IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY S. NOONAN IRA, LLC; LOU NOONAN; AND JAMES M. ALLRED IRA, LLC,

Appellants,

vs.

US BANK NATIONAL ASSOCIATION EE; AND NATIONSTAR MORTGAGE LLC,

Respondent.

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Case No. 78624

APPEAL
from the Eighth Judicial District Court, Clark County, Department IV
District Court Case No. A-14-710465-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

U.S. Bank, N.A., as trustee for the Certificateholders of Citigroup Mortgage Loan Trust Inc., Mortgage Pass-Through Certificates, Series 2007-AR7

Nationstar Mortgage LLC

Mr. Cooper Group Inc.

Nationstar Sub1 LLC

Nationstar Sub2 LLC

Nationstar Mortgage Holdings Inc.

KKR Wand Investors Corporation

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

RESPONDENTS' STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), respondents U.S. Bank, N.A. as trustee for the Certificateholders of Citigroup Mortgage Loan Trust Inc., Mortgage Pass-Through Certificates, Series 2007-AR7 (**U.S. Bank**) and Nationstar Mortgage LLC (**Nationstar**) state this case should be retained by the Supreme Court of Nevada because it raises as principal issues of (1) questions of first impression involving Nevada law, and (2) questions of statewide public importance. *See* NRAP 17 (a)(10-11). Specifically, this case presents the issue of how the superpriority portion of an HOA's lien is calculated when the HOA assesses dues on an annual basis.

ISSUES PRESENTED

1. Whether the district court properly granted summary judgment in respondents U.S. Bank and Nationstar's (**respondents**) favor, finding the superpriority portion of the HOA's lien was prorated monthly even though the HOA assessed dues annually on January 1st.

2. Whether tender preserved the deed of trust despite the HOA's technical compliance with NRS 116's notice and mailing requirements.

3. Whether appellants/HOA foreclosure sale purchasers Anthony S. Noonan IRA, LLC, Lou Noonan, and James M. Allred IRA, LLC (**Purchasers**) waived their arguments challenging the delivery of tender by failing to raise the issue below and conceding below tender was delivered. Alternatively, whether delivery of tender was sufficiently proven at the district court level.

4. Whether the HOA's reasons for rejecting tender are legally irrelevant.

5. Whether BANA's tender letter contained improper conditions because it did not reference nuisance abatement charges (of which there were none).

6. Whether Bank of America, N.A. (**BANA**) was a proper tendering party, despite MERS, not BANA, being record beneficiary.

STATEMENT OF THE CASE

This case involves a dispute about the effect of a homeowner association's foreclosure on its lien under NRS 116.[1] The primary issue in this appeal is whether the district court correctly calculated the superpriority portion of the HOA's lien where the HOA assessed dues annually January 1st of the year. The district court found the HOA's annual charge on January 1st improperly accelerated assessments, in direct contradiction of NRS 116.3116(2)'s non-acceleration language. The district court found BANA's tender of $162.00, representing 9 months' worth of the annual assessment amount, satisfied the superpriority portion of the HOA's lien, thus preserving the senior deed of trust.

The district court made a number of additional findings in U.S. Bank and Nationstar's favor, all of which are fully supported by the evidentiary record in this case (including whether tender was delivered) and precedential case law (including whether the HOA's compliance with notice and mailing requirements defeat tender, whether BANA's tender letter contained impermissible conditions, whether the HOA had valid basis to reject BANA's tender, and whether BANA was a proper tendering party where MERS was record beneficiary at the time of the tender).

The district court's decision was correct. This Court should affirm.

[1] Unless otherwise noted, all references to NRS 116 refer to the pre-2015 version of the statute in effect at the time of the association sale in this case.

STATEMENT OF FACTS

I. Factual Background

A. The Borrower Executes a Deed of Trust

In February 2007, Matthew and Leah Bigam (the **Borrowers**) purchased the property at issue in this case located at 7883 Tahoe Ridge Court, Las Vegas, Nevada 89139 (the **Property**), executing a deed of trust (the **Deed of Trust**) that secured a loan in the amount of $479,400.00 from Republic Mortgage LLC. (2APP0426-442.) The Property is located in a planned unit development. (2APP0440.) The Property is subject to the Conditions, Covenants, and Restrictions (**CC&Rs**), which make the owner of the Property responsible for paying certain fees and assessments to the HOA. (*Id.*)

The Deed of Trust identified Mortgage Electronic Registration Systems, Inc. (**MERS**) as the record beneficiary as nominee for lender and lenders assigns. (2APP0428.) On October 12, 2011, MERS recorded an assignment of the Deed of Trust to U.S. Bank. (2APP0444.) Nationstar services the loan for U.S. Bank.

The Deed of Trust included a Planned Unit Development Rider which provided, "[i]f Borrower does not pay [HOA] dues and assessments when due, then Lender may pay them." (2APP0441, § F.)

B. The HOA Refuses to Accept BANA's Tender Check

The Borrowers eventually fell behind on their obligations to the HOA, and on April 26, 2011, Red Rock Financial Services (**Red Rock**)—on behalf of the Coronado Ranch Landscape Maintenance Association (the **HOA**)—recorded a notice of delinquent assessment lien. (2APP0457.) The notice of delinquent assessment lien indicated Borrowers owed a total of $730.92. (*Id.*)

On June 21, 2011, the HOA, through its agent Red Rock, recorded a notice of default and election to sell. (2APP0488.) The notice of default indicated that the total amount due to the HOA and Red Rock was $1,775.62. (2APP0488.)

Around July 2011, Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (**BANA**) (who was the then-owner and servicer of the loan secured by the Deed of Trust) retained the law firm of Miles Bauer Bergstrom & Winters (**Miles Bauer**) to obtain more information about the HOA's lien and to pay the superpriority portion of the lien. (2APP044 ¶ 4, 2APP0470-71.) On July 25, 2011, Rock Jung, Esq. an attorney with Miles Bauer, sent a letter to Red Rock offering to pay the HOA's superpriority lien and requesting additional information so Miles Bauer could write a check. (2APP0467 ¶ 6; 2APP0470-71.) Mr. Jung explained Miles Bauer represented MERS, as nominee for BANA who was the "beneficiary/servicer of the first deed of trust loan secured by the property." (2APP0470.) The letter requested a statement of the amount of the HOA's

superpriority lien (equal to nine months' worth of assessments) and offered to pay those amounts upon proof of the same. (2APP0471.) The letter stated:

> [A] portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessments . . . 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.

(*Id*.) The letter further stated BANA "does not want these issues to become further exacerbated by a wrongful HOA sale and it is my client's goal and intent to have these issues resolved as soon as possible. Please refrain from taking further action to enforce this HOA lien until my client and the HOA have had an opportunity to speak to attempt to fully resolve all issues." (*Id.*)

In response to Mr. Jung's letter, Red Rock provided an account statement. (2APP467 ¶ 7; 2APP0473-475.) Based on the information from the account statement, Miles Bauer, through attorney Krista Nielson, Esq., wrote a check to the HOA in the amount of $162.00, which equaled nine months' assessments at $18.00 per month ($18 x 9 = $162). (2APP0467 ¶ 8; 2APP0474; 2APP0478-480.)

Ms. Nielson enclosed the check with a letter dated August 26, 2011, explaining the check's calculation and making clear Miles Bauer was attempting to pay the superpriority portion of the HOA's lien. (2APP0478-79.) In her letter, Ms. Nielson explained that "enclosed you will find a cashier's check made out to

Red Rock Financial Services in the sum of $162, which represents the maximum 9 months['] worth of delinquent assessments recoverable by an HOA." (2APP0479.) Red Rock rejected the check. (2APP0467 ¶ 9; 2APP0482.)

C. After Rejecting the Tender, the HOA Foreclosed on the Property

After rejecting the Miles Bauer check, Red Rock recorded a notice of foreclosure sale on June 26, 2014, scheduling the sale for the Property on July 21, 2014. (2APP0459.) The foreclosure sale occurred on July 21, 2014, at which the Property was sold to Purchasers for $50,100. (2APP0462.)

II. Relevant Procedural Background

U.S. Bank and Nationstar do not dispute the procedural history set forth by Purchasers in their Opening Brief, at 1-5. U.S. Bank and Nationstar outline the district court's summary judgment findings and conclusions for ease of reference.

A. The District Court's Initial Summary Judgment Order

After the parties' initial round of summary judgment briefing, the district court issued its order, ultimately finding tender preserved the deed of trust but also finding genuine issues of material fact as to whether there existed any nuisance abatement or maintenance charges to be included in the superpriority portion of the HOA's lien.

The district court made the following relevant findings of fact:

1. The property is located in Coronado Ranch Landscape Maintenance Association (the HOA).

2. Monthly assessments on the property are $18.

3. On July 25, 2011, after the HOA recorded its notice of default, Miles Bauer Bergstrom & Winters (Miles Bauer), a law firm retained by Bank of America, N.A. (BANA), the loan servicer at the time for U.S. Bank's predecessor, Republic Mortgage, contacted the HOA, care of Red Rock, and requested a ledger identifying the super-priority amount allegedly owed to the HOA.

4. In response, the HOA provided a ledger, dated August 10, 2011, identifying the total amount allegedly owed.

5. Based on the annual assessment amount identified in the HOA's August 10, 2011 ledger, BANA accurately calculated the sum of nine months of common assessments as $162.00 and tendered that amount to the HOA on August 26, 2011.

6. The HOA refused BANA's tender but provided no explanation.

7. Despite BANA's tender, the HOA and Red Rock moved forward with foreclosure.

8. The HOA foreclosed on the property on July 21, 2014.

(3APP0525-26.)

The district court made the following relevant conclusions of law:

1. As to Defendants' Motion for Summary Judgment, the Court finds there are genuine issues of material fact as to whether Defendants' tender of $162.00 was equal to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312, and 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 the action taken in this case to enforce the lien.

2. Without further discovery, this Court cannot determine whether Defendants' preliminary estimate of 9 months of the HOA's monthly assessments encompasses the entirety of the superpriority portion of the HOA's lien.

3. However, Defendants' tender of payment was sufficient to preserve their interest in the subject property.

4. Defendants made a good-faith tender of payment to satisfy the superpriority lien despite lacking an accurate accounting from the HOA of all charges incurred against the [Property].

(3APP0527.)

The parties then conducted discovery relating to whether additional charges, such as nuisance abatement charges, should have been added to the superpriority portion of the HOA's lien.

B. The District Court's Reconsideration Order

Purchasers moved to reconsider the district court's initial summary judgment order, specifically the pro-rated calculation of the superpriority portion of the HOA's lien. The district court denied Purchasers' motion by minute order. (3APP0547-48.)

C. The District Court's Second Summary Judgment Order

The parties thereafter filed additional summary judgment briefs and the district court heard oral argument. The district court made the following additional relevant findings of fact:

1. The HOA charged an annual assessment of $216.00 per year which came due on January 1, 2011. Despite the HOA's assessments coming due annually on January 1, 2011, at the time Red Rock recorded the notice of delinquent assessment lien in April 2011, the

[Borrowers] were only four (4) months past due on their annual assessment.

2. No nuisance abatement charges existed at the time Red Rock recorded the notice of delinquent assessment lien.

3. Miles Bauer's letter accompanying the tender check was not impermissibly conditional, as BANA had the right to insist on each condition contained in the letter.

(5APP1169.)

The district court made the following additional relevant conclusions of law:

1. The court finds there are no genuine issues of material fact as to whether defendants' $162.00 tender was sufficient to satisfy the superpriority portion of the HOA's lien. BANA's $162.00 tender equaled nine months' worth of assessments, which tender was more than sufficient given [Borrowers] were only four months past due on their annual assessment when Red Rock recorded the notice of delinquent assessment lien in April 2011. At the time of either Red Rock's recording of the notice of delinquent assessment lien, or at the time of BANA's tender, no additional charges such as nuisance abatement charges, existed to add to the superpriority portion of the HOA's lien.

2. The Nevada Supreme Court published controlling precedent on September 13, 2018 in the case of *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (2018) (***Diamond Spur***) that confirms BANA's tender properly preserved the deed of trust. In both *Diamond Spur* and the instant case, Bank of America contacted the HOA's collection agent seeking to obtain the superpriority amount and offering to pay that amount in full. 427 P.3d at 116. Bank of America tendered nine months' worth of assessments in both cases. *Id.* The letters included with both checks stated the HOAs' acceptance would be understood as "express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [property] have now been 'paid in full.'" *Id*. And in both cases the HOA, via its collection agent, rejected the

payment and sold the property at foreclosure to a third-party buyer. *Id*. BANA's letter here was not impermissibly conditional.

3. Red Rock unjustifiably rejected BANA's super-priority payment. But that unjustified rejection is irrelevant – that payment discharged the super-priority lien under the tender doctrine. The tender doctrine is designed "to enable the debtor to … relieve his property of encumbrance by offering his creditor all that he has any right to claim," which "does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount due, — actually due." *Dohrman v. Tomlinson*, 399 P.2d 255, 258 (Id. 1965). *See also Diamond Spur*, 427 P.3d at 118-19.

4. Plaintiffs contend that the superpriority amount in this action is $216.00, or the entire annual assessment of $216.00 which came due on January 1, 2011. Plaintiffs contend that this is the amount 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" as contemplated by NRS 116.3116.

5. The Court declines to adopt Plaintiffs' interpretation of NRS 116.3116 and its application to the instant facts. Although the Court acknowledges that $216.00 of assessments came due on January 1, 2011, four month[s] prior to mailing and recording of the notice of delinquent assessment lien, the Court finds that where a property is subject to an annual assessment, the superpriority lien portion is limited to nine twelfths (or 75%) of the annual assessment. The Court further finds that because [Borrowers] had only been delinquent on their annual assessment for four months, the superpriority amount is limited to four twelfths (or 33.33%) of the annual assessment.

(5APP1170-72.)

SUMMARY OF THE ARGUMENT

The district court did not err when it granted summary judgment in favor of U.S. Bank and Nationstar. Purchasers' argument BANA was required to pay the entire year's worth of assessments to preserve the Deed of Trust lacks support either through direct interpretation of the superpriority statute, case law interpreting the statute, its legislative history or public policy. BANA's tender of $162.00 more than satisfied the superpriority portion of the HOA's lien, as BANA tendered nine months, even though Borrowers were only four months delinquent.

Purchasers' remaining arguments on appeal also lack merit. First, the HOA foreclosure sale's compliance with NRS 116's notice and mailing requirements do not defeat BANA's valid tender. Second, Purchasers never raised the issue in the district court that BANA never delivered its tender; rather, Purchasers conceded below tender was delivered on multiple occasions. The sole evidence submitted at the district court level confirms BANA delivered tender to Red Rock and that Red Rock rejected it—evidence found in Red Rock's own file that Purchasers introduced and relied upon. Third, Red Rock's reasons for rejection are irrelevant. And, finally, Miles Bauer's letter contained no impermissible conditions, and BANA was a proper tendering party as owner and servicer of the Deed of Trust.

This Court should affirm the district court's entry of summary judgment in U.S. Bank's and Nationstar's favor.

ARGUMENT

I. The District Court Correctly Concluded Miles Bauer's 9-Month Tender of the Superpriority Lien Preserved the Deed of Trust

The parties do not dispute the HOA assessed dues on a yearly basis of $216.00, which breaks down to $18.00 per month. *See* Op. Br. at 13, § A. The parties' dispute concerns solely how the superpriority is calculated when the HOA assesses dues annually. Consistent with the plain language of the statute and this Court's opinion in *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 373 P.3d 66 (2016), the district court correctly prorated the HOA's annual assessments to find Borrowers four months delinquent at the time the HOA lien arose in April 2011.

The plain language of NRS 116.3116(2) (2011) states in full:

> A lien under this section is prior to all other liens and encumbrances on a unit except . . . The lien is also prior to all security interests described in paragraph (b) to the extent any charges incurred by the association on a unit . . . 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***.

(emphasis added).

The "during the 9 months immediately preceding institution of an action to enforce the lien" refers to the first action the HOA institutes to "initiate the nonjudicial foreclosure process." *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 754, 334 P.3d 408, 427 (2014). Here, the HOA, through Red Rock,

initiated foreclosure proceedings when it recorded the notice of delinquent assessment lien on April 26, 2011. (2APP0457.)

The HOA accelerated the entire year's assessments due January 1, 2011, charging the entire yearly amount of $216.00 on this date. (2APP0474.) Under NRS 116.3116(2), the superpriority is calculated "in the absence of acceleration." Accordingly, the district court "decelerated" the annual assessments to find the superpriority consisted of four months assessments of $18 ($216.00/12=$18), given the lien date of April 26, 2011. (*See* 5APP1172, ¶ 14.)

