IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LAKES, AN INDIVIDUAL, Appellant, v. U.S. BANK TRUST, TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Respondent.	Case No. 79324

Appeal
from the Nevada Court of Appeals
Case No. 79324-COA

SUPPLEMENTAL RESPONSE BRIEF OF U.S. BANK TRUST, AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

Whether Nevada's race notice statutory scheme, Nev. Rev. Stat. §§ 111.310-.3655, applies to deed of trust assignments and how, if at all, the provisions of Nev. Rev. Stat. § 106.210 impact that analysis.

II.

Assuming that the race notice statutory scheme does apply, what effect an unrecorded assignment has on the status of a purchaser who took title with record notice of the deed of trust but without notice of the deed of trust's assignment.[1]

SUMMARY OF ARGUMENT

The race notice statutory scheme provides a mechanism to decide disputes between two good faith purchasers of the same property. Nev. Rev. Stat. § 111.325. When two different parties purchase the same property interest in good faith, it provides that the property belongs to the first party to record.

Appellant Daniel Lakes cannot invoke Nevada's race notice statutory regime to obtain an interest in the property free of the Deed of Trust. The race notice statute applies only to competing claims for "the same real property." Nev. Rev. Stat. § 111.325. But Mr. Lakes does not hold the same property interest as the holder of

[1] U.S. Bank has taken these two issues presented from the Court's Order Directing Supplemental Briefing. U.S. Bank objects to Mr. Lakes' redefining the issue before the Court. *See* Lakes Br. 1.

the Deed of Trust. This Court's recent decision in *Diamond Spur* establishes that the homeowners association (HOA) foreclosure sale was void as to the Deed of Trust, and did not convey full title. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612 (2018) ("*Diamond Spur*"). And as a downstream purchaser from the buyer at that foreclosure sale, Mr. Lakes could not acquire more than the seller had to offer. He cannot invoke the race notice statute to lay claim to a property interest that the seller to him never held. The fact that an assignment of the deed of trust had not been recorded does not change that result.

But even if the race notice scheme applied, Mr. Lakes cannot benefit from that scheme. The race notice scheme provides that an unrecorded interest is void against a purchaser "in good faith and for a valuable consideration." Nev. Rev. Stat. § 111.325. A good faith purchaser is one that lacked both actual and constructive notice. *Huntington v. Mila, Inc.*, 119 Nev. 355, 357 (2013) (per curiam).

Here, Mr. Lakes had constructive notice of the Deed of Trust. A recorded conveyance "impart[s] notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." Nev. Rev. Stat. § 111.320. And the Deed of Trust was recorded years before Mr. Lakes purchased the property. *See* JA464–465. It makes no difference that the assignment had not been recorded, because a superior interest in the property had been. This

Court has ruled that the superior interest need not be re-recorded after an HOA foreclosure sale that does not extinguish it. *Diamond Spur*, 134 Nev. at 609.

Regardless, Mr. Lakes had constructive notice of the assignment as well. In circumstances that would cause a reasonable purchaser to investigate unrecorded encumbrances, the purchaser has constructive notice even if he does not make the required investigation. Here, any reasonable purchaser would have followed up on the recorded deed of trust to determine whether it still encumbered the property.

The Court should reverse and render judgment for U.S. Bank.

STATEMENT OF FACTS

The original owner of a home in Las Vegas ("property") borrowed $213,000 to purchase that property in 2007. JA3. He executed a note and Deed of Trust, for which Ocwen Loan Servicing was beneficiary of record and servicer. Op. 1[2]. The original owner, however, failed to pay his HOA payments. JA465. The HOA began foreclosure proceedings. Before the foreclosure sale, Ocwen made a payment to the HOA in an amount necessary under Nevada law to extinguish the HOA's superpriority lien (which was for a small amount). In doing so, Ocwen ensured the HOA lien's superpriority portion would not extinguish the far larger Deed of Trust. Op. 1, 4–5.

[2] Citations to "Op." are to the Nevada Court of Appeals' opinion.

The HOA accepted the full tender for its superpriority lien, but foreclosed anyway to satisfy the rest of its lien. *Id.* at 1. The HOA sold the property in August 2015 for $4,470. JA465. The foreclosure deed recites that the HOA sold the property "without warranty expressed or implied." JA383. After that, the property was transferred three more times in five months, between September 2015 and January 2016 (the final transfer being to Mr. Lakes). JA390-403. The transfer deeds each specified that they were without warranty and subject to all liens and encumbrances on the property. JA403; Op. 2 ("the deed also indicated that [Mr.] Lakes would be taking the property subject to any claims, liens, and other encumbrances, and once again with no warranties regarding title").

