

Case No. 80111

IN THE SUPREME COURT OF NEVADA

SATICOY BAY LLC, SERIES 34
INNISBROOK,

Appellant,

vs.

THORNBURG MORTGAGE
SECURITIES TRUST 2007-3; FRANK
TIMPA; MADELINE TIMPA; RED
ROCK FINANCIAL SERVICES, LLC;
SPANISH TRAIL MASTER
ASSOCIATION; REPUBLIC
SERVICES; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents.

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**BRIEF OF AMICUS CURIAE SFR INVESTMENTS POOL 1, LLC
IN SUPPORT OF APPELLANT'S OPENING BRIEF**

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
E-mail: jackie@kgelegal.com
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
E-mail: karen@kgelegal.com

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301

NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus SFR Investments Pool 1, LLC (“SFR”) certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

SFR is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC’s stock.

Amicus SFR is represented by Jacqueline A. Gilbert, Esq., Karen L. Hanks, Esq., and Jason G. Martinez of Kim Gilbert Ebron.

DATED this 19th day of February, 2021.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
*Attorneys for SFR Investments Pool 1,
LLC*

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INTEREST OF THE AMICUS CURIAE

SFR Investments Pool 1, LLC (“SFR”) has purchased properties at association non-judicial foreclosure sales. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 743, 334 P.3d 408, 409-10 (2014). Many of these properties are the subject of lawsuits in Nevada’s state and federal courts and directly affected by the issues in this case. SFR sought consent from the parties but was only able to obtain consent from appellant and respondents Thornburg Mortgage Securities and Red Rock Financial Services, Inc. Thus, concurrently with this brief, SFR filed a motion for leave to file pursuant to NRAP 29(c).

DATED this 19th day of February, 2021.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert, Esq.
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
*Attorneys for SFR Investments Pool 1,
LLC*

INTRODUCTION

This case highlights how this Court's decision in *Diamond Spur* does not withstand scrutiny. This lawsuit, like nearly every other lawsuit involving a Bank's challenge to an association sale is not the typical property dispute you might see between two innocent parties. This case, like all NRS 116 foreclosure cases is different; it involves a Bank who intentionally decided to allow a bona fide purchaser to buy the property without notice of the Bank's previous attempt to pay the super-priority. Regardless of whether there was a legal obligation to notify the world of said attempt to pay, the fact remains the Bank sat idly by of two years never notifying the world of the attempted payment, and knowing the failure to do so would make any purchaser at the sale a bona fide purchaser. Simply put, whether any purchasers could claim this status was entirely up to the Bank. The Bank knew this, and yet it still kept its 2012 attempt to pay secret for two years.

Then contrary to Nevada's 150 plus year jurisprudence on bona fide purchasers, and after the Legislature codified bona fide purchaser status in 2013 via the enactment of NRS 111.180(1), this Court made BFP status irrelevant in terms of a void sale. Despite the fact this runs contrary to NRS 111.180(1), this case highlights the harm which befalls the innocent, unknowing purchaser all to the benefit of the Bank; a party who deserves no benefit based on its intentional decision

to allow a bona fide purchaser to buy the property in the first place. With one decision, this Court made it so a buyer who paid \$1.4 million for the Property, not only loses \$1.4 million, but also (eventually) will lose the property to the Bank's foreclosure. In addition to the loss of \$1.4 million, the buyer also loses all the investment it put into the property while in possession and litigating a case the Legislature never intended for the buyer to be involved with in the first place. How, by any stretch of the imagination is this equity; for after all, this is the posture a court sits when hearing such a challenge. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 366 P.3d 1105 (2016).

ARGUMENT

I. THE LEGISLATURE INTENDED FOR BFPS TO BE INSULATED FROM ANY CHALLENGES TO FORECLOSURE SALES

Here, the district court correctly found that Saticoy Bay was a bona fide purchaser. [10JA_1724.] It understood that general acknowledgement of risks associated with buying at foreclosure sales, and even the potential of litigation, does not translate into knowledge or notice of specific facts regarding a specific property that would change the result of a sale.

