IN THE SUPREME COURT OF THE STATE OF NEVADA

NONA TOBIN, AS TRUSTEE OF THE GORDON B. HANSEN TRUST, DATED 8/22/08,

Appellant,

vs.

JOEL A. STOKES AND SANDRA F. STOKES, AS TRUSTEE OF THE JIMIJACK IRREVOCABLE TRUST; YUEN K. LEE, AN INDIVIDUAL, D/B/A MANAGER F. BONDURANT, LLC; SUN CITY ANTHEM COMMUNITY ASSOCIATION, INC.; AND NATIONSTAR MORTGAGE, LLC,

Respondents.

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Supreme Court Case No.: 79295

District Court Case No A-15-720032-C
Consolidated with A-16-730078-C

An Appeal from The Eighth Judicial District Court
The Honorable Joanna Kishner, Presiding

APPELLANTS' REPLY BRIEF

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I. Introduction

Respondents argue this "Court should uphold the decisions by the District Court because the delinquency was properly calculated, the HOA foreclosure sale was properly noticed, and the notice of foreclosure sale was not cancelled prior to the sale." In so doing, Respondents mischaracterize the purported evidence presented to the district court. In her Opening Brief and below, Nona Tobin ("Tobin"), as Trustee of the Gordon B. Hansen Trust dated 8/22/08 expressly noted that the sole source of alleged facts in support of its motion for summary judgment was Red Rock Financial Services ("RRFS") foreclosure file.[1] Respondents do not dispute this. The RRFS foreclosure file are merely unauthenticated documents attached to the SCA's motion for summary judgment. Even a cursory review of the RRFS foreclosure file demonstrates several issues of fact that mandate reversal of the district court's decisions.

II. Summary of Argument

This is an action to quiet title following an HOA foreclosure sale. The district court erred by granting summary judgment in favor of Sun City Anthem Community Association ("SCA") and quieting title in favor of Joel A. Stokes and Sandra F. Stokes, as Trustees of the JimiJack Irrevocable Trust ("JimiJack"), especially when JimiJack presented no evidence at the time of trial, and instead relied exclusively on the erroneous April 18 Order and

[1] AA Vol. VI 001124 Tobin Decl., ¶ 27

Findings. There are numerous genuine issues of material fact which prohibit the entry of summary judgment. They include,

- The $300 payment submitted together with Tobin's October 3, 2012 letter paid the then owing $275 delinquent assessment, plus a $25 authorized late fee for the period July 1, 2012 through September 30, 2012, which cured the deficiency through September 30, 2012.
- The December 14, 2012 lien in the amount $925.76 was premature and contained unauthorized charges as at that time, only $275 plus a $25 late fee was all that was delinquent for period October 1, 2012 through December 31, 2012.
- The sale was unfair, especially since SCA admits that it agreed to waive the late fees and interest to help accomplish a short sale, in that Tobin received no notice RRFS was going to proceed with the sale after the March 7, 2014 sale on the recorded February 14, 2012 Notice of Sale was cancelled.
- SCA did not ensure that its agent, RRFS complied with the applicable statutes and CC&Rs.
- There is no record that the foreclosure sale was authorized by a valid vote of the SCA board.
- Specific notices were not provided as required by the CC&Rs and NRS 116.31162(4).
- The record shows that the February 12, 2014, Notice of Sale was cancelled on or about May 5, 2014, and thus, there was no Notice of Sale in

effect prior to the August 15, 2014 foreclosure sale.

- The foreclosure sale involved fraud, unfairness and oppression in that that the sale price was disproportionately low in comparison to the undisputed value of the Property.

Based on the numerous issues of material fact, contained herein and as set forth in Appellant's Opening Brief, it is clear the district court erred by granting summary judgment in favor of SCA. Therefore, the district court's June 24 Order and Findings, based solely on her previous order and findings, is equally erroneous. As a result, the orders granting summary judgment in favor of SCA and quieting title in favor of JimiJack must be reversed.

III. Argument

A. SCA failed to properly calculate the alleged the delinquency.

Respondents impliedly acknowledge the delinquency was not properly calculated. Respondents state, "the court should not believe the Trust was prejudiced by an accounting error that was a small part in a total amount the Trust was not going to pay anyway." Answering Brief, p. 33. There are several things wrong with this statement. Contrary to what Respondents argue, nothing in Tobin's October 3, 2012 letter indicates in any way that Tobin refused to pay assessments as alleged by SCA.[2] Moreover, the $300 check enclosed in the October 3, 2012 letter specifically references "Delinquent HOA dues for 2763 White Sage" – the Property. No one seriously disputes that the payment

[2] AA Vol. VI 001124 Tobin Decl., ¶ 23

identified as "Check for $300 HOA dues" covered the $275 assessment for the quarter ending September 30, 2012 and the $25 late fee which was authorized for the installment being sent after July 30, 2012.[3] SCA's records, again limited to the RRFS foreclosure file as its sole source of facts,[4] demonstrate the inaccuracy in calculating the alleged amount due.

Tobin's payment for "HOA dues" was applied on October 18, 2012 in the RRFS ledger to unauthorized and unnecessary collection fees despite the explicit prohibition contained in NRS 116A.640(8) against "Intentionally apply(ing) a payment of an assessment from a unit's owner towards any fine, fee or other charge that is due."[5] There is simply no delineation between the HOA dues, late fees and collection fees in the ledger.[6]

The Resident Transaction Report shows that the $300, from check no. 143, was credited as "Collection Payment Part(ial)" instead of payment for the July 1 quarterly assessment of $275, plus the $25 late fee for the July 2012 quarter. This payment should have brought the account current, but for the quarterly assessment due October 1, 2012.[7] Again, NRS 116A.640(8) prohibits an RRFS from applying assessment payments to "any fine, fee or other charge that is due".[8] For Respondents to claim that almost $500 was due and owing in October 2012 is unconscionable and not supported by the facts.

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[3] AA Vol. VI 001124 Tobin Decl., ¶ 21
[4] AA Vol. VI 001124 Tobin Decl., ¶ 27
[5] AA Vol. VI 001125 Tobin Decl., ¶ 33
[6] AA Vol. VI 000677 – 000682
[7] AA Vol. VI 001126 Tobin Decl., ¶ 43
[8] AA Vol. VI 001126 Tobin Decl., ¶ 44

B. SCA, by and through RRFS, failed to provide proper notice of the HOA foreclosure sale.

Respondents correctly quote from portions of the CC&Rs in their Answering Brief. Respondents state,

> Such lien, when delinquent, may be enforced in the manner prescribed in the Act. The Association may foreclose its lien by sale after:
>
> > (a) The Association has mailed by certified or registered mail, return receipt requested, to the Owner or his successor in interest, at his address if known and at the address of the Lot, a notice of delinquent assessment . . .
> >
> > . . . As Section 8.8 of the CC&Rs makes clear, foreclosure is "in accordance with the Act" and requires mailing of recorded notices.

Answering Brief, p. 18.

What Respondents fail to note is that the CC&Rs require that the notices be mailed by certified or registered mail, and not just mailed. Respondents conveniently mislead this Court by stating, "Tobin signed for some of the mailings herself." Answering Brief, p. 13. While it is true that Ms. Tobin signed for a couple mailings, this is more than a tacit admission that there is no signature on all of the mailings.

For example, SCA includes in RRFS foreclosure file an unauthenticated copy of a September 17, 2012 Notice of Intent to Lien, that Tobin has no recollection of receiving, nor is there any proof in the SCA file it was sent or

received.[9] Notwithstanding the absence of proof, Respondents claim that "[o]n September 17, 2012, Red Rock **sent** Gordon Hansen letters indicating that his account was in collections with them." Answering Brief, p. 14. Again, there is no evidence that this letter or several of the notices in the RRFS file were "sent". There is no testifying witness that any of the mailings were "sent." There are merely copies of documents in the RRFS file, some of which have signed receipt cards, and some of which that do not – and some of which have affidavits of mailing and some of which do not.

As indicated above, there is no evidence the September 17, 2012 mailing was received as there is no signed card in the file.[10] Further, Tobin expressly stated she has no record or recollection of having received the September 17, 2012 notice of intent to lien.[11] Similarly, there is no signed card evidencing receipt of the Hearing Notice and Sanction for Delinquent Account dated September 20, 2012, nor is there even an affidavit of mailing.[12] The Notice specifically states, "**This is the only notice of this hearing and the sanction**."[13] SCA failed to provide proof that the notice was sent, let alone received. Under any interpretation, Respondents evidence of this alleged notice was deficient.