Meanwhile, Ocwen assigned the Deed of Trust to U.S. Bank in December 2015. U.S. Bank recorded the assignment in May 2016. JA410; JA369.

STATEMENT OF THE CASE

This is a quiet title action between the holder of a Deed of Trust and a downstream purchaser following a homeowners association foreclosure. The trial court ruled for U.S. Bank, the holder of the Deed of Trust, on summary judgment. It concluded Ocwen Loan Servicing's (the previous servicer and beneficiary or record of the Deed of Trust) payment to the HOA satisfied the superiority portion of an HOA lien before a foreclosure sale. As a result, the Deed of Trust was left untouched by the foreclosure sale as the HOA could only foreclose on the subpriority

portion of its HOA lien. The trial court determined that Daniel Lakes took the property subject to the Deed of Trust. It also concluded that Mr. Lakes' unproven bona fide purchaser status was irrelevant. In coming to that conclusion, the trial court applied Nevada's HOA foreclosure scheme, which provides that "[a]n association's foreclosure of its subpriority lien does not extinguish a senior deed of trust." JA468.

Mr. Lakes appealed, and the Court of Appeals reversed and remanded. It concluded that the race notice statute governs over *Diamond Spur*. U.S. Bank timely petitioned for review to this Court, which granted it and requested supplemental briefing on the two issues presented.

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ARGUMENT

I. Standard of Review

This Court "will uphold a district court's grant of summary judgment only if a review of the record in the light most favorable to the nonmoving party demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Huntington*, 119 Nev. at 357. "Questions of law are reviewed de novo." *Id.*

II. Nevada's race notice statutory scheme does not apply to deed of trust assignments after a void foreclosure sale. (Addressing the Court's First Question Presented)

A. The race notice scheme applies only when there are two bona fide claims to the same property interest.

Nevada's race notice statute does not apply to the assignment of a deed of trust after a HOA foreclosure that is void as to that deed of trust. The race notice statute applies when two bona fide purchasers have bought the same property interest. *See* Nev. Rev. Stat. § 111.325 (applying the race notice regime purchases of "*the same real property*" (emphasis added)). The statute resolves those competing claims to the same property in favor of the party whose interest is "first duly recorded." *Id*. But there is no competing claim to the same property interest when the holder of a deed of trust tenders the superpriority amount of a HOA lien before a foreclosure sale. In these circumstances, the foreclosure does not touch the

deed of trust. *Diamond Spur*, 134 Nev. at 612. So there is no dispute within the reach of the race notice statute.

This Court recently held that a HOA foreclosure sale following a tender of the superpriority portion of the lien by the holder of a deed of trust is void as to the deed of trust. In *Diamond Spur*, the original homeowner fell behind on his homeowners association payments, and the HOA began a foreclosure proceeding. *See id.* at 605. The holder of the deed of trust, Bank of America, tendered the superpriority portion of the lien to the HOA. *See id.* After the sale, the purchaser sued the holder of the deed of trust to quiet title to the property. *See id.*

Diamond Spur held that "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property." *Id.* at 612. The Court explained that a valid tender satisfies the superpriority lien, "as the lien is no longer in default." *Id*. So a foreclosure sale "could not convey full title to the property," and the "deed of trust remained after foreclosure." *Id*.

In reaching this conclusion, *Diamond Spur* specifically rejected an argument that a buyer's status as a bona fide purchaser could impact the deed of trust. The buyer—SFR—argued "that even if Bank of America's tender satisfied the superpriority portion of the HOA lien, SFR's status as a bona fide purchaser (BFP) gives it title to the property free and clear of Bank of America's interest." *Id.* But

this Court unanimously confirmed that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." *Id.*; *see also U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 205 (2019) ("A void sale . . . defeats the competing title of even a bona fide purchaser for value."); *Aviano Homeowners' Ass'n v. Wilmington Tr., N.A.*, 433 P.3d 262 (Table format), 2019 WL 292688, at *1 (Nev. 2019) (unpublished) ("[b]ecause the superpriority portion of the lien was no longer in default following the tender, the ensuing foreclosure sale was void as to the superpriority portion of the lien"); *Tyrone & In-Ching, LLC v. Deutsche Bank Nat'l Tr. Co.*, 462 P.3d 1231 (Table format), 2020 WL 2529028 (Nev. 2020) (unpublished) (similar).