The concept of a bona fide purchaser has long been recognized in Nevada,¹ but in 2013, the Legislature codified the definition in NRS 111.180(1). NRS 111.180(1) defines a BFP as

Any purchaser who purchases an estate or interest in any real property in good faith and for valuable consideration and who does not have actual knowledge, constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title or interest to, the real property is a bona fide purchaser.

NRS 11.180(1).

Additionally, NRS 111.180(2) has long protected BFPs even where fraud is involved. The Legislative minutes which brought about codification of BFP support the notion that BFPs were always intended to be protected from any challenge to a foreclosure sale. As Sylvia Smith, President of Nevada Land Title Association testified, BFP “is vital if the former owner shows up to claim title, since the BFP will keep the asset and the former owner or party who claims to have an interest would have to look to the fraudulent seller for financial compensation.” *See* Minutes of the Senate Committee on Judiciary 77th Session, April 1, 2013. This is not to say a party cannot challenge a foreclosure sale, but that party “cannot kick out the new

¹ *Swartz v. Adams*, 93 Nev. 240, 246, 563 P.2d 74, 77 (1977) (finding that where notice of sale was not given to owners, property still could not be returned to owners because property was purchased by a BFP); *see also*, NRS 111.325, NRS 645F.440 and NRS 205.372.

purchaser from the property who in good faith bought the property as a BFP.” *Id.* at p. 28. As Russell Dalton, Chairman of Nevada Land Title Association testified,

This bill protects an innocent party who buys a property at a foreclosure sale...It requires that the former borrower or any other party that claims a defect in the foreclosure process to seek monetary damages against the bank or those parties who wronged that borrower as opposed to disrupting the title, interest and ownership of the buyer after the foreclosure sale.

Id. at p. 28.

When Senator Ford questioned the need for codification given the concept of BFP has been in existence forever, Zachary Ball of Nevada Land Title Association testified, “the concept is not secured. That is what we are attempting to do.” *Id.* at 28-29. Mr. Ball further noted that while the concept of BFP appears in other parts of the Nevada Revised Statutes,² those statutes protect a BFP only from a specific group of wrongdoers. As Mr. Ball testified,

It will be greatly strengthened by codification within the statute. We are looking at a specific court function. In order to prevent those lawsuits, this gives the title industry the ability to better rely on the Nevada statutes and law at the transactional phase.

Id. at 30.

² See NRS 111.325, NRS 645F.440 and NRS 205.372.

Finally, as Senator Hutchison questioned, “I assume you want to strengthen the BFP status to provide the subsequent purchasers some certainty and let them move on with life” to which Mr. Ball responded, “[t]hat is correct.” *Id.* at p. 31.

What is clear from the legislative history of NRS 111.180, the driving force was to strengthen BFP status in Nevada such that courts understood this status cloaked every real estate transaction in Nevada, including all foreclosure sales. And this is irrespective of whether the particular statute mentioned BFP because NRS 111.180 applies whole cloth to any and all real estate transactions. Most importantly, this status is intended to insulate BFPs from lawsuits which challenge foreclosure sales; the idea being a BFP’s title will not be affected by any such challenge because the remedy for the aggrieved party is limited to money damages, if in fact it would be entitled to any.

In that regard, when this Court issued *Diamond Spur*, and held SFR’s status as a BFP was irrelevant because the sale was void, this was in direct contravention of NRS 111.180 because the application of NRS 111.180 does not depend on any distinction between void and voidable sales. Instead, BFP status overrides any challenge to a foreclosure sale unless otherwise specified in a separate statute. There

being no such statute governing an NRS 116 sale prior to 2015,³ BFP status is always relevant. *See In re Fountainbleu Las Vegas Holdings*, 128 Nev. 556, 577, 289 P.3d 1199, 1212 (2012) (“We have recognized that...equitable principles will not justify a court’s disregard of statutory requirements.”); *see also Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 100, 450 P.2d 358, 359 (1969) (“The common law is the rule of decision in our courts unless in conflict with constitutional or statutory commands.”) (citing NRS 1.030 and *Davenport v. State Farm Mutual*, 81 Nev. 361, 404 P.2d 10 (1965).) Additionally, “[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.” *Id.*

In that regard, *Diamond Spur’s* holding which found BFP status irrelevant in the context of a void sale,⁴ which occurred on February 20, 2013, has an expiration date on its application i.e. it only applies to sales which occurred prior to July 1, 2013, the date NRS 111.180(1) became effective.⁵ For all sales that occurred after

³ Now, the only relevant time period is the 60-day redemption period. Once this time expires, a BFP’s title is forever protected from any challenge to the sale. *See* NRS 116.31166(10).

