Because Miles Bauer did not tender an actual payment for any amount of money to NAS or to the HOA, the superpriority portion of the HOA's assessment lien remained due and unpaid on the date of the HOA foreclosure sale.

3. Defendant Bank did not prove that the HOA or NAS wrongfully prevented a tender by Miles Bauer.

Paragraph 14 of the conclusions of law in the court's findings of fact, conclusions of law and judgment (JA1c, pg. 213, ¶14) also states:

> Even if Miles Bauer had learned the amount of the superpriority component – either from NAS or through an archived ledger from Mandolin – actual payment of the superpriority amount would have been futile. The evidence established that NAS had an ordinary course of business of rejecting payments from Miles Bauer if the payments were only for the superpriority component.

On the other hand, even where a tender is made by the person "primarily responsible for performance of the obligation," rejection of the tender does not release the lien if the creditor has a good faith belief that more is owed.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, *3-4 (Sep. 13, 2018), this Court quoted from Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13, 16 (Wis. 1972), that "[a] lien may be lost by . . . payment or tender of the proper amount of the debt secured by the lien." In that case, however, the Wisconsin Supreme Court also stated that "an excessive demand does not waive the lien" if the demand is "made in good faith and in belief that the

person making the demand is entitled to such sum and that he has a general lien upon the specific goods." Id.

In Bank of America, N.A. v. Rugged Oaks Investments, LLC, No. 68504, 383 P.3d 749 (Table), 2016 WL 5219841 (Nev. Sept. 16, 2016) (unpublished disposition), this Court quoted from 59 C.J.S. Mortgages § 582 that "[i]t has been held . . . that a good and sufficient tender on the day when payment is due will relieve the property from the lien on the mortgage, except where the refusal [of payment] was . . . grounded on an honest belief that the tender was insufficient."

In Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), this Court cited Hohn v. Morrison, 870 P.2d 513 (Colo. App. 1993).

In Hohn v. Morrison, the court stated:

> Although this is an issue of first impression in Colorado, other jurisdictions which have adopted the lien theory of real estate mortgages have also adopted the rule that an **unconditional tender** of the amount due by the debtor releases the lien of the mortgage **unless the creditor establishes a justifiable and good faith reason for the rejection** of the tender. Moore v. Norman, 43 Minn. 428, 45 N.W. 857 (1890); Renard v. Clink, 91 Mich. 1, 51 N.W. 692 (1892); Easton v. Littooy, 91 Wash. 648, 158 P.531 (1916) (tender of the full amount due operates to discharge the lien of the mortgage **if the tender is refused without adequate excuse**.) Under this rule, although the underlying debt remains enforceable, the lien of the mortgage is discharged. See Easton v. Littooy, supra; Security State Bank v. Waterloo Lodge No. 102, 85 Neb. 255, 122 N.W. 992 (1909) (emphasis added)

870 P.2d at 517-518.

In First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court stated:

> "To constitute a sufficient tender, it must be unconditional. *Where a larger sum than that tendered is in good faith claimed to be due*, the tender is ineffectual as such if its acceptance involves the admission that no more is due." (Emphasis ours.) A number of other authorities were cited in the Bly case establishing the general recognition of the rule. More recently this rule was reiterated with specific allusion to attorneys' fees in the annotation in 93 A.L.R. 73, where it is stated: "And refusal by the mortgagee to accept a tender upon the ground that it does not include attorneys' fees may prevent the tender from operating as a discharge of the mortgage lien when made in good faith, even though, as a matter of law, the mortgagee was not entitled to the fees."

In Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913), the Kansas Supreme Court stated:

> A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. Moore v. Norman, 52 Minn. 83, 53 N.W. 809, 18 L.R.A. 359, 38 Am. St. Rep. 526, and not page 529; 38 Cyc. 152, and cases cited in note 152, 153.

The second page of the letter by Miles Bauer (JA1b, pg. 152) stated:

> It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay the sum upon presentation of adequate proof of the same by the HOA.

Miles Bauer thereby demanded that the HOA make the same admission that the Kansas Supreme Court held to be improper in Smith v. School Dist. No. 64 Marion

County.

Based upon the state of the law on March 16, 2012, it was appropriate for the HOA and NAS to believe that the HOA's superpriority lien was not limited to "the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated February 23, 2012" as stated by Miles Bauer. (JA1b, pg. 152)

In particular, on December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels (hereinafter "CCICCH") issued its Advisory Opinion 2010-01, which stated:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

Id. at 1.

Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) allowed the HOA to include "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

This Court stated in State Dep't of Business & Industry, Financial Institutions Div'n v. Nevada Ass'n Services, Inc., 128 Nev. Adv. Op. 54, 294 P.3d 1223, 1227-1228 (2012): "We therefore determine that the plain language of the statute requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116."

In the present case, the letter by Miles Bauer, dated March 16, 2012, required that the HOA agree that NRS 116 did not allow the HOA to include costs of collecting and attorney's fees in its superpriority lien. Because Advisory Opinion 2010-01 and NAC 116.470 provided otherwise, NAS and the HOA had a good faith reason to believe that more was owed.

Because Miles Bauer made its request on March 16, 2012, the Nevada Real Estate Division's Advisory Opinion No. 13-01 issued on December 12, 2012, and this Court's opinion in Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016), issued on April 28, 2016, did not exist to guide the HOA or NAS.

In addition, after NAS did not respond to the letter by Miles Bauer, an additional eight (8) months passed until November 13, 2012 when NAS mailed copies of the notice of foreclosure sale to the former owner, defendant Bank and other

interested parties. (JA1b, pg. 199, ¶24)

After that, more than two months passed before the public auction was held on February 1, 2013.

Despite having actual notice of the sale, defendant Bank failed to take any action to prevent the Property from being sold to plaintiff without notice of defendant Bank's unrecorded claim that the HOA had failed to respond to Miles Bauer's letter, dated March 16, 2012.

4. After the HOA and NAS did not respond to Miles Bauer's letter, defendant Bank failed to keep the alleged tender good.

As discussed at pages 14 and 15 of plaintiff's pre-trial memorandum pursuant to EDCR 7.27 (JA1b, pgs. 166-167), the established principles of real property law that govern performance or tender by a subordinate lienholder appear in Sections 6.4 (e), (f), and (g) of Restatement (Third) of Prop.: Mortgages (1997).

Restatement (Third) of Prop.: Mortgages, §6.4 provides:

> **§ 6.4 Redemption from Mortgage by Performance or Tender**
>
> (e) **A performance in full of the obligation secured by a mortgage**, or a performance that is accepted by the mortgagee in lieu of payment in full, **by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance**, **does not extinguish the mortgage**, but redeems the interest of the person performing from the mortgage and **entitles the person performing to subrogation to the mortgage under the principles of §7.6**. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but prior to foreclosure.

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

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

As discussed at pages 15 and 16 of plaintiff's pre-trial memorandum pursuant to EDCR 7.27 (JA1b, pgs. 167-168), Restatement (Third) of Prop.: Mortgages, § 6.4(g) (1997) provides that when a tender is rejected by a mortgagee, the person making the tender has the obligation to keep the tender "good." Comment d to Restatement (Third) of Prop.: Mortgages, §6.4 states that "[t]he tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment."

In Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), this Court stated that "Bank of America was not required to pay its tender into the court or keep the tender good by any other means **than being willing to pay upon demand**." Id. at *1. (emphasis added) Similar language appears at page 12 of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72 (Sep. 13,

2018).

The record on appeal does not contain any evidence proving that payment for any specific amount of money was available "upon demand" after NAS did not respond to Miles Bauer's letter, dated March 16, 2012.

5. Defendant Bank's failure to record its claim that the superpriority lien had been discharged makes that claim void as to plaintiff.

At page 8 in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72 (Sep. 13, 2018), this Court stated that "[t]endering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land."

On the other hand, as quoted at page 15 of plaintiff's pre-trial memorandum pursuant to EDCR 7.27 (JA1b, pg. 167), Restatement (Third) of Prop.: Mortgages, § 6.4(f) (1997) provides that if a tender is made by "one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance," the mortgagee [HOA] has a duty to provide the person performing with "an appropriate assignment of the mortgage [superpriority lien] in recordable form." If that mortgagee [HOA] fails to do so, "the person performing may obtain judicial relief ordering the mortgage [superpriority lien] assigned."

Comment a to Restatement (Third) of Prop.: Mortgages §6.4 (1997) states that

where redemption is made by someone who holds an interest in the land subordinate to the mortgage being foreclosed, the mortgage is not extinguished but is instead assigned to the person making the payment. 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. 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)

Subrogation is broadly defined as when one person is substituted in place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to a debt or claim, and its rights, remedies or securities. See Arguello v. Sunset Station, Inc., 127 Nev. Adv. 365, 252 P.3d 206, 208 (2011); 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).