There is also no signed card evidencing receipt of the correspondence

[9] AA Vol. VI 001127 Tobin Decl., ¶ 49
[10] AA Vol. IV 000684 – 000685.
[11] AA Vol. VI 001127 Tobin Decl., ¶ 49
[12] AA Vol. IV 000687
[13] AA Vol. IV 000692

dated April 10, 2013 that was purportedly sent via certified and First-Class mail and which enclosed the Notice of Default and Election to Sell.[14] Moreover, there is no mailing affidavit or even an unsigned receipt.[15]

For the district court to find that the Notices were properly sent ignores the evidence. At the very least, there are genuine issues of material fact regarding the proper service of the notices that mandate reversal.

Even if sent**,** some of the notices were defective, non-compliant and erroneous. On or about December 14, 2012, SCA caused a Notice of Delinquent Assessments (the "Lien") to be recorded against the Property which claimed the amount of $925.76 was delinquent and owed as of December 5, 2012. As detailed above, the Lien included erroneous charges and did not properly credit assessments paid; the amount was below the minimum past due amount when collection can begin.[16] As of December 14, 2012, the maximum amount of the delinquency for the Property's HOA account was $300.00, consisting of then-current quarterly dues in the amount of $275.00, together with late fees in the amount of $25.00.[17] The is below the amount when the collection process can even begin under the CC&Rs.

On or about February 12, 2014, a Notice of Foreclosure Sale (the "Notice of Sale") was issued by RRFS, which claimed $5,081.45 was due and owing,

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[14] AA Vol. IV 000723 – 000729.
[15] AA Vol. IV 000730 – 000743.
[16] AA Vol. VI 001128 Tobin Decl., ¶ 51
[17] AA Vol. VI 001128 Tobin Decl., ¶ 52

and scheduled the sale for March 7, 2014.[18]

However, over a month later, on March 28, 2014, RRFS provided an accounting ledger to Chicago Title in response to a payoff demand related to the contingent sale to Red Rock Region Investments LLC in which the amount claimed as due and owing on February 11, 2014 was $4,240.10, and that the amount due on March 28, 2014 was $4,687.64,[19] both less than the Notice of Sale amount dated February 12, 2014. So, even under RRFS's view, what was the correct amount? Somewhere, someplace, RRFS obviously got it wrong. Of course, according to Respondents, these errors do not matter. Miscalculate the amount due and owing? That's no big deal. Fail to provide proper notice? That's okay too. Renege on an agreement to waive the late fees and interest to help accomplish a short sale? In Respondents' world, that's fine, too.

Further, the Notice of Sale was provided to the Ombudsman on February 13, 2014 as required by NRS 116.311635(2)(b)(3). However, on or about May 15, 2014, RRFS notified the Ombudsman that the Notice of Sale was cancelled, the Trustee sale was cancelled, and the Owner was retained.[20] The compliance screen was obtained pursuant to a public records request and was produced pursuant to NRCP 16 and authenticated as an attachment to the motion for

[18] AA Vol. VI 001128, 001133 – 001134 Notice of Foreclosure Sale Exhibit 13 to the Tobin Decl.
[19] AA Vol. VI 001129 Tobin Decl., ¶ 60
[20] AA Vol. VI 001129,

reconsideration.[21] No party challenged the authenticity of the Compliance Screen.[22] The district court erred in refusing to consider it, especially since SCA's sole support for its motion for summary judgment was the incomplete and unauthenticated RRFS foreclosure file.

The Property was then sold on August 15, 2014 although no valid notice of sale was in effect as the Notice of Sale was cancelled on or about May 15, 2014 and not replaced.[23] The August 22, 2014 Foreclosure Deed, the recording of which was requested by Opportunity Homes, LLC, claims the Property was sold for $63,100 based upon the First Notice of Default, dated March 12, 2013, which was rescinded on April 3, 2013.[24] There can be no reasonable dispute that the August 22, 2014 Foreclosure Deed contains the several false recitals that were ignored by the district court, including, 1) that the default had occurred as described in the rescinded Notice of Default and Election to Sell; 2) there had been no payments made after July 1, 2012, which clearly was not the case; 3) that as of February 11, 2014, $5,081.45 was due and owing, which was inconsistent with subsequently provided ledgers and that 4) RRFS had "complied with all the requirements of law".[25] Obviously, it did not.