Diamond Spur establishes that the foreclosure sale at issue here was void as to the superpriority portion of the Deed of Trust. The Deed of Trust was recorded years before Mr. Lakes purchased the property. *See* JA464–65. And U.S. Bank's predecessor in interest did all that was required to satisfy the superpriority portion of the HOA lien. *See* Op. 1, 4–5. As a result, the foreclosure sale did not convey full title, and the Deed of Trust survived the foreclosure. *See Diamond Spur*, 134 Nev. at 612.

Mr. Lakes argues, however, that he took full title here because there was no record that indicated that the HOA foreclosure sale failed to eliminate the first deed of trust. *See* Lakes Br. 4–5. *Diamond Spur* has already rejected that argument. The

Court explained that a tender does not need to be recorded. *See Diamond Spur*, 134 Nev. at 609 ("By its plain text, NRS 111.315 does not apply to Bank of America's tender. Tendering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land. Rather, it preserves a pre-existing interest, which does not require recording.").

B. An assignment of a deed of trust cannot expand the interest of a purchaser after a foreclosure sale.

Under *Diamond Spur*, the foreclosure sale was void as to the superpriority portion of the deed of trust. *See Diamond Spur*, 134 Nev. at 612; *see also*, *e.g.*, *7510 Perla Del Mar Ave Trust v. Bank of Am., N.A.*, 136 Nev. 62, 63 (2020) (en banc) ("a deed of trust beneficiary can preserve its deed of trust by tendering the superpriority portion of the HOA's lien before the foreclosure sale is held"); *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 478 P.3d 376, 379 (Nev. 2020) (en banc) ("Rather, when the holder of a deed of trust or its agent tenders payment, we explained, it "*preserves*" its interest in the property."); *Tyrone & In-Ching*, 2020 WL 2529028 (same). So the purchaser at the foreclosure sale does not take full title, only title subject to the deed of trust.

Having taken the property subject to a deed of trust, the buyer at a foreclosure sale cannot convey an interest greater than he acquired. This follows from well-established principles of property law. *See*, *e.g.*, 1 Grant S. Nelson *et al.*, Real Estate Finance Law § 7:21 (6th ed.) (noting that under a void sale "neither legal nor

equitable title transfers to the sale purchaser or subsequent grantees"). Thus, any future purchaser takes the property subject to the deed of trust.

This Court's recent opinion in *Renfroe v. Carrington Mortgage Services, LLC*, illustrates the application of this rule. 456 P.3d 1055 (Table format), 2020 WL 762638 (Nev. 2020) (unpublished). There, both the homebuyer and the deed of trust holder changed after the HOA foreclosure. *See id.* at *1. Bank of America "assigned its deed of trust to respondent Carrington Mortgage Services," and the purchaser at the foreclosure sale sold the property to the plaintiff. *See id.* But before the HOA foreclosure sale, Bank of America tendered the superpriority portion of the HOA lien. *See id.* This tender "discharged the HOA's superpriority lien and preserved Carrington's deed of trust." *See id.* As a result, this Court found that "[t]he ensuing foreclosure sale was therefore *void* as to the superpriority portion of the lien." *See id.* at *2 (emphasis added).

Application of the race notice scheme to assignments after a void HOA foreclosure sale would conflict with this rule. A later purchaser could invoke the race notice statute to obtain an interest that never passed at the foreclosure sale merely because he won the race to record. This Court should reject that deviation from established law.

Instead, this Court should take the same approach that it took in *Renfroe*. Whatever the buyer at the HOA foreclosure sale bought was subject to the Deed of

Trust. *See* JA465–68 (district court's summary judgment opinion recognizing that the HOA only "conducted a subpriority foreclosure, which could not extinguish the Deed of Trust"). The HOA could not foreclose on the Deed of Trust. *See id.* For that reason, no purchaser at the HOA foreclosure sale could acquire the non-foreclosed interest (the Deed of Trust's interest) in the property.

Applying the race notice statute here would also undermine *Diamond Spur*. *Diamond Spur*'s rule provides clarity and stability—a HOA foreclosure sale following a tender of the superpriority portion of the HOA lien is void as to a Deed of Trust. In other words, the tender preserves the deed of trust. But if a later purchaser (who never obtained the property free and clear of the deed of trust) could acquire the full property if it just so happened that a deed of trust assignment was not recorded, then the tender provides little certainty or protection after all.