Comment g to §6.4 of the Restatement further explains the effect of a payment

made by a subordinate lienholder and provides in part:

> The second distinction, mentioned above, is that redemption by a person who is not primarily responsible for payment of the debt **does not extinguish the mortgage, but rather assigns both the mortgage and the debt to the payor by operation of law under the doctrine of subrogation**; See §7.6. In cases of this sort, the payoff has paid, not out of duty, but to protect a real estate interest from foreclosure. Thus, the payoff is entitled to reimbursement from whomever is primarily responsible for payment, and can enforce the mortgage against that person to aid in collection of the reimbursement. Subrogation in this context helps prevent the unjust enrichment of the party who is primarily responsible at the expense of the payor. See §7.6, Illustrations 1 and 2. Since the mortgage is not extinguished, and since the payor has actually paid or tendered the balance owing to protect his or her interest, the accrual of interest on the balance ceases in favor of the mortgagee but continues unabated in favor of the payor. (emphasis added)

At the threat of foreclosure by a senior lien, a junior lienor is 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; 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).

Because Miles Bauer did not actually tender a payment for any amount of money to NAS, the HOA was not obligated to provide defendant Bank with an assignment "in recordable form." The record on appeal does not contain any evidence that defendant Bank attempted to "obtain judicial relief ordering the

mortgage assigned" as required by Restatement (Third) of Prop.: Mortgages, §6.4(f) (1997).

Comment d to Section 6.4 of the Restatement explains the significance of recording notice that a tender has been wrongfully rejected:

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

In the present case, the record on appeal does not contain any evidence proving that after NAS did not respond to the letter by Miles Bauer, defendant Bank took any action to prevent the HOA's superpriority lien from being "present, and apparently undischarged in the public records."

A tender or purported tender must be recorded in order to put third parties, such as bidders at a foreclosure sale, on notice of any claimed payment of the super priority portion of the lien.

NRS 116.1108 states that "the law of real property" supplements the provisions of NRS Chapter 116 "except to the extent inconsistent with this chapter."

The definition of the word "conveyance" in NRS 111.010(1) includes "every instrument in writing" by which an "interest in lands" is "assigned." As discussed above, the law of real property set out in Restatement (Third) of Prop.: Mortgages,

§ 6.4(e) (1997) provides that if Miles Bauer had actually tendered a check to the HOA, the HOA had "a duty to provide to the person performing, within a reasonable time, an appropriate assignment of the mortgage in recordable form." Because Miles Bank did not make a valid tender for any amount of money, the HOA had no obligation to provide the "appropriate assignment" to defendant Bank.

If defendant Bank believed that the HOA or NAS acted wrongfully, the law of real property required that defendant Bank "obtain judicial relief ordering the mortgage assigned." The record on appeal does not contain any evidence that defendant Bank took this required action.

As discussed at pages 17 and 18 of plaintiff's pre-trial memorandum pursuant to EDCR 7.27 (JA1b, pgs. 169-170), Nevada law requires that interests in real property be recorded. An unrecorded interest in property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tai-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

NRS 111.315 states:

> Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or **whereby any real property may be affected**, proved, acknowledged and certified in the manner prescribed in this chapter, **to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated** or to the extent permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such

record. (emphasis added)

Because defendant Bank did not record its claim that the superpriority lien was paid, NRS 111.325 provides that defendant Bank's unrecorded claim of tender is void against plaintiff:

> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, **shall be void as against any subsequent purchaser**, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded. (emphasis added)

In the present case, each of the notices recorded 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., Adv. Op. 75, 334 P.3d 408, 418 (2014), and none of the notices indicated that the superpriority lien had been paid.

Because defendant Bank did not record any document disclosing the assignment allegedly created by Miles Bauer's conditional tender, the unrecorded claim of tender is void as to plaintiff.

6. As a bona fide purchaser, plaintiff was entitled to rely on the recorded notices as proof that the HOA was foreclosing its superpriority lien.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016), this Court stated that the purchaser at an HOA sale is entitled to rely on the recorded notices as proof

that the HOA foreclosed a superpriority lien:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.,* 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**.** (emphasis added)

In the present case, each of the notices recorded by NAS 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., Adv. Op. 75, 334 P.3d 408, 418 (2014), and none of the notices indicated that the superpriority lien had been paid.

The record on appeal does not contain any evidence proving that plaintiff had any reason to know about, or any way to discover, defendant Bank's unrecorded claim that the HOA wrongfully prevented Miles Bauer from tendering the superpriority portion of the lien.

In particular, Eddie Haddad, the manager for plaintiff's trustee, testified at trial that there was no way to contact the trustee or the bank to determine if the superpriority lien has been paid. (JA2, pgs. 253-254, 283) Defendant Bank did not produce any contrary evidence.