⁴ It bears noting the Nevada Supreme Court cited no law in Nevada for this proposition, but rather Texas law. *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121.

⁵ 2013 Nev. Stat., ch. 400, sec. 4, at 2173.

July 1, 2013, a buyer's BFP status overrides any challenge, void or otherwise, to a foreclosure sale. This point is made abundantly clear by the legislative minutes. Here, the sale occurred on November 7, 2014. [10JA_1722.] Thus, the Bank does not get the benefit of *Diamond Spur's* holding regarding BFP status.

II. THE BANK'S UNCLEAN HANDS

It must be remembered that to have its attempted payment deemed effective, the Bank had to challenge the result of the sale in equity, because it was, in effect, challenging the default of the superpriority. *See Shadow Wood*, 132 Nev. at 51, 57, 366 P.3d at 1107, 1110 (a court retains the right to grant equitable relief even in light of the conclusive recitals, including default). And this Court has long recognized that a party seeking equity, one must do equity. *See Building and Const. Trades, Council of Northern Nev. v. State ex rel. Public Works Bd.*, 108 Nev. 605, 613, 836 P.3d 633, 638 (1992) (Rose, J. concurring in part and dissenting in part), citing *Overhead Door Co. v. Overhead Door Corp.*, 103 Nev. 126, 127, 734 P.2d 1233, 1235 (1987).

To determine whether a party's conduct should bar equitable relief, two factors must be considered: (1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (2008).

Bank of America (“BANA”), without doubt, had information regarding all of its loans years before any particular sale. BANA’s conduct of lying in wait and ambushing bona fide purchasers years after it attempted to tender is particularly egregious. BANA wasted years litigating the meaning of the statute, without ever raising tender until after the *SFR* decision. BANA knew years before the sales occurred it tried to tender; it intentionally hid its attempts allowing a bona fide purchaser to purchase the property. Here, BANA tendered well over two years before this particular sale and never once made that information public—no recordings, no announcements at the Association’s foreclosure sale, nor notice of any kind regarding its tender even after the sale. It is irrelevant whether BANA had an obligation to do so, it made a business decision and took a risk not to.

The seriousness of the harm to Saticoy Bay as a result of BANA’s misconduct is readily apparent. Saticoy Bay is now in jeopardy of not only losing its **\$1.2 million purchase price**, but also taking the property subject to a **\$4 million encumbrance** in the deed of trust. Essentially, if this circumstance does not constitute barring the bank’s requested equitable relief, nothing will.

CONCLUSION

If the sale is not unwound, this Court should effectuate Saticoy Bay's bona fide purchaser status and bar the bank's requested equitable relief due to its unclean hands.

DATED this 19th day of February, 2021.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert, Esq. _____
Jacqueline A. Gilbert, Esq.
Nevada Bar No. 10593
Karen L. Hanks, Esq.
Nevada Bar No. 9578
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
*Attorneys for SFR Investments Pool 1,
LLC*

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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief meets the length requirements as it is 9 pages and contains 2035 words, which includes interest of amicus statement, pursuant to NRAP 29(d)-(e).

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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.

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

Dated this 19th day of February, 2021.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert, Esq.

JACQUELINE A. GILBERT, ESQ.

Nevada Bar No. 10593

7625 Dean Martin Drive, Suite 110

Las Vegas, Nevada 89139

Telephone: (702) 485-3300

Facsimile: (702) 485-3301

*Attorneys for SFR Investments Pool 1,
LLC*

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of February, 2021. Electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Appellant's Brief** was made pursuant to the Master Service List.

Dated this 19th day of February, 2021.

/s/ Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON