IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY S. NOONAN IRA, LLC; LOU NOONAN; AND JAMES M. ALLRED IRA, LLC Appellants, v. U.S. BANK NATIONAL ASSOCIATION EE; AND NATIONSTAR MORTGAGE, LLC, Respondents.	Supreme Court No. 78624 District Court No. A-14-710465-C

APPEAL

From the Eighth Judicial District Court, Department IV
The Honorable Judge Kerry Earley, District Judge

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT DECLINED TO APPLY THE PLAIN MEANING OF NRS 116.3116(2) TO CALCULATE THE SUPERPRIORITY AMOUNT

A. Binding Precedent Requires the Court to Strictly Interpret the Statute

At the heart of this appeal is a question purely of the statutory construction and interpretation of NRS 116.3116(2). More specifically, the question Appellant asks this Court to decide, is whether the superpriority amount is that "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien"[1] or if it is simply "nine months worth of assessments." In other words, the Court must determine whether the express language of NRS 116.3116(2) controls over the mere parlance associated with NRS 116 foreclosure actions.

This Court is charged with the responsibility of faithfully interpreting the statutes enacted by the Nevada Legislature. "Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986).

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[1] Nev. Rev. Stat. § 116.3116

With respect to unambiguous statutes, this court looks to the statute's plain language to give effect to the Legislature's intent. *Clark Cty. Dist. Atty. v. Eighth Judicial Dist. Court*, 123 Nev. 337, 344, 167 P.3d 922, 927 (2007)

Appellant respectfully contends that NRS 116.3116(2) is clear and unambiguous on its face, and that this Court is bound to interpret and construct the statute with strict fidelity to the text adopted by the legislature. NRS 116.3116 provides that an HOA's lien for delinquent assessments is "prior to all security interests described in paragraph (b)[2] 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 an action to enforce the lien.**[3] Nev. Rev. Stat. § 116.3116 (emphasis added).

Under this Court's binding instruction in *McKay v. Bd. of Supervisors,* this Court must not look beyond the text of the statute to determine its meaning so long as it concludes that the statute is unambiguous. Respondent acknowledges that NRS

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[2] First Deeds of Trust

[3] This Court concluded in *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 334 P.3d 408, 409 (Nev. 2014) that the "action to enforce the lien" refers to the mailing of the notice of delinquent assessments to the pre-foreclosure homeowner.

116.3116(2) is not ambiguous and that it is susceptible to only one reasonable construction.[4] NRS 116.3116(2) specifies that the superpriority amount is a the sum of the amounts which came due to an association for common expenses in the nine months preceding the institution of the action to enforce the lien.[5] Where an association collects its regular assessments annually, as permitted by NRS 116.3115, and the assessment comes due to the association in the nine months preceding the mailing of the notice of delinquent assessments, a plain reading of NRS 116.3116(2), requires a superpriority lien which includes the entire assessment.

Respondent argues, without any reference to the statutory language of NRS 116.3116(2), that the superpriority amount should be calculated by dividing the annual assessment into 12 equal parts and multiplying that figure by nine. Where this Court is bound to interpret the statute with strict fidelity to the language adopted by the legislature, there is simply no way to reach the conclusion proffered by Respondent.

Respondent relies on *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 373 P.3d 66 (2016) in an attempt to argue the District Court correctly prorated the

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[4] See Respondent's Answering Brief at 15

[5] *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 334 P.3d 408, 409 (Nev. 2014) "action to enforce the lien" refers to the mailing of the notice of delinquent assessments to the pre-foreclosure homeowner.

HOA's annual assessments to find that the Borrowers were four months delinquent at the time the HOA lien arose in April 2011. RAB 13. However, reliance on this Court's description of the superpriority amount in *Ikon* does not equate to a sufficient analysis of the statutory construction of the binding statute. While it is certainly easier to refer to the superpriority amount as 'nine months of assessments,' that ease does not render invalid the actual language of the NRS 116.3116(2).

While Respondents contend that the District Court's interpretation of NRS 116.3116(2) is reasonable, they make no effort to square that interpretation with the controlling statute. Appellants contend that the because the statute is unambiguous, the plain language of the statute controls, and the Court must find that the superpriority amount is equal to the assessments which actually came due during the relevant time period. Because any offer to satisfy the superpriority amount was a "non-negotiable" offer for less than the amount which "[became] due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien," the respondent's deed of trust was not preserved.

Here, the amount which "[became] due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien," is $216.00. That amount was entitled to priority over the deed of trust. Yet, Respondents allege to have made a "non-negotiable" offer of only $162.00 and

failed to satisfy the superpriority lien. If this Court agrees that NRS 116.3116(2) should be interpreted based on the plain meaning of the statutory text, it must find for Appellants.

B. Sage Realty Departs From All Prior Definitions of "Acceleration"

Prior to this Court's opinion in *Sage Realty Ltd. Liab. Co. Series 2 v. Bank of N.Y. Mellon*, 432 P.3d 191 (Nev. 2018), the term "acceleration" had a universally accepted legal and financial meaning; it referred to a creditor's right to change future payment due dates to a current date. *Bouvier Law Dictionary - Acceleration (Accelerate or Accelerated)*, Retrieved online through Lexis on September, 14 2019. For the first time, *Sage* applied the term "acceleration" to a single payment for which the original due date never changed. *Sage,* without citation to any authority, held that adopting an annual payment with a due date of January 1 "accelerated" nonexistent future monthly payments for the same calendar year. Since the legislature used the term "acceleration" in this statute many years before Sage was published, it could not possibly have intended to use it in the manner *Sage* suggests, as it could not have been aware the term had such a meaning.