In Shadow Wood, this Court 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.
>
> This Court also stated in Shadow Wood:
>
> 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. And NYCB points to no other evidence indicating that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale . . . .
>
> * * * *
>
> **Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law**. (emphasis added)
>
> 366 P.3d at 1116.

In Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 499, 471 P.2d 666, 699 (1970), this Court stated that something must appear in the public record to trigger a duty of inquiry. In particular, this Court stated that a duty of inquiry arose because "[a]t the time appellant's judgment lien attached on May 26, 1964, the two IRS liens were already of record giving it constructive notice."

This Court also stated:

> Had appellant purchased the Henderson land at the Sheriff's sale after instead of before the IRS tax liens were released, a different result would prevail. The failure of Moore to have recorded his certificate of sale from IRS would have left the Henderson land free of any recorded notice of prior lien.

86 Nev. at 500, 471 P.2d at 670.

In Adaven Management, Inc. v. Mountain Falls Acquisition Corp., 124 Nev. 770, 778-779, 191 P.3d 1189, 1195 (2008), this Court described the scope of the inquiry notice with which a purchaser is charged as follows:

> To search the indices, the prospective purchaser would first search the grantee index for the purported owner's name to ascertain when and from whom the purported owner received the property. Using that name, the purchaser would check the grantee index for the names of each previous owner, thus establishing the "chain of title." The purchaser must then search the grantor index, starting with the first owner in the chain of title, to see whether he or she transferred or encumbered the property during the time between his or her acquisition of the property and its transfer to the next person in the chain of title. Whether or not a purchaser of real property performs this search, **he or she is charged with constructive notice of, and takes ownership of the property subject to, any interest such a title search would reveal.** (emphasis added)

In the present case, even if plaintiff is charged with inquiry notice of every recorded document that existed on the date of the HOA foreclosure sale, no language in any recorded document provided plaintiff with notice of defendant Bank's claim that the HOA had wrongfully prevented Miles Bauer from tendering the superpriority portion of the lien.

In paragraph 23 of its conclusions of law (JA1c, pg. 215, ¶23), the district court

stated:

> Mr. Haddad, who testified for the Plaintiff trust, has been a real estate investor for more than 20 years. Mr. Haddad, and Plaintiff, admitted that prior to purchasing the property, they knew that the Deed of Trust had been recorded against the property.

On the other hand, every recorded document disclosed that the HOA was foreclosing a superpriority lien that would extinguish the subordinate deed of trust.

In Melendrez v. D&I Investment, Inc.,127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (2005), the court discussed the benefits of encouraging experienced buyers to bid at foreclosure sales:

> 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 Homestead Savings v. Darmiento, 230 Cal. App. 3d 424, 434, 281 Cal. Rptr. 367, 372 (1991), the court stated that "[t]he statute was clearly designed to provide incentives to the public at large to attend the sales in order to obtain a better price at the sale."

In the last sentence in paragraph 23 of its conclusions of law (JA1c, pgs. 215-216, ¶23), the district court stated:

> When Mr. Haddad decided to purchase the property, despite there being a recorded deed of trust against it, without inquiring whether there had been an attempt to pay the superpriority portion of the lien, he took the risk that the deed may be encumbered by a first deed of trust.

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, and because defendant Bank did not record any document stating that the HOA's lien did not include a superpriority amount, plaintiff had no duty to make such an inquiry, and plaintiff is protected as a bona fide purchaser from that unrecorded claim.

The testimony by Mr. Haddad also proves that such an inquiry would have been futile. (JA2, pgs. 253-254, 283) In addition, even if Mr. Haddad had made such an inquiry and actually received a response from defendant Bank, the HOA or NAS, plaintiff would have learned that defendant Bank did not make a valid tender of any amount to the HOA to pay any portion of the HOA's assessment lien.

In paragraph 25 of its conclusions of law (JA1c, pg. 216, ¶25), the district court stated that "[t]he purchaser at an HOA foreclosure sale can only obtain what the seller has to give" and that "[t]here is no warranty or guaranty, and consequently, whatever the seller had is the most that Plaintiff could acquire."

On the other hand, the extinguishment of defendant Bank's deed of trust is not based on the quality of the title held by the former owner. The deed of trust was

extinguished pursuant to the "fundamental principle of mortgage law" that "[a] valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law." Restatement (Third) of Prop.: Mortgages, § 7.1 (1997).

Public policy is not served by allowing a lender to wait until after a foreclosure sale to assert an unrecorded claim or objection that alters the rights acquired by the high bidder. The statute must instead be interpreted to protect the foreclosure sale purchaser's expectations based on the documents recorded prior to the sale.

In Golden v. Tomiyasu, 98 Nev. 503, 514, 387 P.2d 989, 995 (1963), cert. denied, 382 U.S. 844 (1965), this Court concluded its opinion by stating:

> In virtually all foreclosures the trustor or mortgagor suffers a loss. He has not been able to meet his obligation and loses the property. When the sale is by a trustee, as in the present case, he loses it without an equity of redemption. **If the sale is properly, lawfully and fairly carried out, he cannot unilaterally create a right of redemption in himself**. . . .We regret, as do all courts facing such a situation, that the mortgagor or trustor must lose his property, but **we cannot arbitrarily afford relief under such circumstances as here exist.** (emphasis added)

79 Nev. at 518, 387 P.2d at 997.

The same considerations apply to a lender that seeks equitable relief to prevent the completed foreclosure of a prior lien from extinguishing its deed of trust.

If this Court permits the expectations of a high bidder like plaintiff to be frustrated by information that did not appear in the public record prior to the sale, bidding at HOA foreclosure sales will be chilled, and the nonjudicial foreclosure process created by the Nevada Legislature will become useless.

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

At page 12 of defendant Bank's trial brief (JA1b, pg. 190), defendant Bank cited Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, *15, 405 P.3d 641, 648 (2017)(hereinafter "Shadow Canyon"), as authority that where price inadequacy is "palpable and great," only "slight" evidence of unfairness is needed to overturn a sale.

Paragraph 31 of the stipulated facts, filed on February 12, 2018 (JA1b, pg. 200, ¶31) stated that the expert report by Matthew Lubawy stated that "[t]he 'Fair Market Value' at the time of the sale was $158,500.00." (JA1b, pg. 200, ¶31)

In Shadow Wood, 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).

366 P.3d at 1115.

The $14,600.00 paid by plaintiff satisfies this standard.

In Shadow Canyon, this Court also stated:

> 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, *2, 405 P.3d 641, 643-644.

The California rule required that defendant Bank prove "some element of fraud, unfairness, or oppression as accounts for and brings about" the high bid paid by plaintiff. The record on appeal does not contain any such evidence.

As discussed above, even though NAS did not respond to Miles Bauer's letter, dated March 16, 2012, because defendant Bank did not prove that its unrecorded claim that the HOA wrongfully prevented Miles Bauer from paying the superpriority amount was made known to the persons who attended the public auction held on February 1, 2013, this undisclosed claim could not account for or have brought about the high bid paid by plaintiff.

Furthermore, according to Paragraph 32 of the stipulated facts, filed on February 12, 2018 (JA1b, pg. 200, ¶32), the expert report by Michael Brunson stated

that the "Fee Simple Impaired Value" of the Property at the time of the sale was $14,600.00. The expert report by Michael Brunson proved that the low sale price at the public auction held on February 1, 2013 did not result from "some element of fraud, unfairness, or oppression," but was instead caused by features inherent to a foreclosure sale held under NRS Chapter 116.

In paragraph 20 of its conclusions of law (JA1c, pg. 215), the court stated that "[i]n this case, this Court is not convinced that the low price resulted from any fraud, oppression, or unfairness, and consequently, the foreclosure sale will not be set aside or considered a 'wrongful foreclosure.'"

This portion of the court's decision is consistent with the law and the facts of this case.

8. Defendant Bank was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale because it has an adequate remedy at law against the HOA and NAS.

As stated at page 5 of plaintiff's pre-trial memorandum pursuant to EDCR 7.27 (JA1b, pgs. 157), "[t]he common law rule is that there is no equity jurisdiction when a party has available to itself an adequate remedy at law."

According to the United States Supreme Court, 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).

This same limitation on the availability of equitable relief has consistently been applied by this Court. 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.

In Shadow Wood, 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.").

366 P.3d at 1115, n. 7.

In Shadow Wood, this Court also 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:

> 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 has an adequate remedy at law against the HOA and NAS if they wrongfully prevented Miles Bauer from tendering the superprioirty amount of the lien, the district court improperly granted equitable relief to defendant Bank altering the legal effect of the HOA foreclosing its superpriority lien at the

auction held on February 1, 2013.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the findings of fact, conclusions of law and judgment entered by the district court in favor of defendant Bank and remand this case to the district court with directions to enter judgment in favor of plaintiff.

DATED this 19th day of September, 2018.

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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 32(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 9,788 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 19th day of September, 2018.

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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 19th day of September, 2018, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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/s/ /*Marc Sameroff /*
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