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[21] AA Vol. VII 001336 Compliance View Screen, authenticated on April 15, 2019 by Terralyn Lewis, Administration Section Manager, Nevada Real Estate Division, Ex. 14 to Tobin Decl.

[22] AA Vol. VI 001130, Vol. VII 001337 – 001338, 001343 – 001347 Tobin's public record request, Ex. 15 and Tobin's Initial List of Witnesses and Production of Documents, Ex. 16 to Tobin Decl.

[23] AA Vol. VI 001138 Tobin Decl., ¶ 66

[24] AA Vol. VI 00130, AA Vol. VII 001350 Recorded Rescission of Notice of Default, Ex. 17 to Tobin Decl.

[25] AA Vol. VI 001130, AA Vol. VII 0011352 – 001353 Ex. 18 to Tobin Decl.

Further, SCA and RRFS failed to provide the notices required by NRS 116.31162(4), including:

(a) A schedule of the fees that may be charged if the unit owner fails to pay the past due obligation;

(b) A proposed repayment plan; and

(c) A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing.[26]

Under these circumstances, SCA and its collection agent, RRFS, did not conduct the collection process leading up to the foreclosure in compliance with the CC&Rs and applicable law. Accordingly, the orders granting the SCA's motion for summary judgment and denying Tobin's motion for reconsideration must be reversed, along with the district court's June 24 Order and Findings, based solely on those previous orders and findings.

C. SCA's Motion Should Have Been Denied as Genuine Issues of Material Fact Remain.

As set forth above and in Appellant's Opening Brief, there are numerous issues of material fact which should have precluded the entry of summary judgment by the district court. Respondents seemed to have abandoned the argument that the October 3, 2012 letter Tobin mailed to Sun City Anthem included a copy of the Notice of Hearing as claimed by SCA. It did not, which

[26] AA Vol. VI 001130 Tobin Decl., ¶ 69

creates an issue of fact regarding the April 18 Order and Findings at ⁋⁋ 6-8,[27] when compared to Tobin Declaration, ⁋⁋ 18-23 and 36-38.[28] Further, there are genuine issues whether SCA complied with its own CC&Rs regarding required notices. *See* Tobin Declaration, ⁋⁋ 45-47.[29] Notably, SCA's failure to comply with its CC&Rs regarding required notices and a right to hearing was raised by Tobin, it was largely ignored as this issue was not addressed by the district court, nor was it included in the district court's order.

Further, SCA, by and through its agent, RRFS, did not follow its own CC&R requirements regarding notice and a right to a hearing, nor did it conduct a valid foreclosure sale in compliance with the statutory requirements. The SCA file is missing several proofs of mailing and/or signed receipt cards, each of which standing alone creates a sufficient issue of fact to require reversal.

Further, Respondents seemed to have abandoned any argument that the Property was sold for an adequate amount. As noted previously, in *Nationstar Mort., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev Adv. Rep. 91, 405 P.3d 641 (2017), this Court considered whether the bank had established equitable grounds to set aside the sale. Tobin does not dispute that an inadequate price by itself is not enough to set aside a sale; there must also be a showing of fraud, unfairness, or oppression." *Nationstar,* 133 Nev. Adv. Rep.

[27] AA Vol. V 001035 – 001044
[28] AA Vol. VI 001122 – 001125
[29] AA Vol. VI 001126 – 001127

91, 405 P. 3d at 647, quoting *Shadow Wood,* 132 Nev. Adv. Op. 5, 366 P. 3d at 1112 (2016) (citing *Long v. Towne,* 98 Nev. 11, 13, 639 P.2d 528, 530 (1982)).