The district court's deceleration of the monthly assessments is the correct approach when considering the "absence of acceleration" language of NRS 116.3116(2) and related statutes. Per Nevada statute, HOAs adopt budgets on an annual basis, of which assessments are part of that yearly budget. *See* NRS 116.3115(1) ("After an assessment has been made by the association, ***assessments must be made at least annually***, ***based on a budget adopted at least annually*** by the association in accordance with the requirements set forth in NRS 116.31151.") (emphasis added).

The HOA here adopted its annual assessment of $216.00.[2] (2APP0474.) Pursuant to NRS 116.3116(2), only those portions of the HOA's assessments "***in the***

[2] The CC&Rs also confirm the assessments are adopted from the HOA's yearly budget. (*See* CC&Rs § 5.5, 2APP0371.)

absence of acceleration during the 9 months immediately preceding institution of an action" compromise the superpriority. (emphasis added). Purchasers' interpretation requiring the entire $216.00 yearly assessment be due and owing on January 1, 2011, improperly accelerates the whole of the assessments in direct contradiction of the acceleration language in the statute.

"When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Coast Hotels and Casinos, Inc .v. Nevada Labor Com'n,* 117 Nev. 835, 840, 34 P.3d 546, 551 (2001) (citation omitted). "Under established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." *Id.* at 117 Nev. at 841, 34 P.3d at 551 (citation omitted). Further, "courts must construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Id.* (citation omitted). Only where a statute has more than one interpretation, does the statute's plain meaning not apply. *Id.* (citiation omitted).

Here, the district court's interpretation of NRS 116.3116(2) is the only reasonable interpretation, as it gives meaning to all of the words in NRS 116.3116(2) and all of the words of the statute it incorporates (NRS 116.3115(1)). To the extent the Court finds the statute ambiguous, the district court's interpretation comports

with the statute's legislative history too. Regarding legislative history, *Ikon Holdings* is instructive. There, this Court explained the Uniform Common Interest Ownership Act (**UCIOA**), on which NRS 116.3116 is based, "included only 'common expense assessments based on the periodic budget.'" *Ikon Holdings*, 132 Nev. at 368, 373 P.3d at 70. As explained above, the HOA assessed dues annually based on its yearly "periodic budget."

The district court's interpretation further complies with public policy. Despite all HOAs being statutorily required to adopt an annual budget, NRS 116.3116(2)'s non-acceleration language prohibits an HOA from foreclosing on assessments not yet due. For example, had the HOA foreclosed in November 2011, the HOA would have foreclosed on assessments not yet due (the December assessments), and for which the homeowner obtained no benefit. From a public policy perspective, the non-acceleration language prevents this unjust scenario.

Purchasers' creative interpretation of the statute ignores all of the above considerations to advocate, in essence, the assessments were due in total when the HOA said they were due. *See generally* Op. Br. at 15-18. Purchasers are wrong, even ignoring on-point, albeit unpublished, interpretation from this Court. Op. Br. at 14-15 (rejecting the court's interpretation of NRS 116.3116(2) in *Sage Realty LLC Series 2 v. Bank of New York Mellon as Trustee*, No. 73735, 432 P.3d 191, 2018 WL

6617730 (Nev. Dec. 11, 2018) (finding the HOA accelerated assessments by charging them annually rather than monthly)).

The district court correctly calculated the superpriority as four months' worth of assessments, prorating the assessments on a monthly basis. BANA's tender of $162 more than satisfied the HOA's superpriority lien, preserving the Deed of Trust.

II. The HOA's Statutory Compliance Does Not Defeat BANA's Tender

Purchasers stress the "HOA foreclosure sale complied with the relevant provisions of NRS 116," including mailing of all statutorily-compliant notices, waiting the required time-limit between foreclosure steps, to conclude "NRS 116.3116 grants HOA liens priority over a first deed of trust for at least the [superpriority portion.]" Op. Br. at 22-24.[3] The deed recitals or compliance with notice or other requirements of NRS 116 have no effect on BANA's tender