Moreover, a deep bench of cases that have relied on the clear rule in *Diamond Spur* to find that bona fide purchaser status is irrelevant after the superpriority portion of an HOA lien has been satisfied. *E.g.*, *Noonan v. Bayview Loan Servicing, LLC*, 438 P.3d 335 (Table format), 2019 WL 1552690, at *1 (Nev. 2019) (unpublished) (finding that the home-buyers' "purported status" as BFPs "inconsequential" and "irrelevant"); *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A.*, 133 Nev. 1071, 2017 WL 6597154, at *1 n.1 (2017) (unpublished) ("appellant has not explained how its putative BFP status could have

revived the already-satisfied superpriority component of the HOA's lien"). But application of the race notice statute here would introduce confusion about *Diamond Spur*'s clear instruction by allowing some bona fide purchasers to obtain the property free of the deed of trust.

C. Nev. Rev. Stat. § 106.210 supports reversing the Court of Appeals and rendering judgment for U.S. Bank.

Nev. Rev. Stat. § 106.210 removes any lingering doubt whether the race notice statute applies here. That provision provides, in part, as follows:

> [A]ny assignment of the beneficial interest under a deed of trust must be recorded in the office of the recorder of the county in which the property is located, and from the time any of the same are so filed for record shall operate as constructive notice of the contents thereof to all persons . . . If the beneficial interest under a deed of trust has been assigned, the trustee under the deed of trust may not exercise the power of sale pursuant to NRS 107.080 unless and until the assignment is recorded pursuant to this subsection.

Nev. Rev. Stat. § 106.210(1).

Two aspects of this provision are noteworthy. First, it provides that assignments of the beneficial interests in deeds of trusts must be recorded. *See id.* Second, it explains the consequences for failing to record an assignment—the trustee cannot use the power of sale until an assignment has been recorded.

While this provision allows for recording of assignments, it does not say that assignments of the beneficial interests in a deed of trust are subject to the race notice regime. *See Clay v. Eighth Jud. Dist. Court*, 129 Nev. 445, 451 (2013) ("When interpreting a statutory provision, this court looks first to the plain language of the

statute."). If anything, it suggests that assignments of deeds of trust are not subject to the race notice regime. The race notice scheme contemplates that an interest in property will be void against later, good faith purchasers if the interest is not first recorded. Nev. Rev. Stat. § 110.325. But Nev. Rev. Stat. § 106.210 contemplates a very different consequence for a failure to register an assignment of a deed of trust. It states that "[i]f the beneficial interest under a deed of trust has been assigned, the trustee under the deed of trust may not exercise the power of sale pursuant to Nev. Rev. Stat. § 107.080 unless and until the assignment is recorded pursuant to this subsection." *See* Nev. Rev. Stat. § 106.210(1). In other words, by statute, the consequence of failing to record the assignment of a deed of trust is the inability to force a sale until the assignment is recorded. *See id.*

The specific inclusion of a different consequence for the failure to register an assignment suggests that the Legislature did not intend for the race notice regime to apply. Had the Legislature wished to allow a property to be sold out from under a valid deed of trust, it could have done so. *See, e.g.*, *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 102 (2017) (recognizing that Nevada courts have "long adhered" to the "maxim *expressio unius est exclusio alterius* ('the expression of one thing is the exclusion of another')"). But without that legislative mandate, this Court should not read it into the statute. *See Clay*, 129 Nev. at 451. At a minimum, Nev. Rev. Stat. § 106.210 suggests that the Legislature did not seek to apply the same stringent rules

to assignments of deeds of trust. But reading the race notice provision to reach assignments following a void sale would treat assignments more harshly.

III. Even if the race notice statutory scheme did apply, it would not affect the outcome here because Mr. Lakes had notice of the Deed of Trust. (Addressing the Court's Second Question Presented)

Even if Nevada's race notice statutory scheme applied to deed of trust assignments after a void HOA foreclosure, Mr. Lakes is not entitled to its benefits because he was not a bona fide purchaser. Instead, he had constructive notice that the property was subject to a deed of trust.

Only a bona fide purchaser can benefit from Nevada's race notice scheme. Nev. Rev. Stat. § 111.325 establishes when an unrecorded interest in property will be void against a later purchaser of the same property. It provides that the later purchaser must obtain the property "in good faith and for a valuable consideration." Nev. Rev. Stat. § 111.325. The later purchaser must also first record their own interest. *Id.*

A party with either constructive or actual notice of a superior interest does not act in good faith. In *Huntington v. Mila, Inc.*, this Court explained that "[a] subsequent purchaser with notice, actual or constructive, of an interest in property superior to that which he is purchasing is not a purchaser in good faith, and is not entitled to the protection of the recording act." 119 Nev. at 357.