However, in cases like this, where there is such a wide disparity in the value of the property and the foreclosure price, the adequacy of price must be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness, or oppression. *See Id.* Respondents do not dispute that the evidence presented in the district court was less than twenty (20) percent of the fair market value. Combined with the numerous irregularities, there are genuine issues of material fact whether RRFS provided the required notices and a right to hearing required by the CC&Rs;[30] whether RRFS failed to properly credit Tobin's payment,[31] whether RRFS failed to accurately calculate the amount due,[32] whether RRFS failed to provide proper notice of the foreclosure sale,[33] and whether RRFS conducted the foreclosure sale on a cancelled the Notice of Sale.[34]

Having presented evidence of the HOA's failure to provide proper notices, SCA cannot rely on deed recitals to validate an otherwise invalid foreclosure sale. NRS 116.31166(3) requires that a foreclosure sale be conducted pursuant to NRS 116.31162, 116.31163, and 116.31164 to vest a purchaser at the HOA foreclosure sale with title to the Property. It was not done

[30] AA Vol. VI 001126 – 001127 Tobin Decl., ¶¶ 45-47
[31] AA Vol. VI 001126 – 001127 Tobin Decl., ¶¶ 41-43 and 50-52
[32] AA Vol. VI 001126 – 001128 Tobin Decl., ¶¶ 41-43 and 50-52
[33] AA Vol. VI 001127, 001129 Tobin Decl., ¶¶ 49 and 58
[34] AA Vol. VI 001128 – 001129 Tobin Decl., ¶¶ 63-66

in this case. A HOA foreclosure sale does not vest title unless the HOA actually complies with NRS 116.31162, 116.31163 and 116.31164. Here, there are genuine issues of material fact whether there was such compliance. Certainly, SCA's failure to comply with the statutory notice requirements, along with those mandated by the CC&Rs, violates Tobin's due process rights to notice and a hearing. At the very least, there is at least evidence of unfairness or irregularity sufficient to raise a genuine issue of material fact that merits reversal of the district court's Orders, and upon such reversal, remand with instructions to quiet title in favor of Tobin.

Respondents curiously attempt to make up for the deficiencies in the foreclosure process by raising the equitable theories of equitable estoppel and unclean hands. Notably, both are issues of fact that prohibit summary judgment. Further, it is unclear how equitable estoppel applies. What facts Respondents were purportedly ignorant of and how did they rely on those facts to their detriment? *See In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005). Are respondents conceding that RRFS misapplied the payment and that it only went through with the deficient foreclosure because Tobin didn't complain? Did reneging on the agreement to waive the late fees and interest to help Tobin accomplish a short sale somehow harm Respondents?

Similarly, Respondents fail to identify how Tobin's conduct that was unconscientious, unjust or marked by want of good faith. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.,* 124 Nev. 272, 276, 182

P.3d 764, 767 (2008). Respondents admit that the HOA and agreed to waive the late fees and interest to help accomplish a short sale. Answering Brief, p. 38. Then, SCA through its collection agent RRFS, proceeded with the foreclose without proper notice. If there was any egregious conduct in this case, it was solely on the part of SCA who reneged on its agreement with Tobin. Neither equitable defense prevents Tobin from pursuing asserting the foreclosure sale was deficient and that it must be set aside.

IV. Conclusion

Summary judgment is only appropriate when, after a review of the record viewed in a light most favorable to the non-moving party, there remain no issues of material fact, and the moving party is entitled to judgment as a matter of law. Reviewing the record in a light most favorable to Tobin, it is clear that SCA and RRFS made numerous mistakes in attempting to foreclose upon the Property, including: (i) failing to provide Tobin with a notice and right to a hearing as required by the CC&Rs; (ii) failing to properly credit payments; (iii) failing to accurately calculate the amount due; (iv) failing to provide proper notice of the foreclosure sale; and (v) conducting a foreclosure sale on a cancelled Notice of Sale. Any of these errors, standing alone, should be sufficient to set aside the foreclosure. Taken together, the combined errors, together with the meager purchase price at the foreclosure sale mandates that the district court's decisions be set aside, and title quieted in the name of the Trust.

For the foregoing reasons Cross-Claimant Nona Tobin respectfully requests that this Court reverse the decisions of the district court and quiet title to the Property in her favor.

DATED this 14th day of August, 2020.

MUSHKIN & COPPEDGE

/s/L. Joe Coppedge

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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)(5) and the type style requirements of NRAP 32(a)(6) because:

2. [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font; or

3. [ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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[ ] Does not exceed _____ pages.

5. Finally, 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 and volume number, if any, 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 14th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on this 14th day of August, 2020, I served a true and correct copy of the foregoing **Appellant's Reply Brief** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐ via hand-delivery to the addressee listed below;
- ☐ via facsimile;
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/s/K. L. Foley
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