[3] The Opening Brief spends nearly two pages discussing the mailing and notice requirements under NRS 116. Op. Br. 22-23. Purchasers then conclude that "[d]espite having all notice required under NRS 116, Defendants never sought injunctive relief or filed a lis pendens as ***required*** under *Shadow Wood*." Op. Br. at 24 (emphasis added). Purchasers are wrong, factually and legally. Factually, neither U.S. Bank nor Nationstar are seeking equitable relief under *Shadow Wood Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). Legally, Purchasers incorrectly state BANA was "required" to obtain an injunction or file a lis pendens after its tender to preserve the Deed of Trust. To the contrary, BANA was not required to take any action after its tender. *See id.; Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 609, 612, 427 P.3d 113, 119, 121 (2018) (***Diamond Spur***) (holding the tendering party need not take any action to preserve its tender and that "[a] valid tender of payment operates to discharge a lien.").

extinguishing the superpriority. BANA's tender of the superpriority amount satisfied the superpriority portion of the lien as a matter of law to "avert loss of [the lender's] security" as a matter of law. *See SFR Investments Pool 1*, 130 Nev. at 748, 334 P.3d at 414; *see also Diamond Spur*, 134 Nev. at 606-07, 427 P.3d at 117-18.

III. The Evidence Confirms BANA Delivered its Tender Payment

Purchasers argue for the first time in this case BANA did not deliver its tender to Red Rock. Op. Br. at 25-27. They say: "Defendants offer no proof of mailing, or other evidence demonstrating that the letter containing the offer to pay, and purportedly accompanying check, were ever actually sent to the HOA Trustee." *Id.* at 25. Purchasers ignore Miles Bauer's supporting declaration, which confirms delivery of the tender check and letter to Red Rock. Specifically, Mr. Doug Miles, managing partner of Miles Bauer, established the following through affidavit testimony: (1) Miles Bauer sent the letter and check to Red Rock, and (2) Red Rock rejected the check. (2APP0467-68, ¶¶ 8, 9.) Purchasers never challenge the admissibility of Mr. Miles affidavit, at the district court level or on appeal.

Mr. Miles' affidavit testimony comports with the remaining evidence. A copy of Miles Bauer's August 26, 2011 letter and check appear in Red Rock's file. Purchasers attached Red Rock's file containing the letter and check to their supplemental reply in support of their initial summary judgment motion. (1APP0211-2APP0405 (suppl. reply); 2APP0337-39 (tender letter and check in Red

Rock's file).) Purchasers even quoted the tender letter in Red Rock's file in their supplemental reply brief. (1APP0216, 221.) Purchasers also established Red Rock's file was authentic and admissible (3APP0635-36), with which respondents do not disagree. Purchasers fail to explain how Miles Bauer's tender letter and check became part of Red Rock's file if not for the fact they were delivered to Red Rock.

Presumably based on this evidence of delivery, Purchasers never challenged delivery in the district court. To the contrary, Purchasers repeatedly conceded Miles Bauer delivered the tender check throughout the district court proceedings:

- "It is important to note that at the time these [tender] letters were exchanged . . . ." (Purchasers' Suppl. Reply to Mot. Summ. J., 1APP0217, line 7);
- "By contrast, Defendant only offered to pay $162.00 . . . . Yet, the amount Defendant tendered, as a matter of law, was insufficient to satisfy their obligations." (Purchasers' Renewed Mot. Summ. J., 3APP0645, lines 6-7, 14-15.)
- "Accordingly, as a legal matter, the HOA rightly rejected the purported, 'non-negotible' tender payment proposed by BANA." (*Id.* at 3APP0647, lines 12-13.)

The evidence more than establishes Miles Bauer tendered the $162 payment to Red Rock. Purchasers cannot now pretend they did not know the tender letter and

check were delivered, especially when the failed to raise the issue below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (arguments raised for the first time on appeal are waived).

IV. Red Rock's Reason for Rejecting BANA's Tender is Legally Irrelevant

Purchasers contend the HOA, through its agent, Red Rock, had a "good faith reason to believe that the amount offered was insufficient to satisfy the superpriority portion of the HOA's lien." Op. Br. at 27. Yet, Purchasers offer no supporting evidence showing why or on what basis Red Rock rejected BANA's tender. Purchasers' speculation that Red Rock's rejection was based on an incorrect amount finds no evidence in the record. Purchasers even make the bold proclamation that Red Rock was "**prohibited**" from accepting BANA's tender payment, Op. Br. at 32 (emphasis in original), without any controlling authority, any supporting evidence regarding the reasons why Red Rock rejected the payment, and incorrectly assuming BANA's tender did not satisfy the superpriority portion of the HOA's lien.