Under Nevada's race notice statute, a purchaser has notice of any superior interest that has been properly recorded. Nev. Rev. Stat. § 111.320 provides that instruments "recorded in the manner prescribed in this chapter . . . impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice."

Under this rule, Mr. Lakes was not a good faith purchaser because he had record notice of the Deed of Trust. The Deed of Trust was recorded in 2007. *See* JA464. Mr. Lakes did not purchase the property until 2016. JA390–403. So he took it subject to the previously recorded Deed of Trust.

Mr. Lakes argues that he took the property free of the Deed of Trust because the assignment of the Deed of Trust had not been recorded. But that argument conflicts with this Court's test for deciding whether a purchaser acted in good faith. That test asks whether the purchaser had "notice, actual or constructive, of an interest in property superior to that which he is purchasing." *Huntington*, 119 Nev. at 357. If so, he "is not a purchaser in good faith." *Id*. The purchaser's notice that the superior interest is now held by someone else is irrelevant.

But even if the assignment of the deed of trust were relevant, Mr. Lakes would still not be a good faith purchaser. Under Nevada law, "[a] duty of inquiry arises when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would

advise him of the existence of prior unrecorded rights." *Id*. Once this duty has arisen, the purchaser "is said to have constructive notice of their existence whether he does or does not make the investigation." *Id*.

Under this standard, Mr. Lakes had constructive notice of the assignment of the Deed of Trust. As explained, the Deed of Trust had been recorded years before Mr. Lakes purchased the property. *See* JA464–65. *Diamond Spur* establishes that the HOA foreclosure sale would be void as to the Deed of Trust as long as the holder had tendered the superpriority amount. In these circumstances, any reasonable purchaser would inquire about the status of the Deed of Trust. Here, that inquiry would have confirmed that the Deed of Trust remained in place, but had been assigned since the foreclosure sale.

Mr. Lakes's failure to inquire is even more unreasonable in the circumstances of this case. Mr. Lakes's own deed came with no warranty. *See* Op. 2 (the "deed also indicated that [Mr.] Lakes would be taking the property subject to any claims, liens, and other encumbrances and once again with no warranties regarding title"). And it was part of a series of transactions purchasing the property for far less than would be expected for an unencumbered property. At the HOA foreclosure sale, Parcelnomics, LLC paid only $4,470 for the property. JA465. This price reflected that it purchased the property subject to the Deed of Trust. Even if the type of deed alone may not have deprived Mr. Lakes of bona fide purchaser status by itself, its

combination with the HOA foreclosure and previous rock-bottom purchase prices would have caused a reasonable buyer to fully investigate. Instead of undertaking a reasonable search, or hiring a title search company, Mr. Lakes claims that he relied on a clerk in the recorder's office to look at the records. JA428 (Lakes Declaration). He also admits, however, that the "clerk told [him] that [he] needed to do a record search" and pointed him towards the computers to do so. *See* JA428.

Mr. Lakes' only other argument that might speak to his good faith purchaser status turns Nevada's inquiry notice rule on its head. Mr. Lakes argues that "[n]othing in the Clarke County Recorder's records indicates that the HOA foreclosure sale did not wipeout [sic] the Ocwen (Freddie Mac) first deed." Suppl. Opening Br. 5. But this Court confirmed in *Diamond Spur* that the preservation of an interest in property "does not require recording." *Diamond Spur*, 134 Nev. at 609. In any event, the inquiry notice rule does not allow Mr. Lakes to merely assume that the Deed of Trust had been eliminated. Confronted with a recorded deed of trust that would have caused any reasonable purchaser to investigate, Mr. Lakes had constructive notice of the Deed of Trust and its assignment.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals and affirm the trial court's judgment for U.S. Bank.

Dated: June 25, 2021

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CERTIFICATE OF COMPLIANCE

1. I 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). It has been prepared in a proportionally spaced typeface using Microsoft Word in normal 14-point Times New Roman font.

2. 2. I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,214 words excluding the items exempted by NRAP 32(a)(7)(C).

3. Finally, I certify that I have read this appellate brief. 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 Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that this **SUPPLEMENTAL RESPONSE BRIEF OF U.S. BANK TRUST, AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, ESQ.** was filed electronically with the Nevada Supreme Court on June 25, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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