Sage is fundamentally flawed because it assigns a preference for the monthly assessment method that is not expressed, or even implied, by the statute. The statute merely requires an HOA to adopt assessments at least annually. See: NRS 116.3115.

Nothing in this language suggests that annual assessments are less entitled to statutory priority than monthly assessments. Holding that a legislatively authorized annual assessment should be afforded disparate protection in favor of monthly assessments is neither supported by the statute or policy. That conclusion has no more statutory support than a conclusion that monthly assessments should be disregarded in favor of weekly assessments. The former assumption is just as flawed as the latter, because the statutory language supports neither. And if the legislature intended that all assessments should be monthly, it never would have permitted annual an annual assessment method. However, the legislature made no such choice, and the holding in *Sage* runs afoul of the legislature's exclusive authority to draft legislation.

II. RED ROCK RIGHTFULLY REJECTED BANA'S DEFICIENT TENDER ATTEMPT

Respondents claim the reason for Red Rock's rejection of a deficient tender attempt is "legally irrelevant." While this Court has found that a subjective good faith rejection of a payment is irrelevant, where the basis of rejection was invalid, Respondent seems to argue that there is *never* a justifiable basis for rejection of a deficient payment attempt. Obviously, that proposition is absurd. Had Respondents offered one dollar as satisfaction of the superpriority amount and rendered its offer "non-negotiable," there would be no question that the offer was rightfully rejected

as full satisfaction of the superpriority portion, because it was for a deficient amount. By extension, any offer of a deficient monetary amount is rightfully rejected without explanation, where the offering party offers a deficient amount and renders the offer "non-negotiable." The rejecting party should have no obligation to explain the basis for rejecting a non-negotiable offer, because the offeror has already made clear that terms are not subject to negotiation.

Here, where the alleged offer of payment was insufficient to satisfy the superpriority portion of the HOA's lien, Red Rock had more than a simple "good faith belief" that the offer was insufficient. Rather, the amount offered was, under the controlling statute, actually deficient. In *Bank of America, N.A. v SFR* 427 P.3d 113, 116 (Nev. 2018)., this Court held that a tender offer similar to the one here was sufficient to pay the HOA's super priority lien. However, the only challenge to the tender offer in that case concerned the lender's insistence that acceptance would constitute accord and satisfaction of the lender's financial obligations to the HOA. This Court found the lender had a right to insist upon that specific condition. However, this Court has never found that a tendering party can insist on the acceptance of payment which is statutorily deficient and there is no basis for the Court to do so, now.

Respondents assert that their tender offer contains only conditions "upon which it was legally required to insist"[6] despite one of those conditions being a false statement of law detrimental to the HOA. Respondents' offer demanded that the HOA agree that the HOA's nuisance abatement charges are "JUNIOR" to respondents' deed of trust. As described in detail in Appellant's Opening Brief,[7] the opposite is true; NRS 116 makes nuisance abatement charges SENIOR to all deeds of trust. It is difficult to fathom why Respondents contend they are "legally required" to include a false statement of the law in a tender offer, as there is no legal basis for that position.

While it is true that there were no nuisance abatements at issue at the time of the notice of delinquent assessment lien's mailing, that fact is irrelevant. The condition placed on Red Rock and the HOA through the alleged offer has no time limitation, making the condition highly relevant to the HOA. Once the existing HOA lien was paid (in whatever manner, foreclosure or otherwise) nothing would prevent a new super priority lien from arising and nothing would prevent nuisance abatement charges from being afforded superpriority in such a lien. In this highly possible scenario, the HOA would have improperly waived the priority it held by

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[6] RAB at 23
[7] AOB at 31-32

statute for those nuisance abatement charges; a quintessential example of the HOA "altering its rights by agreement" which, pursuant to NRS 116.1104, it cannot do. While Respondent argues a lack of evidence of a nuisance abatement charge for this particular lien, it makes no argument whatsoever in opposition to Appellant's argument that acceptance of the conditions relating to nuisance abatements would run afoul of the law.

The District Court held that this false statement of law is nevertheless a condition upon which Respondents had a right to insist solely because there were no nuisance abatement charges on the HOA ledger at the time the tender offer was made. According to this logic, a homeowner could send a tender offer to the first deed of trust holder demanding that the holder agree with the following condition: "Under Nevada law your deed of trust is JUNIOR to deeds of trust filed later in time". Presumably the lender would reject such an offer not wishing to be bound by such a clearly false statement of law regarding the priority of its lien interest. However, under the holding by the lower court in this case, the offer would be perfectly valid if there are no later filed deeds of trust at the time the offer is made. The homeowner could then sue and argue successfully that its tender offer was valid and "cured" the lien. The homeowner could pay off its mortgage without having to part with a dime. Surely this cannot be the law of tender in Nevada, yet

that is the logical extension of the reasoning relied upon by the lower court in this case. This Court should not permit the law to be manipulated into a "a heads I win, tails you lose" proposition by the lender. The lender willingly and purposefully chose to put this indisputably incorrect statement of law into its offer and should be held accountable for same.

CONCLUSION

For the reasons set forth herein, the Appellants respectfully requests that this Court reverse the decision of the district court below, and grant judgment in favor of Appellants.

DATED this 22nd day of January, 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 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 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 point, or more, and complies with the type-volume limitation because it contains 2657 words or fewer.

FINALLY, I CERTIFY that I have read this Appellants' Opening 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. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of January, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 22, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** upon the following by the method indicated:

X **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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/s/ Amanda Abril
An Employee of The Law Office of Mike Beede, PLLC