The Court should reject Purchasers' utter speculation surrounding Red Rock's rejection. The record provides no objections by Red Rock for its rejection. Any objections Red Rock may now have, are waived. *See First Sec. Bank of Utah, N.A. v. Maxwell*, 659 P.2d 1078, 1081 (Utah 1983); *accord Hossom v. City of Long Beach*, 189 P.2d 787, 791 (Cal. App. 1948) ("the creditor is required to specify his objections to a tender and if he fails to do so he is precluded from objecting

afterwards.") (internal citations omitted); *Lee v. Peters*, 250 S.W.3d 783, 787 (Mo. Ct. App. 2008) ("An objection to a tender, to be available to a creditor, must be timely made, and the grounds of the objection specified, otherwise it is waived."); *Hohn*, 870 P.2d at 517 (adopting rule that "the creditor [must establish] a justifiable and good faith reason for rejection of the tender"); *Blackford v. Judith Basin Cty.*, 98 P.2d 872, 876 (Mont. 1940) ("objections to a tender are waived unless specified at the time"); *see also Sellwood v. Equitable Life Ins. Co. of Iowa*, 42 N.W.2d 346, 353 (Minn. 1950) ("[T]he grounds of objection to a tender must be specified by the creditor").

Regardless, Red Rock's reasons for rejection are legally immaterial. Purchasers' "good faith belief" argument has been expressly rejected by this Court. In the *Diamond Spur* decision, this Court held a "plain reading of [NRS 116] indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments." 427 P.3d at 117. In recent decisions, this Court has held a purportedly "subjective good faith [basis] for rejecting the tender is ***legally irrelevant***, as the tender cured the default as to the superpriority portion of the HOA's lien by operation of law." *Sage Realty LLC Series 2*, 432 P.3d 191, 2018 WL 6617730, at *2 (emphasis added); *accord, e.g., Fiducial, LLC v. The Bank of New York Mellon Corp.*, No. 71864, 432 P.3d 718, 2018 WL 6617727, at *3 (Nev. Dec. 11, 2018) (unpublished disposition)

(same); *SFR Investments Pool 1, LLC v. Mortg. Elec. Reg. Sys., Inc.*, No. 72222, 2018 WL 6433003, at *1 (Nev. Dec. 4, 2018) (unpublished disposition) (same). As explained in *Ikon Holdings*, the Court's interpretation of the superpriority statute there did not create the law, it interpreted the law that already existed. *See K&P Homes v. Christiana Trust*, 133 Nev. 364, 367, 398 P.3d 292, 295 (2017). Thus, Red Rock was presumed to have known the law. Red Rock had no valid basis to reject BANA's tender. Red Rock's basis for rejecting is irrelevant.

V. BANA's Tender Letter Did Not Contain Improper Conditions

In addition to purportedly tendering the wrong amount, Purchasers cite two supposed impermissible conditions imposed by BANA in its tender letter. First, that accepting BANA's tender forever waived any future nuisance abatement charges because Miles Bauer did not expressly state in its letter such charges can be included as part of the superpriority, Op. Br. at 29-33; and second, the letter incorrectly identified BANA as beneficiary or servicer of the Borrowers' mortgage loan despite it not appearing in the recorded documents, Op. Br. at 33. Both arguments fail.

A. The Superpriority Contained No Charges Other Than Assessments

Regarding waiver of nuisance abatement charges, Purchasers' argument fails for two reasons. First, Purchasers failed to show nuisance abatement or any other charges were charged to the Borrowers account that belonged in the superpriority calculation. The district court ordered additional discovery on this very issue, and

after discovery, Purchasers failed to show any charges other than assessments were due and owing on the account that could be part of the superpriority. The district court found: "At the time of either Red Rock's recording of the delinquent assessment lien, or at the time of BANA's tender, no additional charges such as nuisance abatement charges, existed to add to the superpriority." (5APP1170-71.)

Second, Miles Bauer's tender letter contained only conditions upon which it was legally required to insist. In evaluating a materially identical communication accompanying a check in the *Diamond Spur* case, this Court held that the "condition" with a tender that "acceptance of the tender would satisfy the superpriority portion of the lien" and "preserv[e] Bank of America's interest in the property" was a valid condition upon which Bank of America "had a right to insist." 427 P.3d at 118; *accord, e.g.*, *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, No. 70903, 2018 WL 6433121, at *2 (Nev. Dec. 4, 2018) (unpublished disposition) (rejecting argument that the purported "conditions" in a Miles Bauer tender letter negated the effect of the tender); *Bank of America, N.A. v. 7229 Millerbird Street Trust*, 429 P.3d 1258 (Table), 2018 WL 6134210, at *1 (Nev. 2018) (same); *TRP Fund IV, LLC v. U.S. Bank, N.A., as Trustee*, No. 72234, 2018 WL 6134028, at *1 (Nev. Nov. 19, 2018) (unpublished disposition) (same).

Here, Miles Bauer's letter contained the same "condition"—that acceptance of the tender would satisfy the superpriority portion of the HOA's lien. (2APP0479)

("Our client has authorized us to make payment to you in the amount of $162.00 to satisfy **its** obligations to the HOA as a holder of the first deed of trust against the property.") (emphasis added.) As this Court has repeatedly concluded, that was a condition upon which BANA had the right to insist—that payment of the specified amount satisfied BANA's obligations toward the HOA. BANA had no obligation to pay anything more than nine months' worth of assessments. Nothing in Miles Bauer's letter can be construed as implying anything other than what it said—that BANA' obligation to the HOA was no more than $162.00.

B. BANA Was a Properly Tendering Party

Regarding Purchasers' position the letter incorrectly stated BANA was the beneficiary or servicer of the Deed of Trust, Miles Bauer was not wrong. Purchasers' argument exposes a fundamental misunderstanding of record beneficiaries and related law. At the time Miles Bauer sent its first letter in July 2011, MERS was the record beneficiary of the Deed of Trust; no assignment out of MERS had been recorded.[4] (2APP0428; 2APP0470.) While MERS was record beneficiary as nominee, no obligation existed for an assignment to be recorded in BANA's name. *See in Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 519-21, 286 P.3d 249, 258-60 (2012) (recognizing MERS as a proper record beneficiary for the purpose of

[4] The first assignment of the Deed of Trust did not occur until October 2011. (2APP0444.)

allowing ownership and servicing transfers of a deed of trust without the need to record an assignment with every transfer).

Miles Bauer's first letter to Red Rock correctly identified BANA's interest in the property. Miles Bauer explained it "represents the interests of MERS as nominee for Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (hereinafter 'BANA') with regard to these issues." (2APP0470.) The letter continued, explaining "BANA is the beneficiary/servicer of the first deed of trust secured by the property." (*Id.*) Nothing about Miles Bauer's statement is incorrect. Just because MERS—not BANA—appeared as *record* beneficiary, does not negate BANA's interest as *owner* and servicer.

Likewise, when BANA tendered in August 2011, MERS still remained record beneficiary. In stating who it represented in its tender letter to Red Rock, Miles Bauer accurately explained: "As you may recall, this firm represents the interests of Bank of America, N.A., as successor by merger by BAC Home Loans Servicing, LP (hereinafter, 'BANA') with regard to the issues set forth herein . . . . BANA is the beneficiary/servicer of the first deed of trust." (2APP0478; 2APP0479 (explaining, BANA is "a holder of the first deed of trust").) These representations are accurate.

Even if Miles Bauer's statement regarding BANA's interest in the property was incorrect, the tender would not be rendered ineffective. The HOA statute does not prohibit who may satisfy the superpriority; the statute is totally silent. Anyone

can tender. *See* NRS 116.3116; *see also Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank*, No. 71246, 2017 WL 6597154 (Nev. Dec. 22, 2017) (unpublished disposition) (finding a homeowner's payment may satisfy the superpriority portion of an HOA's lien). Further, Purchasers fail to explain why, if BANA had no interest in the property, it would attempt to make payment to preserve the Deed of Trust. Purchasers' argument is illogical. BANA was the proper tendering party.

CONCLUSION

For all of the above reasons, the district court's judgment should be affirmed.

DATED December 9th, 2019.

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CERTIFICATE OF COMPLIANCE

I HEREBY 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains **6,075** words.

FINALLY, I CERTIFY that I have read this **Respondents' Answering 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 opening 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.

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

DATED December 9th, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on December 9, 2019, the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP